The Implementation of Constitutional Ouster Clauses in Sri Lanka: A Sisyphean Task?

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Abstract –The phrase 'A Sisyphean task' originates in Greek mythology, where Sisyphus, king of Ephyra, was condemned to an eternity of repeatedly rolling a large boulder up a hill, only to have it roll back down each time he reaches the top. This paper examines whether the implementation of ouster clauses has proven to be equally futile. Ouster Clauses (also known as privative, preclusive or exclusionary clauses) are legislative provisions which seek to exclude from the ambit of judicial review, certain acts or decisions of a statutory body. Does the legislature repeatedly introduce such clauses, only to have the judiciary disregard them? The author views ouster clauses as pivots in the legal machinery, maintaining the delicate balance between the three organs of government. Therefore, it is critical to identify the role of the judiciary in maintaining that balance. The objective of this study is to identify a common thread in Sri Lankan judicial approach with regard to the specific category of Constitutional ouster clauses. It is a discursive essay on how the courts have tackled the four main ouster clauses contained in the second Republican Constitution, focusing primarily on Article 61A, which is a comparatively recent addition; introduced by the 17th amendment and modified by the 19th. This shall be compared vis-à-vis the functionally similar Article 55(5) which existed prior to the 17th Amendment, in order to highlight any changes in judicial approach and the reasons underpinning such changes. Through a qualitative analysis of Constitutional provisions and relevant judicial decisions, this paper addresses the key problem of whether the Sri Lankan courts have conformed to a general set of principles in interpreting Constitutional ouster clauses, or has implementation been solely dependent on how far an individual judge is willing to go, disregarding the literal meaning, in the name of 'judicial activism'?

Keywords: Ouster Clauses, Judicial Review, Constitutional Law, Administrative Law.

I. INTRODUCTION.

Ouster Clauses (also known as privative, preclusive or exclusionary clauses) are legislative provisions which seek to exclude from the ambit of judicial review, certain acts or decisions of a statutory body. This concept is not a novel one, and such clauses have been a part of administrative law, especially within common law countries, for quite a long time. Since the seminal judgment in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147, the courts have found ways to circumvent ouster clauses by refusing to adhere to the literal construction. They have justified the exercise of judicial review (to varying extents), notwithstanding the existence of an ouster clause, which *ex facie* seems to preclude such review. Thus, in many instances, the courts have exhibited a variety of judicial approaches in interpreting ouster clauses. This wide discrepancy in judicial approach with regard to how ouster clauses *have* been construed, consequently gave rise to heated academic debate as to how these clauses *should* be construed. The objective of this study is to identify a common thread in the judicial approach adopted by the Sri Lankan courts with regard to the specific category of Constitutional ouster clauses. It is a discursive essay focusing on how the Sri Lankan courts have tackled the four main ouster clauses contained in the second Republican Constitution, focusing primarily on Article 61A since it is a comparatively recent addition to the constitution, introduced by the 17th Amendment and modified by the 19th. Article 61A bears a close functional resemblance to Article 55 (5) which existed prior to the 17th Amendment, as well as Article 106 (5) of the First Republican Constitution of 1972. This paper addresses the key problem of determining the extent to which the Sri Lankan courts have recognized the application of Constitutional ouster clauses and whether there is some consistency in judicial approach when construing such clauses.

Before carrying out an analysis on the interpretation of specific ouster clauses, it is important to understand the context within which such ouster clauses are born and the underlying principles which govern their application. Section A of this paper therefore observes the role of ouster clauses in the metaphorical tug-of-war between the three organs of government, by firstly examining the purpose of an ouster clause and secondly the reasons for circumventing such clauses. Section B then delves into the Sri Lankan Context, where the classification of ouster clauses and the significance of such classification for the purpose of interpretation is explained, laying the foundation for an individual discussion on each of the 4 ouster clauses found within the Sri Lankan Constitution. Following a cursory look at the first three ouster clauses, based primarily on Dr. Mario Gomez's observations, this paper then focuses its attention on Article 61A. Subsection 5 under Section B of this paper will compare the application of Article 61A with that of Article 55 (5), highlighting the differences in judicial approach, while the reasons for such deviation are discussed under

subsection 6. Finally, Subsection 7 contains a brief explanation as to why Section 22 of the Interpretation Ordinance has no effect on ouster clauses found within the Constitution.

II. METHODOLOGY

The study adopts the black letter approach, involving a qualitative analysis of both primary and secondary sources. The primary sources utilised for this research consist of the 1978 Constitution of Sri Lanka (along with relevant amendments) and relevant judicial decisions. Dr. Mario Gomez's textbook 'Emerging Trends in Public Law' with special reference to the chapter on ouster clauses was the secondary source which laid the groundwork for this research. This study seeks to develop on Gomez's analysis by identifying recent developments and comparing the changes in judicial approach since the advent of the 17th Amendment, with primary focus on Article 61A which was not a part of Gomez's analysis.

III. RESULTS AND DISCUSSION

A. *The Age Old Tussle*

The introduction of ouster clauses by the parliament and their subsequent interpretation by the courts, is illustrative of the 'age old tussle' between the executive backed by the legislature on one side and the judiciary on the other.

1) The Purpose of an Ouster Clause:

> 'Ouster clauses have been a parliamentary response to what the legislature considered was excessive judicial action in this area. Parliament has sought to eliminate litigation with its attendant developments and expense.' (Gomez 1998 at p.120)

Consequentially, they would allow for quicker decision making and ultimately more efficient government, devoid of judicial encumbrances.

As Justice Wanasundara observes in his dissenting, yet widely quoted opinion in *Abeywickrema v Pathirana* [1986] 1 Sri LR 120;

> "Every person acquainted with the post-independence period of our history, especially the constitutional and legal issues that cropped up during that period, would know how the actions of the Government and the Public Service Commission dealing with practically every aspect of their control over public officers were challenged and taken to the courts. A stage came when the Government found itself practically hamstrung by injunctions and court orders and not given a free hand to run the public service and thereby the administration as efficiently as it would wish. The 1972 reforms came undoubtedly as a reaction to this. The thinking behind the framers of the Constitution was that the public service must be made the exclusive domain of the Executive without interference from the courts. Vide section 106." (at p.182)

The author argues that the ouster clauses contained in the present Constitution is a result of refining that same line of reasoning. This answers the apposite question of 'Why introduce ouster clauses at all?'

2) Justifications for Upholding or Circumventing an Ouster Clause:

The introduction of ouster clauses by the legislature is justified using the argument that these clauses protect both the legislature and the executive against judicial control and interference, thus upholding the well-established constitutional principle known as the Doctrine of Separation of Powers. This argument, supporting the need to uphold an ouster clause is further strengthened by the claim that; if the judiciary fails to give effect to ouster clauses, it would amount to a 'naked usurpation of parliamentary authority', thus resulting in 'judicial anarchy'.

The judiciary on the other hand, relies on another constitutional principle; The Rule of Law, to justify its position of circumventing or refusing to give effect to an ouster clause. The courts have argued that these clauses seek to undermine the peoples' right to be allowed access to judicial remedies, which is imperative to the operation of the Rule of Law. They further contend that there is no point in having enabling statutes which specify (and thereby limit) an administrative authority's scope of power, if there is then a provision which prohibits the enforcement of such limitations. Therefore, the courts have argued that they are not usurping parliamentary authority, but rather giving effect to 'parliamentary intent', since parliament could have never intended for administrative authorities to act with impunity.

B. *The Sri Lankan Context*

1) Classification of Ouster Clauses: For an analysis within the Sri Lankan context, it is important to note the existence of two main categories of ouster clauses based on their source; those introduced by the Constitution (Constitutional ouster clauses) and those introduced by ordinary legislation (statutory ouster clauses). The focus of this study is on the former. Constitutional ouster clauses can be further subdivided based on their subject; i.e. whether such clauses seek to protect decisions of the legislature or those of the executive branch. Each of these categories warrant individual discussion, since the Sri Lankan judiciary has demonstrated certain distinct variations in their approach depending on the source and subject of a particular ouster clause. There are 4 main ouster clauses to be found within the provisions of the

second republican Constitution of Sri Lanka; Article 80 (3), Article 81 (3), Article 61A and Article 154F (2). The first two provisions oust the courts' jurisdiction to review legislative acts, while the third and fourth seek to oust that with regard to executive and administrative action.

Mario Gomez observes the following with regard to Constitutional ouster clauses:

> 'The general principle the Sri Lankan courts have developed is this: a constitutional ouster clause will not protect administrative action which is ultra vires and without legal authority. However, the court will not question the validity of legislative action in the face of a constitutional ouster clause.' (Gomez 1998 at p.120)

While this paper does no refute the latter observation, the author contends that there has been subsequent case law which demonstrates a deviation in judicial approach with respect to the former, especially when it comes to questioning the validity of a decision itself and declaring it ultra vires. This study shows that in the recent past, along with the advent of the 17th and 19th amendments, the courts have in most cases, shown reluctance to review even executive or administrative action protected by a Constitutional ouster clause.

2) Article 80 (3): Judicial approach with regard to Article 80 (3), has been almost entirely uniform, in that the courts have accepted that; once a bill becomes law, its validity cannot be questioned on any ground. This was acknowledged by the Court of Appeal in *De Silva v. Kaleel* [1994] 3 Sri LR 138 at 149. The only deviation from this approach was seen in the Court of Appeal judgment in *Mendis and Fowzie v. Goonawardena and GPA de Silva* [1978] 2 Sri LR 322 (cited in Gomez 1998, p.120) where the court rejected the Respondents' argument that Article 80 (3) rendered the findings of the commission of inquiry, immune to writs. Gomez discusses this particular judgment at great length in his work (page 120-121). However, it is important to note that this exceptional ruling was overturned on appeal by the Supreme Court [1978] 1 Sri LR 166, thus maintaining the uniformity with which Sri Lankan courts have refused to circumvent the ouster clause under Article 80.

3) Article 81 (3): A similar approach has been adopted with regard to the ouster in Article 81 (3), as was given judicial recognition by the Supreme Court in *Bandaranaike v. Weeraratne et al.* [1981] 1 Sri LR 10 (cited in Gomez 1998, p.118). This approach is indicative of the judiciary's reluctance to exercise its supervisory jurisdiction when the impugned act is by the legislature. Gomez also supports this as the reason for such a distinction (at page 107).

However, this paper wishes to highlight a fundamental difference between these two Articles, based on the nature of the parliamentary activity in each case. Article 80 deals with the ordinary legislative function of parliament; i.e. passing legislation. In contrast, Article 81 refers to the expulsion of members of parliament and the imposition of civic disabilities. Such an activity which involves imposition of penal sanctions is innately judicial in nature. Therefore, it is argued that in instances where the legislature performs a judicial function, a different approach should be adopted and that such actions should not be made immune to judicial review. It is the author's belief that intervention by the courts in such instances is completely justified.

4) Article 154F: Moving on to the constitutional ousters guarding executive function, Article 154F (2) ousts the courts' jurisdiction to question decisions of the governor of a provincial council. As illustrated by the judgment in *Premachandra v. Major Montague Jayawickrema* [1994] 2 Sri LR 90 (cited in Gomez 1998, p.119), the Sri Lankan courts have adopted the view that; this particular ouster clause did not completely prevent the court from reviewing the governor's decisions. It is also worth noting that this ouster is comparatively weaker, in that it only prevents a decision made in the governor's discretion being called into question 'on the ground that he ought or ought not to have acted on his discretion'; i.e. the decision itself is not protected against review. Rather, it only precludes the courts from questioning whether such decision falls within the ambit of the governor's discretion.

5) Article 61A Compared with Article 55 (5): As mentioned at the outset, the primary focus of this paper will be on Article 61A, being a recent addition which has not yet been the subject of much academic discourse. As NS Bindra points out in his treatise;

> "the legislative language will be interpreted on the assumption that the Legislature was aware of existing statutes, the rules of statutory construction, and the judicial decisions and that if a change occurs in legislative language, a change was intended in the legislative result." (Bindra 1997).

Therefore, it is pertinent to examine the courts' approach with regard to its functionally similar predecessor-Article 55 (5), which existed prior to the 17th amendment before addressing Article 61A itself. Article 55 (5) reads as follows:

> 'Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a public officer, in

> regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer.'

The Sri Lankan judiciary has uniformly held that Article 55(5) would not oust the courts' jurisdiction if the impugned order is made by an officer who does not have the legal authority to issue it. In such cases our courts have held that the decision of the relevant authority is null and void and the preclusive clause in the Constitution does not bar review. This approach was recognized by the Sri Lankan courts, as demonstrated in cases such as *Abeywickrema v Pathirana* [1986] 1 Sri LR 120 and *Gunarathna v. Chandrananda de Silva* [1998] 3 Sri LR 265 (cited in Gomez 1998). However, it is important to note that the impugned decision cannot be declared a nullity if it has been adopted by a proper authority as required in the definition (per Sharvananda CJ at page 155 in Abeywickrema). This remains true with regard to Article 61A. Article 61A provides that;

> 'Subject to the provisions of paragraphs (I), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.'

The judiciary has recognized that review is barred, unless the impugned act is not made by a Committee of the Public Service Commission or any public officer, "in pursuance of any power or duty....delegated to a Committee or public officer, under this Chapter or under any other law."; i.e. judicial review is precluded in cases where there is improper delegation. Moreover, operation of Article 61A being made subject to the provisions of Article 126, introduces the second exceptional circumstance where the supervisory jurisdiction of the Courts is not precluded; i.e. when there is an infringement or imminent infringement of Fundamental Rights.

Gomez cites the judgment in *Wijesiri v. Siriwardene* [1982] 1 Sri LR 171 to demonstrate judicial recognition of the view that an unlawful decision can be quashed (reviewed) notwithstanding the operation of Article 55 (5).

> 'The modern trend after the decision in *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147 is not to give effect to such preclusive clauses if the decisions sought to be quashed are proved to be unlawful; and that notwithstanding the fact that the preclusive clause is contained in a written constitution rather than in an ordinary statute would not afford an answer to unlawful acts of the executive.' (cited in Gomez 1998, p.117)

This sets out illegality of a decision as grounds for review notwithstanding the operation of Article 55(5). In contrast, it has been established in *Ratnasiri and others v Ellawala and others* [2004] 2 Sri LR 180 that the validity of a decision cannot be called into question in the face of the Article 61A ouster. This view was reaffirmed in the subsequent judgment by the Court of Appeal in *Lokuge et al. v. Dayasiri Fernando et al.* (Unreported. C.A. (Writ) Application No.160/2013) Where Justice Nawaz declares that;

> '…the issue of mandamus would carry the implication from this court that the PSC has made an error in the first instance- a task which this court is constitutionally incompetent to engage in as a result of Article 61A of the Constitution.' (At page 19)

This demonstrates that the Sri Lankan courts have been reluctant to question an error made by an officer with properly delegated authority. It is also worth noting that the justification given by the courts in *Siriwardene* can be interpreted as indicative of the judicial reasoning that Constitutional ouster clauses should not be treated any differently from an ordinary piece of legislation (At least to the extent of barring illegal acts from review). However, more recent cases indicate a greater degree of respect in the face of ouster clauses contained in the Constitution.

The upshot of the comparison in judicial stance pertaining to the two functionally similar ouster clauses; Article 61A and Article 55(5) can be summarised as follows: In both instances, the courts have uniformly accepted that review is not barred; firstly, when the impugned decision is ultra vires due to improper delegation and secondly when there is an infringement or imminent infringement of Fundamental Rights. Moreover, the judiciary has held that an act by an administrative authority can be reviewed on the grounds of illegality notwithstanding the operation of Article 55 (5), while in contrast, the courts have shown reluctance to question the legality of a decision in the face of Article 61A. This difference in the way Article 61A and Article 55 (5) has been interpreted is indicative of a deviation in judicial approach since the advent of the 17th Amendment.

6) Reasons for Deviation: This study observes that the deviation in judicial reasoning was given impetus by other changes introduced in the 17th Amendment; primarily the abolishment of the pleasure principle and the availability of extra judicial remedies. An important feature of the Article 55 (5) ouster is that it gave effect to the 'Pleasure Principle' which is borrowed from English administrative law and recognizes that public authorities hold office at the pleasure of the crown. The existence of this principle was acknowledged by Justice Mark Fernando in *Bandara and Another v. Premachandra, Secretary of Ministry of Lands, Irrigation and Mahaweli*

Development and Others [1994] 1 Sri. LR 301 at page 312. One of the major changes brought about by the 17th Amendment was the abolishment of the pleasure principle, spurned by the introduction of independent commissions.

The introduction of the Public Service Commission brought along with it a series of extra judicial remedies. Article 58 (1) provides that any public officer aggrieved by a decision of a public officer or commission wielding authority delegated to it by the PSC, may appeal to the PSC against such decisions. Moreover, a decision of the PSC itself may be challenged at the Administrative Appeals Tribunal appointed by the Judicial Service Commission pursuant to Article 59. Justice Saleem Marsoof observes that the changes imposed by the 17th Amendment are of relevance in interpreting Article 61A (*Ratnasiri and others v Ellawala and others* [2004] 2 Sri LR 180 at page 189-190). Commenting on the extensive list of provisions available to resolve matters relating to the public service, Justice Marsoof observes that this further strengthens the argument that the ouster in 61A should stand to preclude judicial review:

> 'In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service. I have no difficulty in agreeing with the submission made by the learned State Counsel that this Court has to apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent. (at page 190)'

In addition to these extra-judicial remedies, the author observes that by not barring review in instances where there is an infringement of Fundamental Rights, the option of seeking judicial redress is still left open to the people. Considering the significant pace at which the Sri Lankan Fundamental Rights jurisdiction has been expanding in recent years, it is even more understandable that the courts would not feel pressured to intervene, by attempting to disregard the express language of a Constitutional ouster clause.

7) Effect of Section 22 of the Interpretation Ordinance: The Interpretation Ordinance No. 21 of 1901 as amended by Act No. 18 of 1972 and Law No. 29 of 1974 sought to clarify the legal position with regard to ouster clauses after the seminal judgment in *Anisminic Ltd. v Foreign Compensation Commission and Another* [1969] 1 A11 ER 208. While Section 22 of the Ordinance supports the validity of ouster clauses in general, the proviso to the same section recognizes two exceptions where the Court of Appeal or the Supreme Court can exercise its supervisory jurisdiction; Firstly, if the impugned act is not within the power conferred upon the relevant authority (ultra vires) and secondly, where the relevant authority has not complied with the principles of Natural Justice or any other law which he is bound by. Thus, this provision gives the courts a wide berth in exercising its powers of review, notwithstanding the presence of an ouster clause.

However, this is not the case with regard to constitutional ouster clauses. Since the courts exercise its writ jurisdiction pursuant to Article 140 of the Constitution which requires such power to be exercised 'subject to the provisions of the Constitution', it has been accepted that an ouster clause contained in the Constitution itself would operate notwithstanding the exceptions set out in the Interpretation Ordinance. In this regard, Justice Mark Fernando's application of the '*genaralia specialibus non-derogant*' principle of interpretation in *Migultenne v The Attorney-General* [1996] 1 Sri LR 401 at 419 in interpreting sections 106 and 107 of the First Republican Constitution of 1972 would be of relevance. He argues that the specific provisions contained in the constitution itself would supersede the application of the general principle under the Interpretation Ordinance. This remains true with regard to the present Constitution. Thus, the provisions of the Interpretation Ordinance have in fact no effect on the operation of Constitutional ouster clauses in Sri Lanka.

IV. CONCLUSION

The operation of ouster clauses is a prime example of the continuous tussle between the legislature and the judiciary. The legislature enacts ouster clauses with the aim of upholding the doctrine of Separation of Powers by protecting itself and the executive against control and interference by the judiciary, thus allowing for quicker decision making, devoid of judicial encumbrances. From the legislature's point of view, failure to give effect to an ouster clause is a usurpation of legislative authority. The judiciary on the other hand has expressed the belief that these clauses undermine the people's right to seek judicial redress and is therefore prejudicial to the operation of the Rule of Law. Thus, ouster clauses are pivots in the legal machinery which maintains the delicate balance between the three organs of government. The interpretation of such ouster clauses therefore plays a vital role in ensuring efficient government while safeguarding the rights of the people.

Four main Constitutional ouster clauses can be identified within the 2nd Republican Constitution; two which protect acts of the legislature against judicial review and two protecting the executive branch. The courts have quite uniformly expressed reluctance to intervene in the case of the former, whereas they have been more liberal in the exercise of their supervisory jurisdiction in the face of

the latter category of ousters. However, the author wishes to highlight a fundamental difference between an ouster clause protecting the legislature exercising its legislative authority (Article 80 (3)) and one protecting the legislature in the exercise of an innately judicial function (Article 81 (3)). In the latter instance, the author advocates for a deviation in judicial approach so as to facilitate an effective system of checks and balances. It is argued that an intervention by the judiciary in the face of this category of ouster clause would be completely justified due to the inherent judicial nature of the act which it seeks to protect.

It is observed in relation to the two ouster clauses protecting executive action, that Article 154F (2) is comparatively weaker, due to the narrower scope of protection which it affords.

With regard to the ouster in Article 61A, the author observes that despite showing many functional similarities when compared with its predecessor-Article 55 (5), the newer provision has caused a distinctive deviation in judicial approach. While the courts have refused to give effect to the ouster in Article 55 (5) in cases where the impugned act was illegal, recent judicial decisions show that the courts when dealing with Article 61A, have uniformly shown reluctance to question the validity of a decision; i.e. the decision itself. The study shows that the courts have recognized only two instances where Article 61A does not preclude the courts from exercising its supervisory jurisdiction: Firstly, when there is an infringement or imminent infringement of Fundamental Rights and secondly, when the impugned decision is made by an authority whose power has not been properly delegated as specified in the Article; i.e. Instances of improper delegation. It is therefore the author's contention that the courts have been less inclined to exercise their supervisory jurisdiction in the face of the Article 61A ouster.

The study highlights several contributory factors underpinning this change in judicial approach, mainly focusing on the changes brought about by the advent of the 17th Amendment: Introduction of Independent Commissions, abolishment of the pleasure principle and the availability of an extensive extra-judicial appeal process as well as having recourse to the courts in the case of a Fundamental Rights violation. The author argues that the significant expansion of Sri Lanka's Fundamental Rights jurisdiction in the recent years would compensate for the courts' reluctance to intervene in other instances. Ultimately, this study observes that the Sri Lankan judiciary has for the most part adopted a uniform approach with regard to constitutional ouster clauses, with the exception of Article 61A, where the courts have deviated from their approach to its functionally similar predecessor- Article 55 (5). Currently, the Sri Lankan judiciary exercises great caution and has often shown reluctance to disregard or circumvent Constitutional ouster clauses.

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