ADB - SLJI WORKSHOP
FOR SRI LANKAN JUDGES
Colombo – March 2016 –

Environmental Dispute Resolution: Writs, Remedies, and Procedures
By Justice Saleem Marsoof PC
We live on earth.............
and it is beautiful..........!
even a few drops of water can be so beautiful.........!
Environmental Dispute Resolution: Writs, Remedies, and Procedures

- Environmental Dispute Resolution – Lessons from the States
  
  By Judge Michael Rechmann

- Enforcing Environmental Laws in Sri Lanka Through Fundamental Rights Litigation
  
  By Prof. Jane E Shucosky

- (1) Environment as a Fundamental Right
- (2) The Natural Capital and the Rule of Law – A Sri Lankan Perspective
- (3) The Expanding Canvass of Judicial Review
  
  By Justice Saleem Marsoof PC
Judge Michael Rechmann refers to the 3 pillars of Principle 10 of the Rio Declaration of 1992, namely (1) Transparency (2) Inclusiveness and (3) Accountability.

He also adverted to the range of mechanisms available to those who are dissatisfied with a decision under the EPBC Act or who wish to take some form of civil enforcement action are:

(1) internal review;
(2) judicial review in the Federal Court of Australia;
(3) merits review in the Administrative Appeals Tribunal;
(4) declaratory and injunctive relief in the Federal Court.
Sri Lankan Strategies

Prof Jane E Shucosky says four main strategies are used in Sri Lanka for the protection of the land environment by entities outside the government:

1. **Public Nuisance Complaints** brought to the attention of magistrates under Section 98 of the Code of Criminal Procedure Act, and under Section 261, 283 and 284 of the Penal Code;

2. **Private Nuisance Suits** brought by neighbors of small businesses such as brick kilns and quarries;

3. **Participation in the Comment Process** for environmental impact assessments under the National Environmental Act;

4. **Fundamental Rights Petitions** under Art. 126 of the Constitution.
An Approach for Dispute Resolution

- Rights
- Interests
- Power
Sri Lanka is beautiful...........!
..........and provides us with sustenance
....beautiful lakes!
......and extra ordinary wildlife!
Sri Lankan coastal features

Sandy Beaches
Sandunes
Marine and coastal protected areas of Sri Lanka

- Yala N.P
- Wilpattu N.P
- Bundala Sanctuary
- Kokilai Lagoon
- Paraitivu Island
- Bar Reef Marine Sanctuary
- Muthurajawala Sanctuary
- Chundikulam
- Paraitivu Island
- Bar Reef Marine Sanctuary
- Muthurajawala Sanctuary
- Chundikulam
- Kokilai Lagoon
Beach erosion caused by Tsunami in Kahanda-modara
Cyclones can also cause damage
Sri Lankan Legal Infrastructure

- State Lands Ordinance (Cap 286 – 1980 Ed)
- Coast Conservation and Coastal Resource Management Act, No. 57 of 1981, as amended by Acts No. 64 of 1988 and 49 of 2011
- Mines and Mineral Law No. 33 of 1992
- Fisheries and Aquatic Resources Act, No. 2 of 1996
- Sri Lanka Disaster Management Act 13 of 2005
We live on earth

Environmental Dispute Resolution: Writs, Remedies, and Procedures

WRITS: Remedies & Procedures
Outline of presentation

(1) Introduction to the Writ Jurisdiction of Sri Lankan Courts
(2) Ambit of Certiorari
(3) Want or Excess of Jurisdiction
(4) Natural Justice
(5) Error on the Face of the Record
(6) Defences to Certiorari
(7) Other Writs
(8) Locus Standi
(9) Provincial High Court
Article 140 of Constitution

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:
Article 140 proviso

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.

Example: Article 104H of Constitution
The Court of Appeal may grant and issue orders in the nature of Writs of *habeas corpus* to bring up before such Court-

(a) the body of any person to be dealt with according to law; or

(b) the body of any person illegally or improperly detained in public or private custody, and to discharge or remand any person so brought up or otherwise deal with such person according to law:
Article 154P of Constitution

(1) There shall be a High Court for each Province with effect from the date on which this Chapter comes into force. Each such High Court shall be designated as the High Court of the relevant Province.

(2) The Chief Justice shall nominate, from among Judges of the High Court of Sri Lanka, such number of Judges as may be necessary to each such High Court. Every such Judge shall be transferable by the Chief Justice.
Article 154P of Constitution

(3) Every such High Court shall –

(a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;

(b) notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province;

(c) exercise such other jurisdiction and powers as Parliament may, by law, provide.
Article 154P of the Constitution

(4) Every such High Court shall have jurisdiction to issue, according to law-

(a) orders in the nature of *habeas corpus*, in respect of persons illegally detained within the Province; and

(b) order in the nature of writs of *certiorari*, prohibition, *procedendo, mandamus* and *quo warranto* against any person exercising, within the Province, any power under-

   (i) any law; or

   (ii) any statutes made by the Provincial Council established for that Province,

in respect of any matter set out in the Provincial Council List.
Distinction between ‘law’ & ‘statute’

- *Weragama v Eksath Lanka Wathu Kamkaru Samithiya and others* [1994] 1 SLR 293

- Mark Fernando J:

  “The semicolon appearing after “any law” is an obvious error, because the preceding word “under” must govern both sub paragraphs (i) and (ii), if sub paragraph (ii) is to make any sense… Accordingly, that semicolon must be ignored, or a comma substituted. In that event the final clause qualifies both sub paragraphs which then makes perfect sense…”
Overlaps in jurisdiction

While the above provision conferred on the Provincial High Court a Writ jurisdiction which is, within the territorial limits of the said Court, concurrent with the jurisdiction vested in the Court of Appeal by Article 140 and 141 of the Constitution, Section 12 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, provided a mechanism to avoid any conflict of jurisdiction between these two courts.
Section 12 of PHC (Spl Pr) Act

12 (a) Where any appeal or application is filed in the Court of Appeal and an appeal or application in respect of the same matter has been filed in a High Court established by Article 154P of the Constitution invoking jurisdiction vested in that Court by paragraph (3) (b) or (4) of Article 154P of the Constitution, within the time allowed for the filing of such appeal or application, and the hearing of such appeal or application by such High Court has not commenced, the Court of Appeal may proceed to hear and determine such appeal or application or where it considers it expedient to do so, direct such High Court to hear and determine such appeal or application:
Section 12 proviso of PHC (Spl Pr) Act

- Provided, however, that where any appeal or application which is within the jurisdiction of a High Court established by Article 154P of the Constitution is filed in the Court of Appeal, the Court of Appeal may if it considers it expedient to do so, order that such appeal or application be transferred to such High Court and such High Court shall hear and determine such appeal or application.

- (b) Where the Court of Appeal decides to hear and determine any such appeal or application, as provided for in paragraph (a), the proceedings pending in the High Court shall stand removed to the Court of Appeal for its determination.
**Section 12 proviso of PHC (Spl Pr) Act**

- *Ramalingam v Parameswary and Others* [2000] 2 Sri LR 341 at 347 to 348 *per* Wigneswaran J:
  - When section 12(a) and its proviso in Act No. 19 of 1990 speaks of considering “it expedient to do so” the phrase must be properly understood. “Expedient” as an adjective means suitable or advisable. As a noun it means that which serves to promote. It also connotes the means suitable to an end. It would be unethethical to define the phrase “expedient to do so” as that which serves to promote a selfish end. The main consideration which should attract the attention of the Court of Appeal when deciding whether a case before it should be transferred to an appropriate High Court should be the *convenience of parties*. Easing the work-load of the Court of Appeal cannot be an adequate ground.
Meaning of prerogative writs

M.R. MALLICK in WRITS: LAW AND PRACTICE describes writs as follows:

“Estimologically the word writ means a written order. However, a writ is a remedial right for the enforcement of a substantive right. In England, the writs are issued by the Crown as the head of judicial system. There was no statutory source and the Crown issued it by virtue of its ‘prerogative’. So, it was called in England prerogative writs……..”
Types of prerogative writs

- Certiorari
- Prohibition
- Procedendo
- Mandamus
- Quo warranto
- Habeus corpus
Functions of prerogative writs

- **Certiorari** is to set aside what is invalid or illegal
- **Prohibition** is to forbid proceedings in excess of jurisdiction
- **Procedendo** is to order the valid exercise of power
- **Mandamus** is a command to perform a public duty
- **Quo Warranto** is to challenge the authority of someone holding public office
- **Habeus corpus** is an order to produce a body for a ruling on the legality of its custody or detention
According to Atkin L.J. in *R. v. Electricity Commissioners*, the Writ of Certiorari will be issued -

“wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority…..”
Electricity formula developed

In *R. v. Legislative Committee of the Church Assembly* (1928) 1 KB 411 Lord Hewart CJ. said “it is not enough that it should have legal authority to determine questions affecting the rights of subjects, there must be super-added to that characteristic that the body has the duty to act judicially”.

Recent judicial decisions have dispensed with “duty to act judicially” and merely require that there must be a duty to act fairly.

Electricity formula developed

• In the Atkin Formula the focus was on the source of power sought to be reviewed. It was thought that ‘body of persons’ amenable to writ must be a State organ created by statute. See, *Trade Exchange (Ceylon) Ltd., v Asian Hotels Corporation* [1981] 1 SLR 67.

• The focus has now shifted to the nature of the power sought to be reviewed, as illustrated by *R v Panel on Takeovers and Mergers, ex p Datafin* [1987] 1 QB 815 and *R v Panel on Takeovers and Mergers, ex p Guinness* [1990] 1 QB 146.
Saheer and others v. Board of Governors
Zahira College and Others

“The powers of the Board of Governors as spelt out in the Act cannot be abused or exceeded. When it does writ would lie. Within the scheme of national education, the Board of Governors is a statutory public authority receiving and spending State funds, being subject to government regulations in the admission of students, employment of teachers, etc. As Wade says certiorari and prohibition are designed to prevent excess or abuse of power by public authorities.”
“…….the dynamism of law has driven the traditional remedy of certiorari away from its “familiar moorings by the impetus of expanding judicial review” (H.W.R Wade & C.F Forsyth, Administrative Law, 8th Edition page 627). As Professor Wade observes, Courts have through their decisions extended the pale of judicial review “to bodies which, by the traditional test, would not be subject to judicial review and which, in some cases, fall outside the sphere of government altogether.” (ibid.) A variety of commercial, professional, sporting and other activities are regulated by powerful bodies which are devoid of statutory status, and Courts in Sri Lanka and elsewhere have demonstrated a willingness to ‘recognize the realities of executive power’ and to review the decisions of a number of such bodies. In their desire to prevent the abuse of ‘executive power’ in the hands of these powerful non-statutory bodies, the courts have ventured to review the decisions of these bodies……..The rationale for making such non-statutory bodies amenable to prerogative remedies appears to be that they are discharging functions of a public nature.”
Grounds for issue of certiorari

(1) WANT OR EXCESS OF JURISDICTION

- Leo v Land Commissioner 57 NLR 178
- Gunaratne v Kotakadeniya, Commissioner of Motor Traffic and Others [1990] 2 SLR 14
- Gunaratne v Chandananda de Silva [1998] 3 SLR 265
- Bangamuwa v S.M.J.Senaratne, Director General of Customs [2000] 1 SLR 106
Grounds for issue of Certiorari

(2) DENIAL OF NATURAL JUSTICE – Audi Alteram Partem

- Board of Trustees of Maradana Mosque v Minister of Education 68 NLR 217
- Gnanasambandam v. The Rehabilitation of Property and Industries Authority (REPIA) [1997] 1 Sri LR 178
- Amerasinghe v Daluwatte and Others [2001] 3 Sri LR 258.
Grounds for issue of Certiorari

(2) DENIAL OF NATURAL JUSTICE – Nemo judex in causa sua potest

Geeganage v Director General of Customs [2001] 3 Sri LR 179

Nadira Fernando v Ceylon Tourist Board and Others [2002] 2 SLR 169

Shell Gas Lanka Ltd v All Ceylon Commercial & Industrial Workers Union and others following the test applied in Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon and others (1968) All ER 304 at 310
Grounds for issue of Certiorari

(3) ERROR OF LAW ON FACE OF THE RECORD

- *Hayleys Ltd v de Silva* 64 NLR 130
- *Kundanmals Industries v Comm. of Labour* [1994] 3 SLR 20
Grounds for issue of Certiorari

• (4) UNREASONABLENESS

• *Rooke’s Case* (1598) 5 Co. Rep 99b

• *Associated Provincial Picture Houses Ltd., v. Wednesbury Corporation* [1948] 1 KB 223

• *Podimaharmaya v. The Land Reform Commission* (1990) 2 SLR 416 at 419 *per* Palakidnar J “This Court can interfere where there is a manifest unreasonableness in an administrative act. The test is whether the administrative authority has acted within the rules of reason and justice.”
Grounds for issue of Certiorari

(5) PROPORIONALITY

- In re Harry Hook (1976) 3 All ER 456
- Neidra Fernando v. Ceylon Tourist Board and others (2002) 2 SLR 169 at 187-8
DEFENCES

• ILLUSTRATIVE CASES


• P.B.D Dayaratne v Hon. Dr. Rajitha Senaratne, Minister of Lands and others [2006] 1 SLR 7.
Examples of Mandamus

- *Podimhatmaya v. The Land Reform Commission* (1990) 2 SLR 416 at 419
Examples of Quo Warranto

Quo Warranto is sought to challenge the authority of someone holding public office

- *Dilan Perera v Rajitha Senaratne* [2000] 2 SLR 79
INTERVENTIONS

- ILLUSTRATIVE CASE
Locus Standi

- *Durayappa v. Fernando* 69 NLR 265
- Cf. Wade:
  - “The prerogative remedies, being of a ‘public’ character…. have always had more liberal rules about standing than the remedies of private law. Prerogative remedies are granted at the suit of the Crown, as the titles of the cases show; and the Crown always has standing to take action against public authorities, including its own ministers, who act or threaten to act unlawfully. As Devlin J said: “Orders of certiorari and prohibition are concerned principally with public order, it being the duty of the High Court to see that inferior courts confine themselves to their own limited sphere”……….. Consequently the court is prepared to act at the instance of a mere stranger, thought it retains discretion to refuse to do so if it considers that no good would be done to the public.”
Recent case law on locus standi

- *Premadasa v Wijewardena and others* [1991] 1 Sri LR 333

- Tambiah CJ observed that –

  “The law as to *locus standi* to apply for *certiorari* may be stated as follows: The writ can be applied for by an aggrieved party who has a grievance or by a member of the public. If the applicant is a member of the public, he must have sufficient interest to make the application.”
Recent case law on locus standi

- In *Bandaranaike v de Alwis and Others* [1982] 2 Sri LR 664 at page 682, Wimalaratne J. observed that “every citizen has standing to invite the Court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddlesome busybody, but as a public benefactor.”
Recent case law on locus standi

- “In the present application before this Court, the Petitioners, being office bearers of the Ceylon Association of Ships’ Agents as well as some of them being associated with companies upon whom the purported fee was imposed, clearly have a sufficient interest in challenging the imposition of the purported fee, and are not ‘mere busybodies’ who are trying to fish in troubled waters. It has been specifically pleaded and averred in the petition that the Petitioners have come to Court on behalf of the members of the CASA as well as in their personal capacities.”
Public interest litigation (PIL) has contributed immensely towards redefining the traditional approach of Courts to judicial intervention in matters of vital concern to society, and providing the less informed and weaker sector of society with greater access to justice for the redress of their grievances and resolution of their problems.
Greater Access to Justice for less informed and weaker sector of society

These social rights require active intervention by the state and other public authorities for their realization and the paramount among them are freedom from indigency, freedom from ignorance and freedom from discrimination as well as the right to a healthy environment, to social security and to protection from massive financial, commercial and corporate oppression and exploitation by vested interests and governmental repression and lawlessness.
The 3 lists of the Ninth Schedule

- (1) List I - Provincial Council List
- (2) List II - Reserved List
- (3) List III - Concurrent List
List I - Provincial Council List

1. Police and Public order
2. Plan-implementation of PC economic plans
3. Education and Educational Services.
4. Local Government
5. Provincial Housing and Construction
6. Roads and bridges and ferries
7. Social Services and Rehabilitation
8. Carriage of passengers & goods by motor vehicles within the Province and the provisions of inter-provincial road transport services.
List I - Provincial Council List

9. Agriculture and Agrarian Services-

9.1 Agriculture, including agriculture extension, promotion and education for provincial purposes and agricultural services (other than in inter-provincial irrigation and land settlement schemes, State land and plantation agriculture);

9.2 Rehabilitation & maintenance of minor irrigation works;

9.3 Agricultural research, except NAR institutions.

10. Rural Development
List I - Provincial Council List

11. Health-
11.1 The establishment and maintenance of public hospitals, rural hospitals, maternity homes, dispensaries (other than teaching hospitals and hospitals established for special purposes);
11.2 Public health services, health education, nutrition, family health, maternity and child care, food and food sanitation, environmental health;
11.3 Formulation and implementation of Health Development Plan, and of the Annual Health Plan for the Province;
11.4 The provision of facilities for all institutions referred to in 1 above within the Province, excluding the procurement of drugs;
List I - Provincial Council List

17. Co-operatives-
17.1 Co-operative undertakings and the organization, registration, supervision and audit of co-operative societies within the Province;
17.2 Co-operative development within the Province including co-operative education and propaganda;
17.3 Provincial Co-operative Employees Commission;
17.4 Matters connected with employment, promotion, retirement and other connected matters of employees of co-operative societies within the Province.
List I - Provincial Council List

18. Land- Land, that is to say, rights in or over land, land tenure transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II.

19. Irrigation- Planning, designing, implementation, supervision and maintenance of all irrigation works, other than irrigation schemes relating to rivers running through more than one Province or inter provincial irrigation and land development schemes.
Appendix II

Land and Land Settlement

State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing this matter.

Subject as aforesaid, land shall be a Provincial Council Subject, subject to the following special provisions:-

1. State land-

1.1 State Land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilisation of such land in respect of such subject.
Appendix II

– 1.2 Government shall make available to every Provincial Council State land within the Province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilise such State land, in accordance with the laws and statutes governing the matter.

– 1.3 Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.
Agrarian Services Inquiries

• **List II - Reserved List**
  “All Subjects and Functions not specified in List I or List III”.

• **List III - Concurrent List**

  8. Agricultural & Agrarian Services-
    8.1 Establishment & promotion of agro-linked industries, farms and private nurseries.
    8.2 Soil conservation
    8.3 Plant pests

  29. Inquiries and Statistics for the purpose of any of the matters in this list or in the P. C. List.

• **Nimalaratne v Asst. Commissioner of Agrarian Services** [2000] 3 SLR 184
The Role of Courts and the Judges

(1) The Magistrates Court –
- implements the provisions of the Act and tries criminal cases (*Karunaratne v Boteju* 7 NLR 127)

(2) The Court of Appeal -
- Supervisory jurisdiction over the administrative decisions of the Department other agencies (*Amarasinghe and Others v The Attorney General and Others* [1993] 1 Sri LR 376, *Public Interest Law Foundation v Central Environmental Authority and Another* [2001] 3 Sri LR 230, but in *Heather Therese Mundy v Central Environmental Authority and Others* [2005] LSTR15, No. 213, 1
(3) The Supreme Court of Sri Lanka

- Deals with appeals from the Court of Appeal.
- Also exercises jurisdiction under Art 126 of the Constitution for the redress of violations or imminent violations of fundamental rights (Bulankulame v Secretary, Ministry of Industrial Development [2000] 3 SLR 243; W.G. Wijebandara v Conservator General of Forests and Others [2009] 1 SLR 337; Environmental Foundation Guarantee Ltd and others v Mahaweli Authority of Sri Lanka [2010] 1 SLR 1, Environmental Foundation Guarantee Ltd and others v The Director General of Wild Life Conservation and others SC FR Application No. 224/10 (Was Pending))
Sand Mining Case

- Sand Mining Operations
- Damage to river beds
Judicial Methodology

(1) DIRECTIVE PRINCIPLES OF STATE POLICY

Fundamental Duty to “protect, preserve and improve the environment for the benefit of the community” (Art. 27(4) of Constitution)

(2) THE DOCTRINE OF THE PUBLIC TRUST

Public power is not for personal gain or favour, but always to be used to optimise the benefit of the people. To do otherwise would be to betray the trust reposed by the people within whom, in terms of the Constitution, the sovereignty reposes.
Marine and coastal protected areas of Sri Lanka

- Yala N.P
- Wilpattu N.P
- Bundala Sanctuary
- Muthurajawala Sanctuary
- Paraitivu Island
- Kokilai Lagoon
- Chundikulam
- Bar Reef Marine Sanctuary
- Chundikulam
- Bundala Sanctuary
- Yala N.P

[Map of Sri Lanka showing protected areas]
Judges and those involved in administration of justice have the solemn duty of protecting our earth.
Elephant and the Mahout

You see today a little man sit on top of a great big elephant and make him do what he wills. The elephant is big and strong, far stronger than the little mahout sitting on his neck. But the mahout can think, and because he can think he becomes the master and the elephant is his servant. So, as thought grew in man he became cleverer and wiser.
Man is both creator and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself (Paragraph 1 to the Stockholm Declaration)
We live on earth, and we have only ONE EARTH!
We live on earth and it WAS beautiful............!
THANK YOU FOR YOUR ATTENTION

I also thank the Supreme Court of Sri Lanka, the Sri Lanka Judges Institute (SLJI) and the Asian Development Bank for the support.