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A Provisional Evaluation of the Contribution of the Supreme Court to Political Reconciliation in Post-War Sri Lanka (May 2009-August 2012)

Dinesha Samararatne

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Acronyms and Abbreviations

Colombo Municipal Council	CMC
Convention on the Elimination of Discrimination against Women	CEDAW
Convention on the Rights of Persons with Disabilities	CRPD
General Certificate of Education	GCE
Human Rights Committee	HRC
International Covenant on Civil and Political Rights	ICCPR
International Criminal Court	ICC
Lessons Learnt and Reconciliation Commission	LLRC
Liberation Tigers of Tamil Eelam	LTTE
Member of Parliament	MP
Non-Governmental Organisations	NGO
Prevention of Terrorism Act	PTA
University Grants Commission	UGC

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A Provisional Evaluation of the Contribution of the Supreme Court to Political Reconciliation in Post-War Sri Lanka (May 2009-August 2012)

1. Background and Introduction

Questions relating to reconciliation and transitional justice, among other things, resurfaced in Sri Lankan public life and in relation to Sri Lanka, post-May 2009, with the end of the 30-year long civil war. This paper is an attempt to provide some answers to those questions from the vantage point of 2012. Those answers pertain particularly to the question of political reconciliation and the contribution made towards it, if any, by the Sri Lankan Supreme Court.

According to the more conventional accounts, evaluating the contribution of the judiciary within a given framework, can, arguably, be an unfair exercise. The judicial arm of the state is charged with applying general laws to specific legal disputes; therefore the judiciary can only respond to the disputes that come before them and respond only within the four corners of that dispute. It would be unfair therefore to evaluate the 'performance' as such of the judiciary based on their response to litigation that was, and could only be, initiated by litigants. The non-conventional understanding of the role of the judiciary constructs a more dynamic space for them. That approach considers the judiciary not only as interpreters of the black letter law but also as the guardians of the spirit of those laws and ultimately as promoters and defenders of democracy, human dignity and the rule of law. Within such an understanding, the judiciary is expected to respond not just to the specifics of the issues that come up for judicial determination in a given case but also to the underlying and connected social, economic, political issues etc. The experience in public interest litigation in different parts of the world is one example of the possible outcomes of such an approach. This paper will draw on those arguments and argue further that perhaps, there is a specialised role that ought to be played by the judiciary in a 'post-war' context in achieving political reconciliation.

In the global narrative of 'transitional justice' the significant mileposts in the recent past are generally considered to be the Nuremburg trials, the South African Truth and Reconciliation Commission and the International Criminal Court (ICC). With each of those institutions, the conceptualisation of the appropriate model for accountability for transitional justice has moved from criminal trials to truth telling and back again to criminal trials, with the ICC being understood as an international model for individual criminal accountability and penal punishment for grave wrongs committed during a war.

This paper looks at transitional justice and reconciliation from a different angle; with a focus on the higher courts at the domestic level. In the main, it will attempt to argue that the Sri Lankan judiciary can and ought to play a critical role in the process of political reconciliation in Sri Lankan society. The methods adopted to develop this argument will be discussed in the

second part of the paper along with the limitations of those methods. The third part of the paper considers what 'political reconciliation' could mean as a concept and whether the judiciary could make a contribution in that regard. The fourth part will be a reflection on the mandate of the judiciary under the Sri Lankan Constitution to advance political reconciliation and the fifth would be an analysis of their contribution towards the same. In the sixth part of the paper an attempt will be made to evaluate the output of the Supreme Court May 2009 to August 2012, specifically in relation to judicial review of bills and selected fundamental rights applications. Based on that analysis a consideration as to whether a 'jurisprudence of reconciliation' can be or ought to be developed will be undertaken in the seventh and eighth parts of the paper.

It is hoped that the arguments and reflections presented in this paper would provoke critical thought and evaluation of the role of Supreme Court in Sri Lanka which would in turn affirm the significance of the role of the judiciary in upholding democracy, human dignity and the rule of law. It is also hoped that the arguments made in this paper would assist those working towards political reconciliation both in Sri Lanka and elsewhere and advance the study of both reconciliation and transitional justice.

2. Methods and Limitations

In evaluating the role of the judiciary in relation to 'reconciliation', an exclusive focus is maintained in this paper on 'constitutional adjudication' for several reasons (Dworkin 2003: 4, 6).[1] As pointed out by Dworkin, constitutional adjudication has implications for the society at large over and above adjudication under private law (2003: 6). Constitutional adjudication by its very nature requires 'fresh understanding'[2] of existing constitutional values and provisions according to evolving contexts. Furthermore, the issues arising from constitutional adjudication relate to 'political morality' and they are not simply a matter of 'personal ethics.' (2003: 6-7) Therefore, by nature constitutional adjudication tends to be 'controversial and divisive in the community' (6). For instance, Dworkin considers that 'the moral issues that figure in constitutional adjudication are the most divisive possible (...)' (2003: 6-7). For these three reasons, it is submitted that in understanding the role of the judiciary in relation to political reconciliation, evaluating its contribution in the area of constitutional adjudication is the most important.

While the theoretical approach argued for will consider the Supreme Court as a whole, the qualitative analysis of jurisprudence in this paper will be limited to an analysis of selected aspects of the jurisdiction of the Supreme Court: namely, determinations on fundamental rights and determinations as to the constitutionality of bills before Parliament which are

1 The term is derived from Dworkin.

2 'In constitutional adjudication (...) cases are often hard not because they lie at the borders of doctrine, but because they call for a fresh understanding of the most basic underlying grounds of doctrine' (Dworkin: 6).

known as Special Determinations. The judicial decisions analysed have been selected on the basis of their significance; whether jurisprudential or political. The availability and accessibility of judicial decisions was also a decisive factor in making that selection.

The Supreme Court opinion on the interpretation of Article 89(d) of the Constitution as to whether a military tribunal is a 'competent court' under the Constitution will not be considered in this paper. That case, *Gardihewa Sarath Fonseka v Dhammika Kithulegoda* requires a focused analysis on the military justice system, the particular court martial process and the broader political contexts which cannot be adequately considered within the confines of this paper. That case therefore is excluded from this analysis (*LST Review* 2011).

The accessibility of judicial decisions has improved significantly in the last few years in Sri Lanka but certain problems remain to be resolved. The recent launch of websites for both the Supreme Court and the Court of Appeal has provided universal electronic access to those decisions as and when they are made (see, www.supremecourt.lk and www.courtofappeal.lk). However, the unavailability of a summary or an accessible search mechanism restricts the efficiency of those websites. If the case number, date of judgment and names of the litigants are known, the decisions can be accessed. Past decisions that are not recorded in the official law reports can be accessed only through one or two Colombo-based libraries or through the lawyers who appeared in those cases. Certain Non-Governmental Organisations (NGOs) too attempt to make the significant but not officially reported cases available through their publications and/or through their websites. Moreover, the websites of the courts do not provide information regarding cases for which leave was refused or where applications have been withdrawn. Recent research has shown that data on dismissals and withdrawals can provide extremely significant insights into the role of the judiciary particularly in making determinations regarding fundamental rights (Pinto-Jayawardena & de Almeida Gunaratne 2011; Jayachandra & Samararatne 2011).

The lack of information regarding the total number of cases that were filed in relation to persons who surrendered to the armed forces in the last phase of the war and suspected LTTE (Liberation Tigers of Tamil Eelam) detainees and with regard to the outcome of those applications is a significant gap. The judicial response to litigation initiated by surrendees and suspected LTTE detainees will be addressed in this paper through cases accessed through lawyers who were involved in those cases. But due to the inability to study the overall patterns in judicial decisions, the findings in this regard will be provisional.

The lack of streamlined and systematic information as to the overall performance of the judiciary has negative implications for the judiciary, the academia, other stakeholders and the general public. For instance the judiciary, when unaware of the overall trends in its own responses, is unable to place its role in context and perceives its contribution only in relation to known and/or reported judicial decisions and trends. If on the other hand, systematic and

complete information is available and is complemented through academic comments on the same, it is submitted that the agency of the judiciary would be strengthened (Jayachandra & Samararatne 2011).

This paper looks at the contribution of the Supreme Court between the years 2009 and 2012. The intention of this demarcation is to focus specifically on the post-war context. Given the on-going political debate as to the form(s) of accountability that ought to be used in Sri Lanka regarding war-related incidents, it is useful to consider the performance of the national judiciary. Such an analysis would be helpful in considering whether national accountability through the judiciary could be a meaningful mechanism for post-war justice, accountability and for political reconciliation.

A significant assumption made in this paper is that the mandate of the judiciary (as an institution) is derived through the Constitution and should also be understood as an institution charged with state responsibility. The Supreme Court in that sense is not merely determining individual disputes but is also engaged in a political discourse at the macro-level in finding relevant and contextualised answers for questions regarding governance in the country. It is assumed that the judiciary has a responsibility to develop contextualised applications of concepts such as human dignity, rule of law, political reconciliation and transitional justice. Based on that assumption a limited analysis as to what political reconciliation could mean to the appellate judiciary is undertaken in this paper.

3. Political Reconciliation as a Judicial Mandate[3]

It has been said that there is no 'true meaning of reconciliation' (Meierhenrich 2008: 227). After locating 'reconciliation' in the larger context of 'transitional justice,' this part of the paper looks at selected understandings of both reconciliation and 'political reconciliation'. It will be argued that 'political reconciliation' as capabilities is a more useful way of understanding the concept since it provides a richer conceptualisation as to how the judiciary can engage in the question of political reconciliation.

3.1. Reconciliation as a Concept

At a time of transition from a state in civil conflict to a state in which that particular civil conflict is no more, it has been said that 'transitional justice' and 'reconciliation' are desirable. From the many different meanings attributed to 'transitional justice' one that is relevant to the purposes of this paper is that transitional justice involves measures undertaken towards dealing with the events that a particular society is transitioning from. Brems and Viaene argue that a consensus is emerging globally that transitional justice ought to include "accountability, truth recovery, reconciliation, reparation, guarantees of non-repetition and institutional reform as complementary and mutually reinforcing goals" (Viaene & Brems, 2010: 199-200). Literature

[3] Udagama 2011, 2012

in this field suggests that the transition from apartheid in South Africa and the role of its Truth and Reconciliation Commission (TRC) has provided a spring board for the study of transitional justice in the last three decades. Generally, transitional justice is spoken of in relation to contexts where there is also a transition from a repressive regime (Teitel 2003: 69)[4] and calls for contextualisation in how the aforementioned components are operationalised (Viaene & Brems, 2010: 204; Fletcher, Weinstein & Rowen 2009: 163, 170). The importance of contextualisation of transitional justice has been described as 'widely recognised' (Viaene & Brems: 2010) and the term 'vernacularisation of transitional justice' (224) has also been used in this regard.

The general understanding that transitional justice is desirable has been challenged on the basis that the claim is not based on evidence but rather 'represent[s] hopes for a happy ending' (Fletcher et.al: 169). It has been argued that "there is little empirical data to support the common assumptions that underlie the utility either of criminal trials for alleged perpetrators or truth and truth/reconciliation commissions" (Fletcher et.al: 168). This criticism is made partly due to the lack of understanding and/or consensus as to how the 'success' of those mechanisms ought to be measured (Fletcher et.al: 170).

For the purposes of this paper the focus on transitional justice will be primarily through the lens of political reconciliation. As shown above, reconciliation is but a component of transitional justice and it could be said that depending on the context the weightage attributed to the significance of reconciliation could vary. The literature on reconciliation offers different understandings and interpretations of the concept. This paper has selected a few of them based on their relevance to the Sri Lankan context. Through an overview of each of those understandings an attempt will be made to suggest how political reconciliation ought to be advanced by the Sri Lankan judiciary.

3.2. Reconciliation as 'Narrative Incorporation'[5] and 'Narrative Revision'[6]

Susan Dwyer in her widely cited paper "Reconciliation for Realists" (1999:81) proposes that reconciliation should be thought of as 'tensions' (85) i.e. as:

> (...) [T]ensions between two or more beliefs; tensions between two or more apparently incommensurable sets of values – and our responses to them. Here, the regulative ideals are not exactly truth and logical consistency. Rather, they have to do with understanding, intelligibility, and coherence. (85)

Elsewhere in the same article she argues that:

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4 Teitel for instance defines transitional justice as, "(…) the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes ".

5 Coined by Susan Dwyer (1999: 81,88).

6 Dwyer: 96.

> (...) [R]econciliation be understood as the incorporation – not as an erasure – of that tension. The tension may need to be kept in view; the objective is to find a way to live with that. (87)

and that:

> (...) [T]he continued well-being, or the very survival, of a community or nation depends upon how it manages to incorporate and accommodate these disturbances and challenges to its prevailing narrative of self-understanding. (88)

According to Dwyer, in order to achieve a 'narrative equilibrium' (89) the process of reconciliation among individuals ought to include several steps that ought to be followed consecutively. Those steps should include an understanding of the factual circumstances of the relevant events along with the articulation of the different interpretations of those facts and the choosing from those interpretations one that allows for the accommodation of that event in the ongoing narratives of society (89). Through this process the objective is to move towards a "mutually acceptable interpretation (or interpretations) of those events" (90).

An attractive feature of Dwyer's explanation of reconciliation is that she sees reconciliation as separate (though connected) from truth and justice (98). However, according to her theory reconciliation is more than mere tolerance. She suggests that reconciliation can be achieved through a revision of narratives of the individual and the collective to a degree where those narratives would be recognised as acceptable alternative narratives. Dwyer's account in this sense is minimalist.

Dwyer deliberately withholds from looking at the role of third parties and/or the state in reconciliation except to comment that:

> Sometimes attempts at reconciliation require management or, less contentiously, the facilitative efforts of a third party (...) When we are unable to accommodate a painful event into our narrative without losing coherence, it can help to see that someone else can tell such a story. (93)

Further:

> (...) [W]hen calls for reconciliation issue from national or international political leaders, they must be backed up by concrete plans for a variety of supporting measures – for example, economic, health, and educational initiatives; and these initiatives must not be developed as compensation for past wrongs, but rather as explicit demonstrations of the new government's commitment to the processes of racial and social reconciliation. (98)

The thrust of Dwyer's argument is that, the only realistically possible achievement in political reconciliation is the revision of narratives that would accommodate the tensions that created and arose out of the conflict. She concedes that third parties have a role, particularly in

reconciliation at the macro-level but her work does not provide particular insights on that aspect.

3.3. Reconciliation through Forgiveness and Mercy[7]

Meierhenrichin *Varieties of Reconciliation* (2008: 195) presents a methodologically strong account of reconciliation as a concept. He proposes that:

> (...) [R]econciliation refers to the accommodation of former adversaries through mutually conciliatory means, requiring both forgiveness and mercy, where forgiveness connotes the forswearing of resentment (...) and mercy connotes the extension of an act of compassion to the undeserving person who has committed an unjustified and nonexcused moral injury. (206)

Laying out the different understandings of reconciliation is one of the most useful aspects of Meierhenich's piece. He considers reconciliation as the restoration of equilibrium (2008: 199); as conciliation (199); as resolution (200); and as restoration (202). Based on that discussion, he explains why forgiveness and mercy should be considered as essential to reconciliation and why reconciliation should also alternatively be considered both as an end and also as a means (214). He concedes however that there is no one true meaning of reconciliation and that each study of that concept can only be presented as a 'conceptual variable' (227).

Meierhenich recognises both the personal and institutional aspects of reconciliation and is aware that his conceptualisation of reconciliation is maximalist (2008:217). Compared to Dwyer, he stands at the other end of the spectrum with a maximalist, technically sound understanding of reconciliation. But in relation to the questions posed in this paper, Meierhenich's scholarship is not helpful as he does not reflect on the particular application of that concept at the macro-level or in relation to third parties, leave alone the judiciary.

3.4. Reconciliation as a Political Value

Moellendorf in *Reconciliation as a Political Value* (2007:205), looks at reconciliation from a political perspective. He distinguishes the political from the personal and argues that: "(...) [A] political community in which former strangers view and treat each other as equal citizens is partly constitutive of reconciliation as a normative goal for political purposes" (206).

Within such an understanding of reconciliation, the general acceptance of the 'institutional order' of society is essential for political reconciliation but that does not suggest a complete endorsement of those institutions. A 'comparative endorsement' is adequate if the potential for future justice is recognised and if it is the most feasible option (Moellendorf 2007: 207). Apart from this subjective acceptance, Moellendorf also identifies institutional standards that ought to be achieved for the possibility of reconciliation as a political value. They include

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7 Meierhenrich 2008: 206.

formal "equality of rights, liberties and protections under the law" (208) and "juridical equality and a constitutional democratic legal framework" (208).

If the above described subjective individual perceptions and the objective institutional standards are available, Moellendorf argues that, special representations or institutional arrangements are not required for victims of past injustices and that "full agreement about the political direction of the country is not required" for political reconciliation (2007: 209).

In Moellendorf's understanding, reconciliation is different from social justice and legitimacy (2007: 209-10). His argument is that victims or affected communities might be willing to compromise on both social justice and legitimacy of a government in order to reconcile if the institutional standards referred to above are satisfied.

The arguments made by Moellendorf regarding political regret and respect are also useful for understanding more fully his theory of political reconciliation. He defines political regret as "an attitude involving the judgment of past injustices and the disposition to support policies honouring victims and activists" (2007: 212). That kind of regret according to Moellendorf does not require accepting personal responsibility but rather a general responsibility as a citizen. He defines political respect as 'the attitude involving the disposition to obey just laws' (213) and therefore, do not necessarily require forgiveness or repentance. The most significant consequence of defining political regret and respect in this manner for Moellendorf is that "both can be encouraged by a state without unreasonably infringing on freedoms of thought and conscience" (213).

Accordingly, Moellendorf describes his particular understanding of the implications of political reconciliation to policy in the following words:

> Policies of reconciliation may in this limited way be directed to the attitudes of persons: They may encourage certain judgements and affect certain dispositions to act. The judgements are limited to political morality, to the requirements of equal citizenship, and directed toward state responsibility. The dispositions to act, or refrain, are directed toward the requirements of the law and do not incorporate comprehensive moral conceptions. In this way, policies of reconciliation affect attitudes of persons, but only as citizens. (213)

Moellendorf's analysis is useful for the purposes of this paper at many levels. Firstly, the articulation of the political aspect of reconciliation necessarily implies state responsibility in that regard. That is further strengthened by providing tasks for individuals and institutions in bringing about political reconciliation. By suggesting how policies should be designed, Moellendorf provides directions as to how his conceptualisation of political reconciliation can be operationalised. Further, by distinguishing reconciliation between citizens, from reconciliation between individuals, Moellendorf clearly delineates the scope of political reconciliation and consequently the degree of state responsibility towards

achieving the same. It is also suggested that there can be differences in the degree of reconciliation in the public sphere as opposed to in the private sphere.

3.5. Reconciliation as Capabilities

Colleen Murphy in her recent work, *A Moral Theory of Political Reconciliation* (2010), identifies four broad approaches to understanding political reconciliation — "reconciliation as forgiveness; reconciliation as the creation and stabilization of normative expectations and trust; reconciliation as a political value; and reconciliation as the constituting of a political community" (8-9). However Murphy demonstrates in her work that each of those approaches are unsatisfactory and argues that using the 'capabilities approach' is a more effective means of understanding political reconciliation:

> (...) [M]any intuitively damaging characteristics of relationships during civil conflict and repressive rule are helpfully analyzed using the capability framework. The capability framework enables us to understand the various kinds of harm involved in common unjust institutional structures and patterns of interaction, and the ways in which it may be possible to repair them. It highlights the deeper changes, both official and unofficial, in political relationships required by political reconciliation that neither the frameworks of the rule of law nor of political trust can adequately capture. (94)

Amartya Sen and Martha Nussbaum developed the 'capability approach' as both a concept for understanding freedom and as a method for protecting freedom (Sen & Nussbaum 2000). Martha Nussbaum (2011) in her recent work describes the capability approach in the following words:

> The Capabilities Approach can be provisionally defined as an approach to comparative quality-of-life assessment and to theorizing about basic social justice. It holds that the key question to ask, when comparing societies and assessing them for their basic decency or justice, is, "What is each person able to do and to be?" In other words, the approach takes each person as an end, asking not just about the total or average well-being but about the opportunities available to each person. It is focused on choice or freedom, holding that the crucial good societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action: the choice is theirs. (18)

Murphy, in her work, looks specifically at four capabilities which she considers as being "constitutive of political relationships and especially impacted by civil conflict and repressive rule" (2010: 95). They are, "the capabilities of being respected; being recognized as a member of a political community; being an effective participant in the economic, social and political life of the community; and fulfilling basic functionings that are necessary in order to survive and to escape poverty" (95). While analysing the capability approach is beyond the scope of this paper, it is submitted that it is an approach that provides a rich source for creatively conceptualising and operationalising political reconciliation. Its essence is captured by Murphy in her statement that it is an assessment based on "what a person has, and what a person can

do with what he has" (2010: 96). Elsewhere she states that "personal factors, social norms, public policies, and legal, political and economic institutions" are determinants of a person's capabilities (96).

Capabilities are instrumental in that they empower persons to enjoy freedoms, but capabilities also have an intrinsic value in that they define aspects of justice (Murphy 2010: 98-99). Murphy argues that the weakening of the rule of law and 'the reasonableness of trust' undermines capabilities. Therefore, in her view, political reconciliation can be realised only through a capability framework; "the capabilities framework helps us better understand the various kinds of harm that are involved in obviously unjust actions and gives us a better sense of how to fix such damage" (2010: 102).

> First, the concept of capabilities focuses our attention on the role that institutions play in defining and structuring the genuine opportunities of individuals. (...) the capabilities framework is uniquely positioned to capture the institutional implications of political reconciliation that are broader than the implications of a legal system. Second, the emphasis on the capabilities framework on the influence of personal resources, external resources, and the social and material structure on an individual's capability creates a broad conceptual space for locating injustice in relationships and understanding how political relationships are damaged during periods of civil conflict or repressive rule. (100)

This paper is in agreement with the argument made by Murphy. Using her capabilities framework, an attempt will be made in the next section to argue for a judicial mandate for political reconciliation.

3.6. Capabilities and Political Reconciliation through the Judiciary

Political reconciliation, it has been argued, has to be understood as the obligation of the state and as a political value that has to be achieved. In achieving that, the individual's ability to benefit from reconciliation, as a citizen, must be guaranteed and citizen's capabilities must be recognised and guaranteed. Two arguments are advanced in this section to demonstrate that the judiciary in a transitional society are uniquely positioned to contribute to the achievement of such political reconciliation.

3.6.1. An Independent Judiciary as a Pre-Requisite for Political Reconciliation

The first argument is that a strong and independent judiciary is a pre-requisite for political reconciliation of any form, whether national, international, hybrid or whether legislative, judicial, traditional or political. It is submitted that the role of the judiciary in reconciliation in a transitional context cannot be understood in isolation from its role in other contexts. The judicial mandate should not depend on changing circumstances but is rather determined by the more enduring values such as human dignity, rule of law and democracy. Furthermore, judicial creativity in the context of transition cannot be sustained except where the legal system in general is strong. For instance, it has been shown that the impact of truth commissions is

'diminished' in countries where the legal system is weak (Fletcher et.al 2009: 163, 194). Those countries had not translated the outcome of the commissions to structural changes as expected, due to this problem (Fletcher et.al: 194).[8]

> Whatever the source of the conflict- ideological, identity-based, separatist, or socioeconomic – it appears that it is the commitment to and implementation of structural change, more than any single process such as a trial or a truth commission, which sets the country on the road to resolution. (205-06)

Based on a comparative study of the outcomes of transitional justice mechanisms in different parts of the world at different times, it has been argued that positive results can be brought about only in contexts where there is international pressure or a strong judicial system and the rule of law (Fletcher et.al: 198). Additionally 'the degree of support offered by political parties towards creating a functioning state with adherence to democratic principles and the rule of law contributes to the success of any state-sponsored response to violence' (Fletcher et.al: 202).

> Our current findings regarding these seven case studies indicate that history and current context exert a profound influence on the ability of a society to respond to state repression or mass violence. Thus this analysis leads us to conclude that policy makers and scholars need to develop an appreciation for the ways in which a country's inheritance of its legal system, culture, and democratic traditions as well as its social and political institutions and history of sovereignty interact with each other and the country's contemporary political climate to shape the form and pace of transitional justice efforts. (209)

It is shown that no special mechanism for transitional justice would be effective and/or would have a positive long term impact in a society where the rule of law and the independence of the judiciary are weak. Commenting on the countries which had developed relatively more effective transitional justice mechanisms the authors note that:

> (...) [T]he self-reliant transitional justice states share the common features (relative to the other case studies) of strong democratic institutions, the rule of law, and political parties committed to a negotiated settlement. These attributes allow countries to chart their own course of transitional justice rather than having the international community script their future. The implications of autonomy are profound and reverberate across economic, political, legal, and social dimensions. (Fletcher et.al: 210-11)

Two policy prescriptions from those proposed by Fletcher et.al. are relevant. One is that "Trials and truth commissions do not bring about the rule of law but are important symbols of the importance of and fealty to the rule of law; legitimacy of domestic legal systems is critical to the success of transitional justice" (219-220). The other is that "Sustained focus on the

[8] The case studies are from Argentina, Cambodia, Guatemala, Northern Ireland, Sierra Leone, South Africa and Timor-Leste.

underlying causes of the conflict is essential so that trials and truth commissions do not become a fetish but an invitation for on-going attention to address the societal fissures" (220).

Moreover, Nussbaum has recently argued that the judiciary has a specific role to play in the enforcement of capabilities. She identifies four characteristics that should be manifest in such a judicial approach. Each capability ought to be considered separately 'as something of importance in its own right'; the approach should be one of 'cautious incrementalism' that allows the judiciary to develop the content of the capabilities over through a case by case approach; the judicial interpretation must be contextualised and; the judiciary must constantly focus on the rights of minorities to equal treatment (Nussbaum: 2011: 174-77). In specifically considering political reconciliation as capabilities, the potential for the judiciary to make a significant and normative contribution is clear.

3.6.2. Government by Adjudication as a Specialised Model for Political Reconciliation

The second argument in favour of recognising a judicial mandate for political reconciliation is that through 'government by adjudication' the judiciary is uniquely positioned to advance political reconciliation understood as capabilities. One of the unique characters of the judiciary in any legal system is that they have an institutional and individual responsibility towards reasoned decisions. Each judge must have and provide reasons for judicial decision-making within the existing law and must also locate herself in the history of decision-making of the institution of the judiciary by way of either adhering to or departing from judicial precedent. This distinguishing character of 'government by adjudication' is aptly described by Dworkin in the following words:

> Neither priests nor politicians have a responsibility of justification in principle, of capturing all that they do in more general formulations of right and wrong. Any such responsibility would undermine the emotional base of priesthood, which is mystery, or cripple the accommodating and pragmatic strategies of politicians.
>
> But that responsibility for articulation is the nerve of adjudication. Judges are supposed to do nothing that they cannot justify in principle, and to appeal only to principles that they thereby undertake to respect in other contexts as well. (2003: 11)

Based on the above two arguments, it is submitted that the judiciary is ideally placed to defend and assert the capabilities identified by Murphy and the judiciary thereby can also contribute towards political reconciliation (2010). The capabilities identified by Murphy: the capability of being respected, of being recognised as a member of a political community and the capability to have the basic capacity to survive and to escape poverty are all capabilities that a judiciary in a democratic legal system is well placed to defend on behalf of an individual (2010). This is most evident in constitutional adjudication, particularly through judicial review. However, it must also be noted that the role that is and ought to be played by the appellate judiciary in a

given legal system, depends, to a significant degree, on the constitutional framework of that system.

Protecting capabilities requires macro-level reach by the state. Even though the appellate judiciary in constitutional adjudication largely deals with individual applications, those judicial decisions do have a macro-level reach which is both legal and symbolic. As a fundamental component of the state, the judiciary is empowered in different ways to ensure that its judicial decisions have individual, institutional and political impact.

Capabilities can also be translated to or viewed as rights. Most judiciaries in democratic societies are empowered to adjudicate on rights within a dynamic legal space. Therefore, capabilities as rights, creates a unique and potentially powerful space through which the judiciary can contribute to political reconciliation in a transitional society.

The judiciary has the rare advantage of many perspectives — that of the litigants (who come before the court primarily in their capacity as citizens), that of the government, that of the law, that of judicial precedent: and that of comparative jurisprudence (regional and international). The judiciary's monopoly on adjudication can therefore be utilised as a forum and a source for the articulation of tensions and for finding the mutually accommodating interpretations that would promote political reconciliation in a transitional society.

4. Possibilities for Political Reconciliation through the Appellate Judiciary in Sri Lanka

Through an analysis of certain constitutional provisions, this section seeks to argue that political reconciliation can be considered as an aspect of the mandate of the Sri Lankan appellate judiciary. The central argument made in this regard relates to the Directive Principles of State Policy of the Constitution (Chapter VI of the Constitution). Relying on the interpretation of the Indian counterpart of those principles by the Indian judiciary it will be argued that the Directive Principles provide a specific framework for the interpretation of other constitutional provisions. Political reconciliation can be understood as part of the Directive Principles and therefore can be referred to in delineating the role of the judiciary in the post-war context in Sri Lanka. It will also be argued that the post-war context presents an opportune moment for a re-negotiation of the social contract between the state and its people. The authority already vested with the judiciary has been used in the past for such re-negotiations in Sri Lanka. It will be argued that imperatives of political reconciliation demand that the judiciary uses its existing authority for such 're-negotiation.' Through the discussion of a similar development in the United Kingdom, the possibility of expanding the role of the judiciary will be discussed.

4.1. The Judicial Mandate under the Constitution of 1978

Constitutional adjudication under the Constitution of 1978 (also known as the Second Republican Constitution) arises primarily through fundamental rights applications and applications for writ remedies.[9] Under Article 126[10] the Supreme Court is authorised to adjudicate applications regarding the violation of or the imminent violation of fundamental and language rights of the Constitution and the Court of Appeal is vested with original writ jurisdiction under Article 140.[11] The different writs recognised in the Constitution have been adopted from English law and are issued to make different types of orders to the Executive including the cancelling of a decision taken. This paper does not analyse the contribution of the Court of Appeal through the writ jurisdiction to political reconciliation in Sri Lanka due to limitations of length.[12]The jurisdiction of the Supreme Court to entertain any applications regarding the constitutionality of bills (Article 121(1) of the Constitution), the revisionary

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9 Sri Lanka became a Republic in 1972 through the adoption of the First Republican Constitution of 1972.

10 '(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.(2) 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 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.(3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundament right or language right.(5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.' (Article 126 of the Constitution)

11 'Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person: Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal.' (Article 140 of the Constitution)

12 One of the recent writ matters relevant to political reconciliation the *Land Circular Case* must however be noted. Title to land is one of the most complex issues that have persisted during the war and remains complex in its aftermath. One of the policy initiatives taken by the government in this regard was the issuance of the circular titled 'Regularize the Activities Regarding Management of Lands in the Northern and Eastern Provinces' (Circular No. 04/2011 issued on the 22nd of July 2011. The Circular was preceded by a Cabinet Memorandum titled 'Regularize Land Management in Northern and Eastern Provinces' – (as cited in Fonseka B. and Raheem M. *Land in the Northern Province: Post-war Politics, Policy and Practices* (Centre for Policy Alternatives December 2011) 47)).Some of the key aspects of the circular include priority given to claims for title held prior to the war and a public process for examining claims to land. That process includes observations to be made by an observations committee regarding the proceedings; Mediation as a method for resolving competing claims; A process for appealing against decisions of the committee that makes the initial decision regarding title; Issuance of documents proving title once title is determined (Fonseka B. and Raheem M. *Land in the Northern Province*:...(2011: 48-50).The legality of the circular was challenged before the Court of Appeal by way of a writ application by M. A.Sumanthiran, the National List member of Parliament for the Tamil National Alliance (Writ application 620/2011). It was argued on his behalf, among other things, that the circular was unlawful and was contrary to standards of governance expected of the administration. The Court issued a stay order on the public notice calling for applications for land in the North and East taking into account the undertaking given by the Attorney-General's Department to revise the circular. At the second hearing of the matter, the government agreed to withdraw the circular and stated that a new circular will be presented to the Court. It has been said that a fundamental rights application regarding the circular is also pending before the Supreme Court (Fundamental Rights application number 494/2011).

jurisdiction of the Supreme Court with regard to its own decisions (Article 128 of the Constitution) and the mandate to issue advisory opinions (Article 129 of the Constitution) are three other important avenues for constitutional adjudication.

Until the 17th Amendment to the Constitution was passed in 2001, appointments to the Appellate Courts and to the High Courts were by the President. The 17th Amendment established a Constitutional Council, which among other things, made recommendations to the President on the appointments to be made to the Appellate Courts. That process was more transparent and was also considered to be more democratic since the Constitutional Council itself was appointed through a process of nominations by political parties in parliament. In 2010 the 18th Amendment virtually repealed the 17th Amendment among other things and at present, the President makes the appointments to the Appellate Courts (Edrisinha & Jayakody 2011). The Parliamentary Nominations Council may make recommendations to him in that regard but there is no legal obligation on the President to be guided by those recommendations. Maintaining a degree of accountability in making appointments to the judiciary has been a challenge under the existing constitutional framework. The 17th Amendment made significant progress in that regard but the 18th Amendment has virtually re-vested those powers with the Executive President (Edrisinha & Jayakody 2011).

Following the Constitution of 1972, the Constitution of 1978 too declared that sovereignty lies with the People in Sri Lanka. The Second Republican Constitution went a step further and stipulated how that sovereignty is exercised. Accordingly: "(...) [T]he judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognised, by the Constitution or created and established by law, (...)" (Article 4(c) of the Constitution).

Furthermore the same Article provides that:

> [T]he fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; (...) (Article 4(d) of the Constitution).

Commenting in general on the protection of rights under the Constitution and the role of the judiciary in that regard, Marasinghe comments that:

> No Constitution, however carefully framed and structured, can respond to all slings and arrows aimed at it by the Executive arm of Government. The Judges remain the ultimate guardian of the Rights of the citizen, where such Rights have been enshrined or implied in a Constitution. As guardians of those sacred Rights upon which the edifice of democratic government is built, the Judges must accept their responsibility to expand and contract

> constitutional provisions, with a commitment to strengthen fundamental principles, which underpin democratic government. Unless there is such a commitment by the Judiciary, any solemn declarations of Human Rights in Constitutions may remain in the realm of mere platitudes, rhetoric and solemn political declarations of governments seeking to hoodwink both the international community and their local constituents. (2007: 190-91)

Relying on principles of constitutionalism and the provisions relating to the sovereignty of the People it could therefore be argued that the jurisdiction to guarantee fundamental rights provides the judiciary with a clear mandate for a contextualised and robust interpretation of the specific rights (See Articles 3 & 4 of the Constitution).

In identifying the scope of constitutional adjudication due regard must also be paid to the Directive Principles of State Policy. The Constitution provides that the Directive Principles of State Policy should guide the Legislature and the Executive in legislative policy and governance.[13] However, the Constitution also specifically states that those principles are not justiciable.[14] Nevertheless, it has been suggested that those guidelines ought to be taken into consideration in interpreting fundamental rights by the judiciary.

In judicial determinations such as *In Re the Thirteenth Amendment to the Constitution* ([1987] 2 Sri LR 312) and judgements such as *Seneviratne v University Grants Commission* ([1978-79-80] 1 Sri LR 182) and *Centre for Policy Alternatives v Dayananda Dissanayake* ([2003] 1 Sri LR 277), it has been observed by the Court that constitutional and legislative provisions ought to be interpreted to be consistent with the Directive Principles of State Policy. For instance, in the case of *Centre for Policy Alternatives v Dayananda Dissanayake* Justice M.D.H. Fernando, writing for the Court, makes the following observation:

> The Judiciary is part of the "State", and as such is pledged to play its part in establishing a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all people; and it is mandated to strengthen and broaden the democratic structure of government [see Articles 27(2)(a) and 27(4) read with Article 4(d)] ([2003] 292).

This approach has been endorsed and recommended by several scholars (Wickramaratne, J. 2006: 38-45; Gomez 2004: 122; Fernando-Puvimanasinghe 2009: 41). For instance, discussing Mark Fernando J's obiter dicta in *Vadivelu v Officer in Charge, Sithambarapuram* ([2002] 3 Sri LR 146) Marasinghe makes the following observation in this regard:

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13 'The Directive Principles of State Policy herein contained 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.' (Article 27(1) of the Constitution)

14 '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.' (Article 29 of the Constitution)

> (...) [T]he courts when interpreting legislation, may presume that Parliament while enacting laws had been guided by the Directive Principles of State Policy as the Constitution had required Parliament to do so. Although the principles themselves 'do not confer or impose legal obligations, and are not enforceable in any court or tribunal' but in the interpretation of legislation, the courts may interpret them in the light of the provisions contained in the Directive Principles. (363)

Marasinghe points out that the realisation of fundamental rights themselves is a Directive Principle (Article 27(2)(a) of the Constitution). Accordingly he argues that the chapter on Fundamental Rights and the chapter on Directive Principles are conceptually linked.

> Unless such an interpretation is given to the contents of Chapter VI, there cannot ever be a 'full realization of the fundamental rights and freedoms of all persons' as called for in the Constitution. The Courts in Sri Lanka have this added dimension to human rights despite the non-justiciable clause in Chapter VI. That clause merely prevents a claim being made solely upon a Directive Principle. Directive Principles do not provide a cause of action. But in the interpretation of the fundamental rights contained in Chapter III, the Directive Principles may be used to expand and interpret them broadly and meaningfully to the given fact situation. (364-65)

This 'nexus-argument' has significant implications for the judiciary. In effect it expands the scope of the fundamental rights chapter and the corresponding judicial mandate. Such an approach suggests that even certain economic, social and cultural rights which have traditionally been relegated to the non-justiciable category of rights in Sri Lanka could be made justiciable since Directive Principles recognise state responsibility in that regard. Furthermore, the judiciary is empowered to consider issues that come up before them from the perspective of national policy if it falls within the framework of the Directive Principles. By utilising this nexus, the judiciary can engage in a dynamic and contextualised interpretation of the Constitution.

The Indian experiences with the Directive Principles provide useful guidelines in this regard. The Indian judiciary in several cases have held unequivocally that the fundamental rights chapter must be interpreted in light of the Directive Principles (*Ashoka Smokeless Coal v Union of India* (2007)2 SSC 640, para 51).

Given the similarities between the Sri Lankan and Indian constitutions (the chapters on Fundamental Rights and the Directive Principles of State Policy) and given the openness of the Sri Lankan Supreme Court to considering comparative Indian jurisprudence, it could be argued that the Sri Lankan judiciary should give due consideration to the adoption of the nexus-argument. It must be noted here that in entertaining fundamental rights applications, the Court is mandated to provide remedies that are 'just and equitable' (Article 126(4) of the Constitution). That is a broad and open ended scope. Employing that authority, the judiciary is well-positioned to consider the Directive Principles of State Policy in interpreting statutes,

reviewing Executive and Administrative decisions and in articulating its judicial philosophy and reasoning.

4.2. Political Reconciliation as a Component of the Judicial Mandate

Relying on the argument regarding the nexus between the chapter on fundamental rights and the chapter on Directive Principles of State Policy and the corresponding responsibility of the judiciary to interpret fundamental rights through the Directive Principles, it will be argued in this section that the Constitution clearly provides the judiciary with a mandate to advance political reconciliation. This will be demonstrated through a comparative assessment of the capabilities referred to as essential for political reconciliation in the third part of this paper, with some specific Directive Principles.

The Sri Lankan judiciary has not made any significant pronouncements in the interpretation of the Directive Principles, except, to hold in a few cases that fundamental rights ought to be interpreted in light of the Directive Principles. For instance, in the case of *Vadivelu* Justice M.D.H. Fernando made the following observation:

> I must add that Article 27(12) requires that 'the State' – and that includes the judiciary 'shall recognize and protect the family as the basic unit of society.' It is true that Directive Principles of State Policy do not confer or impose legal rights and obligations, and are not enforceable in any court, but that does not mean that the judiciary is bound to ignore them. (*Vadivelu v Officer in Charge, Sithambarapuram* [2002] 3 Sri LR 146; Marasinghe 2007: 365)

In other words Justice Fernando is suggesting that the judiciary ought to recognise the Directive Principles and take them into consideration in the interpretation of perhaps not only the fundamental rights but also any other constitutional provision. However, as will be pointed out below, one of the problems associated with the Directive Principles is that some of those principles are embedded in a socialist political framework and some others more in a democratic and rights-based framework. Considering the manner in which the judiciary can accommodate these conceptual and normative differences in their interpretations, is beyond the scope of this paper. For the purposes of this paper, it is sufficient to note that the Directive Principles give clear expression to the capabilities identified as essential for political reconciliation. It is helpful to consider the specific Directive Principles in identifying their relevance to political reconciliation. Thematically, the principles are framed within a general obligation cast on the state in maintaining and promoting a democratic and socialist society. Some of the principles suggest that fundamental rights, participatory democracy, social justice and decentralisation have been identified as significant characteristics of such a society:

> 27 (2) The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include:
> (a) the full realization of the fundamental rights and freedoms of all persons; (...)

> (f) the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralised in the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka;
>
> 27(4) The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.

In comparing the capabilities necessary for the achievement of political reconciliation with the Directive Principles, it seems that not only do the principles recognise those capabilities and cast a duty on the state to develop policies for the furtherance of those capabilities, but also that the Principles arguably set a higher threshold for the state in the achievement of political reconciliation.

The capability of being respected and the capability of being recognised as a member of a political community have been clearly articulated in the Directive Principles. The terms 'person', 'citizen' and 'People' have been used in relation to different principles, thereby providing a rich source for understanding the nature of state responsibility in this regard.

The capability of being respected, it is submitted, is encapsulated in the right to equality before the law and the equal treatment of the law (Article 12 of the Constitution; Wickramaratne: 2006). The Supreme Court has developed a fairly complex and rich right to equality jurisprudence which includes the prohibition of unreasonable classifications and the prohibition on unlawfulness (Gomez 1998; Ludsin 2012). This capability also requires the Executive to act fairly in respect of both the substantive and procedural aspects of the rule of law. The capability of being recognised as a member of a political community is explicitly protected through the rights of citizens recognised under Article 14 of the Constitution and also in the Directive Principles. Apart from those fundamental rights, the Directive Principles also recognise that individuals require respect in society:

> 27 (2) The State is pledged to (...)
> (g) raising the moral and cultural standards of the People, and ensuring the full development of human personality; (...)
> 27(6) The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.

The capability of being an effective partner in the economic, social and political life of the community and the capability of meeting basic needs and avoiding poverty have both been recognised through the Directive Principles. Those principles are stated in relation to concepts such as social, economic and political justice, equity, adequate standards of living and social welfare:

> 27 (2) The State is pledged to (...)
> (b) 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; (...)
> (c) 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; (...)
> (e) the equitable distribution among all citizens of the material resources of the community and the social product, so as best to subserve the common good;
>
> And:
>
> 27(9) The State shall ensure social security and welfare.

In addition to articulating the capabilities considered to be essential for political reconciliation, the Directive Principles also stipulate that the state has an obligation towards the promotion of national unity:

> 27(5) The State shall strengthen national unity by promoting co-operation and mutual confidence among all sections of the People of Sri Lanka, including the racial, religious, linguistic and other groups, and shall, take effective steps in the fields of teaching, education and information in order to eliminate discrimination and prejudice.
> 27(10) The State shall assist the development of the cultures and the languages of the People.
> 27(11) The State shall create the necessary economic and social environment to enable people of all religious faiths to make a reality of their religious principles.

It is evident then that the Sri Lankan Directive Principles, though not as broad or detailed as their Indian counterparts, provide a rich source in understanding the obligation of the state in working towards political reconciliation.[15] If the argument of a nexus between the Directive Principles and Fundamental Rights is accepted, it is evident that the judiciary has a clear constitutional mandate to promote the particular type of political reconciliation argued for in this paper. It ought to be done by using the Directive Principles as a broad framework of political values according to which action or inaction of the Executive and the Legislature are evaluated.

However, there could be several reasons for observing a measure of caution in employing the Directive Principles to this end. The open-ended language of the Directive Principles and the political values expressed through the Principles, for instance, arguably do not lend themselves as an adequately precise set of constitutional provisions that could be interpreted meaningfully by the judiciary. Therefore an incremental approach which is thoughtfully reasoned is recommended in this regard.

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15 See Part IV of the Indian Constitution of 1949 as amended.

4.3. Political Reconciliation as a Renewal of the Social Contract

In light of the constitutional interpretation argued for in the above section, it is apparent that, enforcing Directive Principles of State Policy through judicial interpretation is not contingent upon whether Sri Lankan society is in transition. In other words, a transitioning society is not a pre-requisite for judicial incorporation of the Directive Principles in their jurisprudence. That responsibility is an integral aspect of the general judicial mandate under the Constitution. Seen from that light it could be argued that the role of the judiciary is not different in any significant way in a post-war Sri Lankan context.

While agreeing with that argument, it is still possible to argue that the post-war context provides an opportunity for the judiciary to revisit some of the founding principles that inform its role in a 'democratic and socialist society' and to review some of its functions.[16] Through that reflective process, the judiciary can examine the scope of its reach and how effective it has been in fulfilling its constitutional mandate. It would also allow the judiciary to remain relevant in a changing political and legal landscape (both domestic and international). The Constitution describes the State of Sri Lanka as 'a free, Sovereign, Independent and Democratic Socialist Republic' and Sri Lanka is officially known as 'the Democratic Socialist Republic of Sri Lanka' (Article 1 of the Constitution). The normative implications, the conceptual contradictions of the use of these terms lend themselves to a useful and relevant discussion, which is beyond the scope of this paper. In terms of political reconciliation however, the constitutional reference to democratic and socialist values ought to provide the judiciary with a general framework within which Sri Lankan society could be re-imagined in a post-war context.

The term 'renewal of the social contract' is used in this regard (Fox-Decent 2011; Boucher & Kelly 1994). 'Social contract' is understood here to mean the theoretical assumption that is made in the contemporary understanding of democracy; that the state is subject to the maintenance of certain minimum standards and enforcement of certain political values in its governance (Haysom, 2012). The social contract must be understood within the evolving context of the life of a nation. For instance in *Frontiers of Justice; Disability, Nationality, Species Membership*, Martha Nussbaum makes the argument that even its most generous form the doctrine of social contract cannot be theoretically employed in arguing for the protection of the vulnerable and for those who may exercise 'lesser' forms of autonomy (2006: 9-95). According to her, the capabilities approach (discussed in 3.5 and 3.6 of this paper) has to be employed to extend the idea of a social contract and its protection, to the vulnerable in society. It is submitted that the notion of 'renewal' of a social contract by the judiciary, must also be understood in this sense.

In the past, the Sri Lankan judiciary has engaged in such 'moments of renewal'. The direct judicial incorporation of the internationally recognised concept of sustainable development, the liberalisation of the rules of standing for fundamental rights applications and the judicial

16 The Preamble to the Constitution describes the Sri Lankan state as 'a DEMOCRATIC SOCIALIST REPUBLIC.'

introduction and development of the public trust doctrine are but examples of such moments of renewal.

The concept of sustainability in the use of natural resources was first relied on in the celebrated case of *Bulankulama* (2000). A recent enunciation of that concept by the Supreme Court reproduced below demonstrates the manner in which the Court interprets state responsibility to include contemporary understandings of environmental conservation and the role of the state in that regard.

> Contemporary concerns with the state and its role in the protection of the environment have close links with this doctrine of public trust. As part of this responsibility governments make policy decisions related to the environment and its useful utilisation, conservation and protection and should always be only in the interest of the general public with a long term view of such being conserved for intergenerational use (...) Under the public trust doctrine as adopted in Sri Lanka, the state is enjoined to consider contemporaneously, the demands of sustainable development through the efficient management of resources for the benefit of all and the protection and regeneration of our environment and its resources. (*Watte Gedara Wijebanda* (2007))

In relation to the rules of standing in making applications under the fundamental rights jurisdiction of the Supreme Court too, the Court has recently articulated a judicial philosophy that refers to principles of constitutionalism and democracy. Through such an interpretation the Court has been able to side step the procedural restrictions placed upon its jurisdiction under Article 126; only the victim or her attorney-at-law may make an application under that Article. In *Salley v Colombo Municipal Council* (2009)[17] Justice Shirani Bandaranayake (as she was then) writing for the Court reflects extensively on the issue of the liberalisation of standing in the name of public interest. This case involved a fundamental rights petition by a former Deputy Mayor of the Colombo Municipal Council (CMC) on the basis that the failure of the CMC to remove unauthorised hoardings within the city limits of Colombo amounted to a violation of his right to equality and that of the residents of the CMC area. The respondents raised a preliminary objection that the petitioner lacks standing as he has failed to establish the violation of any of *his* rights, as required under Article 126(2). In overruling that objection Justice Bandaranayake spells out the jurisprudential basis on which the Supreme Court may consider fundamental rights petitions made in the public interest.

> Considering the provisions contained in the Constitution dealing with the fundamental rights jurisdiction and the applicability of Article 126(2) read with Articles 3, 4(d) and 17, it is apparent that Article 126(2) should be interpreted broadly and expansively. Where a person therefore complaints that there is *[sic]* transgressing the law or it is about to transgress, which would offend the petitioner and several others, such a petitioner should be allowed to bring the matter to the attention of this Court to vindicate the rule of law and to take measures to

17 *Salley v Colombo Municipal Council* SC (FR) 252/2007, SC Minutes 4th March 2009.

> stop the said unlawful conduct. Such action would be for the betterment of the general public and the very reason for the institution of such action may be in the interest of the general public. (*Salley v CMC* 2009: 20)

The public trust doctrine as developed in Sri Lanka presents another example of how the judiciary 're-negotiates' the social contract between the state and the individual and expands the degree of accountability of the state towards its people (Samararatne 2010: 50-51). Justice M.D.H. Fernando's articulation of the doctrine in the *Heather Mundy* (2004: 13) case captures that 're-negotiation' effectively:

> (...) [T]his Court has long recognized and applied the 'public trust' doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes....Besides, executive power is also necessarily subject to the fundamental rights in general and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law...the 'protection of the law' would include the right to notice and to be heard. Administrative acts and decisions contrary to the 'public trust' doctrine and violative of fundamental rights would be in excess or abuse of power and therefore void or voidable.

There have also been instances where the Court through its jurisprudence has re-negotiated the social contract in a retrogressive manner. *Singarasa v Attorney General* (2006) is one such example. In this case the petitioner had been convicted under the Prevention of Terrorism Act (PTA)[18] on the basis of a confession made in custody. Having exhausted available domestic remedies, he made a petition to the Human Rights Committee (HRC) under the first Optional Protocol of the International Convention on Civil and Political Rights (ICCPR).[19] The HRC, among other things, recommended to Sri Lanka that his conviction should be reviewed (*Nallaratnam Snigarasa v Sri Lanka Communication No. 1033/2001, UN DOC CCPR/C/81/D/1033/2011(*2004)). Relying on that recommendation Singarasa sought a review of his conviction before the Supreme Court. In refusing to carry out such a review, the Supreme Court, sitting as a divisional bench, went on to hold that the accession to the first optional protocol of the ICCPR by Sri Lanka was unconstitutional (CPA 2008; Rodley 2008).

While conceding that the role of the judiciary in a transitional society ought not to be significantly different from their role in a 'stable' society, it is still possible to argue for a change in that role in terms the boundaries within which the judiciary functions. It is submitted that the opportunity for transition that is presented to Sri Lankan society is also an opportunity to reconsider or revisit the political values that ought to constitute the Sri Lankan social contract. In arguing for such a re-examination, parallels can be drawn between recent developments in the United Kingdom in relation to the understanding of the continued

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18 Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

19 Sri Lanka acceded to the ICCPR in 1981 and acceded to the first optional protocol in 1997.

significance of parliamentary sovereignty and the rule of law and the role of the judiciary in interpreting those concepts.

The modern British legal system was more or less built on the concept of the absolute sovereignty of parliament. Austin (1832) and Dicey (1914) made a significant contribution in the development of legal theory in this regard. Based on dicta of the then House of Lords, it is now being argued that the British legal system needs to move away from the absolute supremacy of parliament to the substantive rule of law that will be defended by the judiciary. Furthermore, it has been argued that parliamentary sovereignty does not trump the rule of law but rather is subject to it:

> Generally the need to protect individual rights has come centre stage. The public is now increasingly looking not to Parliament, but to the judges to protect their rights. In this new world, judges nowadays accept more readily than before that it is their democratic and constitutional duty to stand up where necessary for individuals against the government. The greater the arrogation of power by a seemingly all-powerful executive which dominates the House of Commons, the greater the incentive and need for judges to protect the rule of law. (Steyn 2006: 243, 247)

Lord Steyn draws particularly from the dicta in the case of *Jackson* (2006), of which relevant sections are reproduced below:

> Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.[20]

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. (102 per Lord Steyn)

The call of the British judiciary for the review of the doctrine of parliamentary sovereignty on the basis that there has been a change in the 'hypothesis of constitutionalism' suggests that the judiciary are both able to and willing to engage in a process of 're-negotiation' of the social contract, if it furthers the underlying values of a democracy (Jowell 2006). In such a comparative context, the Sri Lankan judiciary would have no difficulty in seeking to contribute to political reconciliation through a progressive understanding of its judicial mandate.

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[20] *R (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262, 107 per Lord Hope of Craighead.

5. The Need for Political Reconciliation through the Judiciary in Sri Lanka

The particular case for political reconciliation through the jurisprudence of the highest courts in the country will be illustrated in this section. The particular political context, the need for a progressive interpretation of a constitution that privileges the office of the Executive President,[21] the unique role of the judiciary as a check against the other branches of government and the absence of other deliberative spaces for accountability particularly for war-related governance issues are the main reasons identified.

5.1. Post-War Political Context

A distinguishing feature of the Sri Lankan post-war context is that one party, i.e. the Government of Sri Lanka has emerged with a clear victory of the conflict and that the other party i.e. the LTTE is no longer officially represented. In such a political situation, any measures towards reconciliation and transitional justice would only result from voluntary initiatives of the victor. Given the majoritarian nature of Sri Lankan politics in general, there are hardly any incentives for a government that has ended a 30-year long war to engage in sustainable reconciliation measures. The Report of the Lessons Learnt and Reconciliation Commission (LLRC) too makes several observations and recommendations in this regard.[22] It states for instance that:

> One of the dominant factors obstructing reconciliation in Sri Lanka is the lack of political consensus and a multi-party approach on critical national issues, such as the issue of devolution (...) It is an unfortunate aspect in the political life of the country, since independence, that political considerations and narrow political gain is uppermost in the minds of politicians, and not necessarily the rights and interests of the people (...). (LLRC: para 8, 301, 322-23)

The role of the judiciary is even more accentuated in such a context as it is the only domestic institution that has the mandate to act as a check on the government and as a supervisor of the exercise of public power by them. The judicial space remains the only space through which reconciliation imperatives could be read into policy measures of the government. Through the mechanism of constitutional adjudication, as pointed out above, the appellate judiciary is well positioned to perform such a task.

5.2. Problematic Aspects of the Constitution of 1978

The concentration of power in the Executive President, the absence of judicial review of legislation, immunity of the President from legal suit while in office and the validity of laws regardless of contradictions with the chapter on Fundamental Rights are but a few of the problematic aspects of the Constitution. One method for mitigating the anti-democratic

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21 Immunity from legal proceeding while holding office (Article 35(1)); the power to dissolve and prorogue parliament (Article 70); the power to make appointments to the appellate courts and independent commissions (Article 41A) are examples of the types of power vested with the Executive President under the Constitution.

22 See in particular the chapter on Reconciliation, Report of the LLRC 2011.

implications of those provisions is for the judiciary to adopt a progressive and dynamic interpretation of the Constitution.

Where Constitutional provisions are being employed to promote governmental choices that go against political reconciliation and when relying on the judicial mandate, it is essential that the judiciary review those choices from the perspective of national reconciliation. That responsibility is even more critical in a context where there are no political incentives for the government to make pro-reconciliation choices and/or decisions.

5.3. Accountability of a Powerful Executive and a Subservient Legislature

Due to the factors identified above, the concentration of political power in the office of the President has increased. The abuse of the party politics system of governance by the government has led to the creation of a subservient Legislature. The excessive number of cabinet ministers (drawn from the Legislature) and the high incidence of cross-overs from the opposition have created a political culture in which the Legislature is subservient to the Executive. In effect, one of the critical roles of the Legislature, which is that of acting as a check on the Executive, has been subverted. This political phenomenon too casts an obligation on the judiciary to be assertive in its judicial deliberations and in defending the principles of constitutionalism and democracy. The post-war context adds a further critical dimension to that obligation.

5.4. Lack of Alternative Spaces for Accountability

Other public institutions designed to promote accountability for the exercise of public power are arguably in crisis in Sri Lanka. The independence of many of the commissions is cast in doubt due to the politicisation of the appointment process under the 18th Amendment to the Constitution. The Sri Lankan Human Rights Commission for instance has been downgraded internationally due to the lack of independence.[23] The public administration system has been criticised for corruption and lethargy, the criminal justice system has been criticised as being politicised, ineffective and also corrupt (International Commission of Jurists 2012).

Moreover, no specific mechanisms have been established to inquire into war-related injustices and issues. The LLRC was the only institution that was established in that regard. Its original mandate did not specifically include the authority to inquire into issues related to the last stages of the war. During the hearings, the Commission decided to expand its mandate itself. Even though the LLRC report has made several significant findings and made progressive recommendations, the implementation of the report is dependent on political will.

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23 The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) in its latest reviews have downgraded the Human Rights Commission of Sri Lanka from A (full compliance) to B (not in full compliance) in relation to the Paris Principles (Principles Relating to the Status of National Institutions) 1993. See in this regard, http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NIs%20%2830%20May%202012%29.pdf accessed on the 29th of January 2013.

The failures of the regular accountability mechanisms and the lack of mechanisms to inquire into the war-related issues strongly suggest a greater obligation on the part of the judiciary to hold the government accountable.

6. Some Responses of the Supreme Court 2009-2012

This section will analyse the Special Determinations of the Supreme Court post-2009, three judgments on Fundamental Rights and several other Fundamental Rights cases filed by detainees. The Fundamental Rights cases have been selected due to their significance and the cases by the detainees based on accessibility of the decisions. Through the analysis of the case law an attempt will be made to draw provisional conclusions as to the nature of the response of the Supreme Court to political reconciliation through constitutional adjudication, 2009-2012.

6.1. A Restrictive Approach to the Review of Bills

Chapter XVI of the Constitution spells out the authority of the Superior Courts in Sri Lanka. Accordingly:

> The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution (...). (Article 120 of the Constitution)

The Court is further authorised to determine whether a referendum and/or a two-thirds majority is required for the approval of such Bill. For the purposes of this paper, it is sufficient to note that that the Supreme Court has *sole and exclusive* authority in determining the constitutionality of bills (Article 120 of the Constitution).

More weightage should be attributed to the analysis of the jurisprudence on the judicial review of bills as all except two determinations issued 2009-2012 have been analysed below.[24] The jurisprudential approach within this mechanism seems to be restrictive, conventional and positivist. The Court draws almost exclusively from the specific constitutional provisions and its previous Special Determinations. Even where the issues are clear, the Court does not refer to international treaties that Sri Lanka has signed or ratified, or any comparative jurisprudence. The reasons for this particular approach are not apparent since the constitutional mandate in this regard does not place specific restrictions on the Supreme Court.

[24] The Special Determinations that are not considered in this paper are the determinations related to Animal Welfare Bill, SD No. 01/2009, delivered on 07th April, 2009 and Default Taxes (Special Provisions Bill), SD No. 02/2009, delivered on 06th May, 2009.

6.1.1. Parliamentary Elections (Amendment) Bill[25] and Elections (Special Provisions) (Amendment) Bill[26]

In August 2009, two bills were proposed in parliament for amendments. One was with regard, among other things, to the type of political parties that can contest parliamentary elections. The other was to permit 'visually impaired' persons to cast their vote at a parliamentary election.

With regard to the definition of a 'recognised political party' the *Parliamentary Elections (Amendment) Bill* sought to vest power with the Elections Commission to prevent a political party from registering if its name 'so nearly resembles such name as to be calculated to mislead, confuse or deceive or signifies any religious community'.[27] Petitioners argued that within a constitutional framework which explicitly recognised minority political parties (under the 17th Amendment at the time), such a restriction was unreasonable. Court accepted that argument and further held that the proposed clause could amount to an interference with the franchise of the People and could also possibly be a violation of their fundamental rights to freedom of speech and expression[28] and the freedom of religion.[29] While the determination of the Court in this regard is an assertion of the political rights of both the voters and political parties, what is regrettable is the mechanical approach the Court adopts in its determination. The Court shies away from making any general observations on the value of political activities and the negative impact the proposed clause may have had on the same, particularly in a multi-cultural society which is in transition.

The judicial attitude as reflected in the determination on the *Elections (Special Provisions) Bill* is similarly problematic. On the one hand, the Court makes a determination that is rights-sensitive but at the same time, maintains a judicial attitude that is technical and almost exclusively focused on the specific wordings of the clauses that are challenged before the Court. In this matter, the petitioner challenged the reasonableness of the proposed clause that allowed only an eligible adult who is totally blind in both eyes to cast her vote and which provides that a family member of that person could accompany and assist in the voting.[30] The Court accepts that argument and holds that the proposed amendment could amount to a violation of the right to equality and the freedom of speech of persons with disabilities.[31]

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25 Parliamentary Elections (Amendment) Bill, S.D. No. 03, 04, 06, 07/2009, delivered on 06th November, 2009.

26 Elections (Special Provisions) (Amendment) Bill, S.D. No. 09/2009, delivered on 06th November, 2009.

27 Section 7(6) in Clause 2 of the proposed Bill.

28 '(1) Every citizen is entitled to - (a) the freedom of speech and expression including publication; (...)' Article 14 of the Constitution.

29 'Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.' (Article 10 of the Constitution)

30 Proposed amendment to Section 40(2) of the Parliamentary Elections Act.

31 Hansard, 6th November 2009, 994. '(1) All persons are equal before the law and are entitled to the equal protection of the law.(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds: Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office: Provided further that it shall be lawful to require a person to have

Accordingly, the Court determines that the proposed amendment shall become law only with a special majority or if the provisions determined to be unconstitutional are amended to cover those with other impairments, to allow for discretion as to whether such a person has to be accompanied by another or not and the eligibility for accompanying such a person (Hansard 06.11.2009: 994). In this matter too, the Supreme Court chose not to make any observations on the broader constitutional and legal issues that were related to the proposed amendment. For instance, Sri Lanka, by the time of this decision, had signed but not ratified the Convention on the Rights of Persons with Disabilities (CRPD) which specifically recognises the duty of the state to ensure the meaningful access and enjoyment of that right by persons with disabilities.[32] Relying on that Convention, the Court could have made observations as to what amounts to a disability, the responsibility of the state towards persons with disabilities and the significance of access to the enjoyment of the right to vote of persons with disabilities.

6.1.2. In Re the 18th Amendment to the Constitution[33]

The most recent attempt at constitutional change was the 18th Amendment which repealed much of the 17th Amendment and removed the restriction on the number of Presidential terms that can be held by one individual. Both the process adopted in passing this Amendment and the substance of it are problematic and goes against the democratic values in contemporary society (Edrisinha & Jayakody 2011).

This was the first attempt at reforming the Constitution in the post-war period. Arguably at this juncture issues such as reconciliation at the national level and the development of a vision for a post-war Sri Lanka were (and continue to be) urgent needs of the country. However, the government thought it best to further strengthen the arm of the Executive President by removing the restriction of two terms on a president and repealing the provisions related to the Constitutional Council.

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sufficient knowledge of any language as a qualification for any such employment of office where no function of that employment or office can be discharged otherwise than with a knowledge of that language. (3) No person shall, on the grounds of race, religion, language, caste, sex or any one such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion. (4) Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.' (Article 12 of the Constitution)

32 'States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to: (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, *inter alia*, by: (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate; (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice; (b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.' (Article 29 of the Convention on the Rights of Persons with Disabilities, 2006)

33 SC (Special Determination) No. 01/2010, SC Minutes of 31st August 2010.

One of the problematic aspects of this Amendment was that the Cabinet approved it as an 'urgent bill' in the national interest which requires the Supreme Court to determine its constitutionality in 24 hours. Consequently, the public had no opportunity for sustained discussions or debates on the 18th Amendment. A lawyer who appeared for the petitioners stated that representations made before the Supreme Court regarding the 18th Amendment were prepared without even the final version of the bill being available to prospective petitioners.[34]

The Supreme Court held the Amendment to be constitutional and determined that it only required a special majority vote in parliament.[35] The Court was of the view that the removal of the limit to the number of terms that can be held by a President was in fact an enhancement of the franchise of the People and therefore was consistent with Articles 3 and 4 of the Constitution. With regard to replacing the Constitutional Council with the Parliamentary Council the Court was of the view that it 'is only a process of redefining the restrictions that was placed on the President by the Constitutional Council under the 17th Amendment' (SC (Special Determination) No. 01/2010, SC Minutes of 31st August 2010: 30). The Court chose to overlook the fact that the restrictions imposed on the discretion of the President in making key appointments by the Constitutional Council were mandatory restrictions while the restrictions imposed by the Parliamentary Council were only guidelines.[36] The Court does not provide its opinion on whether the Bill ought to have been deemed an 'urgent bill' by the Cabinet.

This Supreme Court determination is yet another illustration of how the Court restricts itself. It chooses not to engage in broader questions of constitutionalism and the rule of law which were raised before it by counsel appearing for the petitioners (Edrisinha & Jayakody 2011).

6.1.3. Local Authorities (Special Provisions) Bill and Local Authorities Elections (Amendment) Bill[37]

In 2010 the government sought to reform certain aspects of elections to Local Authorities. The proposed reforms were challenged before the Supreme Court at the bill stage. The introduction of a voluntary quota of 25 percent for women and youth in nomination lists in the Local Authorities Elections Ordinance was one of the clauses that were challenged for its constitutionality.[38] The arguments of the petitioners included the argument that categorising both women and youth together was unreasonable and that the clause was in violation of the

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34 Interview with an Attorney-at-Law who made submissions in this litigation.

35 SC (Special Determination) No. 01/2010, SC Minutes of 31st August 2010.

36 Under Article 41A (1) of the amended Constitution, the President is only required to seek the observations of the Parliamentary Council with regard to the relevant appointments whereas under the 17th Amendment Article 41B, the President could make those appointments only on the recommendation of the Constitutional Council.

37 Local Authorities (Special Provisions) Bill and Local Authorities Elections (Amendment) Bill, SD No 02/2010 delivered on the 16th of November 2010.

38 Local Authorities Elections Ordinance 1963.

CEDAW (Convention on the Elimination of Discrimination Against Women) and was vague. The Court rejected those arguments and held that the voluntary quota was reasonable. The Court went further and held that the right to equality (Article 12 of the Constitution) is preserved by the said clause and that the Constitution does not specifically provide for affirmative action:

> Article 12(4) of the Constitution is not a weapon, but only a shield for the State in order to justify any kind of departure from the main stream purely to encourage the advancement of women, children or disabled persons. Accordingly, Article 12(4) cannot be used to authorize affirmative action on behalf of women, children and disabled persons. (Hansard 16.11.2010: 1329)

However, the judicial interpretation of Article 12(4) leads to confusion as to its meaning. Article 12(4) provides that:

> Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons (Article 12(4) of the Constitution).

The implications of the images of the shield and weapon are not clear. Moreover, the conclusion of the Court that affirmative action is not authorised by Article 12(4) is different to the view held by some legal scholars. For instance, Jayampathy Wickramaratne, commenting on Article 12(4) considers it as a declaration that some classification may be permitted for a 'benign' purpose:

> Benign or reverse discrimination is one that is permitted for the purpose of aiding a minority or ameliorating the conditions of a disadvantaged grouping. It is a case of permitting the State to be, say, gender-conscious as opposed to being gender-blind, in order to compensate for past societal injustices. In the case of disabled persons the aim is to aid a disadvantaged group. In the case of children, it is submitted, the objective is to provide better opportunities to all of them. (Wickramaratne 2006: 422)

The Court in this determination, however, goes on to hold unequivocally that a quota would amount to an unacceptable restriction of the right to franchise:

> In order to ensure equal treatment in elections, especially for the voter to choose the most suitable candidate, it would be essential to remove any unnecessary restrictions in order to have a meaningful exercise of franchise. Introduction of restrictive quotas would not be a meaningful step in the light of ensuring such franchise and also would not be a step taken to guarantee the right to equal protection in terms of Article 12 of the Constitution. (Hansard, 16.11.2010: 1330)

In coming to this conclusion the Court seems to be approaching the issue from a generalised understanding of what a voter's perspective is. Here too the Court chooses to ignore the

political, social and cultural context in which elections are held in Sri Lanka. The fact that women have been severely under-represented in politics and the fact that there is no rationale for clubbing women together with youth does not seem to occupy the mind of the Court (Wickremasinghe & Kodikara 2012). The Court also seems to divorce the deliberative component of democracy from the act of casting a ballot. Court seems to understand Article 4 (d) of the Constitution as only referring to the ballot and therefore suggests that the responsibility of the Court is also only towards protecting that aspect.[39] It must be noted that the Supreme Court has held differently in the past[40] and that the contemporary understanding of democracy is much broader (Sen 2010: part IV). It has been recognised now that the exercise of the ballot is meaningful among other things, only in a context where different members of society are represented in that process (Williams 2011).

Another challenge made against the Bills was that they restricted the franchise of the People and therefore was an indirect amendment of Articles 3 and 4 of the Constitution.[41] The Court chose to follow a literal interpretation of the Constitution and concluded that Article 4 only protected presidential and parliamentary elections and voting at referenda. That interpretation is characteristic of a Court that is not willing to consider the policy issues in a given dispute, particularly in relation to the right of individuals to vote even though it is a significant aspect of a democratic society.

A similar approach to interpretation by the Court is evident in its consideration of the 5 percent cut-off point in determining which candidates are entitled for appointment to the local authorities. It was argued before the Court that smaller political parties and independent groups would be adversely affected by this clause and that it would amount to a violation of the constitutional guarantee of the right to equality. The Court did not consider the particular purpose of local authorities in a democratic society or the particular Sri Lankan context in evaluating this argument. Rather, the Court chose to rule that the cut-off point was not a violation of the right to equality on the basis that a similar cut-off point was applicable to provincial and parliamentary council elections.

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39 'the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; (…)' (Article 4(d) of the Constitution)

40 See for instance *Sunila Abeysekera v Ariya Rubesinghe* [2000] 1 Sri LR 314; *Mediwake v Dissanayake* [2001] 1 Sri LR 177.

41 'In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.' (Article 3 of the Constitution); 'The Sovereignty of the People shall be exercised and enjoyed in the following manner :- (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum; (b) the executive power of the People including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People; (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law; (d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and (e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.' (Article 4 of the Constitution)

Accordingly the Court held that both Bills were in accordance with the Constitution.

6.1.4. Revival of the Under-Performing Enterprises and Under-Utilised Assets Bill[42]

In November 2011, the Cabinet approved as 'urgent' a bill to take over certain enterprises and assets. According to the preamble of the Act, the Bill was introduced to obtain "the maximum benefit from the limited resources available" and thereby to promote "a social order in which social, economic and political justice would prevail".[43]

However, as in the case of the 18th Amendment to the Constitution, the reason for classifying such a bill as 'urgent' was not clear. No information was provided to the public, the Supreme Court or to the parliament to demonstrate the urgent need to acquire the enterprises and assets that were identified in the Bill. The democratic process of law reform was completely circumvented by the government in that only the Attorney-General made submissions to the Supreme Court before the Court made its determination on the constitutionality of the Bill. The general public and civil society organisations were effectively prevented from making representations before the Court primarily due to the classification of the Bill as 'urgent' by the Cabinet.

Apart from the problematic process in introducing this legal change, the substance of the Bill too was clearly problematic. As was explained in parliament by a member of the opposition, M. A. Sumanthiran Member of Parliament (MP), the Assets Act was defective in that it amounted to a vague law that was *ad hominem* (Speech by Sumanthiran 2011). The law was *ad hominem* as only one under-performing enterprise was listed in the given schedule. With regard to that enterprise the Assets Act is defective *ex facie* as litigation had already been initiated to determine among other things, the economic viability of the enterprise. The law was vague as it provided no test with which the state could measure whether an enterprise was under-performing and whether assets were under-utilised. The definitions provided for the terms 'under-utilised asset' and 'under-performing enterprise' are the only standards by which those concepts are to be understood.[44] Additionally the Act provided no guidelines or a standard for

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42 *Revival of Underperforming Enterprises and Underutilised Assets Bill* SC SD No 02/2011, delivered on 08th November 2011.

43 Preamble of the Underperforming Enterprises and Underutilised Assets Act No. 43 of 2011.

44 "Underutilized Asset" means – (a) land that was owned by the Government or a Government Agency and alienated within a period of twenty years prior to the date of the coming into operation of this Act to any person, by transferring freehold or leasehold rights or through a divestiture on the basis that the related operations proposed to be carried out on such land will result in generating employment, foreign exchange earnings or savings or economic activities, beneficial to the public, but where such benefits as aforesaid have not accrued, being prejudicial to the national economy and public interest; (b) land owned by a person that had been granted within a period of twenty years prior to the date of the coming into operation of this Act, either, any tax incentives under any law relation to the imposition and recovery of any tax, incentive under the Board of Investment of Sri Lanka Law, No. 4 of 1978 or regulations framed there under , or any Government Guarantees, on the basis that the related operations proposed to be carried out by such person will result in generating employment, foreign exchange earnings or savings or economic activities, beneficial to the public, but where such benefits as aforesaid have not accrued, being prejudicial to the national economy and public interest; "Underperforming Enterprise" means a company or other authority, institution or body established by or under any written law for the time being in force, in which the Government owns shares and where the Government has paid contingent liabilities of such enterprise and the Government is engaged in protracted litigation with regard to such Enterprise, which is prejudicial to the national economy and public interest.' (Section 9 of the Act)

the determination of the amount of compensation for persons affected by the acquisition of assets or enterprises.

Regrettably, the Supreme Court did not apply its mind to the above mentioned defects of the Bill in determining that the Bill was in conformity with the Constitution. The reasoning of the Court was that the classification of enterprises as under-performing and assets as under-utilised were reasonable and had a rational nexus to the objective of the proposed Bill and therefore was not in violation of Article 12(1) of the Constitution. It is submitted that the classification however was only a description of assets and enterprises and did not provide a test for evaluating the same.

The Act was passed in parliament with 122 voting in favour and 46 voting against the Bill (Lankapress 2011). It has been stated that even two days before the adoption of the Bill in parliament, parliamentarians themselves had not received copies of the proposed law in either of the two national languages (Wickramaratne 2011).

The legislative history of the Assets Bill suggests that the procedure for law reform has been taken advantage of by the executive branch of the government. The abuse of the parliamentary mechanisms for development of legislative policy has also reduced the confidence People had placed in that institution. The reluctance on the part of the judiciary to intervene and push back the legislature and/or the executive leaves the citizen without any meaningful remedy in the legal sphere to resist this usurpation of the People's legislative power.

6.1.5. Employees' Pension Benefits Fund Bill[45]

This proposed Bill sought to introduce a pension fund which was mandatory for the private sector. The Bill provided that only the contributor and his surviving minor children could benefit from the fund and that a contributor shall be a member of the fund only as long as the individual account in the fund carried a positive balance.

The Court determined that in light of the undertaking by the government that those clauses will be revised, that the Bill would be consistent with the Constitution. The government undertook to permit the surviving spouse to be a beneficiary and to extend membership of the fund to a member's lifetime. In requiring those revisions however, the Court makes no jurisprudential determinations or observations.

The text of the determination suggests that the Court is acting as a facilitator while hearing the petitions in improving the substantive aspects of the Bill rather than as the highest judicial court of the land which is vested with the exclusive authority to issue binding interpretations of the Constitution.

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45 SC SD No. 01/2011, delivered on 5th May 2011.

6.1.6. Town and Country Planning (Amendment) Bill[46]

The government proposed a bill for the planning of urban spaces titled 'Town and Country Planning (Amendment) Bill'. Planning measures proposed under that Bill were to have island wide effect including the North and East.

Petitioners challenged the Bill on the basis that it dealt with land which was a devolved matter under the Ninth Schedule of the Constitution. Therefore it was argued that the Bill has to be referred to all the Provincial Councils for approval. The Supreme Court upheld this reasoning after evaluating the scope of the proposed Bill. The test adopted by the Court in this regard was:

> In determining the question as to whether a subject matter is dealing with the National Policy or not, it would (…) be necessary to consider the nature of the provisions contained in the Bill, its purpose and object in the light of the provisions contained in the Thirteenth Amendment to the Constitution and the three Lists enumerated in the Ninth Schedule to the Constitution. (*Town and Country Planning (Amendment) Bill, 2011* Hansard: 428)

Accordingly Court declined to rule on the other substantive arguments made by petitioners and held that the Bill had been placed in the Order Paper of Parliament contrary to Article 154(G)(3) of the Constitution. That Article requires parliament to refer bills that related to matters listed in the Ninth Schedule to be referred to all Provincial Councils. Subsequent newspaper reports stated that the government has decided to withdraw the Bill (Fonseka & Raheem 2011).

The willingness of the Court to consider the purpose and objectives of the proposed law in relation to the purpose of the 13th Amendment is worthwhile noting. Arguably it indicates a willingness of the Court to look at legislative reform from a policy perspective and to critically evaluate it on the basis of principles of devolution; which were introduced by the 13th Amendment albeit not in a satisfactory manner. Given that one of the most contested issues in the ethnic conflict relates to the question of devolution of state power this Special Determination could be considered as perhaps one small step taken in the direction of furthering political reconciliation.

6.1.7. The Divineguma Bill[47]

The *Divineguma* Bill sought to repeal the *Samurdhi* Authority of Sri Lanka Act (No. 30 of 1995) the Southern Development Authority of Sri Lanka Act (No. 18 of 1996) and the *Udarata* Development Authority of Sri Lanka Act (No. 26 of 2005) and to amalgamate the institutions

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46 Town and Country Planning (Amendment) Bill, SD 03/2011, delivered on 3rd December 2011.

47 *Divineguma* Bill SD No. 01, 02, 03/2012.

that had been set up under the respective legislation to establish a new department that would be called *Divineguma*. The establishment of community-based organisations and banks were two of the stated objectives of this proposed Bill. This Bill was challenged on the basis that even though the proposed legislation claimed to provide for national policy on matters such as poverty alleviation and food security (functions allocated to the Centre as per the Ninth Schedule) in fact, it provided for planning and implementation of those policies as well (power allocated to the Provincial Councils as per the Ninth Schedule) (CPA 2013). Relying on the 'functional test' used by the Court in the Special Determination on the *Town and Country Planning Amendment Bill*, it was argued that the Bill ought to be referred to the Provincial Councils as many clauses of the Bill related to devolved matters. It was also argued that the Bill contained many vague phrases which had no statutory definition.

Court agreed with the petitioner that the Bill related to many items in the Provincial Council list and that the Bill had been placed in the Order Paper of Parliament in violation of Article 154(G)(3). In arriving at this conclusion Court observed as follows:

> It is not disputed that the Provincial Councils came into being as a result of the introduction of the Thirteenth Amendment to the Constitution in 1987. The object was to achieve a more democratic constitutional regime on the basis of the power which was hitherto vested with the Central Government, being devolved to the Provincial Centres. By this process, in terms of Article 154(g), certain restrictions have been placed with regard to enacting laws by the Centre over the subjects which are specifically devolved to the Provincial Councils. When there are such restrictions, those cannot be overcome by a mere reference of national policy. Such actions would only negate the whole purpose of the introduction of Provincial Councils in order to devolve power. (*Divineguma* Bill, SD No. 01, 02, 03/2012: 32)

The Court follows the same reasoning that was adopted in the Special Determination on the *Town and Country Planning (Amendment) Bill.* Court builds further on that reasoning by articulating the larger political purposes of the introduction of the 13th Amendment to the Constitution. Court declined to make a ruling on the substantive aspects of the Bill until the requirement under Article 154(G)(3) was satisfied. The substantive challenges to the Bill included challenges that argued that the authority vested with the new authority was vague, broad and lacked adequate checks and balances.

The *Divineguma Bill* determination considered together with the *Town and Country Planning Amendment Bill* determination suggests a move towards more robust thinking on the part of the judiciary as to their role in the judicial review of bills.[48]

[48] The response of the government to the determinations on the *Divineguma* Bill by the Supreme Court was one of resistance. The impeachment motion against the Chief Justice followed immediately after and the political and legal events that ensued led to a constitutional crisis. Please see the Postscript to this paper in this regard.

6.2. A Mixed Approach to the Protection of Fundamental Rights

6.2.1. The Constitutional Council Case

Only one Constitutional Council was appointed under the 17th Amendment. Fresh appointments were not made to the Constitutional Council due to disagreements between political parties as to who should be nominated to the Council. President Rajapaksa re-assumed the power of appointment to the different commissions etc and made appointments in violation of the 17th Amendment. Attempts to compel the President to constitute the Constitutional Council through litigation failed as the Supreme Court refused to call the President to account in the case of *Sumanasiri Liyanage v Mahinda Rajapaksa* (2011). Citing previous (and more progressive) jurisprudence of the Supreme Court, the petitioner argued that Article 35 of the Constitution provides only a limited form of immunity to the president:[49] immunity to the *person,* not to the acts of the president and immunity only as long as the president holds office.[50] The determination of the judiciary however was that due to the immunity granted to the president under Article 35 there was an absolute prohibition on litigation being instituted against him/her while such person holds that office.[51] The Court went on to hold that the President cannot be made a party to an action (except in situations identified in Article 35(2)). Accordingly the preliminary objections of the Attorney-General were upheld and the application was dismissed.

The petitions which were filed in 2008, were taken up for argument in November 2010 and the judgment was issued in March 2011, by which time the 18th Amendment had already been adopted. The Supreme Court's response to the issue was delayed to a point where the response became irrelevant. The judicial approach to the issue was disappointing as the Court chose to be cautious and adopted a narrow and literal interpretation of the relevant provisions of the Constitution without lending its mind to the underlying issues of constitutionalism and the rule of law. The violation of the 17th Amendment therefore could not be prevented and eventually the Rajapaksa government introduced the 18th Amendment to repeal the 17th amendment.

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49 '(1) 'While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity. (...)'.(Article 35 of the Constitution)

50 The petitioner relied on the case of *Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections* [2003] 1 Sri LR 177.

51 '(1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) 18[relating to the election the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:]Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General'.(Article 35 of the Constitution)

6.2.2. The PTA Regulations Case[52]

The continued state of emergency, declared under the Public Security Ordinance,[53] was a significant issue in the aftermath of the war. In August 2011, the President declared that the state of emergency will lapse.[54] However, new regulations were introduced under the PTA, to provide for, the continued detention of suspects detained under the former Emergency Regulations; the proscription of the LTTE; and the authority to keep surrendees under rehabilitation (Weliamuna 2011). Several of those regulations were challenged.

The Court dismissed the case having heard the petitioners and the respondents on both preliminary objections raised by the respondents and the merits of the application. The finding of the Court was that there was no basis to grant leave to proceed. The Court did not provide any reasons for coming to this conclusion.

Not providing any reasons for the refusal to provide leave for the application to proceed is problematic in particular in this type of politically sensitive application. It leaves all stakeholders second guessing the reasons for the decision of the Court. Furthermore, as has been pointed out elsewhere in this paper, the very nature of judicial decision-making requires that the Court clearly articulates the reasons for its decisions.[55]

6.2.3. The Z Score Case[56]

In this case some students who sat for the General Certificate in Education (GCE) Advanced Level in 2011 claimed that their right to equality (Article 12(1) of the Constitution) was violated due to the new common formula (pooled Z score method) (*Kavirathne v Commissioner General of Examinations* 2012: 11) used to calculate the Z score of candidates. The Z score is used to determine eligibility of candidates for entrance to state universities. Petitioners argued that irrespective of whether a candidate sat for the examination under the new or the old syllabus they were treated similarly which they claimed was an arbitrary deviation from past practice.

Supreme Court held that the petitioners' right to equality had been violated and that the classification of both groups of candidates as one was arbitrary. Through an analysis of both Sri Lankan and Indian case-law, the Court arrived at the following test for evaluating whether a classification is reasonable or not:

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52 *CPA v Sec'y Ministry of Defence* SC(FR) No. 453/2011, SC Minutes 13th October 2011.

53 Public Security Ordinance No. 25 of 1947 (as amended).

54 http://news.lk/v2/index.php?option=com_content&view=article&id=18786:sri-lanka-lifts-emergency-regulation&catid=62:latest-news&Itemid=371 accessed on the 2nd of October, 2012.

55 See the discussion under section 2 of this paper.

56 *Kavirathne v Commissioner General of Examinations* SC (FR) No. 29/2012 SC Minutes 25th of June 2012.

> (...) [I]n order to overcome the test of permissible classification, it is necessary to fulfil two conditions which are as follows:
> 1. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and
> 2. That differentia must have a rational relation to the object sought to be achieved by the statute in question (*Kavirathne v Commissioner General of Examinations* 2012: 19-20).

Court applied the no-evidence rule in arriving at the conclusion that the decision to group both sets of candidates together was arbitrary. The nature of the University Grants Commission (UGC) and the unique powers vested with the Commission were other factors the Court took into account in arriving at this conclusion:

> The University Grants Commission is the only authority in Sri Lanka, which is empowered to determine the courses that shall be provided at the Universities, and select students for admission to Higher Educational Institutions in the country. It is indeed an onerous duty, which is cast upon a single authority such as the University Grants Commission. When such type of authority is entrusted to a responsible institution such as the University Grants Commission, the Commission has a duty to act reasonably, objectively as well as without any bias. Furthermore in dealing with the selection of students to Universities which has for many years become extremely competitive, the University Grants Commission should act with a scheme which is transparent and should be in a position to produce the relevant material on which the decisions were made. A mere statement to the effect (...) would not be sufficient. (*Kavirathne v Commissioner General of Examinations* 2012: 29-30)

Another significant aspect of the judgment is the elaboration by the Court of the right to Education in Sri Lanka. Court interprets the right to equality in light of the Directive Principles of State Policy and the Universal Declaration of Human Rights[57] and holds that:

> (...)[A]lthough there is no specific provision dealing with the right to Education in our Constitution as such in the Universal Declaration of Human Rights, the said right has been accepted and acknowledged by our Courts through the provisions embodied in Article 12(1) of the Constitution.
>
> In doing so, the Supreme Court has not only considered that the Right to Education should be accepted as a fundamental human right, but also had accepted the value of such Education (...). (*Kavirathne v Commissioner General of Examinations* 2012: 36)

Court accordingly ordered that the Z scores be declared null and void, that the new Z scores should consider the two batches of candidates as two different populations and that the new score should be duly released.

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57 Universal Declaration of Human Rights of 1948.

The judgment in the Z score case is well reasoned and provides a progressive analysis of the right to education as it ought to be understood in Sri Lanka. The Court refers to the significance of the Z score issue from a grounded perspective and also emphasises the relevance of Sri Lanka's international obligations in this regard. It has chosen a purposive and dynamic approach to the interpretation of its mandate under Article 126 and is transparent as to that understanding. The Court's approach to the issue is broad based and is sensitive to the policy perspectives as well. The observations as to the degree of accountability of the UGC are also significant; the duty of disclosure regarding changes in policy and the duty to provide reasons for decisions of public institutions such as the UGC are affirmed in this decision.

The model for judicial reasoning presented in this case is an effective one. Clearly identified legal principles are used to interpret constitutional provisions so that they continue to remain relevant in a changing social context. Accountability for public power is affirmed and emphasised. It is submitted that such an approach, if adopted in the other Fundamental Rights determinations, may have a more positive impact on governance in Sri Lanka in the post-war context.

6.2.4. Cases regarding Detainees

Many persons detained under the then Emergency Regulations[58] have sought to invoke the fundamental rights jurisdiction of the Supreme Court to challenge the legality of their detention and arrest. The prohibition on torture (Article 11)[59] and the prohibition on arbitrary arrest and detention (Article 13)[60] comprise the core of the right to liberty in the Constitution. The recent judicial approach regarding the right to liberty has been analysed in more detail in *Judicial Response to the Right to Liberty in Terms of the Fundamental Rights Jurisdiction of the Supreme Court (2000-2007)* (Jayachandra & Samararatne 2011). One of the issues that was highlighted in that study was the issuing of bench orders as a practice in dealing with applications complaining of the violation of the right to liberty. Case details gathered for the purpose of this paper suggest that the Court continues with this practice post-2009. As will be demonstrated in this section, this practice could have grave consequences for the normative value attributed to the right to liberty and the related fundamental right to be free from arbitrary arrest and detention. It must be noted, however, that the cases analysed below are only representative and that the findings in this regard are provisional. A more detailed study must be undertaken to evaluate this issue more carefully.

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58 The Emergency Regulations include *Emergency (Miscellaneous Provisions and Powers) Regulation* No. 4 of 1994, Gazette Notification No. 843/12 4th November 1994, *Emergency (Miscellaneous Provisions and Powers) Regulation* No. 1 of 2005 Gazette Notification No. 1405/14 13th August 2005.

59 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.(Article 11 of the Constitution)

60 '(1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law. (…)' (Article 13 (1) and (2) of the Constitution)

Twenty one Fundamental Rights applications that had been filed by detainees post-2009 will be relied on in making provisional findings in this section.[61] The cases were obtained by making contact with the respective lawyers who had appeared for the petitioners. The sample therefore is random and its contents were determined primarily by accessibility and availability.

All the cases involve arrest and detention of persons of Tamil ethnicity. The reasons for the arrest are not provided to the detainee at the time of arrest. The detained persons access a lawyer generally through a family member and file a fundamental rights application complaining of a violation of the right to be free from arbitrary arrest. In some of the cases, petitioners also claim that their right to be free from torture is also violated. In some other cases, petitioners claim that they were forced to sign a document that was written in Sinhala, while in detention.

In all these cases, the Supreme Court chooses to issue bench orders allowing the petitioner to withdraw the application based one of the following reasons; that the Attorney-General has decided to indict the petitioner in the relevant High Court; that the petitioner is to be sent for rehabilitation; or that the petitioner has been released. The fundamental rights issue as to whether the petitioner's right to liberty has been violated is not determined and remains an unanswered question at the point of dismissal of the case.

From a normative perspective this approach is cause for serious concern. The withdrawal and dismissal of the case suggests that the fundamental rights jurisdiction is being used by the petitioner only to compel the relevant authorities to take some action regarding the petitioner and to end the uncertainty with regard to prolonged detention. The Court permits this process by accepting the state's commitment to Court and thereby avoids a determination on the substantive rights issue. In essence therefore the Supreme Court plays the role of a facilitator between the petitioner and the government.

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61 *Appathuray Vinayagamoorthy, Attorney-at-Law (on behalf of Balasubramaniya Karthika) v IC Wellawatte* SC (FR) 181/2009, SC Minutes 6th March 2009; *Appathuray Vinayagamoorthy, Attorney-at-Law (on behalf of Muththusamy Lavan) v OIC Kandy Police Station*, SC (FR) 560/2009, SC Minutes of 9th September 2010; *Appathuray Vinayagamoorthy, Attorney-at-Law (on behalf of Prabakaran Dheepakar) v OIC Ingiriya Police Station*, SC(FR) 564/2009; *Perumal Velaytham v OIC (TID) Vavuniya* SC(FR) 584/2009 SC Minutes 11th January 2010; *Sirappiragasam Prasanna v OIC Kirilapone* SC(FR) 395/2010, SC Minutes 29th July 2010; *Sivalingam Dinesh Kumar* SC(FR) 479/2010; *Weerasingham Raja* SC(FR) 480/2010; *Mahalingam Baskaran v Lt Mahapalage D N Gunatileke, Thekawatte Army Camp, Vavuniya* SC(FR) 602/2010, SC Minutes 11th of November 2010; *Puvenandran Nitharsan v Commandant, STF, Puthayalpitty Camp* SC(FR) 603/2010, SC Minutes 11th of November 2010; *Kanagarajah Hyacinth Asuntha v OIC Pettah Police Station* SC(FR) 98/2011, SC Minutes 2nd May 2011; *Sabaratnam Parameswaran v OIC Borella Police Station* SC(FR) 131/2011 SC Minutes 3rd March 2011; *Mylvanaanam Annaletsumi v OIC CID Colombo* SC(FR) 168/2011 SC Minutes 5th December 2011; *Sanmugam Rajith Kumar v Omanthai Army Camp* SC(FR) 243/2011 SC Minutes 12th July 2011; *Sabaratnam Ganeshan v OIC, CID Colombo* SC(FR) 264/2011 SC Minutes 26th of July 2011; *Palipody Thevakumar v Commander Omanthai Army Camp* SC(FR) 342/2011 SC Minutes 21stNvember 2011; *Kantalingam Thangala v Commandant Omanthai* SC(FR) 364/2011 SC Minutes 28th March 2011; *Thangarasa Santhiramohan v Director TID Colombo* SC(FR) 372/2011 SC Minutes 11th January 2011; *Iruthayanathan Kennady v Commander Omanthai Army Camp* SC (FR) 485/2011 SC Minutes 23rd November 2011; *Aiyathurai Subaskaran v OIC, TID Colombo* SC(FR) 486/2011 SC Minutes 23rd of November 2011; *Sathasivam Krishnaveni v OIC Seeduwa Police Station* SC(FR) 542/2011 SC Minutes 21st March 2012; *Arumugam Ananthan v Omanthai Army Camp* SC(FR) 549/2011 SC Minutes 1st March 2012.

The reasons for this approach to the applications challenging detentions are not clear. Not making a judicial determination on whether the right to liberty had been violated or not reduces from the constitutional guarantee of the right to liberty. It also suggests that the Court is willing to side step a judicial determination as long as the detainee is indicted, released or sent for rehabilitation.

From the perspective of political reconciliation too the practice of allowing for the withdrawal of petitions in light of commitments made by the government, is problematic. In each case that has been analysed for this section, the petition claims that he or she has been subjected to unlawful detention for prolonged periods and in some cases even beyond two years. The fundamental rights mechanism is one method by way of which the narratives of such persons is given a due hearing and where a lawful determination regarding that narrative can be made. Not allowing for that determination therefore amounts to depriving a petitioner of the opportunity to vindicate her rights.

The gravity of this issue will be illustrated through the facts related in one of the petitions analysed for this section. Given that no judicial determination was made in the matter, anonymity of the petition will be maintained. *Seetha*, pregnant with child, was detained by the authorities in April 2009, when she was attempting to cross over to the government-controlled area during the war. She claims that her husband was killed during the last phase of the war. It is only in November 2009 that she is produced before a Magistrate. In December that year, she gives birth while in custody. By the time she files a fundamental rights application, her child is over one year old. *Seetha's* detention had been extended periodically before the Magistrate Court within the prison in which she was detained. In her fundamental rights application *Seetha* claims that her right to be free from arbitrary arrest and detention has been violated, among other things. The application was eventually withdrawn on the basis that the petitioner was to be sent for rehabilitation. It is evident that the story of *Seetha* and that others who had similar experiences, if true, have to be taken very seriously, if political reconciliation is to be brought about in Sri Lanka. Not making a judicial determination in the matter of *Seetha's* case therefore is one opportunity lost for the promotion of political reconciliation through the judiciary and for the upholding of the fundamental rights guarantee to an individual who sorely needed it.

6.3. A Cautious and/or Passive Judiciary?

It has been demonstrated above that the jurisdiction of the Supreme Court relating to the review of bills and the determination of fundamental rights applications provide two very different but complimentary mechanisms through which the Court is well-positioned to give expression to its judicial mandate for political reconciliation.

The above undertaken analysis suggests however that the judiciary has been very cautious in exercising its mandate in both those mechanisms.

6.3.1. Special Determinations

Three trends are apparent in the study of the special determinations of the Court. The determinations regarding the 18th Amendment to the Constitution, the Assets Bill and the Local Authorities Elections Bill represent a strongly positivist and conventional judicial approach. It is even possible to argue that the judicial approach reflected in those determinations reduces accountability in governance, has a negative impact on the practice of democracy and results in strengthening the arm of the Executive.

This experience suggests that the pre-requisites for political reconciliation are not perhaps present in Sri Lankan society and that the judiciary is not making relevant interventions where opportunities present themselves to address those issues through their judicial mandate.

The determinations on the *Town and Country Planning Bill* and the *Divineguma Bill* represent a more progressive judicial approach. The judiciary has adopted a purposive and dynamic interpretation of the Constitution and attempts to interpret the proposed legislation also as a whole. That approach allows the judiciary to consider an understanding of constitutionality that is more relevant to the political and social context of post-war Sri Lanka. The judicial approach in the *Parliamentary Elections Bill* and *Pension Benefits Bill* determinations reflect an in-between approach. The Court arrives at fairly progressive outcomes but does not engage fully with those issues.

There is some reason to hope. The more progressive decisions have been delivered more recently and could perhaps be a signal of a shift in the judicial attitude. While such a shift is very much within the constitutional mandate of the judiciary and is extremely desirable particularly in the context of a powerful Executive, the Court needs to be more articulate and creative in the development of its jurisprudence in this area. In general, the perception of the Court regarding its jurisdiction in this area must become broader and the Court might then be more willing to engage with broader constitutional issues in these determinations.

6.3.2. Fundamental Rights Jurisprudence

Given that only a selected number of cases were analysed within the fundamental rights jurisdiction, only provisional findings can be made in this regard. Even through the analysis of selected case law, it seems that the shift evident in the judicial attitude regarding special determinations is also evident in the fundamental rights jurisdictions. The Constitutional Council case and the PTA Regulations case epitomise a judicial approach that can be contrasted with the approach in the Z score case. The former is government centric and suggests an extremely restrictive role for the judiciary while the Z score case suggests a more dynamic, socially relevant and reasoned approach.

The findings made with regard to the detainee cases fall into a separate category. It suggests that the Court has not been inclined to making judicial determinations with regard to the right to liberty of these persons. A more detailed and close study of these cases is urgently required in order to more fully understand the judicial approach, the possible reasons for it and also to understand the impact of this trend on political reconciliation.

7. Evaluating the Contribution of the Supreme Court to Political Reconciliation

This section looks at several principles of public law that have been considered and/or overlooked by the Supreme Court in the instances of constitutional adjudication discussed in section six of this paper. This section will focus particularly on implications of the responses of the Court to the possibilities of political reconciliation in the post-war context in Sri Lanka.

7.1. Devolution

Except in the Special Determinations on the *Town and Country Planning (Amendment) Bill* and the *Divineguma Bill* the Court seems to demonstrate a pro-centre judicial philosophy. Even in the aforementioned Special Determinations, the only argument that seems more inclined towards devolution is the functionality argument where the Court holds that the actual effect of a proposed bill can only be understood when the bill is read as a whole and where a purposive interpretation is adopted. It is unfortunate that the Court views the legislative policies of the proposed bills in isolation from the legal and political context in which they are proposed as law. If the Court was willing to adopt a broader and contextualised perspective it could have made pronouncements on the value of upholding the constitutionally recognised principle of devolution particularly in the post-war context. The narrow interpretation adopted in the *Local Authorities Elections Bill* on the applicability of Article 154 (G) (3) suggests that the Court is not particularly sensitive to the principle of devolution and its judicial obligation to assert that constitutional value.

7.2. Elections

The regulation of elections has been traditionally considered as having a direct bearing on the quality of democracy in any society. The significance of the right to vote and the regulation of elections in a manner that guarantees the franchise of all persons is that much more in a multi-ethnic society. The claim that minorities are not guaranteed adequate political representation has been one of the claims made by Tamil political parties in the pre-independence period and in its immediate aftermath. Subsequently however, that claim gave way to demands for political representation through power-sharing arrangements.

In the special determinations on the *Local Authorities Elections Bill* and the *Parliamentary Elections Bill* the judicial reasoning does not reflect any of those considerations. The reform of election laws in the Sri Lankan post-war context is an opportunity to ensure minority representation

and participation in governance. As demonstrated through the original proposed bills, in a situation where legislative policy does not reflect such a will, it is essential that the judiciary reminds the government of its obligations with regard to political reconciliation.

7.3. Right to Liberty

Violations of the right to liberty particularly of Tamils have been a serious concern during the ethnic conflict in Sri Lanka. There are many known instances where the PTA and the Emergency Regulations have been abused and many persons have been subject to unlawful and arbitrary arrests and detention and also subjected to torture.

Considered against this context, the response of the Supreme Court to fundamental rights applications claiming a violation of their right to liberty is unsatisfactory. Where petitioners have sought to move the Court on their right to liberty, the Court seems to prefer to take a non-adversarial, mediatory approach by allowing for withdrawal of petitions. For reasons that are not apparent, the Court avoids making a judicial pronouncement on these applications.

Political reconciliation, as argued for in this paper, requires the incorporation of the narratives of victims of the conflict to the dominant narratives, the respect for the capabilities of those victims including the capability of being respected. Judicial determinations particularly of the fundamental rights applications made by Tamils of the war-affected areas, would be one the best possible methods of achieving those outcomes. The Sri Lankan Supreme Court however, has not explored that possibility in a meaningful way from May 2009 to August 2012.

7.4. Constitutionalism

The post-war public law jurisprudence of the Supreme Court contains no engagement with principles of constitutionalism. The 18th Amendment to the Constitution provided the Court with a unique opportunity to delve into the relevance of those principles to constitutional adjudication in Sri Lanka. The challenges made to the 18th Amendment also opened up a deliberative space in which standards of accountability, transparency and inclusivity could have been analysed. Given that it was the first constitutional amendment in the post-war context, the Court could have been both assertive and creative in its deliberations and in its determination. The need to reform the constitutional framework to promote national reconciliation, the need to reform laws and constitutions for the benefit of all people (both majority and minorities) are two examples of issues that the Court ought to have applied its mind to.

7.5. Approach to 'Constitutionality'

The Court's interpretation of 'constitutionality' of proposed constitutional amendments and bills seems to be very positivist. The jurisprudence analysed suggests that the Court is satisfied if the challenged provisions of a bill or a constitutional amendment does not overtly violate the existing constitution. The Court seems reluctant to consider arguments that refer to the

spirit of the constitutional provisions or broader considerations related to governance. The judicial opinion on the voluntary and combined quota for women and youth is a case in point. Moreover, in general, the Court does not seem to consider political reconciliation as an aspect of the concept of 'constitutionality'. In constitutional adjudication it is essential that the law is interpreted in a contextual and relevant manner and it can be argued that post-2009, political reconciliation ought to be a primary consideration in such adjudication.

7.6. Prohibition on Discrimination

The judicial attitude to the prohibition on discrimination found in Article 12 of the Constitution is formal. In the challenges to legislative policy regarding participation of women in local authority elections and the voting of persons with disabilities, the Court does not venture beyond making rulings on the constitutionality or unconstitutionality of the relevant clauses. The potential for social change through judicial interpretations of the constitutional prohibition on discrimination is high. A post-war political context ought to present an added incentive for such a response. The Sri Lankan Supreme Court however, does not seem to be exploring such judicial possibilities.

8. The Challenges of Political Reconciliation through Jurisprudence

Through different arguments on constitutional adjudication and an analysis of selected jurisprudence, this paper has sought to achieve two objectives. One was to make the argument that the Sri Lankan judiciary are able to contribute to political reconciliation through their existing mandate. The other was to inquire as to the degree to which this has already been operationalised. The analysis of Special Determinations from May 2009 to August 2012 and selected fundamental rights applications suggest that the judiciary's contribution in this regard remains inadequate.

However, it must be noted that, due to limitations in the methods that had to be adopted for the study, only provisional findings could be made. Those findings suggest that there is an urgent need for a sustained, systematic and critical study of jurisprudence of appellate courts if a better understanding is to be reached as to both the content and the impact of the jurisprudence of the appellate courts in Sri Lanka on political reconciliation. The responsibility for such work falls on the state, universities and the legal profession due to their expertise and access to the relevant information.

The analysis undertaken in this paper suggests that if political reconciliation understood as capabilities is to be achieved to a satisfying degree through the appellate courts in Sri Lanka, the Court needs to adopt a more dynamic and broader understanding of its role. The judiciary ought to face the challenges of government by adjudication more creatively. Historically, most judges who have had a progressive impact on society through their judicial determinations have also been known for espousing a distinctive philosophy and/or vision regarding their

role. If the Sri Lankan judiciary is to fully realise its potential within the existing constitutional framework as argued for in this paper, it is essential that such a judicial outlook is developed and is also made apparent through the work of the courts. Additionally, the courts also require that more physical and human resources are made available to the judges so that they are able to be more efficient and productive in their work.

It is submitted that the jurisprudence of both appellate and lower courts ought to be viewed relationally; that is to say as an on-going dialogue between the judiciary, the other branches of government and society in general, as to the progress Sri Lankan society ought to make through the institution of the law. Such an approach to jurisprudence might be helpful for all stakeholders as it encourages a contextualised understanding of how both the law should be developed and the judicial approach that should be adopted.

Such an approach to the jurisprudence of the appellate courts could improve the judicial work carried out in the lower courts. The availability of up-to-date information and analysis of the appellate court jurisprudence would be helpful to the rest of the judiciary in the development of their judicial philosophy.

While it is accepted that the role of the judiciary in political reconciliation is limited to some degree by the type of litigation that comes before them, the issues regarding access to justice in the Sri Lankan legal system must also be taken into account. The Supreme Court for instance, is located in Colombo and operates primarily in English. The jurisprudence of the Court is recorded and published in English. It has been argued elsewhere by this author that those factors undermine the access that ought to be afforded to all members of society and also has a negative impact on the rights guaranteed of the constitution (Jayachandra & Samararatne 2011).

The access to justice must also be considered in evaluating the role of the Supreme Court in political reconciliation. It has already been pointed out elsewhere that individuals in general and particularly the victims of war who live in the Northern and Eastern Provinces are unable to access the appellate courts (See Pinto-Jayawardena & de Almeida Guneratne 2011; Jayachandra & Samararatne 2011). Due to poverty many of them are unable to make the journey to Colombo and also lack the capacity to participate in a litigation process. Even though Sri Lanka enjoys a high level of literacy (as per official statistics), many lack the capacity to understand and meaningfully employ mechanisms of constitutional adjudication to assert their rights (Central Bank Statistics 2012).[62] Due to the peripheral position they occupy in society, most find it difficult to access lawyers, police officers and other professional whose assistance they need if they are to engage in litigation to defend their rights. Even for those who surmount those obstacles and access the courts, the proceedings are alien to them and some of them are unable to see the relevance of the process to the injustice that they have

62 The literacy rate in Sri Lanka is 91.9% as stated in a report by the Central Bank.

suffered. These are significant issues that go to the heart of political reconciliation. If they are not addressed, these problems could completely undermine the ability of the Supreme Court to contribute to political reconciliation.

9. Conclusion

This paper has sought to establish that in the post-war context in Sri Lanka, political reconciliation measured through the capability of being respected, of being a recognised member of a political community, of being an effective participant in the life of a community and the capability of achieving basic minimum standards in life demands that the Supreme Court judiciary adopts a purposive approach to the interpretation of the Constitution. The judiciary ought to consider its mandate for constitutional adjudication also as mandate for defending the underlying values of a democratic society and through that for the review of its role in an evolving society.

Political reconciliation when understood as capabilities provides many opportunities for the state through its institutions to make an effective transition from war to peace. This paper has sought to argue that the judiciary has a specific mandate to engage with and/or contribute towards political reconciliation. The Sri Lankan Constitution provides a clearly identifiable framework for constitutional adjudication which includes political reconciliation as a component of the judicial mandate. In evaluating the post-war jurisprudence of the Supreme Court however, it seems as if the Court has not asserted its authority to the extent that it is authorised under this mandate and has therefore left unexplored the different possibilities that the mandate presents for political reconciliation.

10. Postscript

Since August 2012, the judiciary in Sri Lanka have been subject to several challenges, the worst of them being a motion presented in parliament for the impeachment of the Chief Justice. The political and legal context suggests that the special determination on the *Divineguma Bill* (analysed in this paper) and the second special determination on the *Divineguma Bill* (not analysed in this paper) which together concluded that the draft bill was unconstitutional and has been a catalyst for the impeachment motion, thereby suggesting that the motion to impeach the Chief Justice amounts to an abuse of political power.

The Bar Association of Sri Lanka, the Judges' Association, religious leaders, academics and other significant institutions and personalities in Sri Lankan society condemned the impeachment proceedings primarily on the basis that it was politically motivated and that the Chief Justice was not afforded even the rudimentary aspects of a fair hearing under the parliamentary standing order under which the proceedings were conducted. When the proceedings were challenged before the appellate judiciary, the Supreme Court held that the relevant provisions of the Constitution must be interpreted to mean that an impeachment

proceeding must be provided for by law. Accordingly the Court of Appeal held that the impeachment proceedings were null and void.

Disregarding the judicial determinations, parliament voted in favour of impeaching the Chief Justice and the President issued a warrant to the same effect. Within a matter of days a new Chief Justice was appointed even though the incumbent continued to declare that as per the judicial determination, the impeachment proceedings were null and void.

The outcome of the impeachment process has, to say the least, undermined the independence of judiciary in Sri Lanka, at least for the time being. Therefore, the possibilities for promoting and asserting the need for political reconciliation in Sri Lanka through the judiciary are arguably limited. The response of the Executive and the Legislature to the judicial institutions and the Bar during the impeachment process, clearly suggests that those two organs consider political expediency to be of utmost value and that the rule of law and democratic values have no significant bearing on them.

References

Austin, J. *The Province of Jurisprudence Determined* (W Rumble (ed) Cambridge University Press) (first published, 1832).

Boucher, D. and Kelly P. (eds). 1994. *Social Contract from Hobbes to Rawls.* Routledge: London.

Centre for Policy Alternatives (CPA) (January 2013) *Note on the Divineguma Bill*, available at, http://www.cpalanka.org/an-explanatory-note-on-the-divineguma-bill/ (accessed on the 30th of January 2013).

Dicey, A.V. (1914) *Introduction to the Study of the Law of the Constitution.* (8thed.). Oxford: Oxford University Press. Available at http://www.constitution.org/cmt/avd/law_con.htm accessed on the 16th of October 2012.

Dworkin, R. 2003. "The Judge's New Role: Should Personal Convictions Count?". *International Criminal Justice* 1(1): 4-12.

Dwyer, S. 1991."Reconciliation for Realists". *Ethics & International Affairs,* 13(1): 81-98.

Edrisinha, R. and Jayakodi, A. (eds). 2011.*The Eighteenth Amendment to the Constitution; Substance and Process.* Colombo: Centre for Policy Alternatives.

Fletcher, Laurel E. Harvey M. Weinstein, and Jamie Rowen. 2009. "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective". *Human Rights Quarterly,* 31(1): 163-220.

Fonseka, B. and Raheem M. 2011. *Land in the Northern Province: Post-war Politics, Policy and Practices,* Colombo: Centre for Policy Alternatives.

Fox-Decent, E. 2011. *Sovereignty's Promise: The State as Fiduciary.* Oxford: Oxford University Press.

Gomez, M. 2004. "Litigating to Change: Public Interest Litigation in Sri Lanka". *Sri Lanka Law College Review:* 104-26.

-------. 1998. *Emerging Trends in Public Law.* Colombo: Vijitha Yapa.

Haysom, Nicholas. 2012. "Constitution-making and Nation-building in Divided Societies" in Asanga Welikala (ed.) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* 862-898 also available at http://republicat40.org/wp content/uploads/2013/01/Constitution-making-and-Nation-building-in-Divided-Societies.pdf accessed on the 29th of January 2012.

Jayachandra, M. and Samararatne D.. (March and April 2011). "Judicial Response to the Right to Liberty in Terms of the Fundamental Rights Jurisdiction of the Supreme Court" (2000-2007), *LST Review*, 21(281-282).

Jowell, J. 2006. "Parliamentary Sovereignty under the New Constitutional Hypothesis". Public Law: 562-80.

Lankapress. (November 10th, 2011). "Sri Lanka parliament approves asset acquisition act" available at http://www.lankapress.com/?p=758 accessed on the 25th of January 2012.

Ludsin, Hallie. 2012. "Sovereignty and the 1972 Constitution" in Asanga Welikala (ed) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice.* Colombo: Centre for Policy Alternatives 289-340 also available at http://republicat40.org/wp content/ uploads/2013/01/ Sovereignty-and-the-1972-Constitution.pdf accessed on the 29th of January 2013.

Marasinghe, L. 2007. *The Evolution of Constitutional Governance in Sri Lanka.* Colombo: Vijitha Yapa Publications.

Meierhenrich, J. (Winter 2008). "Varieties of Reconciliation". *Law and Social Inquiry,* 33(1): 195-231.

Moellendorf, D. (Summer 2007). "Reconciliation as a Political Value". *Journal of Social Philosophy* 38(2): 205-21.

Murphy, C. 2010. *A Moral Theory of Political Reconciliation.* Cambridge: Cambridge University Press.

Nussbaum, M. 2006. *Frontiers of Justice; Disability, Nationality and Species Membership.* Cambridge, Massachusetts: Belknap Press of Harvard University.

-------. 2011. *Creating Capabilities: The Human Development Approach.* Cambridge, Massachusetts: Harvard University Press.

-------. and A. Sen (eds.) 2000. (first published 1993).*The Quality of Life.* Oxford: Oxford University Press.

Pinto-Jayawardena, K. and Guneratne J.de Almeida 2011. *Habeas Corpus in Sri Lanka; Theory and Practice of the Great Writ in Extraordinary Times.* Colombo: Law & Society Trust.

Puvimanasinghe, S. F. 2009. "Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest". *Sustainable Development Law and Policy,* 10(1):41-49, 86-87.

Rodley, N. S. 2008. "The Singarasa Case: Quis Custodiet: A Test for the Bangalore Principles of Judicial Conduct". *Israel Law Review* 41 500-521) available at SSRN: http://ssrn.com/abstract =1333324 accessed on the 29th of January 2013.

Samararatne, D. 2010. *Public Trust Doctrine: The Sri Lankan Version* (Democracy and Equality Programme), Occasional Paper No. 1, Colombo: International Centre for Ethnic Studies.

Sen, A. 2010. *The Idea of Justice.* Cambridge, Massachusetts: Harvard University Press.

Steyn. 2006. "Democracy, The Rule of Law and the Role of Judges". *European Human Rights Law Review,* 243-53.

Sumanthiran, M.A. (MP) (12th November, 2011) Speech in parliament as reported in Transcurrents, available at http://transcurrents.com/news-views/archives/5860 accessed on the 25th of January 2012.

Teitel, R. 2003. "Transitional Justice Genealogy". *Harvard Human Rights Journal.* 16:69-94.

-------. (May 2011) "The Military Justice System in Sri Lanka – A Supreme Court Judgment: An Opinion and a Look at Comparative Law", *LST Review*, 21(283).

Udagama, D. (16-17 December 2011). "A Critical Analysis of Post-war Constitutional Jurisprudence of the Supreme Court of Sri Lanka", 1st International Conference on the Social Sciences and the Humanities Proceedings, 1: 48-52.

------. (June 2012) "Democratisation as a Pre-Condition for Reconciliation" Keynote address at Forum for Democracy and Social Justice, Inaugural Public Forum *Post-War Sri Lanka: Toward Reconciliation and Social Justice* 2nd June 2012 held at the Russian Cultural Centre, reproduced in *LST Review*, 22(296): 1-10.

Viaene, L. and Brems E. 2010. "Transitional Justice and Cultural Contexts: Learning from the Universality Debate". *Netherlands Quarterly of Human Rights,* 28(2): 199-224.

Weliamuna, J. C. (16 September 2011) *Lifting of Emergency: Exposing the Sham Exercise* published in Groundviews and available at http://groundviews.org/2011/09/16/lifting-of-emergency-exposing-the-sham-exercise/, accessed on the 2nd of October 2012.

Welikala, A. (ed.) 2012. *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*. Colombo: Centre for Policy Alternatives.

Wickramaratne, Eran (MP), (11 November 2011) "The Expropriation Bill", *Sri Lanka Mirror*, available at http://www.srilankamirror.com/english/features/8607-the-expropriation-bill, accessed on the 25th of January 2012;
http://news.lk/v2/index.php?option=com_content&view=article&id=18786:sri-lanka-lifts-emergency-regulation&catid=62:latest-news&Itemid=371 accessed on the 2nd of October, 2012

Wickramaratne, J. 2006. *Fundamental Rights in Sri Lanka* (2nd edition). Colombo: Stamford Lake Publication.

Wickremasinghe, Maithree and Kodikara Chulani. 2012. "Representation in Politics: Women and Gender in the Sri Lankan Republic" in Asanga Welikala, (ed.) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* 772-820 also available at, http://republicat40.org/pdf/ accessed on the 29th of January 2013.

Williams, Susan H. 2012. "Gender Equality in Constitutional Design: An Overview for Sri Lankan Drafters" in Asanga Welikala (ed) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*, 821-861, also available at http://republicat40.org/wp-content/uploads/2013/01/Gender-Equality-in-Constitutional-Design-An-Overview-for-Sri-Lankan-Drafters.pdf accessed on the 30th of January 2013.

Legislation

Local Authorities Elections Ordinance 1963
Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979
Underperforming Enterprises and Underutilised Assets Act No. 43 of 2011

Regulations

Emergency (Miscellaneous Provisions and Powers) Regulation No. 4 of 1994, Gazette Notification No. 843/12 4th November 1994
Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005 Gazette Notification No. 1405/14 13th August 2005

Case law

Sri Lanka – Reported

Bulankulama v Secy Ministry of Industrial Development [2000] 3 Sri LR 243
Centre for Policy Alternatives v Dayananda Dissanayake [2003] 1 Sri LR 277
In Re the Thirteenth Amendment to the Constitution [1987] 2 Sri LR 312
Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections [2003] 1 Sri LR 177
Mediwake v Dissanayake [2001] 1 Sri LR 177
Seneviratne v University Grants Commission [1978-79-80] 1 Sri LR 182
Sunila Abeysekera v Ariya Rubesinghe [2000] 1 Sri LR 314
Vadivelu v OIC Sithmabarapuram [2002] 3 Sri LR 146

Sri Lanka – Unreported

Aiyathurai Subaskaran v OIC, TID Colombo SC (FR) 486/2011 SC Minutes 23rd of November 2011
Appathuray Vinayagamoorthy, Attorney-at-Law (on behalf of Balasubramaniya Karthika) v IC Wellawatte SC (FR) 181/2009, SC Minutes 6th March 2009
Appathuray Vinayagamoorthy, Attorney-at-Law (on behalf of Muththusamy Lavan) v OIC Kandy Police Station, SC (FR) 560/2009, SC Minutes of 9th September 2010
Arumugam Ananthan v Omanthai Army Camp SC (FR) 549/2011 SC Minutes 1st March 2012
CPA v Sec'y Ministry of Defence SC (FR) No 453/2011, SC Minutes 13th October 2011
Gardihewa Sarath Fonseka v Dhammika Kithulegoda SC Ref No 1/2010, CA (Writ) Application 676/2010, SC Minutes 10th January 2011
Heather Mundy v Central Environmental Authority SC Appeal 58/2003 SC Minutes 20th January 2004
Iruthayanathan Kennady v Commander Omanthai Army Camp SC (FR) 485/2011 SC Minutes 23rd November 2011
Kanagarajah Hyacinth Asuntha v OIC Pettah Police Station SC (FR) 98/2011, SC Minutes 2nd May 2011
Kavirathne v Commissioner General of Examinations SC (FR) No 29/2012 SC Minutes 25th of June 2012
Land Circular Case Writ application 620/2011
Mahalingam Baskaran v Lt Mahapalage D N Gunatileke, Thekawatte Army Camp, Vavuniya SC(FR) 602/2010, SC Minutes 11th of November 2010
Mylvananam Annaletsumi v OIC CID Colombo SC (FR) 168/2011 SC Minutes 5th December 2011
Nallaratnam v Singarasa SC Spl (LA) No 182/99, SC Minutes 15th September 2006
Palipody Thevakumar v Commander Omanthai Army Camp SC (FR) 342/2011 SC Minutes 21st November 2011
Perumal Velayutham v OIC (TID) Vavuniya SC (FR) 584/2009 SC Minutes 11th January 2010
Puvenandran Nitharsan v Commandant, STF, Puthayalpitty Camp SC (FR) 603/2010, SC Minutes 11th of November 2010
Sabaratnam Ganeshan v OIC, CID Colombo SC (FR) 264/2011 SC Minutes 26th of July 2011
Sabaratnam Parameswaran v OIC Borella Police Station SC (FR) 131/2011 SC Minutes 3rd March 2011
Salley v Colombo Municipal Council SC (FR) 252/2007 SC Minutes 4th March 2009,
Sanmugam Rajith Kumar v Omanthai Army Camp SC (FR) 243/2011 SC Minutes 12th July 2011

Sathasivam Krishnaveni v OIC Seeduwa Police Station SC (FR) 542/2011 SC Minutes 21st March 2012
Sivalingam Dinesh Kumar SC (FR) 479/2010
Sivappiragasam Prasanna v OIC Kirilpone SC (FR) 395/2010, SC Minutes 29th July 2010
Sumanasiri Liyanage v Mahinda Rajapakse 297 and 578/2008 SC (FR) SC Minutes 18th March 2011
Thangarasa Santhiramohan v Director TID Colombo SC (FR) 372/2011 SC Minutes 11th January 2011
Watte Gedara Wijebanda v Conservator General of Forests SC Application 118/2004, SC Minutes 5th April 2007
Weerasingham Raja SC (FR) 480/2010

Special Determinations of the Supreme Court

Local Authorities (Special Provisions) Bill and Local Authorities Elections (Amendment) Bill, SD No 02/2010 delivered on the 16th of November 2010
Revival of Underperforming Enterprises and Underutilised Assets Bill, SC SD No 02/2011, delivered on 08th November 2011
18th Amendment Bill, SD No 01/2010, SC Minutes of 31st August 2010
Divineguma Bill, SD No 01, 02, 03/2012
Parliamentary Elections (Amendment) Bill, S.D. No 03, 04, 06, 07/2009, delivered on 06th November, 2009
Default Taxes (Special Provisions Bill), SD No 02/2009, delivered on 06th May, 2009
Animal Welfare Bill, SD No 01/2009, delivered on 07th April, 2009
Elections (Special Provisions) (Amendment) Bill SD No 09/2009, delivered on 06th November, 2009
Town and Country Planning (Amendment) Bill, SD 03/2011, delivered on 3rd December 2011

Indian

Ashoka Smokeless Coal India (P) Ltd v UOI (2007) 2 SCC 640

United Kingdom

R *(on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262

Constitutions

First Republican Constitution of Sri Lanka 1972
Second Republican Constitution of Sri Lanka 1978

Treaties and International Standards

Convention on Rights of Persons with Disabilities 2006
International Covenant on Civil and Political Rights 1966
Paris Principles (Principles Relating to the Status of National Institutions) 1993
Universal Declaration of Human Rights 1948

International jurisprudence

Nallaratnam Singarasa v Sri Lanka Communication No 1033/2001, UN Doc CCPR/C/81/D/1033/2001(2004)

Reports

Central Bank, *Economic and Social Statistics of Sri Lankan 2012* (Central Bank 2012) also available at http://www.cbsl.gov.lk/pics_n_docs/10_pub/_docs/statistics/other/econ_&_ss_2012.pdf accessed on the 29th of January 2013.

Centre for Policy Alternatives and Friedrich Ebert Stiftung *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (Centre for Policy Alternatives and Friedrich Ebert Stiftung 2008)
International Commission of Jurists, 'Authority without Accountability: the crisis of impunity in Sri Lanka' November, 2012 also available at http://www.icj.org/wp-content/uploads/2012/10/SRI-LANKA-IMPUNITY-REPORT-NOV-12-FINAL.pdf accessed on the 31st of January 2013
Report of the Lessons Learnt and Reconciliation Commission (LLRC) (2011)

The imperative for political reconciliation re-emerged in the Sri Lankan public landscape with the end of hostilities in May 2009. In that context, this paper seeks to foreground the mandate and actual contribution of the Sri Lankan judiciary with regard to political reconciliation by considering three questions. One, whether the judiciary in a democratic society can and/or ought to engage with the question of political reconciliation and two, whether the Sri Lankan judiciary has such a mandate within the existing constitutional framework. Through an assessment of some current thinking on the question of political reconciliation in general and particularly through the capabilities approach, it is argued that Sri Lankan judiciary does have a mandate to contribute towards political reconciliation. The third question considered in the paper is whether, the Supreme Court has in fact engaged with the question of political reconciliation. Through an examination of Special Determinations of the Supreme Court and jurisprudence on Fundamental Rights during May 2009 to August 2012, it is argued that while some contribution has been made, by and large the Court has been cautious in its approach, leaving many possibilities unexplored.

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