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USING CONSTITUTIONAL PROVISIONS TO ADVANCE ENVIRONMENTAL  
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Camena Guneratne

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## ARTICLE

# USING CONSTITUTIONAL PROVISIONS TO ADVANCE ENVIRONMENTAL JUSTICE – SOME REFLECTIONS ON SRI LANKA

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# 1

## INTRODUCTION

The environmental justice movement originated in the United States mainly in the context of polluting industries and the disposal of hazardous waste, which affect minority and low-income communities. The term has been defined by Robert Bullard, Director of the Environmental Justice Resource Center at the Clark Atlanta University, in his work *'Dumping in Dixie: Race, Class, and Environmental Quality'* as 'the principle that all people and communities are entitled to equal protection of environmental and public health laws and regulations.'<sup>1</sup> The movement in the United States focuses primarily on issues of pollution and health, and the disproportionate burden borne by certain communities of the impacts of environmental pollution and natural resources degradation. It is also therefore integrated with questions of civil and political rights, racism and discrimination, which may be based on a range of factors including class, race, ethnicity, nationality, gender, and urban/rural divisions.<sup>2</sup>

Kameri-Mbote and Cullet have critiqued the narrow focus of the environmental justice movement in its country of origin. They agree that it 'challenges a process of development that does not ensure the sharing of environmental costs and benefits equitably among citizens.'<sup>3</sup> However, they also argue that while it has moved away from a focus on the environment per se to issues of social justice, it is still constrained by the main concerns of western

environmentalism, i.e. resource conservation and pollution prevention, and does not challenge the underlying economic model which is the root cause of environmental degradation and social injustice.<sup>4</sup>

Since its origin in the United States, the discourse on environmental justice has expanded globally, including in developing countries. While the validity of its original focus on pollution and discrimination is not disputed, in the context of the wider concerns of the development process in countries of the global South, the principle needs to be broadened beyond its limited boundaries as described by Kameri-Mbote and Cullet into one which defines development models founded on environmental and economic sustainability, social equity and human rights. Developing countries including Sri Lanka are grappling with dilemmas of poverty, and social and economic inequality, and are seeking models founded on these standards. The principle of environmental justice must therefore address the fundamental paradigms of development with particular emphasis on ensuring that the benefits as well as the brunt of the development process are shared equally for the greater good.

Carmen Gonzalez offers a definition of environmental justice that is consistent with the challenges faced by developing countries. It consists of four aspects, namely, distributive justice, procedural justice, corrective justice, and social justice. She describes these four aspects as follows:

Distributive justice calls for the fair allocation of the benefits and burdens of natural resource exploitation among and within nations. Procedural justice requires open, informed, and inclusive decision-making processes. Corrective justice imposes an obligation to provide compensation for historic inequities and to refrain from repeating the conduct that caused the harm. Social justice, the fourth and most nebulous aspect of environmental justice, recognises that environmental struggles are inextricably

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1 Quoted in Luz Claudio, 'Standing on Principle: The Global Push for Environmental Justice' (2007) 115(10) *Environmental Health Perspectives* A500-A503.

2 Krista Harper and S Ravi Rajan, 'International Environmental Justice: Building the Natural Assets of the World's Poor', *Political Economy Research Institute Working Paper Series Number 87* (2004) <[http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1070&context=anthro\\_faculty\\_pubs](http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1070&context=anthro_faculty_pubs)> accessed 9 May 2015.

3 Patricia Kameri-Mbote and Philippe Cullet, 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management' *International Environmental Law Research Centre, Working Paper(1996-1)5* <[www.ielrc.org/content/w9601.pdf](http://www.ielrc.org/content/w9601.pdf)> accessed 9 May 2015.

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4 *ibid.*

intertwined with struggles for social and economic justice.<sup>5</sup>

This four-pronged definition enables the principle of environmental justice, while addressing immediate issues of injustice and discrimination, to be also used as a tool for transformative change in developing countries such as Sri Lanka. It must not be limited to rights to a pollution free environment, but should also encompass rights to sustainable development, to equal access to natural resources, and to freedom from poverty, hunger and deprivation. Importantly, it must also reinforce the capacity and autonomy of citizens to determine the sustainable use and protection of natural resources and the equitable sharing of such resources. Thus procedural rights that empower peoples and communities also come within the ambit of the principle.

The enforcement and fulfilment of such a principle of environmental justice is most effectively implemented within a constitutional framework of human rights. Constitutional rights, which are enforceable at the highest level of the judicial process, provide both the substantive and procedural foundation on which to conceptualise and interpret this concept, to offer practical responses to immediate issues and to articulate paradigms of environmental protection and development processes. In the last two decades, an increasing number of countries have incorporated environmental rights into their constitutions.<sup>6</sup> These

rights are not limited to protection of the environment per se or the sustainable use of natural resources, but are also linked to other social and economic rights such as those to food and water, and sanitation.<sup>7</sup> Procedural aspects of enforcement are grounded in civil and political rights including rights to equality, non-discrimination and due process. Environmental rights thus reflect the universality and indivisibility of human rights,<sup>8</sup> and potentially provide courts with the basis on which to substantiate the principle of environmental justice and realise its objectives.

Sri Lanka has a large body of jurisprudence that has interpreted and innovated the specific rights contained in the Constitution, and this body of law can serve as the basis of further expansion into the area of environmental justice. Notwithstanding the limited scope of the fundamental rights provisions in the Constitution, over the years the Sri Lankan judiciary has creatively used them to develop a body of case law, which has defined social justice and human rights in the development process and in the context of environmental degradation. The role of the judges has been facilitated by the public interest litigation on issues of environment and development and fundamental rights which has been driven largely by non-governmental organisations litigating either in their own capacity or as legal counsel for affected people. This paper will consider the constitutional framework in Sri Lanka and the extent to which its provisions have been used to define environmental and related developmental rights, and to further environmental justice.

This paper will begin by introducing the substantive and procedural provisions on fundamental rights in

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5 Carmen G Gonzalez, 'Environmental Justice and International Environmental Law' in Shawkat Alam et al (eds) *Routledge Handbook of International Environmental Law* (Routledge 2013) ch 5 and Seattle University School of Law Research Paper No. 12-11 <<http://ssrn.com/abstract=2011081>> accessed 9 May 2015.

6 Kishan Khoday, 'Environmental Justice, Comparative Experiences In Legal Empowerment' (United Nations Development Programme June 2014) <[www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruleoflaw/environmental-justice-comparative-experiences.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/environmental-justice-comparative-experiences.html)> accessed 5 May 2015. Khoday notes that 140 Constitutions today incorporate environmental principles. This includes 19 countries in Latin America and the Caribbean and 32 in Africa. Of the 140 constitutions containing environmental rights, 92 contain substantive rights, 30 procedural rights, 83 impose an individual duty related to the environment, and 140 impose a duty on the government to address environmental protection.

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7 'The rights to water and sanitation in national law' <[www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/#SRI](http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/#SRI)> accessed 5 May 2015; Lidija Knuth and Margret Vidar, 'Constitutional and Legal Protection of the Right to Food around the World' (Food and Agricultural Organisation 2011) <[www.fao.org/docrep/016/ap554e/ap554e.pdf](http://www.fao.org/docrep/016/ap554e/ap554e.pdf)> accessed 5 May 2015.

8 David R Boyd 'The Constitutional Right to a Healthy Environment' *Environment, Science and Policy for Sustainable Development* (July-August 2012) <[www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html](http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html)> accessed 5 May 2015.

the Sri Lankan Constitution. It will then examine in detail the jurisprudence on the right to equality embodied in Article 12. It is this Article and its interpretation of non-discrimination and the equal protection of the law that has been the basis of an extensive body of jurisprudence defining environmental rights and justice. The paper will then briefly discuss other constitutional rights that have also been interpreted in this context with varying impacts.

## 2 THE SUBSTANTIVE AND PROCEDURAL FUNDAMENTAL RIGHTS PROVISIONS OF THE SRI LANKAN CONSTITUTION

The present Sri Lankan Constitution was enacted in 1978. It contains a Bill of Rights in Chapter III, which is limited to civil and political rights. The rights encompass the accepted gamut of this category of rights including the right to freedom of thought, conscience and religion,<sup>9</sup> freedom from torture and cruel, inhuman and degrading treatment and punishment,<sup>10</sup> and the right to equality before the law and the equal protection of the law.<sup>11</sup> Article 14 covers a range of rights including freedom of speech and expression,<sup>12</sup> freedom of peaceful assembly and association,<sup>13</sup> the freedom to engage by oneself or in association with others in any lawful occupation, profession, trade, business or enterprise,<sup>14</sup> and the freedom of movement and of choosing one's residence within Sri Lanka.<sup>15</sup> Economic and social rights are not included in this Chapter and there is no right to a healthy environment. Unlike the Constitutions of

neighbouring South Asian countries such as India, Pakistan and Bangladesh, the Sri Lankan Constitution does not contain a provision guaranteeing the right to life.

What would amount to economic and social rights are included in Chapter VI of the Constitution entitled "Directive Principles of State Policy." However, this Chapter is subject to certain limitations. Firstly, the "rights" are not categorically articulated as such, but are merely intended to guide the State to establish a just and free society and as objectives that the State is pledged to fulfil.<sup>16</sup> Several provisions relate to aspects of social justice including the "promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life,"<sup>17</sup> and "the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities."<sup>18</sup> A further objective is "the equitable distribution among all citizens of the material resources of the community and the social product, so as best to sub-serve the common good."<sup>19</sup> The only mention of environmental concerns is expressed in the provision that: "The State shall protect, preserve and improve the environment for the benefit of the community"<sup>20</sup> and the duty imposed upon "every person in Sri Lanka" to "preserve nature and conserve its riches."<sup>21</sup>

Many of these objectives are expressions of economic, social, and developmental rights. However, a limitation on the effectiveness of these provisions is that they are not justiciable and cannot be litigated in, or enforced by, a court of

9 Constitution of the Democratic Socialist Republic of Sri Lanka, art 10.

10 *ibid* art 11.

11 *ibid* art 12.

12 *ibid* art 14 (a).

13 *ibid* art 14 (b) and (c).

14 *ibid* art 14 (g).

15 *ibid* art 14 (h).

16 The Directive Principles shall "guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society." *ibid* art 27 (1).

17 *ibid* art 27 (2) (b).

18 *ibid* art 27 (2) (c).

19 *ibid* art 27 (2) (e).

20 *ibid* art 27 (14).

21 *ibid* art 28 (f).

law.<sup>22</sup> Therefore they remain merely aspirations that may be fulfilled at the discretion of the State.

The enforcement procedures of these rights have also been set out in the Constitution and the task of protecting the fundamental rights of the people lies with the Supreme Court, which has sole and exclusive jurisdiction to hear and determine any question relating to the infringement of such rights.<sup>23</sup> The jurisdiction of the Court is not unlimited and there are some procedural restrictions on the petitions that the Court can entertain.

To begin with, the infringement of a right must be by executive or administrative action, and the jurisdiction of the Court cannot be invoked against private actors.<sup>24</sup> The Court has upheld this limitation, stating in an early case: 'the wrongful act of an individual unsupported by state authority is simply a private wrong. Only if it is sanctioned by the state or done under state authority does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the state.'<sup>25</sup> The Court has interpreted "state action" as encompassing executive acts of a state official done in the exercise of his or her authority (including abuse of authority), or while holding public office. Acts of agencies of government also constitute state action.<sup>26</sup> Interestingly, in a case that concerned the rights of an environmental defender, the Court held that the failure of the state to act would also constitute state action. In other words, state action includes state inaction.<sup>27</sup>

The rules governing *locus standi* also restrict the filing of fundamental rights petitions in Sri Lanka to some extent, and only an aggrieved party may sue for violation of rights.<sup>28</sup> This is in contrast to India where liberal constitutional procedures permit representative standing in fundamental rights litigation, and which facilitated the development and expansion of social action litigation including on environmental issues. While initially the Sri Lankan Court enforced this provision strictly,<sup>29</sup> as discussed below, the expansive interpretation given to the substance of fundamental rights such as the right to equality, has in turn resulted in a greater degree of flexibility in the rules governing who may petition the Court.

An increasing proportion of the fundamental rights jurisprudence that has developed in Sri Lanka over the last three decades has been in relation to issues of environment and development. Since the fundamental rights action is available only against the State, these cases have been filed as challenges to state development projects or other state action, which have potential adverse impacts on communities, or which were perceived as being detrimental to the common good. By and large these cases have been filed as public interest litigation, usually by non-governmental organisations working in the field of environment. In some of these cases, the lawyers concerned have attempted to file "test cases" where they have presented innovative arguments in an attempt to urge the Court to deliver

22 *ibid* art 29. It states, "The provisions of this Chapter do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal."

23 *ibid* art 126.

24 *ibid* art 17. There is a general view that this does not prevent civil suits being filed against private actors in the lower courts but the issue has not been tested.

25 *Perera v University Grants Commission* (1978-79-80) 1 Sri L R 128, 138 [*'Perera'*].

26 *Amal Sudath Silva v Kodituwakku, Inspector General of Police and Others* (1987) 2 Sri L R 119; *Mariadas Raj v Attorney General* (1983) 2 Sri L R 461; *Gunewardene v Perera* (1983) 1 Sri L R 305.

27 *Mohamed Faiz v The Attorney General* (1995) 1 Sri L R 372.

28 Constitution (n 9) art 126 (2) reads as follows: "Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges."

29 In *Somawathie v Weerasinghe and Others* (1990) 2 Sri LR 121, the Court did not permit a wife to bring a fundamental rights action on behalf of her husband who was in custody but in *Sriyani Silva (Wife of Jagath Kumara-Deceased) v Iddamalgoda, Officer-In-Charge, Police Station, Payagala and Others* (2003) 1 Sri L R 14, it took a more liberal stance.



an expanded interpretation of the constitutional provision in question. As discussed below, these have met with limited success.

The following discussion on Article 12 and other fundamental rights provisions of the Constitution will demonstrate that the Court has not been constrained by their limited scope in interpreting constitutional rights to address issues of environmental justice and to define equitable development paradigms. It will analyse in particular the strategies of the Court in extending these rights to the public at large in the context of development issues.

# 3

## THE RIGHT TO EQUALITY

Unlike the Constitutions of some South Asian countries such as India, Pakistan and Bangladesh, the Sri Lankan Constitution does not contain a right to life provision. This has undoubtedly inhibited the Sri Lankan Supreme Court in developing a momentous body of case law similar to that has evolved in these other countries in the last two decades. It can be argued, however, that the Sri Lankan Supreme Court has used the equality provisions in Article 12 of the Constitution to deliver judgements which have defined human rights including environmental rights, and developmental policies of the State, in much the same way as the right to life provisions of these other countries have been used.

Article 12(1) of the Constitution states that, “All persons are equal before the law and are entitled to the equal protection of the law.” Therefore there are two elements contained in the provision, namely the right to equality or non-discrimination, and the right to the equal protection of the law. A notable proportion of the fundamental rights cases filed before the Supreme Court have been on the basis of the violation of this Article.

A discussion of the general development of the jurisprudence on Article 12 is beyond the scope of

this paper. While the early cases involved issues of administrative justice in situations such as employment recruitments, promotions, and university admissions,<sup>30</sup> these in turn paved the way for the application of the constitutional remedies to situations that were probably not foreseen at the time, including those involving issues of the environment and development. The following section will examine some of the procedural and substantive innovations developed by the Court to address questions of environmental protection, developmental policy and human rights.

### 3.1 Procedural Innovations - Discrimination and the Expansion of Standing to Sue

Litigation on Article 12 is noteworthy both for its expansive interpretation of the right to equality and the equal protection of the law, as well as the consequent expansion of the principle of *locus standi*. The first significant case concerning issues of environmental justice that relied on Article 12 was *Bulankulame v The Secretary, Ministry of Industrial Development and Others*, popularly known as the Eppawela case.<sup>31</sup> The Government of Sri Lanka had proposed to enter into an agreement with a US based company, Freeport Mac Moran Resource Partners, to mine the entirety of Sri Lanka’s known phosphate deposits located in Eppawela in the north central province, a heavily agricultural area. According to the agreement, the deposits, which at the current rate of use were estimated to last the country for 200 years, would be mined and exported within a period of 30 years. The process of mining and processing the phosphate would have had severe detrimental impacts on the environment, the people of the area and the country as a whole. Several thousand people were to be displaced from their traditional lands as a result of this project. It was also established that an environmental impact

<sup>30</sup> See *Perera* (n 25); *Seneviratne v The University Grants Commission* (1978-79-80) 1 Sri L R 182; *Ramupillai v The Minister of Public Administration, Provincial Councils and Home Affairs* (1991) 1 Sri L R 11 [*‘Ramupillai’*]; *Palibawadana v The Attorney General and Others* (1978-79-80) 1 Sri L R 65 [*‘Palibawadana’*].

<sup>31</sup> (2000) 3 Sri L R 243 [*‘Eppawela’*].

assessment under Sri Lankan law had not been carried out on the project.<sup>32</sup>

The Environmental Foundation Ltd (EFL) decided to challenge this project and opted to do so as a fundamental rights application to the Supreme Court. As part of the legal strategy, and due to the restrictive application of *locus standi* in regard to fundamental rights applications at the time, the lawyers of EFL who filed the case did so in the names of residents of the area who could claim that they would be materially affected by the project and could therefore present themselves as petitioners. The Petitioners argued that the proposal constituted an imminent infringement of their rights including under Articles 12(1) of the Constitution.<sup>33</sup>

At the outset the Court considered the question as to whose rights were violated by the proposed project and took an expansive view of this matter, noting that:

The court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a constitutional right given by Article 17 read with Article 12 and 14 and Article 126 to be before this court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka - rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and

accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lanka, becomes relevant.<sup>34</sup>

In this instance, therefore, the Court, while considering the rights of the seven petitioners before it, also linked their rights to the collective rights of the people of Sri Lanka including future generations. It further expanded on this argument in its determination as to whether the Petitioners' rights under Article 12 had been violated. It noted that the proposed agreement was heavily biased in favour of the company concerned and 'is so framed that it generously strengthens, assists, supports, aids and abets the Company's designs', including circumventing the requirement for an environmental impact assessment under the National Environmental Act.<sup>35</sup> The terms of the agreement also enabled the company to avoid the cost of the environmental damage that would inevitably be caused by the proposed project, which cost would be borne by the general community either through reduced environmental quality or increased taxation to finance mitigation measures. Interestingly, the Court held that for these reasons, the proposed agreement seeks to circumvent the law 'and its implementation is biased in favour of the company as against members of the public, including the Petitioners' (emphasis added).<sup>36</sup> The Court therefore upheld the Petitioners' claim that there was an imminent infringement of their fundamental rights under Article 12(1) of the Constitution.

The notion that the right to equal treatment and equal protection of the law can be extended to the general public as against the State, an individual, or other entity was reinforced in a case concerning noise pollution.<sup>37</sup> In this case, the failure of a

32 Camena Guneratne 'The Eppawela Phosphate Mining Project - Breaking New Ground in Natural Resources Management' (2000) 5/3 *Asia Pacific Journal of Environmental Law* 275.

33 Since the agreement had not been signed at the time of filing the case the infringement had not actually taken place.

34 *Eppawela* (n 31) 258.

35 National Environmental Act No 47 of 1980 as amended in 1988 and 2000.

36 *Eppawela* (n 31) 318.

37 *Al Haj M T M Ashik and Four Others, Trustees of the Kapuwatta Mobideen Jumma Mosque, Denipitiya, Weligama v R P S Bandula, Officer in Charge Weligama and Nine Others* (2007) Supreme Court of Sri Lanka Fundamental Rights Application No 38/2005 (unreported) <[www.island.lk/2007/11/10/news9.html](http://www.island.lk/2007/11/10/news9.html)> accessed 20 August 2015.

government agency to promulgate regulations to govern noise pollution was deemed to be a violation of the rights of the general public to the equal protection of the law.

The trustees of a mosque filed a fundamental rights application in the Supreme Court claiming a violation of Article 12 on the basis that the police of the area had imposed restrictions on the use of loud speakers in their mosque, while two other mosques in the area had been granted loudspeaker permits. The Court, noting that the application raises issues of sound pollution, which were causing annoyance and disturbance to the people in the vicinity, directed the Central Environmental Authority to promulgate regulations to govern noise pollution. However, after a period of two years, the Authority had failed to do so. Subsequently, a non-governmental organisation and an individual were permitted to intervene in the case, representing the interests of the public at large to be protected from the harmful effects of noise pollution. The Court observed:

With the inclusion of the aforesaid parties, and considering the material presented and the submissions that were made the Court proceeded with the matter as being of public interest, to make a determination as to the effective guarantee of the fundamental right enshrined in Article 12(1) of the Constitution for the equal protection of the law in safeguarding the People from harmful effects of noise pollution. The impact of pollution is pervasive and its effect cannot be identified with the right of any particular person. The matter has to be viewed as being of general and public concern affecting the community as a whole (emphasis added).<sup>38</sup>

The Court went on to hold that:

There is no dispute in this case that People have been denied the equal protection of the law by the failure of the executive to establish by way

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<sup>38</sup> *ibid.*

of regulations an effective legal regime as mandated by Section 23P of the National Environmental Act No.47 of 1980, as amended by Act No.56 of 1988 to safeguard the public from the harmful effects of noise pollution. The facts also reveal that there are no guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Article 12(1) of the Constitution.<sup>39</sup>

In both these cases, the petitions were filed by individual petitioners, who were alleging a violation of their own rights under Article 12. These cases were not filed as public interest petitions on the grounds that the public was affected, though in the second case the Petitioner company was permitted to intervene on this basis. Nevertheless, in both cases, the Court held that the rights that were being violated by reason of environmental degradation or noise pollution were not limited to that of the petitioners before it, but constituted a violation of the rights of the people,<sup>40</sup> thus expanding distributive justice beyond individuals and communities.

### 3.2 Substantive Innovations - The Principle of Arbitrary Action

Early cases, which set out the initial interpretations of what constitutes a violation of Article 12, relied on the traditional doctrine of reasonable classification in order to define discriminatory treatment of a petitioner.<sup>41</sup> Equality was interpreted to mean that those who are alike must be treated alike, and therefore those who are placed in similar circumstances must have the same rights and be subject to the same duties and liabilities.<sup>42</sup>

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<sup>39</sup> *ibid.*

<sup>40</sup> In fact, in the latter case, the Petitioners themselves were deemed to be violating the rights of the public.

<sup>41</sup> *Palihawadana* (n 30).

<sup>42</sup> The Court expanded the definition of reasonable classification to address situations of formal and substantive quality, thus validating the implementation of affirmative action. See *Ramupillai* (n 30).

Notwithstanding an initial reluctance,<sup>43</sup> the Court, following the lead of the Indian Supreme Court, subsequently expanded the boundaries of equality to encompass the doctrine of arbitrary action.<sup>44</sup> The Indian decisions have held that arbitrariness is the antithesis of equality and essentially hostile. An arbitrary act is implicitly discriminatory and singles out an individual for differential treatment violating that individual's right to equal protection of the law.<sup>45</sup> In applying this argument, the Sri Lankan Supreme Court has held that it is not necessary to make a comparison between a petitioner and any other person in order to determine whether the former has been treated unequally.<sup>46</sup> Therefore an action that is clearly unreasonable and arbitrary could constitute discrimination under Article 12 even though the petitioner cannot establish that any other person has been treated differently.

The following judgements illustrate how the Court has implemented this principle in cases concerning issues of environment and development. It is noteworthy that in these cases too, the Court has extended the principle to hold that such action may violate the rights not only of the petitioner before the Court, but also that of the general public. The Court has also upheld the principle in situations where the petitioners did not claim to be directly and materially affected by the action in question.

The case of *Environmental Foundation Ltd v Urban Development Authority of Sri Lanka and Others*<sup>47</sup> (the Galle Face case) was an early case where the Petitioners claimed that arbitrary action in the

course of a development project violated their right to equality and the equal protection of the law. The Petitioner was an incorporated company, a non-profit organisation working in the area of environmental protection. It filed this case against the Urban Development Authority (UDA) in respect of a historic public promenade in Colombo known as the Galle Face Green, which the UDA was proposing to lease to a private company, which would convert it into a mega entertainment and leisure park, restricting free access by the public. The Petitioner had written to the UDA and the private company requesting details of the agreement, which request was refused. The Petitioner contended that the refusal amounted to an arbitrary exercise of power in the absence of specific reasons that supported such refusal. This argument was upheld by the Court, which stated:

The UDA is here purporting to exercise statutory power. It has held out in publication P5 that a very transparent transaction has been entered into in respect of Galle Face Green with [the private company] with all necessary safeguards to preserve and protect the public interest. Since the transaction entered into and the publication constitute a purported exercise of power, the arbitrary refusal of information required by the Petitioner is an infringement of the Petitioners' fundamental rights guaranteed by Article 12(1) of the Constitution.<sup>48</sup>

The Court also overruled an objection of the Respondents that the Petitioner company was not entitled to the protection of the constitutional provisions as it is not a natural person. The judge held 'in my view the word "persons" as appearing in Article 12(1) should not be restricted to "natural" persons but extended to all entities having legal personality.'<sup>49</sup> In the earlier Eppawela case, this argument was further extended to hold that those entitled to claim a violation of Article 12 includes not only identifiable individuals or even communities, but also the general public and the entire citizenry of Sri Lanka.<sup>50</sup>

43 See *Elmore Perera v Minister of Public Administration* (1985) 1 Sri L R 285.

44 See the Indian cases of *Royappa v State of Tamil Nadu* AIR 1974 SC 555; *Maneka Gandhi v Union of India* AIR 1978 SC 597; *Ramana v International Airport Authority* AIR 1979 SC 1628; *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487.

45 *Royappa* (n 44).

46 In *Jayasinghe v The Attorney General and Others* (1994) 2 Sri L R 74, it was stated that 'While generally it is necessary to prove that other persons, similarly circumstanced, have been differently treated in order to establish a denial of equal treatment, this is not an inflexible principle of universal application.'

47 Supreme Court of Sri Lanka (2005) Supreme Court Fundamental Rights Application No 47/2004 (unreported) [*Galle Face*].

48 *ibid* 7.

49 *ibid* 8.

50 *Eppawela* (n 31) 262.

The principle of arbitrary action was reinforced in the later case of *Environmental Foundation Ltd v The Mahaweli Authority of Sri Lanka*.<sup>51</sup> The Petitioner company challenged the lease of land in environmentally sensitive and protected areas by the Respondent Authority which had also granted permission to the lessees to construct buildings on the lands. The Petitioner company argued that it was bringing the action in the public interest and complained of a violation of Article 12(1) of the Constitution. The Court found that the lease was in contravention of the relevant laws, as the lands fell within a sanctuary created under the Fauna and Flora Protection Ordinance,<sup>52</sup> and were also within the 100 metres reservation of a protected area. The Court also found that an environmental impact assessment was not done under the National Environmental Act as required for such a project.

The articulation of the judgement is interesting. Having found that the alienation of the lands was in contravention of the law, the judge observed:

From the aforesaid, it is clear that the alienation of the lands and the granting of permission to construct houses in the lands which are the subject matter of this application have been done in violation of the applicable laws and regulations in an arbitrary manner by the 1st Respondent Authority thereby violating Article 12(1) of the Constitution.

Due to the above reasons, I hold that the 1st Respondent Authority has violated Article 12(1) of the Constitution by (i) alienation and (ii) granting of permission to construct houses in respect of the lands which are the subject matter of this application.

It is noteworthy that in this dictum there is no indication as to whose rights have been violated by such arbitrary action. Further, in both cases

51 Supreme Court of Sri Lanka (2010) Supreme Court Fundamental Rights Application No 459/2008 (unreported) [*Environmental Foundation*].

52 Fauna and Flora Protection Ordinance No. 2 of 1937 as amended.

discussed, the Petitioner company did not claim to be materially affected by the alienation of the Galle Face Green or the protected areas, and merely stated that it was filing the action in the public interest. In its final order in the *Mahaweli Authority* case the Court did state: 'The 1st Respondent has violated the fundamental right to equality and equal protection of the law as guaranteed to the Petitioners by Article 12(1) of the Constitution.'<sup>53</sup> Nevertheless it appears that in cases of public interest as opposed to individual rights, where executive action is held to be arbitrary, the Court will not insist on an identified victim of the violation. The mere fact that executive action is arbitrary will bring it within the ambit of Article 12, on the premise that the rights of the general public have been violated. In effect, the rule of *locus standi*, which requires a petitioner to show that he or she was materially and directly affected, has been relaxed. The Court is effectively addressing issues of corrective justice in environmental and developmental matters.

### 3.3 Application of Article 12(1) to Legislative Review

The application of Article 12 to the general public has not been limited to executive action but has been used in the process of legislative review.<sup>54</sup> This constitutional provision has been invoked in several actions challenging proposed laws that potentially impact upon issues within the sphere of environmental and developmental justice and the human rights of the people. An early example of such litigation is that on the Intellectual Property Bill.<sup>55</sup> The Petitioners contended that several provisions in the Bill were inconsistent with Article 12(1) in that they permitted the grant of a patent for a period of 20 years in respect of products and

53 *Environmental Foundation* (n 51) 21.

54 Constitution (n 9) art 120 provides that the Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or part thereof is inconsistent with the Constitution.

55 Supreme Court Special Determination No.14/2003 on the Intellectual Property Bill (unreported) (2003) <www.elaw.org> accessed 16 July 2015 [*Intellectual Property Bill*']. See also Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 137.

processes, giving the patent holder exclusive rights over the patented invention. These provisions read with Articles 3 and 4 of the TRIPS Agreement<sup>56</sup> would prevent the government of Sri Lanka from according to its own citizens and corporate entities any protection or privileges that are not granted to foreign persons or corporate entities, and would allow the foreign patent holders of any product or process, (including medicinal drugs and the processes for their manufacture), to control the supply and price of such drugs in the Sri Lankan market. The consequent increase in the prices would affect the ability of Sri Lankan citizens to obtain medicines at the cheapest available price and from a source of their choice. This is in effect discrimination against the people of Sri Lanka who are in an unequal position vis-à-vis foreign patent holders. The Petitioners drew attention to the consequences on the health of people in developing countries of adhering to the TRIPS Agreement and further, pointed out that mitigatory measures present in the TRIPS Agreement had not been included in the Bill.

The Court agreed that:

the provisions of the TRIPS Agreement would be applicable to countries developed as well as developing, which cannot be treated as equals. Article 12(1) of the Sri Lanka Constitution not only guarantees equality before the law, but also provides for the equal protection of the law. It is well settled law that just as much as equals should not be placed unequally, at the same time unequals should not be treated as equals.<sup>57</sup>

As in the stand taken by the Court in the Eppawela case, it was in effect holding that the Sri Lankan executive was discriminating against its own citizens vis-a-vis foreign companies.

The judgment on the determination of the Intellectual Property Bill was relied upon by petitioners in a subsequent challenge to the constitutionality of the Water Services Reform Bill on the grounds of inconsistency with

Article 12.<sup>58</sup> The Bill sought to regulate water services and to empower the State to grant licenses to service providers who would connect, provide and maintain water services to consumers within the area in respect of which a license would be granted. In effect the Bill sought to permit the privatisation of water services that had been within the exclusive jurisdiction of the State. The Petitioners argued that water services would be provided to consumers on the basis of an agreement entered into with a licensee on commercial terms. The provisions of the Bill that vest specific powers weighted in favour of the licensee without adequate provision to safeguard the interests of consumers would amount to a violation of the right to equality. They also argued that the Bill does not contain any directions, guidelines, or statement of principles or priorities in respect of the distribution of water, either under normal conditions or in times of scarcity, nor does it distinguish between different classes of consumers. Therefore the Bill has the effect of treating unequally placed persons as if they were equals and is inconsistent in its entirety with Article 12(1) of the Constitution. Having cited international standards on the right to water, the Petitioners further argued that in as much as water is a commodity essential to life, an adequate supply of water at an affordable price is also a pre-requisite for the enjoyment of all other fundamental rights. Therefore the State is abdicating its duty to respect, secure and advance the fundamental rights of the people, and the said Bill in its entirety is inconsistent with the provisions of Article 3 read with Article 4(d) of the Constitution.<sup>59</sup>

While this argument could validly have been brought within the purview of the current interpretation of Article 12, unfortunately, the Court refrained from ruling on this issue, although the Bill was held to be unconstitutional on other grounds.

### 3.4 Balancing the Rights of Individuals and the Public

Several cases reflect the proclivity of the court to prioritise the interests of the general public over

<sup>56</sup> See TRIPS Agreement <[www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm)> accessed 6 March 2015.  
<sup>57</sup> *Intellectual Property Bill* (n 55) 4.

<sup>58</sup> Supreme Court Special Determination No 24/2003 and 25/2003 on the Water Services Reform Bill (unreported) (2003).

<sup>59</sup> Written submissions in Supreme Court Special Determination No 24/2003 (on file with the author).

those of individuals who claim that their rights have been violated. In the case of *Vishwanath v Divisional Secretary, Madhurawala and Others*,<sup>60</sup> the Petitioner had been granted a permit for quarry blasting. The permit was subsequently rescinded due to protests by the surrounding community, which alleged that it would have adverse effects on the environment and on their personal security. The Petitioner was requested to cease operations until an inquiry was instituted. By the time the inquiry committee decided that it had no objections to the operations, the permit had expired. Subsequently, the relevant state agencies refused to renew the permit. The Petitioner contended that his rights under Article 12(1) had been violated. The Court agreed that Article 12(1) embodies a guarantee against arbitrariness in the decision making process, but noted that in making that decision it had to consider not only the grievances of the Petitioner but also those of the surrounding community. Continuous assessment and monitoring is a necessary aspect of issuing and renewing permits, and subsequent public protests about the adverse impacts of the operations must be taken into account when doing so. The Court therefore held that the action of the relevant agencies in refusing to renew the permit was not arbitrary and did not constitute a violation of Article 12(1).<sup>61</sup>

The Court has also held that even though the rights of individuals under Article 12 may be violated, the interests of development must override such rights. However, in such instances the individuals must be adequately compensated. The case of *Heather Therese Mundy v The Central Environmental Authority and Others*<sup>62</sup> concerned the construction of the Southern Expressway, a highway that would connect the capital city of Colombo with Matara in the south. The Appellants argued that the Central Environmental Authority (CEA) had not followed proper procedures in granting approval for the

project in as much as subsequent changes to the route of the highway had been approved without notice to affected persons.<sup>63</sup> The Appellants had originally filed action in the Court of Appeal under its writ jurisdiction<sup>64</sup> to quash the approval granted for the project by the CEA several years earlier, insofar as it purported to approve a route not described in the Environmental Impact Assessment Report (EIAR), and to direct the CEA to call for a supplementary EIAR from the project proponent (the Road Development Authority), in accordance with the prescribed procedures. The Court of Appeal had held that the highway was “an absolute necessity” and formulated four issues to be determined, one of which was “Whether - where the wider public interest is at stake - the Court has the discretion in deciding whether to grant or refuse the remedy [by way of writ] even if the impugned decision affects certain individuals.” The Court of Appeal had stated that:

...Courts have to balance the right to development: and the right to environmental protection. While development activity is necessary and inevitable for the sustainable development of a nation, unfortunately it impacts and affects the rights of private individuals, but such is the inevitable sad sacrifice that has to be made for the progress of a nation. Unhappily there is no public recognition of such sacrifice which is made for the benefit of the larger public interest which would be better served by such development. The Courts can only minimize and contain as much as possible the effect to such rights...<sup>65</sup>

The Court of Appeal went on to dismiss the writ applications on the basis that:

[When balancing the competing interests] the conclusion necessarily

60 (2006) 1 Sri L R 369 (Supreme Court).

61 See also *Wattegedera Wijebanda v Conservator General of Forests* (2007) Supreme Court Application No 118/2004 (unreported).

62 (2004) Supreme Court Appeal No 58/2003 (unreported) < [www.elaw.org/content/sri-lanka-mundy-vs-central-environmental-authority-and-others-sc-appeal-582003-decided-20-ja](http://www.elaw.org/content/sri-lanka-mundy-vs-central-environmental-authority-and-others-sc-appeal-582003-decided-20-ja) > accessed 22 August 2015 [*Mundy*].

63 The changes to the route were done in order to prevent damage to wetlands.

64 Court of Appeal Application No 688/2002 (unreported).

65 *Mundy* (n 62) 12.

has to be made in favour of the larger interests of the community who would benefit immensely by the construction of the proposed expressway ... the adoption of the Combined Trace would undoubtedly result in irreversible damage to the eco-system in the Bolgoda Wetland area. Therefore the only option is to adopt the Final Trace which ... will result only in the displacement of affected people in that area ... the obligation to the society as a whole must predominate over the obligation to a group of individuals, who are so unfortunately affected by the construction of the expressway.<sup>66</sup>

On appeal, the Supreme Court held that the deviations in the route were in fact alterations, which required the approval of the CEA. Before such approval was granted, the Appellants were entitled to be noticed and heard in respect of such alterations which materially affected them, and an omission to do so constituted a violation of their rights under Article 12(1). While the Supreme Court did not overrule the decision of the Court of Appeal, it held that the Court of Appeal erred in refusing relief in the exercise of its discretion. The Supreme Court held that:

Although the Court of Appeal seemed to agree that the rights of the Appellants had been infringed, that their sacrifice had not been duly recognized, and that the Court should minimize as much as possible the effect on their rights, nevertheless it felt obliged to choose between two options only: to grant relief or to dismiss the applications. The Court did not take note of the impact of the fundamental rights on its writ jurisdiction. While the circumstances were such that the Court could

reasonably have concluded that, on balance, the Final Trace should be left undisturbed, ... it was only equitable that the Appellants should have been compensated for the injury to their rights. ... If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest plot of land and a little hut because they are of “extremely negligible” value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property, the greater his right to compensation.<sup>67</sup>

These cases raise some interesting issues. To begin with some rights including Article 12 guaranteed in the Constitution are not absolute and are subject to restrictions. These include “meeting the just requirements of the general welfare of a democratic society.”<sup>68</sup> The Constitution thus envisages that individual rights may be balanced against the public good. While the Court did not expressly cite this provision in any of these cases, the facts demonstrate the complexity of the competing interests before a court when ruling on matters of environment and development, and in determining whose interests should be prioritised in ensuring environmental justice. These cases indicate that the tendency of the Court is to tip the scales in favour of public interest over that of the individual in instances of both environment protection and the process of development, and even where the Court has agreed that the petitioner’s rights under Article 12 have been violated, the right may still be subsumed by the greater good. However, as shown in the Southern Expressway case, the Court has also attempted to keep the balance even as far as possible and has held that those affected must at least be adequately compensated for their sacrifice

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66 *ibid.*

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67 *ibid* 15.

68 Constitution (n 9) art 15(7).



# 4

## OTHER CONSTITUTIONAL RIGHTS - THE RIGHT TO OCCUPATION AND FREEDOM OF MOVEMENT

While much of the jurisprudence dealing with and defining issues of environmental justice concern Article 12, several other constitutional provisions have been relied on in cases where interests of environment and development have been contested. These include Articles 14(1)(g) and 14(1)(h), which guarantee the right to engage oneself in a lawful occupation, and the right to freedom of movement and to choose one's residence within Sri Lanka respectively. They have been cited in several cases challenging development projects, or activities harmful to the environment or to the general community. These two rights may be compared to the conceptualisation of environmental justice in the US, which is focused on the rights of individuals and communities to live in their immediate environment free of pollution and waste.

Many of the cases filed under Article 14 could also have been litigated on the basis of public nuisance, since the petitioners were complaining of interference with their rights to peaceful and undisturbed occupation of their homes and their land, and also to interference with their legitimate livelihoods. However, in several cases, the lawyers opted to use the constitutional rights, particularly where the project in question had potential ramifications for the wider community or the country. In fact, in two similar instances of quarry blasting operations that had serious negative impacts on the surrounding community, while one was instituted as a public nuisance action,<sup>69</sup> the other was instituted as a fundamental rights application, citing Articles 14(1)(g) and (h) of the Constitution.<sup>70</sup>

Similarly, in the case of *Desban Harinda*,<sup>71</sup> the plaintiffs who were minor children claimed that the operation of a power plant that caused environmental and health problems infringed their rights under Articles 14(1)(g) and (h). This case too could have been filed as a public nuisance action, but was litigated under the constitutional provisions as a "test" case. However, in both these cases, the Court refrained from making a ruling and ordered a settlement.

A definitive ruling was made on these constitutional provisions in the *Eppawela* case where the Petitioners claimed that they were in danger of losing the whole or some portion of their lands and their means of livelihood if the proposed mining project was implemented. The seventh petitioner who was the Viharadhipathi (Chief Monk) of the Galkanda Purana Viharaya (ancient temple) where he had resided for over 35 years, stated that the Viharaya and the agricultural lands that sustain it were in danger of being destroyed if the proposed mining project was implemented. All the Petitioners claimed an imminent infringement of their rights under Articles 14(1)(g) and (h) which was upheld by the Court. In this case, the Court specifically cited the constitutional restrictions on the exercise and operation of certain fundamental rights including 'meeting the just requirements of the general welfare of a democratic society.'<sup>72</sup> However, in contrast to the *Mundy* case, in this case the learned judge found in favour of the affected individuals, observing: 'In the light of the available evidence, I am not convinced that the proposed project is necessary to meet such requirements.'<sup>73</sup> In this instance, the balance between individual rights and the public good was weighted in the Petitioners' favour.

<sup>69</sup> See *Keangnam Enterprises Ltd v E A Abeysinghe and Eleven Others* (1994) 2 Sri LR 172 (Court of Appeal), where the order of the Magistrate's Court issuing an injunction restraining operation of the petitioner's quarry was heard on appeal.

<sup>70</sup> *Environmental Foundation Ltd v The Attorney General and Others* (1991) Supreme Court Application No 128/1991 (unreported) [*'Nawimana'*].

<sup>71</sup> *A V Desban Harinda (a minor) and Four Others v Ceylon Electricity Board and Six Others* (1997) Supreme Court of Sri Lanka Fundamental Rights Application No 323/1997 (unreported) [*'Desban Harinda'*].

<sup>72</sup> *Eppawela* (n 31) 320.

<sup>73</sup> *ibid.*

## 5

### INFERRING RIGHTS NOT CONTAINED IN THE CONSTITUTION

The right to information or freedom of information is not guaranteed either by constitutional provisions or by statute.<sup>74</sup> Nevertheless, in the Galle Face case<sup>75</sup> discussed above, the Supreme Court took the view that in order for the freedom of speech guaranteed under Article 14(1)(a) of the Constitution to be meaningful and effective, it should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. According to the Court, the Urban Development Authority being an organ of the Government has an obligation to ensure that a person could effectively exercise this right and its denial of access to official information amounted to an infringement of the Petitioner's fundamental rights under Article 14(1)(a), and also to a violation of the Petitioner's right to equality guaranteed under Article 12(1). It is also a violation of the rights of the Petitioner, and the general public, to procedural justice as an aspect of environmental justice.

It should be noted that in the Eppawela case, the Supreme Court, citing Principle 10 of the Rio Declaration, had earlier held that access to information on environmental issues was of paramount importance.<sup>76</sup> Environmental impact assessment laws of Sri Lanka make provision for public comments on the EIA report and the Court took the view that failure to prepare one, reinforced by the confidentiality provision of the proposed agreement, effectively excluded public awareness and participation, as contemplated by the Sri Lankan legislature, as well as by Principle 10 of the Rio Declaration. In the view of the Court, this amounted to a violation of Article 12.

74 The 19<sup>th</sup> Amendment to the Constitution passed on 28 April 2015 now contains a provision guaranteeing the right to information.

75 *Galle Face* (n 47).

76 *Eppawela* (n 31) 316.

## 6

### RE-DEFINING EXISTING RIGHTS

There have been instances where lawyers have attempted (to date unsuccessfully) to interpret specific rights in the Constitution to widen the scope of environmental justice. They have particularly attempted to do so in regard to Article 11, which provides protection from "cruel, inhuman and degrading treatment."<sup>77</sup> A large proportion of fundamental rights cases filed in the Supreme Court have been based on violations of this provision where petitioners have alleged torture at the hands of State officials, including members of the police and the armed forces. The Constitution does not define what would amount to torture or cruel, inhuman and degrading treatment, and it has been left to the Court to interpret the provision. Environmental lawyers have argued that the constitutional protection from torture should be expanded to situations beyond what was envisaged by the drafters of the Constitution, and the term "cruel, inhuman and degrading treatment" in Article 11 includes being subjected to a polluted and degraded environment.

The early definitions of torture were restrictive. In *de Silva v Chairman, Ceylon Fertilizer Corporation*,<sup>78</sup> torture was defined as any act by which severe pain or suffering is, without lawful sanction inflicted on a person for a particular purpose, which may include extracting information or a confession, supposedly for an official purpose. The phrase "cruel, inhuman and degrading treatment" has also been given a restrictive definition by the Court which held that whether the treatment in question would come within this definition or not would depend on the characteristics of the victim and the circumstances of the case.<sup>79</sup>

77 Constitution (n 9) art 11 reads: "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

78 (1989) 2 Sri L R 393 [*de Silva*].

79 *Wijayasiriwardene v Kumara, Inspector of Police, Kandy and Two Others* (1989) 2 Sri L R 312; *de Silva* (n 78); *Channa Pieris and Others v Attorney General and Others* (1994) 1 Sri Lanka Law Reports 1.

In an attempt to expand the circumstances where such treatment can take place, petitioners filed cases concerning environmental degradation, which adversely impact on individuals. In the Nawimana case,<sup>80</sup> an application was made under Article 126 of the Constitution, alleging, *inter alia*, the violation of Article 11. In this case, the 2<sup>nd</sup> to 21<sup>st</sup> Petitioners were residents of villages in the south of Sri Lanka who claimed to be suffering serious injury as a result of large scale quarry blasting operations in the vicinity of their villages. They alleged that the operations posed a serious threat to their lives and property, including that children were suffering from both physical and psychological problems, the hearing of residents was affected, there was structural damage to houses, and damage to the water table in the area causing wells to dry up. The Respondents included a public official who had renewed the license for the quarry without giving the Petitioners a hearing, and who had also failed to regulate the blasting.

As noted above, the circumstances of this case were appropriate for filing a public nuisance action. However, lawyers for the Petitioners opted to file a fundamental rights case under Article 126 as a test case to determine, among other things, whether the Court would expand the definition of “cruel, inhuman and degrading treatment” in this manner. The strategy did not succeed as the Court ordered the parties concerned to negotiate a settlement by which the blasting operations would be regulated so as to minimise the impacts on the surrounding people, and did not issue a definitive judgement on the issue.

In the case of *Desban Harinda*<sup>81</sup> too, the lawyers attempted to expand the definition of cruel inhuman and degrading treatment to encompass adverse environmental conditions. In this case the petitioners who were minor children claimed that a power generating station run by a private company with the agreement of the Ceylon Electricity Board (a State institution), caused a hazard to their lives and health. They argued that they were subjected to unbearably high levels of noise for long periods,

which caused hearing problems, headaches and loss of sleep. The emission of harmful gases such as carbon dioxide, carbon monoxide and sulphur dioxide caused respiratory problems and, as they were very young children, these conditions could have serious impacts on their physical and mental development. They further argued that the constant emanation of noise, vibration and fumes amounted to cruel, inhuman and degrading treatment and violated their rights under Article 11 of the Constitution.

While the case was pending the power plant ceased operations and the Petitioners agreed to withdraw the case. Once again the Court did not make a ruling as hoped, on a wider definition of what constituted cruel, inhuman and degrading treatment. Therefore the matter remains unresolved to date.

## 7 CONCLUSION

The fundamental right provisions of the Sri Lankan Constitution are limited, both substantively and procedurally. Substantively, they cover only civil and political rights. As regards procedure, the limitations on standing restrict petitioners to those who can claim that they have been materially affected by the action in question, which must be State action. Nevertheless, within this narrow ambit, the Sri Lankan Supreme Court has interpreted the fundamental rights provisions to re-define and substantially expand the substance and scope of environmental justice. Conversely, litigation on matters of environment and development has contributed in no small measure to the development of fundamental rights jurisprudence in Sri Lanka.

As in the US, the Sri Lankan Supreme Court has premised the concept of environmental justice on principles of equality and non-discrimination, and its evolution in the context of the constitutional provisions is closely linked to the interpretation of Article 12, including non-discrimination, the equal protection of the law and the principle of arbitrary action. However, the Sri Lankan Supreme Court has

<sup>80</sup> *Nawimana* (n 70).

<sup>81</sup> *Desban Harinda* (n 71).

pushed the boundaries of this argument to a much greater extent and both these aspects have been used to argue that it is not only the aggrieved parties before the Court whose rights to environmental and developmental justice have been violated, but also the rights of a community, the public or the nation. Further, the concept has not been confined to challenging issues of pollution and waste, but has been used to review all aspects of the development model and processes.

It must be noted however, that in spite of the jurisprudence discussed above, the Court does remain constrained by the narrow constitutional framework within which it has to function.. Although the equality provision in the Sri Lankan Constitution has been creatively interpreted in much the same way as the right to life provisions in neighbouring countries of the region to consider environmental and developmental issues, this does not mean that this clause alone can provide the sole basis on which complex problems of human rights, environment and development can be determined. There is an urgent need to re-draft the fundamental rights chapter of the Constitution to include justiciable social and economic, as well as environmental and developmental rights, including such basic rights as those to food, water, shelter, health and education, as well as the right to a clean and healthy environment. Although the equality provision has been used expansively to encompass issues of environment and development, it is doubtful whether the boundaries could be pushed much further to address these more specific rights. The narrow scope of the current provisions on fundamental rights, including the absence of a right to life provision, would be an obstacle in doing so.

The last attempt at constitutional reform that took place in the year 2000 did not include these categories of rights except in very limited terms.<sup>82</sup> A draft Constitution which to date has not been enacted includes the right to life,<sup>83</sup> but there is no mention

of the right to a clean and healthy environment. Article 25 of the draft Constitution entitled “social rights” states that every citizen has the right to have access to, inter alia, sufficient food and water, but the obligation of the State is merely to take reasonable legislative and other measures within its available resources with a view to achieving the progressive realisation of these rights. Obligations of the State in relation to environmental protection and ensuring an adequate standard of living for its citizens in all its aspects have again been relegated to a chapter on Principles of State Policy and Fundamental Duties, which do not give rise to legal rights and are not enforceable in a court. These provisions are over a decade old, and a new draft must necessarily reflect new perspectives on economic and social rights, including environment and sustainable development.

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82 See Government of Sri Lanka, Draft Bill (No 372) to repeal and replace the Constitution of the Democratic Socialist Republic of Sri Lanka < [www.priu.gov.lk/Cons/2000ConstitutionBill/Index2000ConstitutionBill.html](http://www.priu.gov.lk/Cons/2000ConstitutionBill/Index2000ConstitutionBill.html) > accessed 5 May 2015.

83 *ibid* art 8(1).

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