An Assessment of the Potential of Human Rights Protection in Sri Lanka in the Context of the Dualist Nature of the Constitution

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Abstract

The decision of the Supreme Court of Sri Lanka in Singarasa v. The Attorney General (2006) has inspired some human rights activists and scholars to criticise the said judgment as marking a deviation from the human rights friendly attitudes of Sri Lanka. In this case, the Supreme Court refused to give effect to the decision of the Human Rights Committee established under the International Covenant on Civil and Political Rights (ICCPR 1966). The reason was that, under the dualist theory on which our Constitution is based, international instruments do not form part of our law automatically. Even though, Sri Lanka is a dualist country the Supreme Court, in a series of cases decided prior to 2006 had followed a somewhat different approach to that of Singarasa's case (2006). These cases appear to have maintained a balance between the sovereignty of the state and the need to protect human rights. Hence, it is necessary to examine whether the decision of the Supreme Court in Singarasa's case (2006) has the effect of disturbing the said balance before assessing its impact on human rights protection in Sri Lanka as a judicial precedent. By means of a positivist epistemological approach using a qualitative doctrinal methodology this study aims at an in-depth evaluation of the primary and secondary sources related to the judicial approach to the protection of human rights in Sri Lanka utilizing objectivist ontology with the main objective of making proposals to create a legal environment conducive to human rights protection.

Key words: *Dualist theory, Human rights, Monist theory, Sovereignty*

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Introduction

As evident in cases like *In Re Bracegirdle* (1937), Sri Lankan Supreme Court had been mindful of the need to protect various aspects of human rights. Supreme Court had made use of the concept of 'rule of law' in protecting the liberty of human beings and their right to freedom from arbitrary arrest, detention and punishment. In such a scenario, the creation of the UN and its pro-human rights activities appear to have influenced the decisions of the Sri Lankan courts in cases affecting human rights issues. For instance, the International Bill of Human Rights and the core Human Rights Treaties and Optional Protocols have been referred to in several Sri Lankan cases involving human rights.

A welcome feature of the human rights-friendly judicial attitudes of our courts demonstrated in the above-mentioned cases is that they have resulted in the increased faith of our people in the locally available mechanisms of which they seem to be content. This is evident from the large number of fundamental rights applications in the Supreme Court today. However, the issue before the Supreme Court in *Singarasa v. Attorney General* (2006) was whether the decision of a body established under an international instrument that Sri Lanka has ratified has the effect of superseding that of the apex court of this country. The position of the Supreme Court, in this case, was that the accession to an Optional Protocol of an international instrument by the President of Sri Lanka, contrary to the

Constitution of the country, is *ultra vires* his powers and has no legal effect within the country.

Sri Lanka has not denounced the ratification of the Optional Protocol (No.1) to the International Covenant on Civil and Political Rights (ICCPR) (1966) even after the Supreme Court declared in *Singarasa v. Attorney General* (2006) that the ratification was unconstitutional. Consequently, the individual complaints procedure is still open for a citizen of Sri Lanka under Optional Protocol (No.1) to the ICCPR (1966) irrespective of whether he would be able to have its decision enforced in Sri Lanka. This position raises several issues relating to the extent to which human rights may be protected within the dualist structure of the Sri Lankan Constitution. For instance, whether the protection of human rights should be confined to those rights enshrined in the chapter 3 of the Constitution as fundamental rights and the rights contained in enabling statutes or whether it should be expanded beyond such limits are important questions. This research paper adopts a positivist epistemological approach in evaluating the primary and secondary sources of law to assess the judicial approach and the scope of human rights protection in Sri Lanka within its constitutional framework (McConville & Chui 2017) utilizing a qualitative doctrinal methodology (Guba & Lincoln 2005) with an objectivist ontology to generate transferable evidence on those questions. Hence, this paper examines the potential of human rights protection in Sri Lanka in the context of constitutional issues raised in Sri Lankan cases in comparison with other jurisdictions

with the main objective of making proposals of necessary law reform to create a legal environment conducive to human rights protection.

Human Rights and Fundamental Rights

Human Rights

"All human beings are born free and equal in dignity and rights …" (Universal Declaration of Human Rights 1948, Article 1). Thus, human rights are a category of inalienable rights that every person inherits by virtue of his or her being a human being. These rights are spelt out mainly in the International Bill of Human Rights which is composed of three international instruments. They are the Universal Declaration of Human Rights (UDHR 1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966) and the International Covenant on civil and Political Rights (ICCPR1966).

The UDHR declares the standards of human rights which the State parties are expected to respect and protect without creating legal obligations for them. Nevertheless, it is widely accepted that some of its provisions have now become rules of customary international law. On the other hand, treaties impose legal obligations on the State parties which accept them to take steps to ensure that everyone in the State can enjoy the rights set out in them. Similarly, optional protocols supplement the treaty obligations and enable the State parties to accept additional obligations. Legally, there is no difference between a treaty, a

convention, or a covenant. They are all international legal instruments. The International Covenant on Civil and Political Rights (ICCPR 1966), that Sri Lanka ratified in 1980 is one of the nine core human rights treaties. Thus, Sri Lanka has, by ratification, agreed to abide by the legal obligations imposed by this treaty. Furthermore, in 1997 Sri Lanka ratified the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1), 1966.

The legal effect of the ratification of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1), 1966 is that Sri Lanka has agreed to accept the individual complaints procedure. Consequent to this ratification a citizen of Sri Lanka is entitled to seek remedies for violations of human rights from the Human Rights Committee in Geneva after exhausting the locally available remedies. It was under this procedure that the complainant in *Singarasa v. Attorney General* (2006) obtained a favourable decision from the Human Rights Committee in Geneva which the Supreme Court of Sri Lanka refused to enforce. To have a clear understanding of the impact of this case, it must be examined not in isolation but along with some relevant cases where human rights which are declared to be fundamental rights in the Constitution were at issue.

Fundamental Rights

There is an important difference between 'human rights' and 'fundamental rights'. While the former speaks about

the inalienable and indivisible inherent rights of a human being, the latter refers to the human rights that are recognized by the Constitution of the particular country in which the human being concerned lives (UDHR 1948 Article 8). The UDHR declares the right to an effective remedy by national tribunals against the violation of 'fundamental rights' also as one of the human rights in the following terms: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law" (UDHR 1948 Article 8).

Thus, while setting the standards of human rights for the guidance of member States, the UDHR recognizes the need to respect the sovereignty of each State by leaving it to them to decide by the Constitution and the ordinary law of the country. Hence, it is clear from Article 8 of the UDHR that there is an essential difference between 'human rights' and 'fundamental rights'.

To have a clearer understanding of the scope of human rights, their basic nature must also be compared with those of the remedies available under the private branches of law as well as the public law governing fundamental rights. In Sri Lanka, a person is entitled to seek a remedy from the courts and tribunals of the country under the private branches of law such as the law of contract, delict, or property in the event of a breach of his or her rights. However, to obtain relief for the intrusion by organs of the state, it is essential that the crucial rights are constitutionally protected. Such rights which a society

considers compulsory to protect by way of constitutional guarantees are called fundamental rights.

Accordingly, the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka contains such rights which have been guaranteed to the citizens by the Constitution as Fundamental Rights (1978 Chapter 3). Thus, it is one important branch of the municipal law of Sri Lanka which deals with issues relating to basic rights between the citizens and the state. The Supreme Court of Sri Lanka has recognized that the ICCPR 1966 contains certain rights as laid down in the UDHR 1948 on which the Fundamental Rights contained in Articles 10 -14 of the Constitution are based (*Singarasa v Attorney General* 2006). Nevertheless, in keeping with the dualist theory which underpins the Sri Lankan Constitution, the Supreme Court refused to give effect to the findings of the Human Rights Committee at Geneva. Consequently, whether a person is entitled to an effective remedy against the violation of all the human rights recognized by international law or only to some of them is a matter for the Constitution and the law of the country in which he or she lives. The answer to this issue depends on the theory on which the Constitution is based, namely, the monist theory or the dualist theory.

Monist Theory Vs Dualist Theory

"The monist approach views international law and domestic law as belonging to a single system, with international law seeping into domestic law through

osmosis" (Sornarajah 2016-2017 p.7). Thus, monism is a hypothesis that international law is automatically integrated into municipal laws. The municipal law of a nation governs the domestic aspects of government and deals with issues between citizens, and between citizens and the administrative machinery, while international law mainly concentrates on the relations among states (Shaw 2008). Strake (1936) has stated that:

> Municipal law thus becomes a normative order or particular system of norms having validity over certain persons within a certain defined territorial area, while international law is a normative order of wider validity and operation.

On the other hand, dualism is a theory which requires a particular state that has ratified an international treaty to incorporate the legal measures of the treaty into the municipal laws through a national provision or a legal plan which facilitates the admission of those measures in the international treaty (Filipescu and Fuerea 2000, cited in Marian 2007). Hence, Dualism prescribes that an international treaty would only be effective at an international level. This dichotomy between the two theories of international law, Monism and Dualism, has been scrutinized and criticized by many jurists across the world.

Human Rights of The Sri Lankan Citizens in the context of International Law

While criticising the approach of the Sri Lankan Supreme Court (Apex Court) in *Singarasa Vs. Attorney General* (2006), Sornarajah (2016-2017) states that the European Convention on Human Rights (ECHR 1953) has ensured that cases related to Human Rights violations in the United Kingdom could be taken to the European Court. He has further expressed that it ensures that the rules of the Convention and their application by the European Court are taken seriously in England.

Thus, in the case of *A v The Secretary of State for the Home Department* [2004], known as the Beltmarsh Case, a review of the deportation orders was sought by nine foreigners suspected of terrorism who were kept in Beltmarsh, a high-security prison awaiting the execution of the deportation orders made by the Secretary of State of the United Kingdom. They were successful in obtaining relief from the House of Lords. The reasoning of the bench was that the order was made on the basis of the statutory provisions (Great Britain. Anti-terrorism, Crime and Security Act, 2001) was inconsistent with the European Convention on Human Rights (ECHR 1953) (*A v The Secretary of State for the Home Department* [2004]). Similarly, in the recent past, the English law has taken a progressive turn towards monism in issues connected to personal liberty. Even though the United Kingdom has now left the European Union, it is still a participant in the European Convention on Human Rights (ECHR 1953) to which it still has a commitment.

As for the position in the United States of America as

demonstrated in the American case of *Hamdon v Rumsfield* 548 U. S. (2006) the Supreme Court has held that a suspected terrorist held in the custody of the American troops could not be tried before a military commission created by executive order. The reasoning given in the said judgment was that such a procedure would be contrary to Article 3 of the Geneva conventions which applied to 'conflicts not of an international character'. The said Article required such suspects of terrorism to be tried and punished before a regular court affording a fair trial. It is one recent example of the way the American courts have leaned towards monism in fulfilling their obligations to international treaties, overruling an executive order.

In *Singarasa v. Attorney General* (2006) an issue similar to that in the American case of *Hamdon v Rumsfield* 548 U. S. (2006) was adjudicated before the Supreme Court of Sri Lanka. Singarasa was arrested under the Emergency Regulations and the Prevention of Terrorism [Temporary] Provisions Act (Sri Lanka 1979) as a terrorist suspected of an attack on an Army camp in Sri Lanka. A confession had been obtained from him while in the custody and despite his allegation of being tortured, the said confession was used against him in the High Court to incriminate him. There, he was sentenced to 50 years imprisonment. He appealed to the Court of Appeal of Sri Lanka against the said conviction which confirmed it but reduced the sentence to 35 years. Being aggrieved by the said judgment of the Court of Appeal, he filed a petition in the Supreme Court of Sri Lanka seeking leave to appeal

against the said judgment which was refused by a bench comprising Mark Fernando J. and two other judges.

Singarasa, thus having exhausted the locally available mechanisms to seek a remedy, petitioned the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR 1966) as Sri Lanka has ratified the Optional Protocol (No.1) to the International Covenant on Civil and Political Rights (ICCPR 1966). The committee issued a recommendation that the Sri Lankan Courts had not fulfilled its duty of examining the allegation of torture of Singarasa. Further, it decided that requiring Singarasa to prove the fact that he was tortured in obtaining a confession from him was inconsistent with the provisions of the International Covenant on Civil and Political Rights (ICCPR 1966).

With the said recommendations of the Human Rights Committee Singarasa invited the Sri Lankan Supreme Court to revise its previous order and to set aside his criminal conviction. As stated earlier, Sri Lanka had ratified the Optional Protocol (No.1) to the International Covenant on Civil and Political Rights (ICCPR) in 1997. By that action, Sri Lanka has recognized the competence of the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR1966) to entertain complaints from individual citizens of Sri Lanka. In the circumstances, there is a conflict between Article 4(1)(c) of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978) and this Treaty.

Sarath Silva C.J. with four other Judges of the Supreme Court of Sri Lanka held in Singarasa's Case that Sri Lanka is a dualist country according to the structure of the 1978 Constitution. Furthermore, the 1978 Constitution of Sri Lanka is consistent with the rule of law (In Re Eighteenth Amendment to the Constitution 2002) in that it does not attribute any unfettered discretion or power to any organ or body established under it. Hence, any act of the President of Sri Lanka in acceding to such a protocol is inconsistent with the Constitution, *ultra vires* the President and consequently does not bind the State and the Courts (*Singarasa v Attorney General* 2006). Dias and Gamble (2006) have critisised the said judgment of the Supreme Court that:

> It raises fundamental questions about the degree to which Sri Lankan citizens can rely on international human rights protections, contained in covenants or conventions that Sri Lanka has ratified but not incorporated into its own domestic law.

The Need for a Balanced Approach to the Protection of Human Rights

It is still open for a citizen of Sri Lanka to have recourse to the individual complaints procedure under the Optional Protocol No. 1 of the ICCPR as Sri Lanka has not denounced its ratification. On the other hand, the authority of the Supreme Court decision in Singarasa's Case (2006) may operate to make the availability of this

opportunity for Sri Lankans redundant. This situation leads to unnecessary conflicts between the executive branch of the government and the judiciary which must be avoided. It must be noted that in some cases decided before Singarasa case, Sri Lankan Supreme Court has adopted a balanced approach to the protection of human rights within the existing constitutional framework. For instance, in *Sunil Rodrigo v Chandananda De Silva and Others* (1997), the issue was whether the arrest and detention of the petitioner constituted an infringement of the petitioner's fundamental rights guaranteed under Articles 13 (1) and 13 (2) of the Constitution (1978). In answering this issue in the affirmative the Supreme Court relied *inter alia* on Article 14 of the ICCPR (1966).

Weerawansa v The Attorney General and Others (2000) is another case concerning the infringement of the petitioner's fundamental rights under Articles 13 (1) and 13 (2) of the Constitution. While granting relief to the petitioner the Supreme Court, in this case, referred to Article 27 (15) of the Constitution which emphasises the need to respect international law. Based on this constitutional provision, the Supreme Court declared that we ought to respect international instruments such as the ICCPR (1966) and its first Optional Protocol to which Sri Lanka is a party. Although Article 27 (15) is one of the directive principles of state policy which is not legally enforceable according to Article 29 of the Constitution, this case demonstrates a favourable judicial attitude towards the protection of human rights.

In *Bulankulama and Others v Secretary, Ministry of Industrial Development and Others* (2000), the Supreme Court took into consideration, *inter alia*, the Stockholm Declaration (1972) and Rio De Janeiro Declaration (1992) in making its decision. The Supreme Court held that although the international instruments were not legally binding, Sri Lanka as a member of the United Nations, could not ignore them. The somewhat flexible approach of the Supreme Court in the cases discussed above may be compared with the rigid approach to human rights protection in *Leelawathie v The Minister of Defence and External Affairs* (1965). In this case, the fact that the Universal Declaration of Human Rights (1948) had no binding force was strictly applied. Consequently, the Minister's decision to refuse a spouse's application for citizenship was upheld with the result that the two spouses had to live apart in two countries.

It must be noted that the 1948 Constitution, which was in force at the time Leelawathie case was decided, contained neither fundamental rights nor directive principles of state policy in the Constitution. It may be argued that although the present Constitution is based on the dualist theory, its provisions, particularly, Article 27 (15) warrants a more flexible approach to human rights protection. Furthermore, the views expressed by the Supreme Court in cases like *Weerawansa v The Attorney General and Others* (2000) supports such a move. This may be achieved by the provisions in the Constitution itself as in *Sepala Ekanayake v A. G.* (1988) or by enacting enabling legislation incorporating treaty provisions into our

municipal law.

Conclusion and Recommendations

The desire of the Sri Lankan government to protect Human Rights is evident from the ratification of the Optional Protocol-No.1 of the International Covenant on Civil and Political Rights (ICCPR 1966). Moreover, the willingness of the judiciary to draw from international instruments dealing with human rights, but for the dualist nature of the Constitution, is explicit from most of the cases discussed in this paper. Hence, it appears that Sri Lanka is left with two options to address this issue. One of these options is to amend the Constitution to change its character into a monist system. This will enable the citizens to have access to treaty bodies established under the treaties Sri Lanka has ratified or acceded to, like the Human Rights Committee after exhausting all the remedies available locally. The second option is to adopt a selective approach in incorporating only the desired Human Rights enshrined in International Instruments to the municipal laws of the nation. The Parliament has made use of the second option in several Acts.

The first option would require the amendment of Articles 3 and 4 of the Constitution which provides for the sovereignty of the people and the exercise of it respectively. Article 3 is an entrenched provision. Though Article 4 is not entrenched, the Supreme Court has held that Articles 3 and 4 are so closely interrelated that they

should be read together. If the structure of the Sri Lankan Constitution were changed to be in line with the monist theory all international treaties and protocols ratified by Sri Lanka would become part of the Sri Lankan law irrespective of whether they are compatible with the Sri Lankan cultural norms or not. Such an initiative would be prejudicial to the Sri Lankan community as there will not be a mechanism to filter such incompatible laws.

In the circumstances, it may be recommended that the second option would be more suitable for the Sri Lankan society as it would allow the legislature to incorporate only the relevant human rights that would not be in disharmony with the Sri Lankan values. While safeguarding the sovereignty which ultimately lies with the people, such a move allows them to exercise it with full knowledge of the pros and cons of their actions.