



## Cross Fertilization between Administrative Law and Fundamental Rights: Broadening Ambit of Judicial Review in Sri Lanka

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### Abstract

This paper critically analyses the cross-fertilization between Administrative Law and Fundamental Rights. Administrative Law constitutionalizes through the Fundamental Rights. Due to this reason Fundamental Rights come under Administrative Law and it is a part and parcel of Administrative Law. According to the Merriam-Webster dictionary the word “cross-fertilization” is defined as an interaction or interchange between cultures, ideas or categories, especially of a broadening or productive nature. Applying this definition for scope of Administrative Law and Fundamental Rights, we can assume that cross-fertilization between Administrative Law and Fundamental Rights means the interaction between each other to broaden the scope of each other. This paper identifies that cross fertilization contributes to Administrative Law concepts to expand one of its subject branches. That is Fundamental Rights. During the past, this transaction has been taking place impliedly improving and enhancing the concepts of Administrative Law and Fundamental Rights. This paper further aims to elaborate that cross-fertilization between Administrative Law and its subjects branch Fundamental Rights has been broadly emphasized in judicial review of Sri Lanka. The resultant of all this is the development of the scope of Administrative Law and its fragment Fundamental Rights, paving the way for constitutional supremacy.

**Keywords:** *Cross fertilization, Administrative Law, Fundamental Rights, Judicial Review, Constitutional supremacy*

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## Introduction

The mutual exchange of ideas, concepts and techniques between Administrative Law and its discipline Fundamental Rights have paved the way for cross-fertilization between Administrative Law and Fundamental Rights, resulting a mutual benefit for each other. Cross fertilization has immensely contributed for the development of the scope of Administrative Law as well as Fundamental Rights. By alleging the concepts of Administrative Law and Fundamental Rights, courts take decisions and give judgments which help to improve the scope of Administrative Law and Fundamental Rights.

Operations of administrative agencies, such as rule construction, adjudication, and implementation of regulations of government are governed by the Administrative Law. Administrative Law is a part of public law. The administration shall act as per the regulations of the legislature to keep the Administrative Law active. The primary purpose of Administrative Law is thereby to maintain the powers of government within their legal bounds, so as to safeguard the citizens against their abuse<sup>1</sup>. It is the responsibility of public authorities to exercise their powers within the four corners of the legislation. The grounds of judicial review are important in this context and up-to-date judicial review of administrative action has acquired many developments in its application<sup>2</sup>. Although the “doctrine of ultra vires” was considered as the “fundamental principle of Administrative Law”, it has now progressed from ultra vires regulation to concern on behalf of the individual’s protection and for the control of power other than control of vires. Hence, the current tendency is to sustain the principles of virtuous administration in the country. On the other hand, the Administrative Law in Sri Lanka with regard to judicial control has developed specific philosophies namely: legitimate expectation, natural justice, proportionality, public trust doctrine and right to equality<sup>3</sup>.

Within the context of Sri Lanka, basically, the discretionary powers of

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<sup>1</sup> Wade & Forsyth, *Administrative Law*, (10thed.) Oxford: Oxford University Press, 2009 (pp.04)

<sup>2</sup> Thakshila Udayanganie, ‘Ensuring good administration through development of judicial review in Sri Lanka: Special reference to fundamental rights based jurisdiction as ground for judicial review’,2012,(pp.182)

<sup>3</sup> *ibid* 182.

public administrative authorities can be challenged in two ways: writs and Fundamental Rights. System of Fundamental Rights in Sri Lanka is similar to the system that is prevailing in India, where the principles of good governance and public trust doctrine are in place. Therefore, the scope of exercising the power of judicial review of given jurisdiction has enhanced. Due to this, the exercise of judicial power of the people by the judiciary and for upholding the rule of law has been held high<sup>4</sup>. Therefore, the main purpose of writing this term paper is to critically analyze the effectiveness of using Fundamental Rights based approach to challenge administrative action the way it enhances the good administration.

Currently, it has been recognized that there is a cross-fertilization between Fundamental Rights and its main study field i.e.; Administrative Law, and it is believed that Administrative Law prevailing in Sri Lanka has moved towards a rights based approach. Therefore, the common view held by philosophers is that Administrative Law concepts have been utilized to pave the way for the development and expansion of its discipline Fundamental Rights. Fundamental Rights have been used to expand the ambit of Administrative Law concepts. In some cases Fundamental Rights have been used to issue writs, when Fundamental Rights petitions are being heard in the Supreme Court. Judges have referred to Administrative Law concepts like proportionality and public trust doctrine. Attention now has been focused on expanding the scope of the control of administrative action to areas of Fundamental Rights with the development of the cases in the superior courts. As per the Fundamental Rights jurisdiction and article 12(1) of the 1978 constitution, the judge can uphold the principle of rule of law via equality before the law<sup>5</sup>. This can be regarded as one of the essential features of good and fair administration.

### **The Cross-Fertilization between Administrative Law and Fundamental Rights Aid to Broaden the Ambit of Judicial Review**

In order to get a better understanding as to how Administrative Law

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<sup>4</sup> ibid 182.

<sup>5</sup> ibid 183.

and its subject branch Fundamental Rights nourish each other, it is better to identify each ground of judicial review and observe how it has affected each other.

The final action one can take under Administrative Law is writ. According to the 1978 constitution the writ jurisdiction was introduced on a constitutional foundation. Article 140 grants power to issue writ to the court of appeal, Article 154 gives power to provincial high courts to issue a writ in limited circumstances involving exercise of power under a law or statute covered by a matter in the provincial council list of the constitution. In some circumstances Parliament may specify that the writ jurisdiction of court of appeal be exercised by the Supreme Court.

In the case of ***W.A.C Perera V Prof Daya Edrisinghe***<sup>6</sup>, it was stated that, “the fact that by entrenching the Fundamental Rights in the constitution, the scope of the writs has enlarged its implicit in article 126(3), which recognizes that a claim for the infringement of a Fundamental Right<sup>7</sup>”. Due to this reason we can see the writ alleged with Fundamental Rights and the scope of writ jurisdiction has improved as well as the Supreme Court decision in Mundy case and the court of appeal’s decision in Kunantham case. Both decisions were willing to see a violation of Fundamental Rights as being an independent ground of review in an application for a writ<sup>8</sup>.

The main purpose of Administrative Law is to keep the powers of government within their legal bounds, so as to protect the citizens against their abuse<sup>9</sup>. Administrative authorities acting outside the power or act beyond the power is called ‘Doctrine of Ultra Vires’. Doctrine of Ultra vires is one of the judicial grounds of Administrative Law. Galligan observes that the doctrine of ultra vires has been extended and developed to mean “Acting beyond principles of good administration<sup>10</sup>”. Administrative

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<sup>6</sup> [1995] 1 S.L.R. 148 at 156

<sup>7</sup> Dandris Gunaratna. “Judicial response to the Concept of Sovereign power of people” in S.Marsoof and N.Wigneswaran[Eds]

<sup>8</sup> Mario Gomez, ‘Blending Right with Writs :Sri Lanka Public laws new Brew’ 475.

<sup>9</sup> H.W.R. Wade & C.E Forsyth, Administrative Law.[10th ed] oxford university press, 2009, pg 30.

<sup>10</sup> Talagala,C. (n.d.). The Doctrine of Ultra Vires and Judicial Review of Administrative Action. The Bar Association Law Journal.

power is generally derived from legislation. Legislation confer power on administrative authorities for specified purposes, sometimes laying down the procedure to be followed in respect of exercise of such power. The article 4 (a) of the constitution legislation reflect the will of people and the will of people includes their rights and impliedly it protects fundamental rights, and it assists to develop the scope of doctrine ultra vires.

A novel concept of grounds of judicial review regarding Administrative Law was introduced by Lord Diplock. This was relating to the case of GCHQ, where he explains illegality, irrationality procedural impropriety and proportionality.

Lord Diplock described illegality as a ground of judicial review and he further states that the decision maker should understand correctly, the law that regulates his decision making and should stand by it. It is an indication that administrative authorities give decisions according to the law, which means it is in line with the legislature. As Fundamental Rights are already included in the legislature. Lord Diplock's new prospects to illegality has indirect effects on Fundamental Rights.

Unreasonableness is discussed in the main topic, under the irrationality. If the administrative authority has used the power to take a clear unreasonable decision, the court could exercise its jurisdiction to protect the rights of citizen and declare that the act is ultra vires. When court exercises to protect the rights of the citizens, the court should consider the Fundamental Rights. As a result of that, the judgments develop the scope of not only unreasonableness but also the Fundamental Rights, as Fundamental Rights also is alleged with it.

Long before Fundamental Rights were enacted, courts used *Wednesbury's unreasonableness* and **CCSU** case of irrationality as a judicial review<sup>11</sup>. Shivaji Felix is of the view that *Wednesbury's unreasonableness* was an established ground for judicial review against arbitrary action to claim

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<sup>11</sup> *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (1948) 1 KB 223; *Council of Civil Service Union v. Minister of Civil Service* (1984) All ER 935.

equality in Sri Lanka<sup>12</sup>. For example, in the case of *Gunarathne*<sup>13</sup>, the claimant argued that his right to equality was violated, and the decision was unreasonable. Sharvananda, the Chief Justice believed the respondent has misdirected himself and he refused to provide what was requested by the petitioner.

In Sri Lankan case of *Mohomed V Land Reform Commissioner*<sup>14</sup>, the petitioner gives a house for rent to another person and at a certain time he refused to pay the rental and the land reforms commissioner ordered the tenant to leave the house. It was combined with fundamental rights and freedom to movement and of choosing his residence. The court gave a decision combined with Fundamental Rights. This decision supported to improve the unreasonableness concept as a separate judicial review.

Proportionality is considered as a part of judicial ground of Administrative Law. Administrative measures should be reasonable for proportionality when applied to reach the expected result. The doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck not merely whether it is within the range of rational or reasonable decision. Secondly, the proportionality test may go further than the traditional grounds of review as much as it may go further than the tradition to be directed to the relative weight accorded to interest and considerations. Thirdly, the heightened scrutiny test developed is necessarily appropriate for the protection of human rights<sup>15</sup>.

Legitimate expectation is, when a decision is taken by an administrative authority affecting some legal right, liberty or interest of the persons affected, can legitimately expect that it will be treated fairly, or some rules of fair procedure is applied in taking a decision by the relevant administrative authority. In Sri Lankan case *Multinational Property Development Ltd V Urban Development Authority*<sup>16</sup>, U.D.A approved a project by the petitioner company to construct a car park complex on the

<sup>12</sup> Shivaji Felix, Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka, 113

<sup>13</sup> *Gunarathne v. Commissioner of Elections* [1987] 2 Sri.L.R 165.

<sup>14</sup> [1988]1 S.L.R. 154.

<sup>15</sup> S Marsoof. "The explanation canvas of judicial review", The Bar Association Law Journal.

<sup>16</sup> [1996] 2 S.L.R. 51

said land and decided to allocate the land on ninety-nine years lease. The sums agreed were paid and the final draft was ready. After the change of government, the U.D.A. decided not to allocate the land to the petitioner company. The individuals who had legitimate expectations could sue for benefits and there was a violation of Fundamental Rights. They appealed before the court for benefits taken away from them. When the court gave the judgment for the legitimate expectation case, Fundamental Rights also were considered. This is a good example that improved legitimate expectation as a separate judicial ground.

Natural justice is a technical terminology for the rule in contrast to bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*). While the term natural justice is regularly retained as a general concept. It has largely been replaced and extended by "duty to act fairly". Here, two main rules are based on Fundamental Rights, when the court exercises natural justice, automatically Fundamental Rights come into play. In the case *Izadeen V Director of Civil Aviation*<sup>17</sup>, the petitioner was a pilot holding a commercial pilot license. The Director General of civil Aviation who suspended the petitioner had been questioned during the inquiry and the statements were recorded. Director General asked the petitioner in writing to show cause as to why his commercial pilot license was cancelled. It is essential that the petitioner to be heard in his defense. There was a failure of a fundamental principal. The right to be heard in judicial proceedings is considered as a Fundamental Right under the constitution of Sri Lanka<sup>18</sup> and violation of this right can be corrected by invoking the fundamental right jurisdiction of the supreme court of Sri Lanka<sup>19</sup>. Cases of this nature impliedly developed the scope of natural justice.

Fairness and Public Trust doctrine are also separate judicial grounds of Administrative Law. Fairness demands, that the state should observe rigorously its own internal standards and guidelines. Fairness may also require a response that is proportionate to the alleged misconduct.

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<sup>17</sup> [1996] 2 S.L.R. 348

<sup>18</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 12(3)

<sup>19</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 126.

To the Supreme Court “fairness lay at the root of equality and equal protection<sup>20</sup>”. The key concept of the public trust is that the court has to observe, that those who wield public power should hold such power in trust. Discretionary powers given to public institutions are never untrammelled. They are to be used to achieve the purpose for which they were conferred. Arbitrary and unreasonable decisions are the antithesis of fair play and equal treatment that violate the trust placed in public officials. ***Hearher Therese Mundy V Environmental Authority and others***<sup>21</sup> case made clear that the Supreme Court could enact the notion of the public trust into an application for a writ and held that it was a separate ground of review.

In Sri Lanka there has been a considerable progress in the public interest litigation arena, and the courts have liberalized rules relating to standing or locus standi and permitted not only persons aggrieved but also others to challenge the violations of Fundamental Rights, thus helping to stand as a separate ground of judicial review in Administrative Law. The constitution has advanced in writ jurisdiction with regard to fundamental rights, and sometimes been creative in expanding the scope of people’s sovereignty by relaxing the rules on locus standi through concepts such as public interest litigation and public trust.

Cross fertilization does not help to improve only one segment or one concept, it helps both parties to improve gradually.

Above mentioned facts prove that fundamental rights do help to improve scope of judicial review in Administrative Law. How Administrative Law helps to improve its fragment fundamental rights is a separate judicial review. As mentioned earlier, Sri Lankan courts however had the climate to engage in activism without being unnecessarily shackled by ultra vires, so much so that the judiciary has been so bold as to extend their control of administrative action even to the field of fundamental rights.

<sup>20</sup> Mario Gomes, (n.d.). Blendind Rights with Write: Sri Lankan Public Law's New Brew.456.

<sup>21</sup> ***Hearher Therese Mundy V Environmental Authority and others***, Supreme ourt minutes of January 2004.



**Cross fertilization between Administrative Law and its segment, Fundamental Rights forms the Constitutional Supremacy**

One of the features of public law jurisprudence since the early 1990's has been the case law that developed under article 12 of the constitution under the current constitutional procedure for the enforcement of Fundamental Rights. The Supreme Court is the first and final court of jurisdictions. A case should be disposed of within 18 months, though sometimes it may take one year. This is a quick procedure. Supreme Court not only provide justice for citizens seeking redress because of violations committed by state but also the public officials who had been discriminated against or treated unfairly. Latter Article 12 has become their main legal weapon and resulted in a large body of jurisprudence emanating from the court. Supreme Court's interpretation of the equality and equal protection constitution guarantees the justice for the victims.

As per the "Galle Face Case" the Supreme Court held that the right to freedom of speech, expression and publication contained in Article 14 of the Constitution included by implication the right to information. The Urban Development Authority (UDA), in refusing to provide information about the purported lease of 'Galle Face' to the petitioner, had violated the petitioner's right to information. The UDA's action was also in violation of the constitutional right to equal protection of the law since its 'bare denial of access to official information' in the absence of specific reasons was an arbitrary exercise of power.

Case laws of Administrative Law aids its fragment Fundamental Rights to stand as an independent ground of review. The case of Mundy demonstrates how the Supreme Court could expand the control of administrative action into the area of Fundamental Rights<sup>22</sup>. It is pertinent to note that Sri Lankan courts have interchangeably used principles in Administrative Law jurisprudence in Fundamental Rights which has substantially enriched the scope of judicial review.

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<sup>22</sup> C Talagala, 'The doctrine of ultra vires and judicial review of administrative action', BALJ [2011] Vol XVII pp 84-9'

### ***Perera V Prof Daya Edirisinghe***<sup>23</sup>

A Student of fine arts at the University of Kelaniya applied a writ of mandamus and the court stated that the article 12 of the constitution read together with the rules and exam criteria of the university, grants a duly qualified candidate a right to degree. The university had to grant the degree without discrimination. Though the university has a discretion, it should be exercised without violating article 12. Although the application was a writ under article 140, court held the stand that the university discretion must be exercised with article 12 and it impliedly confirmed that Fundamental Right is an independent ground of review.

### ***Karunadasa V Unique Gemstones***<sup>24</sup>

Supreme Court held for writ application was of the view that the article 12 maintained the view that, natural justice required the provision of reasons by public administrators. The reason was important protection offered by the law and facilitated a subsequent review of the decision. Article 12 made it even more compelling that a person be told the reasons for the adverse decision.

### ***Dissanayaka V Kaleel***<sup>25</sup>

There is no writ but an action brought under section 99 (13) of the constitution. The Supreme Court noted that Article 12 of the constitution required an expansive, rather than a restrictive, interpretation of the principles of natural justice. To the court, fairness lay at the root of equality and equal protection.

### ***Piyadasa V land Reform Commission***<sup>26</sup>

The cabinet had approved a scheme to provide land to tenant cultivators. The criteria had been announced by the ministry of plantation industries and the petitioners satisfied with the criteria. While the land was transferred to one group of cultivators, the transfer of the land to the petitioners was halted. The Supreme Court on appeal granted mandamus to compel the transfer of the land. Doing this was discriminatory and amounted to a

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<sup>23</sup> [1995] 1 S.L.R. 148

<sup>24</sup> [1997] 1 S.L.R. 156

<sup>25</sup> [1993] 2 S.L.R. 135

<sup>26</sup> [1994] 2 S.L.R. 178

violation of article 12. Although the application was a writ, its expression was a Fundamental Right and stood as a separate ground of judicial review.

### ***Bulankulama V Secretary Ministry of Industrial Development***<sup>27</sup>

Executive power is not an exemption when it comes to Fundamental Rights. Article 12 (1) guarantees the equality before law and the equal protection of the law. For the purposes of appeals now under consideration, the “protection of the law” would include the right to notice and to be heard. Administrative actions and judgments contrary to the “public trust” doctrine and or violation of Fundamental Rights and abuse of power is therefore void and voidable. The link between writ jurisdiction and Fundamental Rights are also apparent in this case.

As a result of cross fertilization between Administrative Law and Fundamental Rights a constitutional supremacy has been created. Though Fundamental Rights are written in the constitution, when it is referred as a law resource, it gives the due respect to the constitution. This automatically creates the constitutional supremacy. But on the other hand, Fundamental Rights and International Human Rights are supposed to play an enhanced role in future. At the same time the judges are considering International Human Rights standards to implement the constitution and statutes. This process is likely to continue and a larger body of jurisprudence from the Human Rights Committee under the first optional protocol to the ICCPR is likely to integrate international norms even more closely into Sri Lankan legal system. This is an indication that Sri Lanka is advancing towards a monism system. Consideration of International Law and Municipal Law will help to form one integrated system that could be applied in any state.

In the case of *Centre for Policy Alternatives V Dayananda Dissanayaka, Commissioner of Elections*<sup>28</sup>, Supreme court adopted an interpretation of a statute which said it was ‘wholly consistent’ with Article 25 of the International Covenant on Civil and Political Rights, which recognized that every citizen shall have the right and opportunity to take part in the conduct

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<sup>27</sup> [2000] 3 S.L.R. 243,256-257

<sup>28</sup> *Centre for Policy Alternatives V Dayananda dissanyaka, Commissioner of election*, supreme court minutes of 27 may 2003

of public affairs.

***Sanjewa, Attorney at Law V Sena Suraweera***<sup>29</sup>, the supreme court referred to the right of ‘everyone to the enjoyment of the highest attainable standard of physical and mental health’ contained in article 12 of the International Covenant on Economic, Social and Cultural Rights.

Generally, legislation grant the administrative power. Legislation confer power on administrative authorities for specific purposes, sometimes lay down the procedure to be followed in respect of exercise of such power<sup>30</sup>. Constitutional legislations referred to in the constitution and the administrative power derived from constitution also shows the supremacy of constitution. But according to the constitution’s sovereignty power of citizens of Sri Lanka, the actual supremacy power goes to the people when referred to the constitution, because the constitution is created by the parliament and parliament is created by the will of the people as per the article 4 of the constitution.

## Conclusion

The cross fertilization between Administrative Law and its fragment Fundamental Rights has developed and each of them play an independent role in separate judicial grounds with the advantage of cross-fertilization. Administrative judicial ground of ultra vires, natural justice, public trust doctrine, legitimate expectation, proportionality, illegality, fairness, *locus standi* and all mentioned judicial grounds of Administrative Law are developing and will function as a separate judicial review in future.

Cross fertilization of ideas and concepts is noticed in the past between writs and Fundamental Rights when challenging the discretionary power of public authorities. In applications for writs, Sri Lankan courts are beginning to assert that the exercise of discretionary power by the public authority must conform to the requirements of Article 12 and

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<sup>29</sup> [1996] S.L.R. 158

<sup>30</sup> C Talagala, ‘The Doctrine of Ultra Vires, and Judicial review of Administrative Action’, The Bar association Law Journal, 129

also with the other traditional grounds of review. At the same time the courts have asserted that the constitutional right to equality and equal protection includes the right to natural justice, to reasons, a recognition of legitimate expectations, and the rights against arbitrary and unfair treatment. So, finally the concept of cross-fertilization has considerably enriched Sri Lankan Administrative Law.

As a result of implementation of the Fundamental Rights and the rights gained by the cases and judgments of Administrative Law, we can assume that we have achieved constitutional supremacy. The actual supremacy is held by the people because the constitution reflects the will of people. All above facts prove that there is a cross fertilization between Administrative Law and its fragment Fundamental Rights, and it has broadened the ambit of judicial review and created the way for constitutional supremacy.