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# Looking Beyond the Shores of Home: The Value of Comparative Constitutional Adjudication in Advancing Environmental Justice in Sri Lanka

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## Abstract

*What does the study of constitutional adjudication reveal about Sri Lanka's judicial engagement with comparative law? What are the models employed by courts in embracing constitutional experiences of foreign jurisdictions? What are the dangers associated with judicial borrowing? In seeking answers to these questions of comparative method, this paper evaluates several emblematic decisions handed down by the Sri Lankan judiciary in the sphere of environmental justice. While the analysis suggests that the courts have drawn inspiration from Indian authorities and international environmental law standards to varying degrees, the discourse on comparative constitutional adjudication remains characterised by two broad criticisms; Firstly, that foreign law/concepts fail to adequately capture the needs and aspirations of the people as, constitutions are, by their very nature, linked to a particular nation's identity. Secondly, that citation of foreign authorities occurs as an ad hoc judicial practice, leaving room for absurdities to seep in. Notwithstanding these criticisms, the paper emphasises that, in the context of Sri Lanka's constitutional scheme where specific environmental rights are absent, the careful judicial adoption and adaptation of foreign law could prove useful in filling the void left by the legislature, in bolstering the rights of vulnerable communities, and in promoting greater governmental accountability.*

***Keywords**: Comparative Constitutional Adjudication, Environmental Justice, Judicial Borrowing, Judicial Activism, Right to Environment*

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## Introduction

Throughout history, constitutional designers and interpreters have looked beyond their shores to discover, in the practices of other nations, possible sources for emulation.[1] This comparative endeavor is wide-ranging and encompasses the transfer/borrowing[2] of precedents, arguments, concepts, tropes, and heuristics across different doctrinal boundaries.[3] The proliferation of foreign legal materials online, the globalization of legal education, and the ease of travel and communication have contributed to the intensification of such constitutional borrowing.[4] However, with the global judicialization of politics and the increased exchange of constitutional ideas, the appropriateness of drawing on alternative, foreign perspectives-particularly in the context of judicial activity has become a contentious issue in recent years.[5]

Against this backdrop, this paper engages in a critical evaluation of the use of comparative law in constitutional adjudication. In order to avoid the abstract nature of the discussion, the paper explores this theme in light of new benchmarks set by the Sri Lankan judiciary

1 Gary J Jacobsohn and Shylashri Shankar, 'Constitutional Borrowing in South Asia' in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 204.

2 A survey of the literature reveals concern about the choice of metaphors to capture cross-constitutional interaction. Available options include 'transplants', 'diffusion', 'borrowing', 'circulation', 'cross-fertilization', 'migration', 'engagement', 'influence', 'transmission', 'transfer', and 'reception'; See, Vlad F Perju, 'Constitutional Transplants, Borrowing and Migration' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1306.

3 Nelson Tebbe and Robert L Tsai, 'Constitutional Borrowing' (2010) 108 Michigan Law Review 459.

4 Vlad F Perju, 'Constitutional Transplants, Borrowing and Migration' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1306.

5 Jacobsohn and Shankar (n 1).

in the sphere of environmental justice litigation.

For theoretical and conceptual clarity, the paper begins with Part III; a brief overview of the models employed by courts to embrace the constitutional experiences of foreign jurisdictions. Part IV evaluates several emblematic decisions delivered by the apex courts of Sri Lanka with a view to understanding the ways in which comparative jurisprudence has influenced judges in framing and articulating their own position when adjudicating on controversial environmental issues. Drawing from the analysis of selected jurisprudence, Part V discusses the potential risks associated with judicial borrowing, questioning whether the process of comparative constitutional law adequately addresses the needs and aspirations of the people. Part VI offers concluding reflections on the significance of comparative perspectives for constitutional adjudication in Sri Lanka.

## Methodology

In order to answer the research questions articulated above, the paper adopts an analytical as well as comparative approach that involves the study of both primary and secondary sources. While primary sources such as constitutional provisions, international conventions and case law authorities form the analytical basis of the paper, cross jurisdictional referencing between Sri Lanka and India form the comparative basis. The paper also uses expert opinion drawn from a library-based study in validating claims, formulating findings, and drawing conclusions.

## Models employed by courts to embrace constitutional law and experience of foreign jurisdictions: carving out typologies

Literature on comparative law presents various typologies to explain the use of foreign law in constitutional adjudication. One

simple model conceives the use of foreign legal experience along a spectrum.

At one end of the spectrum is the 'soft use' of comparative law - where the court places no reliance on foreign experience in reaching its final conclusions.[6] Passing references to foreign experience, presentation of empirical information of how principles or practices urged on the court have worked elsewhere, and use of foreign legal rules or judicial arguments to define or justify consideration of an issue (which is then resolved by reference to domestic sources), are some practices found at the 'soft' end of the spectrum.[7]

On the other end of the continuum is the 'hard use' of comparative law – where foreign authorities actively shape the conclusions reached by the court. This includes borrowing reasonings of other courts, reliance on foreign law to support or assist with the interpretation of a constitutional provision, and empirical recourse to foreign experience to justify transplantation of the foreign rule, institution, or practice.[8]

## Advancing environmental justice through judicial activism in Sri Lanka: hard and soft use of comparative law

The Sri Lankan Supreme Court's jurisprudence on environmental justice offers a host of examples indicative of the hard and soft use of comparative law.

One of the earliest judgements symbolic of this trend is *Bulankulame v The Secretary, Ministry of Industrial Development*

6 Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law (The George P. Smith Lecture in International Law)' (2006) 13(1) Indiana Journal of Global Legal Studies 37.

7 Ibid.

8 Ibid.

*and Others* (*Eppawala Case*).[9] The case involved a proposed agreement between the Sri Lankan government and an overseas company for the exploration and mining of phosphate from a deposit located at Eppawela in the North Central Province. The Environmental Foundation Ltd. (EFL) sought to challenge this project by a fundamental rights application to the Supreme Court. Due to the restrictive application of *locus standi* with regard to the fundamental rights applications at the time,[10] the lawyers of EFL strategically filed the case under the names of local villagers, who could claim that they would be materially affected by the project and could therefore, present themselves as petitioners.[11] At the inception, the respondents raised a preliminary objection claiming that, being an alleged 'public interest litigation', the petition should not be entertained under the provisions of the Constitution.

Dismissing this objection and upholding a violation of the residents' right to equality under Article 12(1), the court declared that the petitioners were not disqualified from litigating the matter merely because it dealt with the collective rights of the citizens of Sri Lanka.[12]

Guided by the Indian case of *M.C. Mehta v Kamal Nath*,[13] the court stretched this argument further by observing that fundamental rights litigation is an effective means of holding the government accountable as a 'trustee' of Sri Lanka's natural resources for the benefit of future generations. The court also broke new ground by

9 [2000] 3 Sri LR 243.

10 Under Article 126(2) of the 1978 Constitution of Sri Lanka, standing to invoke the jurisdiction of the Supreme Court for the violation of fundamental rights is restricted to the person affected (victim) or his Attorney-at-Law.

11 Camena Guneratne, 'Using Constitutional Provisions to Advance Environmental Justice – Some Reflections on Sri Lanka, 11/2 Law', (2015) Environment and Development Journal 72 <http://www.lead-journal.org/content/15072.pdf> accessed 19th September 2022.

12 [2000] 3 Sri LR 243, 258 (Amerasinghe J.).

13 (1997) 1 SCC 388 (SCI)

absorbing the international environmental law standards of 'inter-generational equity' and

'sustainable development'[14] (as propounded by Justice Weeramantry in the *Hungary v Slovakia*[15]) into the corpus of domestic law in Sri Lanka. Justice Amerasinghe, delivering judgment for a unanimous bench of the Supreme Court, made specific observations regarding the reception of international law: *Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the sense in which an Act of our Parliament would be. It may be regarded, merely as "soft law." Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would… be binding if they have been either expressly enacted or become a part of the domestic law by adoption by superior courts of record and by the Supreme Court in their decisions.*[16]

While the comparative method employed by Justice Amerasinghe in relaxing the rules of standing and in recognizing the doctrine of public trust is illustrative of the 'soft use' or 'silent absorption' of comparative law, the turn to principles of international environmental law is illustrative of the 'hard use' of comparative law. The *dictum* quoted above was undoubtedly an indelible turning

14 The court took note of the concept of 'sustainable development' as developed by the Stockholm and Rio Declarations on the Environment to hold that *'Human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature'*; UN General Assembly, United Nations Conference on the Human Environment (adopted 15 December 1972) UNGA/RES/2994; UN Commission on Human Rights, Human Rights and the Environment (adopted 9 March 1994) E/CN.4/RES/1994/65.

15 *Gabcikovo-Nagyamaros Project (Hungary v Slovakia)* (1997) ICJ 7.

16 *Bulankulame v The Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243, 274 (Amerasinghe J.).

point in the dualist constitutional scheme of Sri Lanka.[17] Scholars have observed that this *dictum*, if followed by subsequent benches, would facilitate the reception of international law (whether treaty or 'soft law') into the domestic legal system with greater ease,[18] and fill the vacuum left by the legislature through its inaction.[19]

Another case which adds to the growing body of jurisprudence on environmental justice is *Watte Gedera Wijebanda v Conservator General of Forests*.[20] The petitioner in this case alleged an infringement of his right to equality, when he was refused a permit for mining of silica quartz in a quarry located in an archaeologically sensitive area.

Drawing an important parallel with the Indian courts, and reading the non-justiciable Directive Principles of State Policy (DPSP) in a complimentary fashion, the court affirmed that the right to a clean environment and the principle of inter-generational equity (with respect to the protection and preservation of the environment) are inherent in a meaningful reading of Article 12(1).[21] Keeping up with the judicial trend established in the *Eppawela Case,* the court also declared that, *'...although international instruments... are not legally binding upon governments, they constitute an important*

17 Constitutional scholars have maintained that, in light of the acceptance of the doctrine of sovereignty of Parliament, treaties have no legal status unless directly transformed through enabling legislation; JAL Cooray, *Constitutional and Administrative Law of Sri Lanka* (Sumathi Publishers 1995) 237-238.

18 Deepika Udagama, 'The Politics of Domestic Implementation of International Human Rights Law' (2015) 16 Asia-Pacific Journal on Human Rights and the Law 104.

19 Wasantha Senevirathne, 'Proposal for a Marriage between Monism and Dualism: Is a Mixed Method of Incorporating International Law into Domestic Law of Sri Lanka Apposite?' in *Law in Defence of Human Integrity: Principles and Policies, Collected Essays* (Colombo University Press 2020)

20 [2009] 1 Sri LR 337.

21 *Watte Gedera Wijebanda v Conservator General of Forests* [2009] 1 Sri LR 337, 356 (Thilakawardena J.).

*part of our environmental protection regime.'*[22] However, in contrast to the judicial approach in the *Eppawala Case* – where reliance on foreign authorities was both extensive and elaborate, reference to foreign authorities in *Watte Gedera Wijebanda's Case* was rather 'soft' and 'decorative' in character as it was limited to reinforcing an interpretation that had been made on a previous occasion by the court.

A more recent case where the court strengthened the obligation of the state to protect the environment in their performance of statutory duties through a soft use of comparative law is *Ravindra Gunawardena Kariyawasam v Central Environmental Authority (CEA)*[23] (*Chunnakam Power Plant Case*). The case concerned the operation of a thermal power plant in the Chunnakam area of Jaffna, in a manner which polluted groundwater, making it unfit for human consumption. The petitioner alleged, *inter alia*, that the relevant statutory authorities including the CEA and Board of Investments had failed to exercise its power and enforce the law in the best interests of the public, thereby denying the residents of Chunnakam their legitimate expectation to clean water and violating Article 12(1) of the Constitution.

In considering the question of whether the scope of Article 12(1) could be stretched to encompass environmental rights, the court made passing references to the jurisprudential developments in India[24] where it is well established that the right to a clean environment is embedded in Article 21 (right to life) of the Constitution of India. Following a thorough analysis, the court upheld the petitioner's claim and recognised three substantive aspects of environmental rights, including the right of access to

22 Ibid, 359 (Thilakawardena J.).

23 SCFR 141/2015, SC Minutes 04 April 2019.

24 The court cited the Indian case of *ND Jayal v Union of India* (2004) SC 867 (SCI) in support of this view

clean water. In doing so, the court enjoined the concepts of public trust and sustainable development with DPSPs.[25]

Drawing inspiration from a string of Indian cases[26], including the often-cited case of *Vellore Citizen's Welfare Forum v Union of India*,[27] the court also justified the application of the 'Polluter Pays' principle to offset the substantial loss/damage caused to the residents of Chunnakam by the groundwater pollution.

However, as far as reference to international law is concerned, it is quite intriguing that the court has confined itself by referring only to the older international law standards on sustainable development such as the Rio Declaration of 1992.[28] Reference to the Sustainable Development Goals and the 2030 Agenda adopted by the UN General Assembly in 2015, particularly Goal 6 – clean water and sanitation, would have strengthened the normative jurisprudential argument of the court.[29]

The foregoing analysis indicates that the Sri Lankan courts have demonstrated a bold, albeit sporadic, adoption of recent developments in Indian jurisprudence to promote environmental justice. First, as in India, the courts have liberalised standing requirements; thereby enabling non-governmental organisations and public-spirited individuals to litigate on environmental

25 *Environmental Foundation Ltd. and Others v Mahaweli Authority of Sri Lanka and Others* [2010] 1 Sri LR 1

26 *S Jaganath v Union of India* (1997) AIR 811 (SCI); *M.C. Mehta v Kamalnath* (1997) 1 SCC 388 (SCI); *Ramji Patel v Angrik Upbhokta Marg Dharshak Manch* (2000) 3 SCC 29 (SCI).

27 (1995) 5 SCC 647 (SCI)

28 Dinesha Samararatne, 'Sri Lanka's public trust doctrine as responsive judicial review?' Hong Kong Law Journal (forthcoming)

29 Ibid.

conservation and development matters.[30] Second, and more importantly, the courts have re-interpreted the core of fundamental rights to address environmental justice by infusing fundamental rights with the state's obligations under DPSP.[31] While the Supreme Court of India has utilized the right to life provision as the entry point for environmental claims,[32] the Sri Lankan Supreme Court has employed the right to equality provision to entertain environmental claims. Most notably, the Lankan judiciary has stretched the equality provision to include a right to a clean and healthy environment,[33] a right of access to clean water, [34] a right to information on environmental issues,[35] and has guided state functionaries to refrain from the arbitrary exercise of power in

30 The main catalyst for the evolution of environmental justice and Public Interest Litigation (PIL) in India is deemed to be the Bhopal disaster of 1984; See, Shyami Puvimanasinghe, 'The Role of Public Interest Litigation in Realizing Environmental Justice in South Asia: Selected Cases as Guidance in Implementing Agenda 2030' in Sumudu A Atapattu, Carmen Gonzales and Sara L Seck (eds) *The Cambridge Handbook of Environmental Justice and Sustainable Development* (The Cambridge University Press 2021).

31 Rehan Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka' (2015) 10 AsJCL 99

32 Ibid.

33 *Bulankulame v The Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243.

34 SCFR 141/2015, SC Minutes 04 April 2019: The Court observed that 'access to clean water is a necessity of life and is inherent in Article 27(2)(c) of the Constitution'; Art 27(2)(c) is a Directive Principle of State Policy which declares that the state must ensure to all citizens 'an adequate standard of living'. This is probably one of the first times that the Court has made a clear declaration on the right of 'access to clean water'; Dinesha Samararatne, 'Chunnakam Power Plant case: Court recognises right to be free from 'degradation of the environment' (Daily FT, 29 July 2019) <http://www.ft.lk/columns/Chunnakam-Power-Plant-case--Court-recognises-right-to-be-free-from--degradation-of-the-environment-/4-682834> accessed 15 August 2022

35 *Environmental Foundation Limited v Urban Development Authority* [2009] 1 Sri LR 123

alienating land in environmentally sensitive areas.[36] Likewise, the courts have recognised environmental law principles such as polluter-pays, sustainable development and inter-generational equity by referencing international and foreign authorities.

Although these judgements reflect a judicial attitude that is responsive and receptive to the jurisprudential developments in comparative jurisdictions and international law, reference to authorities outside the Sri Lankan system continues as a random, arbitrary and unregulated judicial practice.[37] What seems to be happening mostly is that, judges make passing references to one or two authorities drawn from a single jurisdiction in seeking to validate a decision that is already established in his/her mind,[38] thereby reducing constitutional interpretation to an outcome-determinative test.[39] As a result of this 'cherry picking' / 'forum

36 *Environmental Foundation Ltd. and Others v Mahaweli Authority of Sri Lanka and Others* [2010] 1 Sri LR 1; *Sugathapala Mendis et al v Chandrika Bandaranayake Kumaratunge* [2008] 2 Sri LR 339.

37 Dinesha Samararatne 'Use and Relevance of Strasbourg Jurisprudence in Sri Lanka's Fundamental Rights Judgements' (forthcoming); Mark Tushnet refers to this practice as 'bricolage' (a term borrowed from Claude Lévi-Strauss) *i.e.*, where constitution-makers and interpreters randomly adapt what is 'at hand' in ways that contribute to a certain eclecticism; See, Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 Yale Law Journal 1225.

38 See, Andrea Lollini, 'Legal argumentation based on foreign Law: An example from case law of the South African Constitutional Court' (2007) 3(1) Utrecht Law Review 60.

39 Ernesto J Sanchez, 'A Case against Judicial Internationalism' (2005) 38 Conn L Rev 185.

shopping'[40] exercise, courts neither delve into the nitty-gritties of the foreign decisions cited, nor provide strong justifications for citing them. For instance, in all cases analysed above, the courts have failed to explain or justify the case selection or jurisdiction selection using clear standards. Close geographical proximity and similarities between the legal systems of India and Sri Lanka, perceived similarities of socio-cultural contexts and the institutional links between judges seem to be the most compelling factors that enabled such judicial affinity and doctrinal convergence.[41]

Another pertinent observation is that it has taken approximately a decade for Indian jurisprudence to travel across the Palk Strait and creep into Sri Lankan judicial determinations. This delay is indicative of the time it takes for the Sri Lankan system to respond and adapt to comparative jurisprudential developments.[42]

## Dangers associated with judicial borrowing

Almost by definition, each constitution is linked with a particular

40 The phrases 'cherry-picking' and 'forum dressing' is used interchangeably by scholars to describe how judges chose jurisdictions in order to support a conclusion favoured by them, leading to arbitrary decision making – not legitimate judging; See, Anne Smith, 'Internationalisation and Constitutional Borrowing in Drafting Bills of Rights' (2011) 60 Int'l & Comp LQ 867; Christopher Mc Crudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499; Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law (The George P. Smith Lecture in International Law)' (2006) 13(1) Indiana Journal of Global Legal Studies 37; Ursula Bentele, 'Mining for Gold: The Constitutional Court of South Africa's Comparative Experience with Comparative Constitutional Law' (2009) 37 Georgia Journal of International and Comparative Law 239.

41 Dinesha Samararatne, 'Judicial Borrowing and Creeping Influences: Indian Jurisprudence in Sri Lankan Public law' (2018) 2(3) Indian Law Review 205.

42 Dinesha Samararatne, 'Travelling jurisprudence and porous boundaries – prospects for Comparative Public Law' (*Admin Law Blog,* 12 September 2018) <https://adminlawblog.org/2018/09/12/dinesha-samararatne-travelling-jurisprudence-and-porous-boundaries-prospects-for-comparative-public-law/> accessed 3 November 2022.

state, its system of government, and its people.[43] Consequently, one of the strongest arguments against the migration of constitutional ideas is that foreign law/concepts do not adequately reflect or respond to the unique context in which it is embedded, including the needs and aspirations of the people, that nation's particular history, culture, economy, geography and demography.[44] This line of criticism, which assumes that reference to foreign materials is 'undemocratic,' overlooks the fact that utilizing foreign law is a means by which a constitutional system engages with the outside world.[45] Such engagement[46] or dialogue[47], not only enable judges to import traditions that are lacking in their own systems,[48] but also help them to tease out new interpretations of domestic constitutional provisions while reinforcing critical components of their home country's constitutional identity. The judicial recognition of notions such as inter-generational equity and sustainable development in Sri Lanka, by referencing Indian law and international standards,

43Cheryl Saunders, 'Designing and operating constitutions in global context' in Mark Elliot and David Feldman, *The Cambridge Companion to Public Law* (1st edn, Cambridge University Press 2015).

44 Sujith Choudry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74(3) Indiana Law Journal 820; Ernesto J Sanchez, 'A Case against Judicial Internationalism' (2005) 38 Conn L Rev 185.

45 Vlad F Perju, 'Constitutional Transplants, Borrowing and Migration' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1306

46 Vicki Jackson uses the term 'engagement' to refer to constitutional borrowing; Vicki C Jackson, 'Comparative Constitutional Law: Methodologies' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

47 Sujith Choudry uses the term 'dialogue' to refer to constitutional borrowing; Sujith Choudry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74(3) Indiana Law Journal 820.

48 Quoting Vlad F Perju, 'Constitutional Transplants, Borrowing and Migration' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1306 as cited in Eszter Bodnar, 'The Invisible Factors behind Using Comparative Law in Constitutional Adjudication' (2019) 10 Rom J Comp L 201.

exemplifies this point.[49]

A second related criticism of the use of comparative or international law is that it is in tension with originalism. According to originalists, foreign or international law should not be used as authority because they are contemporary and shed no light on the original understanding of the Constitution.[50] For instance, originalists claim that the use of the Indian model of PIL, which supports the infusion of fundamental rights with the teleological objectives of the directive principles, results in re-writing the Sri Lankan constitution, straying away from its original purpose.[51] The accusation here is that the convergence of enforceable rights with unenforceable welfare obligations, dilutes the sanctum of individual rights within the framework of a liberal democracy paving way to judicial socialism.[52] This argument too is untenable as it fails to recognise that the importation of values under DPSP empowers vulnerable communities to vindicate their rights through existing legislation and compels public authorities to take steps to enhance the welfare of the citizens.[53] Such a model of standing is not only suitable, but is also encouraged, for a meaningful realisation of fundamental rights in Sri Lanka, especially in light

49 A perusal of historical and religious sources reveals that concepts such as sustainable development were embedded in the wisdom of ancient Sri Lankans; See, Kokila Konasinghe, 'The Role of the Judiciary in Promoting Sustainable Development in Sri Lanka' (2021) 3(1) International Journal of Governance and Public Policy Analysis; Kokila Konasinghe and Asanka Edirisinghe, '(Re) thinking Nature: Follow thy old Wisdom – What can Sri Lanka's ancient Kings tell us about protecting the natural world' (*The Association of Commonwealth Universities* 7 December 2021) <https://www.acu.ac.uk/the-acu-review/follow-thy-old-wisdom/> accessed 5 November 2022.

50 John O McGinnis, 'Foreign to Our Constitution' (2006) 100 Nw U L Rev 303.

51 Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 The American Journal of Comparative Law 3.

52 Ibid.

53 Lakshman Marasinghe, 'Public Interest Litigation and the Indian Experience: Its Relevance to Sri Lanka' (2003) 15 Sri Lanka J Int'l L 51.

of the constraints on judicial review of legislation, governmental apathy and legislative inertia. As observed by Justice Prasanna Jayawardena in the *Chunnakam Case*, *'The Directive Principles of State Policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to.'*[54] This is a commendable approach as the concern of the judiciary is rightly fixated on the injustice alleged in the petition.

Criticism of the use of foreign materials in constitutional adjudication also focuses on the possible impact of variations between legal systems.[55] The argument here is that, invocation of imported constitutional materials stands a good chance of proving unreliable considering the presumed inability of judges to make the necessary functional translations between two cultures.[56] In the opinions of some comparative scholars, transplantation simply cannot work and 'nothing can be translated.'[57] Other critics counter that basic principles of constitutional law are 'the same around the world' and fears that foreign experiences will be misinterpreted are exaggerated.[58]

Further, when the state, which is the potential source of borrowed knowledge and experience, is vastly larger than the borrower – as is the case with India and Sri Lanka, sensitive political issues related to constitutional sovereignty and autonomous statehood arise.[59]

54 Cassels (n 49).

55 Louis J Blum, 'Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication' (2002) 39 San Diego L Rev 157

56 Deepika Udagama, 'Constitutional Borrowing in South Asia' in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 204.

57 John C Reitz, 'How to Do Comparative Law' (1998) 46 AM. J. COMP. L. 617.

58 Blum (n 53).

59 Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 204.

Regardless of the merits / demerits of constitutional borrowing, the judiciary needs to be mindful that the transplantation of foreign constitutional ideas is not exposed to what has been described as the 'mutation effect' *i.e.*, the process of extending the scope of a holding, regardless of its factual basis, to cover abstract situations not even contemplated in the reasoning that grounded the original decision.[60]

## Conclusion

Sri Lanka is a classic example of a young constitutional democracy in South Asia that has made significant strides in advancing environmental justice through comparative constitutional adjudication. Despite the apex court's reputation for citation of foreign authorities, the discourse on comparative constitutional adjudication remains characterised by two broad criticisms. First, as a matter of jurisprudential philosophy, foreign law/concepts fail to adequately capture the needs and aspirations of the people as, constitutions are, by their very nature, linked to a particular nation's history, culture, and identity. The second criticism focuses on lack of method; citation of foreign authorities occurs as an unregulated/unprincipled judicial practice or a 'cherry picking/ forum shopping' exercise, leaving room for absurdities to seep in. Notwithstanding these criticisms, the study of cases demonstrates how the careful adoption and adaptation of foreign or international law by judges could prove useful in filling the void left by the legislature, bolstering the rights of vulnerable communities, and promoting greater governmental accountability.

60 For a fuller discussion of the mutation effect see, Horacio Spector, 'Constitutional Transplants and the Mutation Effect' (2008) 83 Chi.-Kent L. Rev. 129.