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THE IMPACT OF OUSTER CLAUSES IN MODERN SRI LANKAN JURISPRUDENCE

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Introduction

Ouster clauses are statutory provisions that exclude certain actions and decisions from the jurisdiction of competent courts of law. Such clauses prevent the courts from remedying the injustices that can be caused by executive zeal and pose a great peril towards good governance and the goals of sustainable development. In fact, as O. Sambo and Abdulkadir state[1], "*it seeks deny the litigant any judicial assistance in respect of the matter having bearing on sustainable development and good governance brought before it. The legislature seeks, by the enactment of ouster clauses, to deny the court the power of judicial review in respect of the matter in which its jurisdiction has been ousted*". Courts, however, tend to take a narrow view of provisions that restrict or remove the jurisdiction of courts to inquiry into any matter, and as a rule, narrowly interpret clauses ousting its common law jurisdiction.

Ousting the jurisdiction of the court is a reaction from the legislative arm of the government to the increasing powers of the court in respect of judicial review of certain kind of disputes.[2] However, the review of impugned decisions claimed to be protected by ouster clauses by courts promotes "*constitutional justice, democratic principles, good governance, and sustainable development and reduces injustices in the polity*".[3] Ouster clauses, which are also termed "finality clauses" may be expressed in statutes as "*the decision shall be final*" or "*shall be final and conclusive*", or "*by way of writ or otherwise*", or "*shall not he questioned in any legal proceedings whatsoever*".

The rationale behind "Ouster Clauses"

The ostensible reason for ouster clauses is that the economic policy of the government would be shackled, and that the decision-making process of the administration would be significantly impeded, if each and every action or decision is taken to courts for judicial review. Some feel that the Government would be brought to a standstill as its decisions are continuously contested over months or years by parties unsatisfied with such decisions by way of appeals or by applications for judicial review.

The delays caused by such reviews will cost the Government, and as a result the people, large sums of money, forestall the economic development of the country and prevent the Government from carrying out its mandate. Thus, proponents of ouster clauses claim that in the common interest of the public such review processes should be curtailed. As a result, the

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legislature by incorporating special clauses within the statutes will limit the type of review or completely bar review in some circumstances.

Development of Law regarding "Ouster Clauses"

The Court of Appeal in ex parte Shaw[4] held that the decision of a Statutory Tribunal could be quashed by certiorari, not only where the tribunal had exceeded its jurisdiction, but also where an error of law appeared on the face of the record. The court in its decision, breathed new life into judicial review based upon "*error of law on the face of the record*" which had lain dormant for more than a century; and initiated the process of consolidation by which any decision concerning questions of law were brought within the fold of judicial review during the second half of the last century.

The landmark case of Anisminic Ltd vs. Foreign Compensation Commission[5] further expanded the doctrine of ultra-virus by bringing within its fold actions that had been previously precluded by ouster clauses. The House of Lords in its celebrated decision held that: [6]

a) An ouster clause did not protect a determination which was outside a tribunal's jurisdiction;
b) the misconstruction of the Order in Council which the Commission had to apply involved an excess of jurisdiction, since they based their decision on a ground which they had no right to take in to account and sort to impose another condition not warranted by the order.

With this decision the difference between jurisdictional and non-jurisdictional errors of law were practically abolished and made into a distinction without any difference. Thus, the Commission had over stepped its power and thereby destroyed its jurisdiction and made its decision a nullity, by asking the wrong question, and by imposing a requirement which the Commission had no authority to impose.[7]

The ramifications of this decision was that, from then onwards a tribunal had no power to decide questions of law incorrectly, as any such decision would *ab initio* remove the jurisdiction of the tribunal and render its purported decision liable to quashed by way of writ. The reason being that every such error made by the tribunal took it outside its jurisdiction and destroyed its mandate to decide.[8] As a result, it was recognized that a tribunal could commit a jurisdictional error also during the course of its proceedings and not only at the initial stages of the proceedings.

This act of the Court in openly challenging the Supremacy of Parliament and inquiring into a decision that Parliament itself had debarred can only be regarded as a victory for rule of law and good governance; because as stated by Lord Brown of Eaton[9] Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law. The House of Lords in O'Reilly vs. Mackman[10] and Ex parte Page[11] upheld and affirmed the decision in the Anisminic case. These decisions do not mean that ouster clauses are no longer effective, but on the contrary ouster clauses will still operate by keeping frivolous, futile and unproductive attempts at judicial reviews at bay and serve to protect the interests of good administration of justice.

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The position with regard to Sri Lanka

The Privy Council in its landmark decision in the Board of Trustees of Maradana Mosque[12] followed the decision of the Anisminic case and quashed the decision of the Minister of Education on the ground that there was an infringement of the rules of natural justice. The then Parliament of Ceylon reacted by amending[13] the Interpretation Ordinance and thereby limiting the power of courts to review the acts of administrative officials. Section 22 of the Interpretation Ordinance[14] as amended reads as follows:

> *Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal.*

The proviso to that Section provides that the provisions of the section shall not apply to the Court of Appeal in the exercise of its powers under Article 140 of the Constitution[15] in respect of the following matters, and the following matters only, that is to say-

a) *Where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and*
b) *Where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:*

Thereafter, until the late 90's of the last century the court of Sri Lanka consistently took the view that the powers of the Courts to inquiry into any situation that had not been specifically exempted by the proviso[16] of the ordinance had been ousted by the amendment. Thus, the court in James vs. The Board of Review[17] held that the provisions of Section 22 of the Interpretation Ordinance read with Section 59(3) of the Paddy Lands Act[18] bar the petitioner's application for a writ of certiorari. It was held by the court that Section 22 of the Ordinance prohibits any kind of challenge to an order which falls within the ambit of the Section on grounds other than those exempted in the proviso.

Consequently, the period following these decisions in the eighties and early nineties was a period of oblivion for judicial review. However, the Supreme Court in a series of decisions starting from the nineties has consistently held that the provisions of the Interpretation Ordinance as amended does not restrict the power of the Supreme Court or the power of the Court of Appeal under Article 140 of the Constitution to inquire into actions excluded by the amendment.

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In Wicremabandu vs. Herath[19] the petitioner who was an Attorney-at-Law was arrested by the Police in 1987 on a detention order made by the Secretary to the Ministry of Defence under Regulation 17 of the Emergency Regulations. The Supreme Court in two separate decisions disregarded the Ouster Clauses and held that the rights of the petitioner had been infringed.

H. A. G. De Silva, J. in his decision held:

"*We are of the view that Section 8 of the Public Security Ordinance and Regulation 17 (10), which provides that such an order shall not be called in question in any court on any ground, do not affect our jurisdiction.*

- *Firstly, existing written laws continue in force 'except as otherwise expressly provided in the Constitution' (Article 168(1));*
  - *Articles 17 and 126 confer jurisdiction on this Court in respect of infringements of fundamental rights, and this is express provision which prevails over any existing written law to the contrary, including Section 8 - whatever the position might have been prior to the Constitution.*
  - *Article 16 (1) saves the Public Security Ordinance (since it is existing written law) but only from invalidation on the ground of inconsistency with fundamental rights; it does not validate any inconsistency with Articles 17 or 126.*
- *Secondly, the power to make Emergency Regulations does not include the power to make regulations overriding the provisions of the Constitution (Article 155 (2));*
  - *Regulation 17 (10) therefore cannot override or in any way affect the jurisdiction of this Court under Articles 17 or 126. The exercise of that jurisdiction will be subject to the common law principles applicable to the judicial review of administrative orders.*"

Justice Kulatunga also held that such restrictions were invalid and had been rejected by the Courts in Siriwardena vs. Liyanage,[20] Janatha Finance vs. Liyanage,[21] Visuvalingam vs. Liyanage,[22] and Edirisuriya vs. Navaratnam.[23] In the Janatha Finance case Ranasinghe J. (as he then was) explained that "*It is now settled law … that such exclusion would be operative only in respect of acts done in good faith and ex facie regular, and which are not tainted by malice or any abuse of power*". He proceeded to demonstrate that in any event, the right of persons under Article 17 of the Constitution to apply to the Supreme Court as provided by Article 126 does not have to give way to such provisions.[24] Justice Kulatunga stated that he was of the view that such provisions do not in any way limit the scope and extent of the powers of the Supreme Court to review any emergency regulation or order made thereunder in exercise of its jurisdiction under Article 126 of the Constitution.

A landmark case in this regard on untrammelled powers of the Court of Appeal is the case of Atapattu vs. People's Bank.[25] Here the question was whether there was a right to substitution, in the place of a deceased applicant in proceedings for the redemption of land under section 71 of the Finance Act, No. 11 of 1963, as amended by Act No. 33 of 1968 and Law No. 16 of 1973. Since section 71(3) enacts that every determination of the Bank shall be final and conclusive and shall not be called in question in any court, it was contended that the effect of section 22 of the Interpretation Ordinance was that a decision by the Bank refusing substitution could not be reviewed by the Court of Appeal in the exercise of its writ jurisdiction under Article 140.

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Article 140 of the constitution provides:

"*Subject to the provisions of the Constitution, the Court of Appeal shall ………. grant an issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the Judge o any Court of First Instance or tribunal or other institution or any other persons*"

Justice Mark Fernando held, that there is an apparent conflict between the ouster clause (which is a pre-Constitution legislation), and Article 140 of the Constitution. He stated that "*While generally a Constitutional provision, being the higher norm, must prevail over statutory provision, there are some constitutional provisions which enable pre-Constitution written law to continue to apply*". The first is Article 16(1), which is inapplicable here, because that deals only with inconsistency with fundamental rights. The second is Article 168(1), which provides:

"*Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the Constitution, shall, mutatis mutandis, and except as otherwise expressly provided in the Constitution, continue in force.*"

However, this would make the ouster clause operative only "*except as otherwise expressly provided*" in Article 140. The meaning of that phrase was considered by a bench of five Judges in Wickremabandu v Herath (Supra), in relation to a similar question, and it was held that the conferment of jurisdiction of the Court by those Articles was express contrary provision, with the result that Article 168(1) did not make the ouster clause operative vis-a-vis the fundamental rights jurisdiction. The Privy Council held in Shanmugam vs. Commissioner for Registration of Indian and Pakistani Residents,[26] that:

"*to be express provision with regard to something it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language however broad the language may be which covers it so long as the applicability arises directly from the language used and not by inference from it.*"

Mark Fernando J. held that Articles 17 and 126 constituted "*express provision*", because they directly confer jurisdiction; although they make no specific mention of the ouster clause in Section 8, the language used is broad enough to confer an unfettered jurisdiction. The position is the same in regard to Article 140: the language used is broad enough to give the Court of Appeal authority to review, even on grounds excluded by the ouster clause.

But there is one difference between those Articles and Article 140. Article 140 (unlike Article 126) is "*subject to the provisions of the Constitution*". Fernando J. asked the question[27] "*Is that enough to reverse the position, so as to make article 140 subject to the written laws which Article 168(1) keeps in force?*", and he replied that "*Apart from any other consideration, if it became necessary to decide which was to prevail (an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution") I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it. But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3)*". That phrase refers only to contrary provisions in the Constitution itself, and does not extend to provisions of other

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written laws, which are kept alive by Article 168(1). Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to "*any law*".

The modern Sri Lankan jurisprudence

Dr Jayantha de Almeida Gunaratne[28] in "New Vistas for Judicial Review" discussed the nature of jurisdiction conferred on the Supreme Court in relation to fundamental rights and the Court of Appeal under Article 140 of the Constitution. He stated that the judicial approach proffered in the Peter Atapattu case has been consistently followed by the Supreme Court thereafter and may now be regarded as established law. He further stated "*that given the fact that, equality is a sine qua non of the rule of law*[29] *which is turn postulates non-arbitrariness, even where contractual and other proprietary relationships are involved, if any action or decision of public (statutory) body could be shown to be arbitrary in the sense of it being unreasonable, irrational or discretionary the violation of the right complained of would become referable to Articles 3, 4(d) and 12 to be read with the jurisdiction conferred on either the Supreme Court … or the Court of Appeal …* ".

The Supreme Court upheld and confirmed the views expressed in Peter Atapattu's case in Sirisena Cooray vs. Tissa Bandaranayake[30] and these views were further reiterated in Wijepala Mendis vs. Perera[31] and Moosajees vs. Arthur. Thus, these decisions in combination firmly establish the view that ouster clauses do not operate to exclude the constitutional jurisdiction conferred on Supreme Court by Articles 17 and 126 and the Court of Appeal by Article 140 of the Constitution.

Moosajees Ltd vs. Arthur[32] was an application for an appeal from the decision of the Court of Appeal denying writ of certiorari to quash the order made by the Board of Review of the Ceiling on Housing Property.[33] Justice Weerasuriya held, stating that the decision in the case of Sithamparanathan vs. Premaratna[34] is significant in that it held that section 39 (3) of the C.H.P law did not protect a decision which the Board patently lacked jurisdiction to decide. It was stated[35] that while the Board of Review had the power ex facie to make the order it did, namely to hold whether the promises in question were either residential or business premises, nevertheless that power of the Board did not confer jurisdiction to the Board.

a) to formulate the wrong question;
b) to misconstrue the provisions of Section 47 of the C.H.P law and apply the wrong test; and
c) to take in to account irrelevant considerations.

Weerasuriya J. held that in the circumstance, the impress of finality set out in Section 39 (3) of the CHP law read with Section 22 of the Interpretation Ordinance had no application to the impugned decision of the Board. Accordingly, the Court of Appeal had jurisdiction to review the decisions of the Board and a writ of certiorari would lie to quash it.

Conclusions

As this discussion on the merits of the aforesaid decisions indicates, it is now settled law that the provisions of the Interpretation Ordinance combined with Ouster Clauses in any statutory law do not affect the power of the Supreme Court or that of the Court of Appeal to inquire into

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these impugned actions or decisions. Ousters Clauses have not completely lost their effectiveness but continue to serve their primary function of preventing vexatious litigations from bring the administrative machinery to a standstill.

Nevertheless, the Courts will review any act or decision that poses a threat to the rule of law and good governance; because as Lord Woolf[36] (former Lord Chief Justice of England and Wales), said in the context of a discussion regarding ouster clauses, that there may be situations where the courts whose function it is to uphold and protect the rule of law may have to "*take a stand*". Therefore, in such circumstances, there were some "*advantages in making it clear that ultimately there are even limits on the supremacy of parliament which it is the courts' inalienable responsibility to identify and uphold*". Thus, the power of the courts to inquire into these actions, even if prohibited by Ouster Clauses is untrammelled. The position after the Peter Atapattu and Moosajees case is that Sri Lankan law on this issue once again reflects the Anisminic case.

Resources:

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2. Ibid.
3. Ibid.
4. R vs. Northumberland Compensation Appeal Tribunal, Ex parte Shaw (1952 (I) All E.R. 122)
5. Anisminic Ltd vs. Foreign Compensation Commission, 1969 (2) A.C. 147
6. Moosajees Ltd vs. Arthur & Others (SC) 2004 (1) ALR 1
7. Administrative Law, Wade & Forsyth 8th Edition at page 270
8. Council of Civil Service Unions vs. Minister For the Civil Service (1985)
9. R vs. HM the Queen in Council, ex parte Vijayatunga [1988] QB 322, per Simon Brown J, now Lord Brown of Eaton under Heywood Back
10. O'Reilly vs. Mackman (1983 (2) A.C. 237 at page 278)
11. Regina vs. Visitor of the University of Hull, Ex parte Page (1993) A.C. 682 at page 701)
12. Board of Trustees of Maradana Mosque vs. Minister of Education (The Hon. Badi-Ud-Din Mahmud) 68 NLR 217
13. Interpretation Ordinance Amendment Act, No 18 of 1972
14. Interpretation Ordinance, No 21 of 1901
15. The Constitution Of The Democratic Socialist Republic Of Sri Lanka
16. Interpretation Ordinance, Op. cit., Proviso to Section 22
17. James vs. The Board of Review (Paddy Lands) 1978-79 SLR Vol 2 Page 123
18. Paddy Lands Act, No 1 of 1958.
19. Wicremabandu vs. Herath, 1990 SLR Vol 2, Page No 348
20. Siriwardena and Others vs. Liyanage and Others, 1983 (2) SLR 164
21. Janatha Finance and Investments Ltd vs. Liyanage and Others, 1983 (2) SLR 111
22. Visuvalingam vs. Liyanage, 1984 (2) SLR 123 at 132
23. Edirisuriya vs. Navaratnam and Others, 1985 (1) SLR 100
24. Wicremabandu vs. Herath, Op. cit., per Kulatunga J.
25. Atapattu vs. People's Bank, 1997 (1) SLR 208
26. Shanmugam vs. Commissioner for Registration of Indian and Pakistani Residents, 64 NLR 29
27. Atapattu vs. People's Bank, Op. cit., at page 222

28. Dr Jayantha de Almeida Guneratne, PC, "New Vistas for Judicial Review", Sri Lanka Law College Law Review, 2005
29. Premachandra vs. Jayawickrema 1994 (2) SLR 90
30. Sirisena Cooray vs. Tissa Dias Bandaranayake, 1999 (1) SLR 1
31. Wijayapala Mendis vs. P.R.P Perera, 1999 (2) SLR 110 per Mark Fernando J.
32. (SC) 2004 (1) ALR 1, Op. cit.
33. Ceiling on Housing Property Law, No 1 of 1973
34. Sithamparanathan vs. Premaratna 1996 (2) SLR 202
35. (SC) 2004 (1) ALR 1, Op. cit., at page 10
36. Jeffrey Jowell, Immigration wars, The Guardian, Tuesday 2 March 2004

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