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**PUBLIC TRUST DOCTRINE AS 'PEOPLE'S  
SOVEREIGNTY':  
A NARRATIVE BEYOND ENVIRONMENTAL  
PROTECTIONS**

**LAW & SOCIETY TRUST**

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### *Editor's Note... ..*

Put simply, the Public Trust Doctrine (PTD) is an unequivocal rejection of the argument that various discretions exercised by state officers are absolute, unfettered and not subject to judicial review. In this Issue, *Nayantha Wijesundara* examines PTD through the prism of social contract theory and the notion of People's sovereignty as contained in the 1978 Constitution.

His main conclusions are that PTD forms an integral part of the Sri Lankan constitutional tradition and that violation of the same negates legitimacy of actions of state institutions. Looking at comparative principles, particularly, the American, Indian and African versions of PTD, he makes the argument that the doctrine as applied in Sri Lanka is wider in scope as the Sri Lankan courts have extended its scope to wider rights based issues as opposed to confining itself to the protection of environmental rights.

PTD developed as a concept through the Court's judicious use of public law principles relating to powers and discretions in order to declare that whenever powers are conferred by the Constitution or by statute on various authorities, they are held in trust for the benefit of the public. Thus, there are no absolute or unfettered powers or discretions in public law. Whenever the law confers powers or discretions on public bodies and officials (however high), such powers or discretions are treated as having been conferred in the public interest, and not for private or political benefit or advantage.

It was judicially opined through a series of well known cases that even the acts of the President are liable to such review, despite the personal immunity from legal proceedings conferred by Article 35 of the Constitution, because such "immunity is a shield for the doer, not for the act". Although legal proceedings cannot be instituted in any court or tribunal against the President, nevertheless such acts are liable to review in

proceedings against other persons who rely on such acts in order to justify their own conduct. In fact, the Supreme Court's declaration that the "Public Trust" doctrine is not a mere matter of contract merits particular attention;

*"We are not concerned with contractual rights, but with the safeguards based on the Rule of Law which Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers. Discretionary powers can never be treated as absolute and unfettered unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have conferred - not at the whim and fancy of officials, for political advantage or personal gain.*

*(Priyangani v Nanayakkara, [1996] 1 SriLR 399 at 404-405).*

Further, applying this doctrine to the use of public funds and resources, the Court declared that persons paid out of public funds, collected directly or indirectly from citizens of all shades of political opinion cannot be used to advance the interests of those of one political persuasion alone. Public officers are expressly required that they should perform in a manner devoid of politics. They are officers engaged in rendering services to the public, for which they were paid out of public funds.

As such, they cannot be commandeered to work for one political party. Therefore use of resources of the State, including human resources, for the benefit of one political party or group, constitutes unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals.

Bringing in a new perspective to these discussions, Wijesundara draws linkages between the concept of People's sovereignty and the Lockean contract theory, referring - through an exploration of relevant case law - to the Directive Principles of State Policy to buttress his interpretation of PTD. Thus, the People are sovereign under the 1978

Constitution. The state merely holds the power of the sovereign People 'in trust' and wields that power for the benefit of the People. Validly, his point is that PTD, as developed in the local context of People's sovereignty entrenched in Articles 3 and 4 of the Constitution, differs from the application of English law principles of Administrative Law pertaining to judicial review of executive action based on the notion of parliamentary sovereignty.

Most importantly however, the paper's concluding - and damning - reflection is that that the doctrine of PTD has been wielded inconsistently by Sri Lankan judges. The 18<sup>th</sup> Amendment to the Constitution was an explicit instance of such judicial withdrawal and as rightly affirmed by this writer, '...there have been instances where the People of Sri Lanka have been 'betrayed' by all arms of the state resulting in a total violation of the public trust.'

His paper concludes with several recommendations including proposed constitutional amendments to better secure the PTD doctrine in Sri Lanka's domestic context. Notably these recommendations draw upon judicial precedent to suggest the specific adoption of PTD as a ground of review based on the constitutional principle of sovereignty of the People enshrined in Articles 3 and 4 of the Constitution.

***Kishali Pinto-Jayawardena***



# THE PUBLIC TRUST DOCTRINE IN SRI LANKA AS 'PEOPLE'S SOVEREIGNTY': A NARRATIVE BEYOND ENVIRONMENTAL PROTECTIONS

*Nayantha Wijesundara\**

## 1. Introduction

Generally, the Public Trust Doctrine (PTD) is a concept that is principally associated with the protection of the environment. However, as argued in this paper, PTD as applied by the Sri Lankan courts have evolved into a far wider concept dictating that even 'state power' (and not only the resources of a country) is held on trust by the organs of the state for the benefit of the People. The objective of this paper is to develop a coherent constitutional basis and establish clear parameters for PTD based on the ideas of People's sovereignty, social contract theory and Directive Principles of State Policy, whilst establishing that PTD is a doctrine which transcends the narrow confines of environmental protection.

The research problem grappled with in this paper is that, although Sri Lankan courts have utilized PTD as a measure to curb excesses of the executive based on a wide constitutional foundation, PTD is still principally perceived as an instrument used in the protection of natural and national resources, whilst the application of the doctrine has also been inconsistent.

This paper seeks to verify the veracity of the following hypothesis: PTD is based on the mutually complementary notions of People's sovereignty and social contract theory. The Directive Principles of State Policy are closely knitted with PTD since they provide the essential parameters for the doctrine's application. Thus, PTD is not limited only to the protection of natural and national resources but the doctrine has been mandated to uphold the sovereignty of the People, which also includes the protection of natural and national resources.

### *Existing knowledge and salience of the present research*

This research has been carried out on the basis of relevant secondary material such as books, journal articles, papers, judicial decisions and newspaper reports. The existing literature on PTD comes largely from the United States<sup>1</sup> and the discussion thereto is generally limited to PTD in the context of

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<sup>1</sup> J.L.Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', Michigan Law Review(Vol. 68), pp.471-566; D.Takacs, 'The Public Trust Doctrine, Environmental Human Rights, And The Future Of Private Property', 16 New York University Environmental Law Journal 711(2008); M.C.Blumm & R.D.Guthrie, 'Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxon Vision', University of California Davis Law Review,Vol.44,2012 < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1816628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1816628)>(accessed 12/11/2012); M.C.Blumm, and E. Doot, 'Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches', Environmental Law, Vol. 42,

environmental protection. Although some of these writers discuss countries other than the USA, none of them have discussed the Sri Lankan jurisprudence which has a distinct 'local flavour'. Consequently, the literature on PTD originating from the USA is largely incomplete as far as the jurisprudential development of PTD is concerned. In understanding the use of PTD in India, sole reliance was placed on the case law as developed by the Indian judiciary. It is noteworthy that the Indian courts consistently rely on PTD in matters relating to environmental protection; a study of these cases is sufficient for one to adequately assess the Indian approach to PTD.

When it comes to Sri Lanka, as far as this writer is aware, only one comprehensive study on PTD has been carried out.<sup>2</sup> Although other writers have referred to PTD in their writing, these works do not amount to a comprehensive study of the doctrine, and as such, they are of limited value in understanding PTD. Samararatne, tracing the origins of PTD and how the doctrine is applied in other countries, correctly identifies that Sri Lanka has its own version of PTD. Samararatne's work, discussing the judicial development of PTD, identifies three areas where the doctrine is applied in Sri Lanka: namely, protection of natural and national resources, exercise of discretion and issues pertaining to rule of law. The relevance of the present paper is that, PTD is looked at as an instrument to curb excesses of the state based on the ideas of sovereignty of the People and social contract theory, through the development of a theoretical framework. This study brings all aspects of PTD as applied in Sri Lanka, within the broad umbrella of People's sovereignty.

### ***Research structure***

Part 2 of this paper develops a theoretical framework for the application of PTD based on the ideas of People's sovereignty, social contract theory and Directive Principles of State Policy. A study on how PTD has been applied in selected jurisdictions is undertaken in part 3, whilst PTD as applied in the Sri Lankan context is looked at in part 4. This section also undertakes a limited study on the inconsistent application of the doctrine and possible reasons for the same. Parts 5 and 6 of this paper contain the conclusions of the findings and recommendations to develop PTD jurisprudence, respectively.

## **2. Theoretical Framework: Social Contract theory, People's Sovereignty, Directive Principles of State Policy and their nexus to the Doctrine of Public Trust**

As stated elsewhere, this paper looks at PTD as developed in Sri Lanka as a concept stemming from the social contract theory and the idea of People's sovereignty. This part argues that the social contract theory means that the People have created an entity called the 'state' for the furtherance of their rights and

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No. 1, 2012, Lewis & Clark Law School Legal Studies Research Paper No. 2012-1, <papers.ssrn.com/sol3/papers.cfm?abstract\_id=1925112> (accessed 12/11/2012); M.K.Scanlan, 'The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin', Ecology Law Quarterly [Vol. 27], pp.135-202 <papers.ssrn.com/sol3/Delivery.cfm?abstractid=1928621>(accessed 13/1/2013); J.L.Wescoat Jr., Submerged Landscapes: The Public Trust In Urban Environmental Design, From Chicago To Karachi And Back Again, <https://litigation-essentials.lexisnexis.com/.../app?... - United States> (accessed 13/10/2011)

<sup>2</sup> D.Samararatne, Public Trust Doctrine: The Sri Lankan Version, ICES,(Colombo,2010).



protection, and in order to facilitate this objective, the People have temporarily surrendered some of their rights to this artificially created state. Therefore, all the power that the state enjoys is what is granted by the People who were the original holders of such power. Hence, the state holds 'borrowed' power on a temporary basis for the purpose of furthering the rights of the People i.e. to further the public interest. Thus, in effect, it is ultimately the People who are sovereign and not the state. The state is only the 'custodian' of the People's power. This part also demonstrates how the Directive Principles of State Policy lay down the 'guidelines' for the state to follow when it exercises power in order to uphold good governance.

It is contended that the concepts of social contract, People's sovereignty, Directive Principles of State Policy and PTD are all intimately connected, that when a state institution or an official violates the public trust (when power is used for any purpose other than public benefit), it invariably amounts to a violation of People's sovereignty and breach of the Social Contract.

### ***The Social Contract Theory: Hobbes, Rousseau and Locke***

There are three main proponents of the social contract theory: Thomas Hobbes<sup>3</sup>, John Locke<sup>4</sup> and Jean-Jacques Rousseau<sup>5</sup>. Although the contract as propounded by them have minor variations, their theories essentially state that, initially man lived in a 'state of nature' free from encumbrances and an organized form of government, this 'state of nature' gave rise to conflict and chaos as societies grew. Hence, the people created government and entered into a contract with that government. In this relationship, the people would surrender their rights to the government and in turn, the government would give them an organized social structure and protect their rights.

Hobbes, a realist, depicts the 'state of nature' as a primitive situation where the existence of man was solitary, poor, nasty, brutish and short. He believed that man was at war with each other, in the sense that there was an unending competition between men who were pursuing their vainglorious selfish ends. As this was detrimental to human existence, the people contracted amongst themselves and gave the power of government to a single man or an assembly of men, who in turn would protect their rights.

According to Hobbes,<sup>6</sup> the contract was only between men and not between men and ruler, although the position of the ruler was created by the very contract the men entered amongst themselves. As the ruler was not party to the contract he was not bound by its terms either. Hence, even if the ruler became a despot, the people had no right to change the ruler. Hobbes was proposing an absolute monarchy where the people could be reduced to 'subjects'. Sovereignty, according to Hobbes, was vested in an absolute ruler.

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<sup>3</sup> T.Hobbes, *Leviathan*(1651), Wilder Publications,(Redford,2007).

<sup>4</sup> J.Locke, *The Second Treatise of Government*(1690),The Liberal Arts Press,(New York,1952).

<sup>5</sup> J.Rousseau, *The Social Contract*(1762),Penguin-Great Ideas, (London,2004).

<sup>6</sup> Hobbes,op.,cit.,;See also, C.Agarwal, *Political Theory (Principles of Political Science)* (Eighth edition),S.Chand & Company, (New Delhi, 2008 (reprint 2009)), pp.127-131;A.Appadorai,*The Substance of Politics*(Eighth edition),OUP,(India,1957), pp. 23-25.

Rousseau<sup>7</sup>, an idealist, believed that people in the 'state of nature' were essentially good and happy. However, with time there were quarrels as the societies grew and their interests became more diverse and corrupt. Hence, to prevent the total disintegration of society and to go back to the original 'state of nature', people entered into a contract among themselves and the individual surrendered himself completely to the contract. Rousseau called this contract 'the general will' and this meant that it is the community of people that is sovereign and the individual will had little or no importance.

The general will represented the common good and every individual's will had to be in harmony with the general will. If something was the will of the community, then that will had to be the will of every individual, irrespective of the consequences of such will to certain groups within the general populace. This, in effect means, if the general will was to exterminate all individuals above the age of sixty, then, according to Rousseau, it is also the will of all people above sixty to be exterminated, an idea which is simply absurd. Be that as it may, in Rousseau's contract theory, it was the community that was supreme and the government was simply the 'agent' of the sovereign community of people.

Locke's 'state of nature' is more civilized and advanced than Hobbes's depiction of the same. According to Locke,<sup>8</sup> people lived in peace and harmony and they were free and equal, and there were limited rules (law of reason or natural law) which guaranteed the people's life, health and property. As there was no organizational structure or a common law in this 'state of nature', people lived their lives according to what they thought was right and were also the arbiters of their own causes. This resulted in confusion as the law of reason was interpreted and enforced by individuals to suit their own ends and as the society grew, it resulted in chaos. Hence, the people contracted among themselves to give up some of their rights including the right to interpret and enforce the law to the community. The community selects a few individuals and forms a government and the power to interpret the law and adjudicate upon disputes and responsibility to protect people's rights are transferred to the government thus established.<sup>9</sup>

Here, it is noted that according to Locke, the people surrender their individual rights to the community and not to the government. And even that surrender of rights is limited to the rights of interpreting and enforcing the law of reason. The individuals keep to themselves the natural rights of life, liberty and property. The government must exercise power for the benefit of the people and not in an arbitrary and capricious manner.<sup>10</sup> Locke states in this regard that '...they are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough'.<sup>11</sup>

In Locke's view, the government holds power 'in trust' for the people and it is the community of people that is supreme. The government is only the instrument through which the supremacy of the community is exercised. As such, if the government deviates from its purpose, the people have the power to oust such

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<sup>7</sup> See, Rousseau, op., cit.; See also, Agarwal, op., cit., pp.135-140; Appadorai, op., cit., pp. 28-31.

<sup>8</sup> Locke, op., cit.; See also, Agarwal, op., cit., pp.131-135; Appadorai, op., cit., pp. 25-28.

<sup>9</sup> Locke, op., cit., pp.77-78

<sup>10</sup> See also, Appadorai, op., cit., pp.25-28.

<sup>11</sup> Locke, op., cit., p.81.

government and appoint another in its place.<sup>12</sup> The idea of People's sovereignty is an embedded presupposition in Locke's theory. As the main focus of this paper is the PTD, which stems from the idea of people's sovereignty, Locke's theory of state is of great significance to this research.

Although both Hobbes and Rousseau speak of a 'state' that comes to being as a solution for the chaos resulting from the 'state of nature', these ideas are debatable in today's context. For instance, today, great importance has been accorded to the 'individual' and his/her rights in the international legal order as well as in most countries. There is no place in today's civilized world for a despotic monarch who abuses and terrorizes the people although to Hobbes, this was a perfectly acceptable state of affairs.<sup>13</sup> Similarly, in today's world, a person or a group of persons cannot be simply disposed of even if an overwhelming majority (general will) was in support of the idea, because if this were so, no minority group in the world will be safe.

Thus, it is demonstrated that although Hobbes, Rousseau and Locke all had their own ideas on the nature of the social contract, it is Locke's theory which comes closest to reflecting today's world, its values on human dignity and most importantly, the modern day constitutional arrangements, including that of Sri Lanka, and hence, this paper will adopt the Lockean contract theory for the purposes of developing a theoretical framework for PTD.<sup>14</sup>

#### *People's Sovereignty as per the Sri Lankan Constitution*

Unlike in the British constitutional tradition, in Sri Lanka, sovereignty is in the People. According to Agarwal,<sup>15</sup> sovereignty could be divided into two main categories: political sovereignty and legal sovereignty. Political sovereignty means the forces that influence the conduct of the state, or in other words, the power of the People. This power is temporarily transferred to the state so that the state would protect the rights of the people. Legal sovereignty means the authority of the state to make and enforce laws. It is noted that legal sovereignty is subordinate to political sovereignty, since the legal sovereignty owes its validity and continuation to the political sovereign.<sup>16</sup>

The Constitution of Sri Lanka provides for People's sovereignty in Articles 3 and 4.<sup>17</sup> Article 3 reads: '[i]n...Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and franchise'.<sup>18</sup>

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<sup>12</sup> See, Appadorai, op., cit., p.27.

<sup>13</sup> In fact, there is evidence to suggest such rulers are shunned and are often ousted from power. For instance, Gaddafi of Libya and Mubarak of Egypt.

<sup>14</sup> Even the American Declaration of Independence has invoked the Lockean social contract theory.

<sup>15</sup> Agarwal, op., cit.

<sup>16</sup> *Ibid*, pp.155-159.

<sup>17</sup> See for a comprehensive account on the notion of People's sovereignty, J. De Almeda Gunaratne, P.C., 'Judicial Response to the Concept of Sovereign Power of the People in Sri Lanka', In Pursuit of Justice, Kamalabayson Foundation, (Colombo, 2008), pp.137-218.

<sup>18</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka, Article 3.

What Article 4 provides is the manner in which the People may exercise and enjoy their sovereignty. Article 4(a) states that the legislative power of the People shall be exercised by parliament and by referendum, while Article 4(b) states the executive power of the People is exercised by the President whilst as per Article 4(c), the judicial power of the People is exercised by parliament through courts and other tribunals exercising judicial powers. Article 4(d) and (e) also provides for fundamental rights and the franchise as further means of exercising sovereignty of the People.

There have been a few landmark judgments and determinations of the Supreme Court which have elucidated the scope and nature of Articles 3 and 4. Hence, it is of import to consider some of them at this juncture in order to gain a fuller understanding of the notion of People's sovereignty as per the Constitution.

In the *Nineteenth Amendment case*<sup>19</sup> it was held that Articles 3 and 4 are linked and must be read together. It was opined that Article 3 conceptualized the idea of 'sovereignty' while Article 4 gave it a practical dimension.<sup>20</sup> This case further held that the reason why Article 4 and its sub-Articles specifically refer to legislative, executive and judicial power as 'legislative power of the People', 'executive power of the People' and 'judicial power of the People' is because the '...power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.'<sup>21</sup> The *Nineteenth Amendment case* aptly demonstrates the nexus between People's sovereignty and PTD, as it clearly states that it is the People who are the true proprietors of state power whereas the state only holds it in trust for them.

In the *Thirteenth Amendment case*<sup>22</sup>, both the majority and dissenting opinion by Wanasundara J, discussed the integral nature of Articles 3 and 4. It was held by the majority that although it is only Article 3 that is the entrenched provision out of the two, and Article 4 merely sets out the manner in which the sovereignty of the People could be exercised, the amendment of Article 4 may require People's approval at a referendum since its amendment could impinge on the sovereignty of the People as declared in Article 3.<sup>23</sup> This shows once again, how closely knitted these two provisions are, that the amendment of one could, possibly, impinge on the other. Wanasundara J went further in his dissenting judgment to hold that although it is only Article 3 that is expressly entrenched, even Article 4 has to be considered as entrenched since it is closely linked to Article 3.<sup>24</sup> What this case demonstrates is how fundamental and closely linked Articles 3 and 4 are.

Most importantly, Article 3 states that '[i]n...Sri Lanka sovereignty is in the People and is inalienable'.<sup>25</sup>

<sup>19</sup> *In Re the Nineteenth Amendment to the Constitution* (2002) 3 Sri L.R 85. See also, *In Re Eighteenth Amendment to the Constitution* (2002) 3 Sri L.R 71.

<sup>20</sup> *Ibid*, p.96.

<sup>21</sup> *Ibid*, p.97.

<sup>22</sup> *In Re The Thirteenth Amendment To The Constitution and The Provincial Councils Bill* (1987) 2 Sri L.R 312

<sup>23</sup> *Ibid*, pp. 324-325.

<sup>24</sup> *Ibid*, pp. 335-339.

<sup>25</sup> The Constitution, Article 3.

Here, the provision does not vest, but 'declares' that the sovereignty is in the People<sup>26</sup> and that it is inalienable, meaning, it cannot be divorced from the People. What is gathered from the wording of Article 3 is that People's sovereignty is a pre-constitutional fact, which has found expression in the Constitution, rather than a special status bestowed on the People by the Constitution.

As discussed above, under the Sri Lankan Constitution, it is the People who are sovereign and the state is merely holding the power of the sovereign People 'in trust' and wielding that power for the benefit of the People. This is consistent with the Lockean contract theory as discussed above, since it is the People who are sovereign and the state is merely the trustee with whom the People entered into a contract with for their protection and advancement. The social contract theory presupposes the idea of People's sovereignty, because the 'contract' to surrender some of the rights in order to ensure greater well-being was perceived and voluntarily done by the People who artificially created a state for this purpose. If the People were not sovereign, they would not have been able to create the social contract.

### ***Directive Principles of State Policy***

If there is a contract (for instance, between the People and the State), there must be an objective/purpose for such contract and certain terms or guidelines to be followed in the execution of the contract. One could examine the Constitution in this regard since it is the supreme law of the land which lays down the components of the state, their functions, their relationship with the sovereign People and also, the duties People have towards the community. The preamble of the Constitution states that the People of Sri Lanka had mandated their elected representatives to enact a new Constitution in order to achieve the goals of a democratic socialist republic where there would be, *inter alia*, freedom, equality, justice and fundamental rights. This, then, could be taken to be the purpose of the contract or the mandate given to the state at the inception of the Constitution by the People. The guidelines to be followed in the pursuit of these purposes can be found in chapter VI of the Constitution which lays down the Directive Principles of State Policy and Fundamental Duties.

Article 27(1) states that the Directive Principles shall guide the executive and the legislature in the enactment of laws and governance in order to establish a just and free society. There are a number of sub-Articles that lays down goals to be achieved by the state. Some of them are: realization of fundamental rights<sup>27</sup>, guaranteeing an adequate standard of living for the people<sup>28</sup>, rapid economic development<sup>29</sup>, safeguarding the sovereignty and territorial integrity of Sri Lanka<sup>30</sup>, strengthening national unity<sup>31</sup>,

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<sup>26</sup> See Amerasinghe J in *Bulankulama and Others v. Secretary. Ministry of Industrial Development and Others* (2000) 3 Sri.L.R. 243, p.253.

<sup>27</sup> The Constitution, Article 27(2)(a).

<sup>28</sup> *Ibid*, Article 27(2)(b).

<sup>29</sup> *Ibid*, Article 27(2)(d)

<sup>30</sup> *Ibid*, Article 27(3).

<sup>31</sup> *Ibid*, Article 27(5).

protecting and preserving the environment<sup>32</sup> and etc.

Although the state has a duty to follow the Directive Principles in the governance of the country, Article 29 states that the provisions in Article 27 does not create any legally enforceable duties or obligations, meaning, violation of Article 27 provisions are non-justiciable. The principles have to be coupled with another constitutional provision for them to have standing in court as an enforceable constitutional provision.<sup>33</sup>

Marasinghe opines that, from the language of the Constitution, it is clear that the legislators and the judiciary are expected to be guided by the Directive Principles in enacting and interpreting statutes, respectively<sup>34</sup> and that the principles should be considered an extension of the fundamental rights chapter for there to be full realization of fundamental rights guaranteed under the Constitution.<sup>35</sup>

In fact, it has been held by the Indian Supreme Court that the Directive Principles form the 'very conscience' of the constitution<sup>36</sup> and that when the constitution is interpreted, one must look at not only the black letter word but also the spirit of the constitution which is reflected in the preamble and the Directive Principles.<sup>37</sup> It has also been held by the Indian courts that although Directive Principles are not enforceable in court, the courts must evolve and adopt rules of interpretation that give effect to the Directive Principles as they are so fundamental to the Constitution.<sup>38</sup>

Kashyap writes that the Directive Principles are very much an operative and important part of the Indian constitution and that even though the principles are non-justiciable, they have played a key role in the enactments and interpretation of social reform legislation. He further states that the preamble, fundamental rights and Directive Principles are all integral parts of the same constitutional edifice and that they form the 'soul' of the constitution.<sup>39</sup>

In the *Minerva Mills case*<sup>40</sup> it was held that the importance of Directive Principles to the constitution cannot be over-emphasized because they represent the high ideals to be achieved by the state. The socio-

<sup>32</sup> *Ibid*, Article 27(14).

<sup>33</sup> For instance, *In Re The Thirteenth Amendment*, op.,cit. *Vadivelu v. O.I.C, Sithambapuram, Regional Camp Police Post, Vuuniya and Others* (2002) 3 Sri L.R. 146; *Sugathapala Mendis and Others v. Chandrika Bandaranaike Kumaratunga and Others* (SC/FR 352/2007)S.C Minutes 08 October 2008, gave effect to Article 27, although its legal validity came from the fact that it was coupled with other constitutional provisions.

<sup>34</sup> L.Marasinghe, *The Evolution of Constitutional Governance in Sri Lanka*, Vijitha Yapa,(Colombo, 2007), p.363; see also, *Walte Gedara Wijebanda v. Conservator General of Forests and Others* (2009) 1 Sri L.R. 337,at p.356.

<sup>35</sup> Marasinghe,op.,cit., p.364.

<sup>36</sup> *Markandeya v. state of Andhra Pradesh*, AIR 1989 SC 1308 (para.9).

<sup>37</sup> *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Others* 1981 AIR 298 < Indian Kanoon - <http://indiankanoon.org/doc/1111529/>>(accessed 29/12/2012).

<sup>38</sup> *U.P.S.E. Board V. Hari Shankar*, AIR 1979 SC 65; see also, *Central Inland Water Transport corporation Ltd. & another. Etc. V. Brojo Nath Ganguly & another*, 1986 AIR 1571.

<sup>39</sup> S.Kashyap, *Our Constitution ( An Introduction to India's Constitution and Constitutional Law)* (Fifth edition), National Book Trust, (New Delhi,2011), pp.152-159.

<sup>40</sup> *Minerva Mills Ltd. & Others. v. Union of India & Others* 1980 AIR 1789, as cited in J. Wickramaratne, *Fundamental Rights in Sri Lanka*(Second edition), Stamford Lake,(Pannipitiya, 2006), p.43.

economic rights stated in the Directive Principles are as important as the fundamental rights and together they carry out the objectives stated in the preamble of the constitution.

The Directive Principles which are considered the 'soul' and 'conscience' of the Constitution, plays a vital role in giving effect to PTD. This is because, as was contended earlier, PTD means that the state exercises the power of the People on their behalf and that power is held in trust for the People. The Directive Principles give the guidelines for the use of state power in order to achieve the purposes laid down in the Preamble to the Constitution.

If this is seen in the context of a trust fund, it could be said that the state is the trustee while the People are the beneficiaries. The property forming the trust is state power which has to be used only for the benefit of the beneficiary. The guidance for the proper use of the trust property is stated in the Directive Principles.

In fact, the link between PTD and Directive Principles is nothing new in the Sri Lankan jurisprudence as evidenced by the *Waters-Edge case*<sup>41</sup> and the recent *Environmental Foundation v. Mahaweli Authority case*.<sup>42</sup>

The above illustrates the nexus between the social contract theory, People's sovereignty, Directive Principles of state policy and PTD. The social contract theory recognises a state that comes into being as a result of an agreement entered into by the People, in order to protect their interests. The idea of People's sovereignty is embedded in the contract theory (especially Locke) because it is the People that create and give power to the state for the specific purpose of protecting their interests, and if the state fails to do so, the People have the power to replace that inept state with another one. The ultimate masters are the People. The Directive Principles provide guidance to the state as to how to serve the best interest of the sovereign People. The Directive Principles lay down particular goals such as social unity, environmental protection and economic development, to be achieved by the state in order to protect the People from the dangers of the 'state of nature' where there was chaos. PTD means that the state holds the power of the People 'in trust' and exercises it on their behalf in order to achieve these goals stated in the Directive Principles so that the purposes stated in the preamble to the Constitution could be realized.

However, it is noted that this theoretical framework on PTD applies only to Sri Lanka, because it is only Sri Lanka that has recognised the basis of PTD to be rooted in People's sovereignty (and by extension of logic, social contract theory). Other jurisdictions, as will be demonstrated in the next part, have used the doctrine restrictively mostly in the adjudication of environmental disputes.

### **3. Origins of Public Trust Doctrine and its application in foreign jurisdictions**

This part will examine the possible origins and subsequent development of PTD in other jurisdictions. For

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<sup>41</sup> *Sugathapala Mendis, op., cit*

<sup>42</sup> *Environmental Foundation Limited and Others v. Mahaweli Authority of Sri Lanka and Others*, 2010(1) Sri L.R. 1, at p.19.

this purpose, judgments from India, United States of America (USA), relevant legislation from South Africa and Kenya will be discussed.<sup>43</sup> It is noted at this juncture that all the countries discussed in this part have used PTD only in the context of environmental protection, although India has connected PTD with Article 21 of the constitution<sup>44</sup> which guarantees right to life, even this has been done in the context of the right to a clean and healthy environment.

It is observed that even countries such as India and USA, which have a vibrant and comparatively activist judiciary, have not realized the true potential of PTD. However, it is Sri Lanka, which has expanded the scope of the application of PTD beyond the narrow confines of environmental protection,<sup>45</sup> although the courts have been anything but consistent in their approach. The acceptance and development of PTD in Sri Lanka will be examined in the next part of the paper

It is widely accepted that the origins of PTD lies in Roman Law.<sup>46</sup> In a recent judgment of the Supreme Court of Sri Lanka it was held that the origins of PTD could be traced back to Justinian's Institutes where it recognizes the common ownership of air, running water and sea, and how the rulers have held these properties in trust for the general public.<sup>47</sup>

ix, an American jurist, opines that the modern PTD is found in the Roman Law and English Law.<sup>48</sup> Sax, seems, has found the solution to 'resource management' problems in PTD. He believes that PTD has the breadth and substantive content' to challenge actions of the state on environmental issues.<sup>49</sup> In his seminal work on PTD, Sax states that PTD lays down three types of restrictions on governments: firstly, the property subject to the Public Trust must be available for the use of the general public, secondly, the trust property cannot be sold, even for a reasonable monetary consideration, and thirdly, the property must be maintained and dedicated for particular types of uses.<sup>50</sup> While noting that these restrictions sum up the effect of PTD with regard to natural resource conflicts, it is further observed that Sax takes up the traditional view on PTD since he cannot foresee the extension of PTD beyond environmental issues.

Takacs too traces the origins of PTD to the era of Justinian and the Roman empire. He states that Emperor Justinian commissioned the leading jurists at the time to compile the laws of the day and as a consequence

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<sup>43</sup> Judgments from USA are looked at since it is the USA that is responsible for the recent revival of PTD, while the Indian jurisprudence is examined since India too has given a constitutional basis for PTD in addition to having a robust PTD jurisprudence. South Africa and Kenya are discussed in this paper since they have explicitly recognized PTD in their legislation unlike the other two jurisdictions.

<sup>44</sup> Article 21 of the Indian constitution reads: 'No person shall be deprived of his life or personal liberty except according to procedure established.'

<sup>45</sup> For instance, consider the judgment in *Senarath and Others v. Chandrika Bandaranayake Kumaratunga and Others* (2007)1 Sri L.R.59; determination in *Re the Nineteenth Amendment*, op.,cit.; *Heather Mundy and Others v. Central Environmental Authority and Others* S.C Appeal 58/2003, Supreme Court Minutes 20<sup>th</sup> January 2004.

<sup>46</sup> For instance, see, Takacs,op.,cit.,p.2.

<sup>47</sup> *Environmental Foundation Limited*,op.,cit., pp.18-19. See also, per Tilakawardane J in *Watte Gedara Wijebanda*,op.,cit. p.357.

<sup>48</sup> Sax,op.,cit.,p.473.

<sup>49</sup> *Ibid*, p.474.

<sup>50</sup> *Ibid*, p.477.



it was codified that air, running water, sea, etc. to be common to all mankind and the state to be the 'steward in perpetuity' of such resources. He states that several centuries after the fall of the Roman Empire, PTD had made its way into the Magna Carta where the oppressive King John was forced to revoke the exclusive fishing and hunting licenses he had granted a select few, because such privileges infringed on the public's right of access to natural resources.<sup>51</sup> Describing the rationale for PTD, Takacs writes that;

[t]he Public Trust Doctrine's power comes from the longstanding idea that some parts of the natural world are gifts of nature so essential to human life that private interests cannot usurp them, and so the sovereign must steward them to prevent such capture.<sup>52</sup>

Samararatne, goes a step further than Sax and Takacs in her exposition of PTD. She alludes to the origin of PTD to both Roman Law and the equitable jurisdiction of the Chancery Courts in England. According to Samararatne, the English Law idea of PTD stresses on the proper exercise of public power.<sup>53</sup> Samararatne's observations in this regard are bolstered by Wade and Forsyth, who, writing on the nature of discretionary power, remark that '[s]tatutory power conferred for public purposes is conferred *as it were upon trust*, not absolutely-that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.' [emphasis added].<sup>54</sup>

Samararatne further writes that PTD is a 're-incarnation of established principles of English Administrative Law as applied in Sri Lanka.'<sup>55</sup> It is observed however, although Sri Lankan courts do use English public law principles in the adjudication of disputes connected to PTD, the rationale is different to that of English law principles of Administrative Law. The reason for this is, in Sri Lanka, as demonstrated by a number of judgments, the basis of PTD has been stated to be the idea of People's sovereignty as entrenched in Articles 3 and 4 of the Constitution, whereas in England, Administrative Law principles pertaining to judicial review of executive action are based on the notion of parliamentary sovereignty.

The following is a survey of PTD cases in selected foreign jurisdictions. It is noted that the case law discussed is not exhaustive due to the space constraints inherent in a research paper. However, these cases that are discussed provide an overview of the development and application of PTD.

### ***Development and application of PTD in the USA***

The earliest record of PTD in the USA is from the Supreme Court of New Jersey in a 1821 case, which held that a government could not make an absolute grant of the water of a state denying access of the people, and that such a grant is inconsistent with the law of nature and the 'constitution of a well ordered

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<sup>51</sup> Takacs, op., cit., p.2.

<sup>52</sup> *Ibid*, p.5.

<sup>53</sup> Samararatne, op., cit, pp.7-13.

<sup>54</sup> H.W.R.Wade and C.F.Forsyth, *Administrative Law* (Tenth Edition), OUP, (Oxford,2009), p.296.

<sup>55</sup> Samararatne, op., cit., p.12.

society.’<sup>56</sup> The subject matter of this case was the state government’s attempt to convert public lands covered by tidal waters into private ownership, which was held to be void as it was against PTD.

Several decades later, in the *Illinois Railroad case*<sup>57</sup>, the US Supreme Court used PTD to hold that a lake and groundwater were held in trust for the people so that they could use the waters to navigate, as well as for commerce and fishing purposes. In this case the state of Illinois attempted to grant the entire lakeshore of Lake Michigan to a private railroad company. Takacs writes that this case stands for the proposition that the state cannot abdicate the stewardship of navigable waters and the land under them as such abdication is inconsistent with the idea that the government is required to preserve such resources for the use of the public. He further comments that the legislature must exercise their police powers in harmony with PTD and not abdicate their duties of ‘stewardship’ for the sake of private interests.<sup>58</sup> Sax writes that this case created a new type of ‘judicial skepticism’, where the courts would be wary about ‘dubious’ government conduct when governments attempt to restrict public access to resources for the benefit of a privileged few.<sup>59</sup> It is noted that this spirit of ‘judicial skepticism’ as observed by Sax still holds true if one considers some of the Sri Lankan cases such as the *Waters-edge*<sup>60</sup> or the *Eppawala case*.<sup>61</sup>

In 1916, the Supreme Court of Ohio held that the state as trustee for the public cannot abandon its duty by the trust property by acquiescence or permit a diversion in the nature of the uses such property is utilized for. This case also held that the state is only the legal title holder and that it should hold the property in trust for the larger public and unlike in the case of private property, the trustee of public property cannot abandon such property.<sup>62</sup>

A survey of the US cases show that PTD has been applied by US courts with regard to any type of navigable stream,<sup>63</sup> wetlands,<sup>64</sup> and even artificially enlarged waters,<sup>65</sup> and on occasion, wild-life.

### ***Development and application of PTD in India***

In India, PTD has been intimately linked with Article 21 of the Constitution which guarantees right to life. Indian courts have been progressive in their interpretation of the Constitution to facilitate PTD within Article 21 and more so, to linkup Article 21 rights with protection of environment. However, Indian courts began using PTD only in 1997<sup>66</sup>, although they have been consistent in their approach towards the doctrine and environmental issues since then. It is noted here that the Sri Lankan courts have been using the

<sup>56</sup> *Robert Arnold v. Benajah Mundy* 6 N.J.L. 1(1821). See also, Takacs, op., cit., p.2.

<sup>57</sup> *Illinois Central Railroad v. Illinois* 146 U.S. 387(1892).

<sup>58</sup> Takacs, op., cit., pp.2-3.

<sup>59</sup> Sax, op., cit., pp.490-491.

<sup>60</sup> *Senarath*, op., cit.

<sup>61</sup> *Bulankulama*, op., cit.

<sup>62</sup> *State v. Cleveland and Pittsburgh R.R.*, 94 Ohio St. 61, 80, 113 N.E 677, 682 (1916), as cited in Sax, op., cit., p.486.

<sup>63</sup> *Marks v. Whitney*, 6 Cal.3d 251 (1971), as cited in J.S.Stevens, *Applying the Public Trust Doctrine to River Protection*, p.1 < [www.waterplan.water.ca.gov/.../vol4-environment->](http://www.waterplan.water.ca.gov/.../vol4-environment->) (accessed 13/12/2012).

<sup>64</sup> *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), as cited in Stevens, op., cit., p.2.

<sup>65</sup> *State v. Superior Court (Fogerty)* 29 Cal.3d 240 (1981), as cited in Stevens, op., cit., p.3.

<sup>66</sup> See, Takacs, op., cit., p.15.

doctrine at least since 1993<sup>67</sup>, although, the development and application of the doctrine in Sri Lanka has been the lone battle of a few judges<sup>68</sup>, and the application of the doctrine was never consistent.

When considering the Indian Jurisprudence vis-à-vis PTD, *Mehta v. Kamal Nath*<sup>69</sup> could be considered the seminal case as it eased the doctrine into Indian Jurisprudence. In this case, the respondent attempted to change the course of the Beas river in order to facilitate a commercial enterprise by the river bank. The changing of the course of the river threatened the surrounding forests and mountains and increased the risk of flooding. Here, the court citing the work of Sax<sup>70</sup> and relying on a host of US cases, upheld the validity of PTD as a mechanism to protect the integrity of the environment. Recognizing the Roman Law origins of the doctrine the court explained PTD thus:

The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.<sup>71</sup>

Although *Mehta* brought in an entirely new dimension to the Indian legal framework, it does not provide much assistance in determining when PTD was assimilated into the Indian legal system.<sup>72</sup> The judgment merely states that '[o]ur legal system – based on English common law - includes the public trust doctrine as part of its jurisprudence.'<sup>73</sup> Having said that, it is recognized that what is important is the application of the doctrine in a progressive manner to safeguard constitutional rights while protecting natural resources. As will be demonstrated in the following paragraphs, Indian courts have expanded the scope of PTD from the narrow interpretation provided by the US Supreme Court, which accorded protection mostly to water-ways, streams, wild-life and wetlands.

In the *M.I. Builders case*<sup>74</sup>, PTD was linked up with Article 21 of the constitution for the first time. This case is a development on the *Mehta case* discussed above, in that although *Mehta* introduced PDT to Indian jurisprudence, it did not connect the doctrine to the constitution. In this case where a public park and a market place were to be demolished to build a shopping complex, the Supreme Court held that such property is considered property forming the public trust. The court further held that demolishing such property adversely affects the people's quality of life, and as such, could amount to a violation of the

<sup>67</sup> *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* (1993) 1 Sri.L.R.283.

<sup>68</sup> Consider judgments of Mark Fernando J, Tilakawardene J, Amerasinghe J and S.N. Silva CJ.

<sup>69</sup> *M. C. Mehta v Kamal Nath and Others* Writ Petition(C)No. 182 of 1996 <[www.elaw.org/node/2785](http://www.elaw.org/node/2785)>(accessed 02/02/2013)

<sup>70</sup> *Supra*.

<sup>71</sup> *Mehta, op., cit.*, para.25.

<sup>72</sup> According to Takacs, none of the Indian cases say when PTD was incorporated into the Indian legal system (*Takacs, op., cit.*, p.17).

<sup>73</sup> *M. C. Mehta, op., cit.*, para.34.

<sup>74</sup> *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu* 1999 S.C.C. 464, as cited in *Takacs, op., cit.*, p.16.

people's right to life enshrined in Article 21 of the Constitution.

Similarly, in the *Co-Operative Housing Society case*<sup>75</sup>, the High Court of Andhra Pradesh held that the construction of a building in a park amounted to a violation of PTD. This case reiterated that the right to a clean environment is an inherent right under Article 21 which guarantees right to life, and hence, the land reserved for a public park cannot be used for other purposes such as building schools. Again, in a similar case in 2010, the Madras High Court restrained the state from building an underground car park on a public park. This case too used PTD as the basis for its decision.<sup>76</sup>

In the *Intellectuals Forum case*<sup>77</sup>, the action of the state was challenged in the Supreme Court on the basis that the proposed developmental activity of building a housing scheme would adversely affect two ancient tanks in Tirupathi, and that it would be a breach of the public trust. The court while acknowledging the eternal tussle between the need for economic development and preservation of the environment, held that it is nevertheless the duty of the state to protect and preserve nature. The court stated that environmental protection has been given the status of a fundamental right under Article 21 and it is also recognized as a fundamental duty in the Directive Principles of State Policy.

The Supreme Court, in its judgment in the *Karnataka Industrial Areas Development Board case*, elucidating the content of PTD, held that the concept of 'public trusteeship' could be accepted as the basic principle for the protection of natural resources on land and sea. It further held that PTD stands on the basis that resources such as air, sea and water cannot be owned or accessed by a few because of their great importance to the general populace and because they are a gift of nature to mankind.<sup>78</sup> Similarly, in 2009, the Supreme Court reiterated in the *Fomento Resorts case* that PTD casts a duty upon the state to hold resources for the use of the general public as opposed to the benefit of a few, and when the state fails to manage resources thus, the public has a right to challenge such action/inaction of the state.<sup>79</sup> Further, the Madras High Court held in 2010 that, it is a recognized principle that tanks, rivers and water-bodies are all 'communal' properties and the state is only the 'custodian' of such resources who is bound to protect and preserve them for the general populace.<sup>80</sup>

In contrast to other PTD cases in India, a September 2012 judgment of the Karnataka High Court

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<sup>75</sup>*Co-Operative Housing Society v. Municipal Corporation of Hyderabad* 2001 (5)ALD 663 <[www.indiankanoon.org/doc/351766/](http://www.indiankanoon.org/doc/351766/) - India>(accessed on 02/02/2013).

<sup>76</sup>See also, *R.Chandran v. State of Tamil Nadu, W.P.No.4647 of 2010* <Indian Kanoon - <http://indiankanoon.org/doc/554448/>>(accessed 22/1/2013).

<sup>77</sup>*Intellectuals Forum, Tirupathi v. State of A.P and Others*, Appeal (Civil) 1251 of 2006 <[www.indiankanoon.org/doc/1867873/](http://www.indiankanoon.org/doc/1867873/) - India>(accessed on 22/1/2013).

<sup>78</sup>*Karnataka Industrial Areas Development Board v. C. Kenchappu* (2006) 6 SCC 371; See also, *Rajendra Singh & Others v. Government of Delhi & Others*, WP (C)No.7506 of 2007 and WP(C) No.6729 of 2007 <Indian Kanoon - <http://indiankanoon.org/doc/1856066/>>(accessed 22/01/2013) , for a similar view pertaining to PTD and its purposes.

<sup>79</sup>*Fomento Resorts and hotels Ltd. v Minguel Martins* (Judgment on January 2009) Civil Appeal No.4154 Of 2000. <[www.indiankanoon.org/doc/1238478/](http://www.indiankanoon.org/doc/1238478/) - India>(accessed 02/02/2013)

<sup>80</sup>*M. Velu v. The State of Tamil Nadu and Others*, Writ Petition No.50425 of 2006, p.6 <[www.indiankanoon.org/search/?formInput=m.velu India](http://www.indiankanoon.org/search/?formInput=m.velu India)>(accessed 02/02/2013).

indicated that PTD could apply to property (a building) held by a municipal council, although the court did not deal with PTD or its parameters at length. The court merely held that:

[r]egard being had to the fact that Public Trust Doctrine applies to the...Municipality in respect of the properties belonging to it, the disposal of the properties or the right to use the properties necessarily requires to be compliant with the mandate of Sec. 72 of the Karnataka Municipalities Act, 1964...<sup>81</sup>

In this case there was no reference to Article 21 of the Constitution. However, there was a reference to Article 14 which guarantees equality.<sup>82</sup> But this short judgment did not demonstrate any nexus between PTD and Article 14 rights. This judgment's association with PTD seemed somewhat abrupt and hence, it is not possible to state with certainty at this juncture whether India has extended PTD beyond the ambit of environmental protection and into the realm of equality issues, or whether this judgment was only an isolated 'quirk' of a High Court.

The Indian case law (spanning from 1997 to 2012) discussed above, albeit not exhaustive, provides an adequate insight as to how PTD has been incorporated and used within the Indian legal framework. In India, PTD is used predominantly in the context of natural resource management, although the right to a clean and sustainable environment has been connected to Article 21 of the Constitution. It is puzzling as to why PTD is not used in the context of corruption in general, personal liberty and general exercise of state power, especially given that the Indian Supreme Court has read PTD into the right to life. There is no argument that when there is massive corruption by the state or when the personal liberties of the citizens are threatened, it reduces the quality of life, and as such, it is evident that PTD could be applied to these situations by a simple extension of logic. Furthermore, it is a noticeable fact that in many of the Indian judgments on PTD the judges have referred the paper by Sax<sup>83</sup> and the *Illinois Central Railroad case*<sup>84</sup> discussed above.<sup>85</sup> It seems, although PTD is tied up to right to life in India, the judiciary is still shackled by the narrow constrictions of the US jurisprudence on the matter. It seems that the Indian judiciary might not be aware that if PTD has been linked up with the right to life, PTD need not be restricted only to the protection of Article 21 rights in the context of a clean environment.

### ***Development and application of PTD in South Africa and Kenya***

When considering PTD in the African context, the jurisprudence as developed in South Africa and Kenya

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<sup>81</sup> *Mr Rehan Pasha v. The State Of Karnataka*, Writ Petition Nos. 14979-14980 of 2011 (Lb-Res) & 14981 Of 2011 <Indian Kanoon - <http://indiankanoon.org/doc/60224634>>(accessed 02/02/2013), p.5.

<sup>82</sup> Article 14 of the Indian Constitution reads: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth"

<sup>83</sup> *Supra*.

<sup>84</sup> *Illinois Central Railroad*, op.,cit.

<sup>85</sup> In this regard, see also in addition to the case law discussed, *Sri G Eshwaraiyah vs The State Of Karnataka*, W.P.Nos.20080-20082/2010 (LA-KIADB), <Indian Kanoon - <http://indiankanoon.org/doc/91960220/>>( accessed 02/02/2013).

is discussed for the purposes of this paper, although there are other countries such as Uganda which has successfully incorporated the doctrine in to their jurisprudence.<sup>86</sup> Section 24 (b) of the Bill of Rights in South Africa,<sup>87</sup> provides that the environment shall be protected for the benefit of the present and future generations via appropriate legislation which promotes environmental integrity and sustainable development. In addition, there are a number of other constitutional provisions that highlight the importance of environmental protection.<sup>88</sup>

Statutorily, the environment is further protected by the National Environmental Management Act,<sup>89</sup> which expressly provides for PTD in section 2 (4)(o). This section states that '[t]he environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.'

In addition, many other resource specific legislation highlight the importance of PTD as a mechanism for protecting and preserving the environment. It is observed that starting with its 1996 constitution, South Africa had passed many legislation incorporating PTD into their system.<sup>90</sup> PTD forms an integral part of the South African jurisprudence in the context of environmental protection. Commenting on the legislative provisions on PTD in South Africa, Blumm and Guthrie write that PTD in South Africa is expansive and includes all natural resources.<sup>91</sup>

In *Waweru v. Republic*<sup>92</sup>, a 2006 decision by the Kenyan High Court, reiterated the position in India and USA to hold that the essence of PTD is that the state has a fiduciary duty to protect the environment and natural resources for the benefit of the people. Although this case failed due to a procedural impropriety, it is noted that the case clearly established PTD in the Kenyan legal system. Further, the 2010 Constitution of Kenya adopted PTD as part of Kenyan law. Similar to Section 24(b) of the South African Constitution, Section 42 of the Constitution states that the environment shall be protected for the benefit of the present and future generations, whilst Section 69 provides that natural resources shall be exploited and used in a sustainable manner which would benefit the people of Kenya. Section 70 of the Constitution provides that when the environment is polluted or when there is an imminent danger of such pollution, the court shall issue appropriate orders and directives to the relevant public officers to take appropriate action, and the section also provides for compensating the affected parties.

The above survey of the application of PTD in foreign jurisdictions demonstrates that the doctrine is applied only in the context of environmental protection. In this respect, although the USA revived the

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<sup>86</sup> See, Blumm and Guthrie, op., cit., for a succinct exposition of PTD in a number of states ranging from USA, India, Philippines, Pakistan and African states.

<sup>87</sup> Constitution of the Republic of South Africa, chapter 2.

<sup>88</sup> For instance, see sections 146 and 152 of the South African Constitution. See also, Blumm and Guthrie, op., cit., p.50.

<sup>89</sup> Act No.107 of 1998.

<sup>90</sup> Biodiversity Act No.10 of 2004; Integrated Coastal Management Act 24 of 2008; Mineral and Petroleum Resources Development Act No. 28 of 2002; National Water Act No.36 of 1998.

<sup>91</sup> Blumm and Guthrie, op., cit., p.52.

<sup>92</sup> *Peter K. Waweru v. The Republic*, Misc. Civil Appli. 118 of 2004 (H.C.K. at Nairobi Mar. 2, 2006) (Kenya), <[www.elaw.org/node/3651](http://www.elaw.org/node/3651)> (accessed 19/10/2012).

modern day PTD, its interpretation remains narrow when compared with India and South Africa. It is reiterated that India is better placed to extend PTD to other areas of governance to cover issues such as corruption and wider human rights violations (other than environmental conflicts), since the doctrine is closely linked to right to life as enshrined in Article 21 of the Constitution. However, judging by decided cases, it does not seem that the Indian courts are inclined to do so.

As will be demonstrated in the following part, Sri Lanka, however, has managed to extend the scope of the doctrine to cover wider social issues in addition to environmental disputes. However, as will be shown, there is still room for development of PTD even in the Sri Lankan context.

#### **4. Public Trust Doctrine in the Sri Lankan Jurisprudence**

This part examines the application of PTD in the Sri Lankan legal framework. It includes a brief overview of PTD as adopted in Sri Lanka and a discussion on the judicial development of the doctrine. In addition, it will critique the 18th Amendment to the Constitution as an occasion where PTD was violated whilst examining some possible reasons for the inconsistent application of the doctrine.

##### ***Overview of PTD in Sri Lanka***

PTD has been part of the Sri Lankan legal framework for approximately two decades. Its application, albeit inconsistent, has been more progressive and expansive in comparison with the legal systems discussed in the previous part of this paper. In fact, PTD has even been recognized as a new ground of judicial review.<sup>93</sup> The Sri Lankan judiciary, it seems, has had no qualms in progressively expanding the scope of PTD as an instrument to battle abuses of state power, while retaining its traditional role as a weapon to promote environmental protection and curb environmental degradation.<sup>94</sup> In addition, the scope of PTD has also been extended in the protection of 'national resources', against arbitrary privatizations.

Pinto-Jayawardene writes that PTD means that the powers vested in public authorities are held in trust for the People and must be exercised for the purposes for which they were granted. If such power is misused, such action is subject to review by courts.<sup>95</sup> Commenting on the advent of PTD, Samararatne writes that PTD was first introduced to Sri Lanka as a principle to curb abuse of discretionary power through the judgments of Mark Fernando J.<sup>96</sup> Samararatne contends that the doctrine has also been used in Sri Lanka

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<sup>93</sup> M. Gomez, 'Blending Rights with Writs: Sri Lankan Public Law's New Brew', (2006, Supplement), *Acta Juridica*, pp.451-477, at p.455

<sup>94</sup> See generally, M.de Silva, 'Environmental Rights', Sri Lanka: State of Human Rights 2009-2010, LST,(Colombo,2011), pp.465-523, at pp.493-513; W.Karunaratne (Ed.), *Some Significant Environmental Judgments In Sri Lanka*, Environmental Foundation Limited,(Colombo,2009) <[www.efl.lk/wp.../EFL-CASE-LAW-BOOK-FINAL-ALL-PAGES.pdf](http://www.efl.lk/wp.../EFL-CASE-LAW-BOOK-FINAL-ALL-PAGES.pdf)>(accessed 13/1/2013), for an overview of the nature of environmental protection in Sri Lanka.

<sup>95</sup> K. Pinto-Jayawardene, 'Focus on Rights- Upholding the Public Good', *The Sunday Times*, Colombo, 12.10.2008; See also, Sri Lanka Governance Report 2008, TISL, (Colombo,2008), pp.1-19 for an overview of some recent PTD case law in Sri Lanka

<sup>96</sup> Samararatne,op.,cit., p.27.

as a device which curtails exploitation of natural and national resources and as a doctrine that promotes the rule of law, although PTD is not expressly recognized in the Constitution.<sup>97</sup> Samararatne submits that the 'underlying values' of PTD are democracy as 'rearticulated' in terms of sovereignty of the People and the rule of law.<sup>98</sup>

It is argued elsewhere by this writer with regard to People's sovereignty and PTD that:

...Article 3 of the Constitution vests Sovereignty in the People, on whose behalf and for whom the three arms of the State exercise their power. These powers are exercised in order to achieve the goals stated in Article 27 which states the Directive Principles of State Policy. If any arm of the State derogates from these stated objectives and threaten People's Sovereignty, the Courts have jurisdiction to declare such action as unconstitutional and violative of the doctrine of Public Trust.<sup>99</sup>

As argued in part 2, the basis of PTD are the concepts of social contract theory and People's sovereignty, although no mention has been made of the social contract theory in any of the Sri Lankan judgments. The fact is, the overwhelming majority of judicial pronouncements illustrate that the basis of PTD in Sri Lanka is the idea of People's sovereignty as enshrined in Articles 3 and 4 of the Constitution.<sup>100</sup> However, it was demonstrated in part 2 that the Lockean social contract presupposes People's sovereignty, because it is the People who 'voluntarily surrender' a portion of their rights to the state (via the community of People) that was brought about as a result of the agreement the People entered into amongst themselves, for the purpose of furthering their well-being. Therefore, it is argued that the People surrendered some of their rights and 'temporarily entrusted' their powers of governance to the state as part of the contract. The state has to exercise such powers 'in trust' for the People and 'only for their benefit'.<sup>101</sup> As the state cannot do whatever it pleases with the powers and property of the people, it is evident that it is the People who are sovereign and not the state.

When the state oppresses the People or when public property or natural resources belonging to the People is mismanaged by the state, such action is struck down on the basis that it is contrary to the purposes for which the state had the custody of such power or the resources. In other words, it is a violation of the 'trust obligations' of the state. The Directive Principles of State Policy, plays the pivotal role of a 'guideline' for the state in its exercise of public power, which it holds in trust for the sovereign People.

However, no single judgment in the Sri Lankan jurisprudence encapsulates all the elements discussed in

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<sup>97</sup> *Ibid*, pp.27-40.

<sup>98</sup> *Ibid*, p.47

<sup>99</sup> N.Wijesundara, 'Rise of Judicial Review in Sri Lanka in Comparison with the United Kingdom', BALJ, 2012 Vol.XIX(Part1), BASL,(Colombo), 2012, pp. 122-129, at p.123.

<sup>100</sup> It is submitted that even when the judgments use fundamental rights in conjunction with PTD, this amounts to an assertion of People's sovereignty since Article 3 of the Constitution clearly states that sovereignty includes fundamental rights.

<sup>101</sup> See Tilakawardane J's judgment in *Sugathapala Mendis*, op.,cit. and the ensuing discussion in this paper.



part 2,<sup>102</sup> although collectively taken, the judicial pronouncements on PTD clearly establish the theoretical framework discussed therein.

### *Judicial application of PTD*

The following discussion on the case law is divided chronologically into two periods reflecting the advent and development of PTD in Sri Lanka. The first category of cases which broadly covers the period 1993-1995, at the most, only mention the fact that power is held in trust for the People or that discretionary power is to be exercised for the public benefit. The second category of cases, ranging from 2000-2008, contributes to the jurisprudential development of PTD in such a manner so as to 'crystallize' the doctrine with a constitutional basis founded on Articles 3,4, and 27. Some of the cases, as will be demonstrated, even recognized PTD as a new ground of judicial review

#### *Advent of PTD: Early case law*

In *De Silva v. Athukorale*<sup>103</sup>, where the issue was the acquisition of a private property by the government for development work, it was held by Fernando J that there is no notion of unfettered or absolute discretion, and that whatever discretion given to public officers in the exercise of their duties must be used having consideration to the rule of law and Article 12 of the Constitution.<sup>104</sup> Discussing the nature of power granted to public officials, His Lordship further held that '[i]t was a power conferred solely to be used for the public good; and not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.'<sup>105</sup>

Fernando J in this judgment discussed English Administrative Law principles and case law heavily in coming to his determination. In fact, there were only passing references to PTD in this judgment. However, His Lordship mentioned in this case that the discretion given to public officers must be exercised in light of the rule of law and Article 12 (which guarantees equality), for the public benefit. Fundamental rights, of which Article 12 is part of, is a component of People's sovereignty.<sup>106</sup> In this case His Lordship, instead of depending solely on English Administrative Law principles, mixed those principles with the idea of rule of law and People's sovereignty by bringing in fundamental rights.

It is this writer's view that the approach taken thereby is constitutionally correct. The reason is that, English Administrative Law principles, based on judicial review of administrative action on the basis of the doctrine of *ultra vires*, are formulated to justify the idea of Parliamentary sovereignty.<sup>107</sup> But this is not

<sup>102</sup> Perhaps with the exception of Tilakawardane J's judgment in *Sugathapala Mendis*, op.,cit.

<sup>103</sup> *De Silva v. Athukorale*, op.,cit.

<sup>104</sup> *Ibid*, p.293.

<sup>105</sup> *Ibid*, p.297. See also Fernando J's judgment in, *Jayawardena v. Dharani Wijaythilake, Secretary, Ministry of Justice and Constitutional Affairs and Others* (2001)1 Sri.L.R.132.

<sup>106</sup> Constitution, Article 3.

<sup>107</sup> See C.Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review', in C. Forsyth(ed.), *Judicial Review and the Constitution*, Hart Publishing, (Oxford,2000); M.Elliott, 'The Demise of Parliamentary Sovereignty? The implications for justifying Judicial Review', (1999)115

applicable to Sri Lanka, because there is no notion of Parliamentary sovereignty. It is the 'sovereignty of the People' that is the underlying principle in the Sri Lankan Constitution. Hence, even if English Administrative Law principles are used in Sri Lankan case law, the courts cannot apply them on the same basis that they are applied in the United Kingdom. It is contended what Fernando J did in this case was to state the basis of applying English Public law principles to be the notion of rule of law and fundamental rights, or in other words, People's sovereignty. Thus, it is opined that the first ever reported case on PTD in Sri Lanka has, in fact, used People's sovereignty as the basis for the doctrine although not explicitly stated so.

In *Bandara v Premachandra*<sup>108</sup> Fernando J, echoing the rationale in *Athukorale*<sup>109</sup>, reiterated yet again in a fundamental rights matter that '...powers of appointment and dismissal are conferred by the Constitution...in the public interest and not for private benefit, and their exercise must be governed by reason and not caprice, they cannot be regarded as absolute, unfettered or arbitrary.'<sup>110</sup> In this case, although PTD was not expressly mentioned, the rationale of the Supreme Court that power is to be exercised for the public benefit, captures a fundamental facet of PTD.<sup>111</sup>

In the *Premachandra case* too, where the exercise of discretionary power by a Governor of a Province in appointing the Chief Minister, was challenged, the Supreme Court held, similar to *De Silva* above, that there are no absolute or unfettered discretions given to public functionaries and that they hold power in trust for the People to be used for the public good and purposes for which such powers were given. The court further held in the next paragraph that the Governor is given discretion to select the Chief Minister who commands the confidence of the Council, and thereby *to give effect to the wishes of the people in the Province*.<sup>112</sup>

In this statement one could see the germ of People's sovereignty, as the 'franchise' too is part of sovereignty as enshrined in Article 3.<sup>113</sup> However, it is noted that this case is not the strongest articulation of People's sovereignty as the basis for PTD, although their Lordships ought to have embarked on a discussion on the issue of franchise and sovereignty since the main issue in contention in this reference was the nature of the discretion exercised by the Governor in appointing the Chief Minister as per provisions on Article 154F of the Constitution, a power which clearly affects People's franchise because, if the Governor is to have unfettered discretion in appointing the Chief Minister and if he appoints a person who does not command the support of the majority of the Provincial Council, it could amount to a violation of People's sovereignty.

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The Law Quarterly Review, pp.119-137; D.Oliver, 'Is the Ultra Vires rule the basis of Judicial Review?', Public Law [1987], pp.543-569.

<sup>108</sup> *Bandara and Another v. Premachandra, Secretary, Ministry of Lands, Irrigation, and Mahaweli Development and Others* (1994)1 Sri.L.R.301.

<sup>109</sup> *Supra*.

<sup>110</sup> *Bandara, op., cit., p.312*.

<sup>111</sup> See also, *Fernando v. Sri Lanka Broadcasting Corporation* (1996)1 Sri.L.R.157.

<sup>112</sup> *Premachandra v. Major Montague Jayawickrama and Another* (1994)2 Sri.L.R.90, at p.105.

<sup>113</sup> See, *In Re the Nineteenth Amendment, op., cit., p.96 and 109* which clearly states that franchise forms part of People's sovereignty.

## *Jurisprudential Development and crystallization of PTD*

The *Bulankulama case*<sup>114</sup>, according to Samararatne, was possibly the first case which dealt directly with the nexus between Article 3 and PTD.<sup>115</sup> It is observed, although this may have been the first reported judgment which discussed the relationship between PTD and Article 3, this certainly is not the first Sri Lankan case to have based PTD on the idea of People's sovereignty.

The issue in this case was the purported agreement of the government with an American company to grant exclusive rights to explore for phosphate at Eppawala, in North-Central Sri Lanka. It is observed that according to the agreement, the amount of phosphate extracted would increase up to 26.1 million metric tons per annum within the first thirty years, and could possibly exhaust all phosphate reserves in Sri Lanka as it was a non-renewable resource.<sup>116</sup> The purported action by the state was challenged under Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution which respectively guarantees equality, freedom of lawful occupation and freedom of movement and to choose a residence in Sri Lanka.

Amerasinghe J discussing the notion of People's sovereignty, stated that Articles 3 and 4 'declares' that sovereignty is in the People and that being a representative democracy, the 'powers of the People' are exercised through the three arms of the state, who are *for the time being entrusted with certain functions*. His Lordship further held that the organs of the state are the 'guardians' to whom the People have committed the care and preservation of the resources of the People.<sup>117</sup> Thereafter, discussing PTD, His Lordship stated that Articles 27(14) and 28(f) of the Constitution lay down duties of the state and other persons with regard to the preservation of environment.<sup>118</sup>

This case acknowledges the pre-constitutional nature of People's sovereignty (since Articles 3 and 4 merely 'declares' the sovereignty of the People as opposed to 'bestowing' such sovereignty) and that the state organs hold People's power only on a temporary basis as guardians, or in other words, as 'trustees' for the People. His Lordship also demonstrated the nexus between PTD and Directive Principles of State Policy<sup>119</sup> by stating the obligations of the state and citizens towards future generations, albeit in the context of environmental protection. This judgment aptly demonstrates the inter-relationship between People's sovereignty, PTD and Directive Principles.

Another significant case which brought together PTD and the idea of People's sovereignty was the *Nineteenth Amendment case*<sup>120</sup>, discussed above in part 2 of this paper. This reference pertained to the purported constitutional amendments which sought to affect, broadly, the appointment of Prime Minister,

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<sup>114</sup> *Bulankulama, op., cit.*

<sup>115</sup> Samararatne, *op., cit.*, p.30.

<sup>116</sup> *Bulankulama, op., cit.*, p.276.

<sup>117</sup> See also, Weeramantry J in *Gaboikovo-Nagymaros Project* (Hungary/Slovakia- The Danube Case 1997 General List N 92 25<sup>th</sup> September 1997), a case relied on by Amerasinghe J in his exposition of the idea of trusteeship of natural resources.

<sup>118</sup> *Ibid*, pp.253-257.

<sup>119</sup> The Constitution, Article 27.

<sup>120</sup> *In Re the Nineteenth Amendment, op., cit.*

the dissolution of the Cabinet of Ministers, the dissolution of Parliament and conferment of immunity of Members of Parliament from disciplinary action in certain situations.

Their Lordships held that the basic premise of public law is that power is held in trust and that power vested with the executive is the power of the people and the organs of the state are only custodians of the power of the people.<sup>121</sup> Referring to the power of dissolution of Parliament<sup>122</sup> and the power of impeachment of President<sup>123</sup> vested with the President and the Members of Parliament respectively, their Lordships held that such powers are to be used in trust for the People only when it is necessary to preserve the sovereignty of the People and to make it meaningful and effective. The exercise of such power with 'partisan objectives' amounts to a violation of the rule of law.<sup>124</sup> Their Lordships reiterated that sovereignty of the People includes the power of government and these powers 'continue to be reposed in the People' and the three organs of the state are only custodians who exercise such power in trust for the People.<sup>125</sup>

This case is one of the most significant judicial pronouncements showing how PTD in Sri Lanka has been extended to the exercise of state power, whilst discussing the nature of People's sovereignty and the limits placed on the exercise of power by the state. It is observed that although the previously discussed cases mention that the state holds power in trust for the People and that it could only be used for the public benefit, none of them went so far as to discuss these aspects in depth. If there had been any doubt vis-à-vis the application of PTD in the exercise of state power, this case removed all such doubts.<sup>126</sup>

In *Heather Mundy*<sup>127</sup>, a writ appeal to the Supreme Court, Fernando J acknowledged that PTD has always been part of Sri Lankan law and also hinted that PTD amounts to a separate ground of judicial review.<sup>128</sup> His Lordship, similar to his previous judgments on PTD, discarded the notion of unfettered discretion and reiterated the view that public power is held in trust for the People.<sup>129</sup> The issue in this case was that the Appellant's residential property was affected adversely by the construction of the Southern expressway. The Court of Appeal while recognizing that the Appellant's rights were affected, nevertheless dismissed the petition on the basis that development activities that are beneficial to a large proportion of the citizenry cannot be hindered because they may affect a minority of individuals.

Fernando J observed in the appeal to the Supreme Court that, although the Court of Appeal had recognized that the rights of the Appellant were affected, it had not acted under Article 126(3) of the Constitution which requires the Court of Appeal to refer writ petitions with a rights element to the Supreme Court to

<sup>121</sup> *Ibid*, p.99.

<sup>122</sup> The Constitution, Article 70(1).

<sup>123</sup> The Constitution, Article 38(2).

<sup>124</sup> *In Re the Nineteenth Amendment*, op., cit., p.100.

<sup>125</sup> *Ibid*, p.97, 98 and 100-101

<sup>126</sup> Since then, S.N.Silva CJ had relied on this case on many occasions in his determinations when discussing PTD and sovereignty. For instance, *Senarath*, op., cit.; *Appropriation Bill 2008*, SC(SD)3 and 4/2008, Supreme Court Minutes 24 October 2008

<sup>127</sup> *Heather Mundy*, op., cit

<sup>128</sup> *Ibid*, pp.13-14; See also, *Samararatne*, op., cit., pp.50-51; *M.Gomez*, op., cit., p.455.

<sup>129</sup> *Heather Mundy*, op., cit., pp.13-14

adjudicate on the rights issue. However, undeterred by the lapse of the Court of Appeal in failing to act under Article 126(3), the Supreme Court, despite sitting only in appeal, treated the matter as if it had been referred to the Supreme Court<sup>130</sup> and held that the actions of the state had amounted to a violation of Article 12(1) rights, in granting compensation.<sup>131</sup>

A few years thereafter, in *Senarath v. Kumaratunga*<sup>132</sup> PTD was used to curb financial corruption and fraud by the former President. Here, the issue was the retirement entitlements that had been claimed by President Kumaratunga purportedly under Presidents' Entitlement Act.<sup>133</sup> According to the facts of the case, in lieu of some of the entitlements such as the pension, official residence and maintenance allowance, President Kumaratunga had unlawfully attempted to bestow upon herself through the Cabinet of Ministers of which she was the head, a vast amount of movable and immovable property. This included a property near the Parliament complex on which the state had spent at least Rs.800 million for development,<sup>134</sup> a house near Independence Avenue in Colombo 07<sup>135</sup> and allocation of a large number of personal staff<sup>136</sup> and Police security detail of about 200 Police officers and 36 vehicles.

This purported claim was challenged in the Supreme Court under Article 12(1) of the Constitution. The petitioners claimed that as the head of the executive, the President and her Cabinet of Ministers should have exercised their power in trust for the People and where such trust is violated, the public has the right to challenge such action.<sup>137</sup>

Holding with the petitioners on the basis of People's sovereignty, PTD and rule of law, S.N. Silva CJ held that:

...where the executive being the custodian of the People's power abuse a provision of law in the purported grant of entitlements...and secures benefits and advantages...it is in the public interest to implead such action before court...Since executive power is exercised in trust for the People, such wrongful action is an infringement of the fundamental right to equality...<sup>138</sup>

Shedding light on the ratio of the decision, S.N. Silva CJ in a newspaper interview had stated that sovereignty lies with the People and it is exercised through the three arms of the state, and that everyone, including the President has a responsibility, and if they act against this responsibility, they lose

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<sup>130</sup> Generally, a Court sitting in appeal limits its jurisdiction to that of the lower court in hearing the appeal. But in this case, the Supreme Court converged the writ jurisdiction with the fundamental rights jurisdiction to grant compensation on the basis of an Article 12(1) violation while issuing a writ of mandamus. See, Wijesundara, 'Rise of Judicial Review in Sri Lanka', op., cit., at pp.124-125.

<sup>131</sup> *Heather Mundy*, op., cit., pp.15-16.

<sup>132</sup> *Senarath*, op., cit.

<sup>133</sup> Act No.4 of 1986.

<sup>134</sup> *Senarath*, op., cit., p.65.

<sup>135</sup> *Ibid*, p.66.

<sup>136</sup> *Ibid*, p.67.

<sup>137</sup> *Ibid*, pp.72-73.

<sup>138</sup> *Ibid*, p.76.

immunity.<sup>139</sup>

In 2007, Tilakawardane J in *Watte Gedara Wijebanda*<sup>140</sup> relying on PTD, brought together the idea of People's sovereignty and Directive Principles of State Policy in the context of environmental protection. In this case the petitioner instituted action under Article 12(1) after being refused a permit for quarry mining in an environmentally sensitive area, although another person has been granted a mining permit in the same area. Her Ladyship stated that all persons have the right to the sustainable use of the environment and although environmental protection has not been specifically recognized in the Constitution, the Supreme Court has, on numerous occasions, brought environmental protection within the purview of right to equality as enshrined in Article 12(1) of the Constitution.

Referring to the Directive Principles of State Policy in Articles 27(4) and 28, which lay down the responsibility of the state and all other persons to protect and preserve the environment, Her Ladyship held that although Directive Principles are not specifically enforceable against the state, they nevertheless provide valuable guidance and direction to the organs of the state to be followed in the enactment of laws and carrying out functions of good governance.<sup>141</sup>

Discussing PTD, Her Ladyship further held that the People have committed the care and preservation of resources to the state<sup>142</sup>, who is the 'guardian' of People's resources,<sup>143</sup> and that, upon accepting public office, every state official is empowered with the trust of the People in order to exercise their powers in the public interest.<sup>144</sup>

Furthermore, drawing a nexus between PTD and People's sovereignty, Her Ladyship held that as per Article 3 the People are sovereign and 'being a representative democracy, the powers of the People are exercised through persons who are for the time being only, entrusted with certain functions' and those functions are held in a 'sacred trust', never to be exploited or abused for one's own personal gain. 'To do so would be the highest betrayal of the sacred trust reposed in them not only by the present generations but all generations to come.'<sup>145</sup> It is observed that this progressive approach towards PTD was to be developed further by Tilakawardane J in the landmark *Waters-Edge* judgment discussed in the following pages.

In terms of jurisprudential development of PTD in Sri Lanka, the *Waters-Edge case*<sup>146</sup> is considered seminal not only because of its clear exposition of PTD and its implications, but also because, in this writer's opinion, it is the most progressive interpretation of PTD so far.

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<sup>139</sup> *The Sunday Times*, Colombo, 12.10.2008.

<sup>140</sup> *Watte Gedara Wijebanda*, op., cit.

<sup>141</sup> *Ibid*, p.356.

<sup>142</sup> See also, *Ven. Ellawala Medananda Thero v. District Secretary, Ampara and Others*(2009)1 Sri.L.R. 54, where it was held that 'state land', which is a resource of the People, is held by public bodies in trust for the People and such land could be alienated only in accordance with the law.

<sup>143</sup> *Watte Gedara Wijebanda*, op., cit., p.357

<sup>144</sup> *Ibid*, p.362.

<sup>145</sup> *Ibid*, p.359.

<sup>146</sup> *Sugathapala Mendis*, op., cit.

This case was concerned with the construction of a private golf resort for an elite few on a land that has been acquired for a public purpose. The action of the executive was challenged as being contrary to the rule of law and violative of Article 12(1) of the Constitution. The perpetrators of the impugned executive action were the public servants at the 'highest echelons of the executive' including former President Kumaratunga.<sup>147</sup>

The following extract of the judgment which captures the essence of PTD and People's sovereignty, and quite possibly the best exposition of the Sri Lankan model of PTD, is reproduced as it is, since it is felt that the thrust of the argument made by Tilakawardane J could not be captured fully by paraphrasing:

The principle that those charged with upholding the Constitution be it a police officer of the lowest rank or the President are to do so in a way that does not "violate the Doctrine of Public trust" by state action/inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The "Public Trust Doctrine" is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favor, but always to be used to optimize 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. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and a contravention of the Rule of Law.

This Court has long recognized and applied the Public Trust Doctrine, establishing the exercise of such powers is subject to judicial review...The Public Trust Doctrine application is only enhanced by the Directive Principles of State Policy...The Public Trust Doctrine, taken together with the Constitutional Directives of Article 27, reveal that all state actors are so principally obliged to act in furtherance of the trust of the People that they must follow this duty even when a furtherance of this trust necessarily renders inadequate an act or omission that would otherwise legally suffice. In other words, it is not enough to argue that procedure has been followed, when procedural compliance results in a violation of the public trust.<sup>148</sup>

In short, what the above paragraph says is that PTD is a basic tenet of the Sri Lankan Constitution and when PTD is violated, it affects People's sovereignty. Her Ladyship aptly describes the nature of People's sovereignty: that state power originates with the People and that those powers are entrusted to the three arms of the state only for the purpose of maximizing the benefit for the People. It is observed that this exposition alludes to the idea of social contract theory because as per Locke, some of the rights surrendered at the time of entering the contract with the state, included the right to adjudicate upon

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<sup>147</sup> *Ibid*, p.5.

<sup>148</sup> *Ibid*, pp.13-14.

disputes and the rights to legislate and interpret laws.<sup>149</sup> After the contract was entered into, these 'rights', however, constitute some of the most fundamental 'duties' of the state and the state organs have to discharge these duties for the benefit and protection of the People. Thus, it is seen that the power of the state originates from the People as some of those powers were in fact rights exercised by the People prior to their surrender at the time of entering the social contract.

Tilekawardane J further held that PTD and its effect is enhanced by the Directive Principles<sup>150</sup> and that these two taken together, create a higher level of duty, which cannot be discharged by mere compliance with statutory provisions. This means, even if an act of a state functionary is lawful or in accordance with the black letter word of the law, it could still be contrary to PTD if such act does not follow the guidelines provided by the Directive Principles. A state functionary can exercise power only to realize the objectives in Article 27, which are aimed to usher in a Democratic Socialist state. This pronouncement demonstrates that to conform with PTD, one must, on occasion, depart from the pure positivist approach towards legal disputes and engage in higher norms that are lodged in the realm of morality.

Furthermore, commenting specifically about the conduct of President Kumaratunga, Her Ladyship held that even the President of the country does not have unlimited power and the President and Ministers hold in trust the power of the People acquired through the sovereignty of the People.<sup>151</sup> The President does not have the power to shield or coerce the action of public officials or state agencies when such action is against the Constitution and PTD<sup>152</sup> Her Ladyship further stated that given the nature of the office of the President as custodian of the People's executive power, it places a responsibility of the highest nature to act in a proper manner<sup>153</sup> and that President Kumaratunga failed in every way to act responsibly in her position as President and that she had abused her power to accommodate the private interests of a few who are not the People of Sri Lanka.<sup>154</sup>

It is noted that during 2007-2009, Sri Lanka witnessed a proactive Supreme Court which upheld a number of challenges to executive action based on PTD as made effective through the fundamental rights chapter, Articles 3, 4 and 27 of the Constitution. Notable among these PTD cases are the *Waters-Edge case* discussed above, *SLIC case*<sup>155</sup> and *LMSL case*<sup>156</sup>. However, jurisprudentially speaking, it was only the *Water-Edge case*<sup>157</sup> that contributed in a tangible manner towards the development of PTD among the three cases.

Both the *LMSL case* (dealing with the privatization of Lanka Marine Services Ltd.) and the *SLIC case*

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<sup>149</sup> See Chapter 2.

<sup>150</sup> See also, *Environmental Foundation Limited and Others v. Mahaweli Authority*, op.,cit., for a judicial pronouncement on the nexus between PTD and Directive Principles.

<sup>151</sup> *Sugathapala Mendis*, op.,cit., p.40.

<sup>152</sup> *Ibid*, pp.41-42.

<sup>153</sup> *Ibid*, p.49.

<sup>154</sup> *Ibid*, p.51.

<sup>155</sup> *Vasudeva Nanayakkara v. K.N Choksy and Others S.C* (FR)No.158/2007, Supreme Court Minutes 4<sup>th</sup> June 2009.

<sup>156</sup> *Vasudeva Nanayakkara v. K.N Choksy and Others* (2008)1 Sri L.R.134.

<sup>157</sup> *Supra*.



(dealing with the privatization of the Sri Lanka Insurance Corporation), despite having lengthy judgments<sup>158</sup>, discussed PTD and its implications, only cursorily. In fact, the *LMSL case* only made a passing reference to People's sovereignty and PTD in its ratio.<sup>159</sup> In the context of PTD, the *SLIC* judgment was limited to a discussion of a few cases on PTD and sovereignty, despite devoting almost 60 pages to discuss the facts of the case. Perhaps, the recognition accorded to these two cases comes from the politically charged nature of the cases, given that the main petitioner in both cases was an active politician, or it could also be because these cases dealt with 'national resources' of immense value, but not necessarily because they contributed in any tangible way towards the development of PTD jurisprudence in Sri Lanka.<sup>160</sup>

The judicial attitude towards PTD in Sri Lanka, as discussed through the above survey of case law, has been favourable and expansive. Almost all the cases agree on People's sovereignty as the basis of PTD in the Sri Lankan legal landscape. It is noted that the case law on PTD covers a wide spectrum ranging from exercise of discretionary power, protection of natural and national resources, rule of law<sup>161</sup>, fundamental rights and corruption. It is aptly demonstrated that the wide umbrella of People's sovereignty brings together all these elements within PTD.

### ***Public Trust Doctrine since 2010***

Despite the progressive and expansive attitude adopted by Sri Lankan courts towards PTD, its application has been anything but consistent. This is exemplified by the absence of notable case law during the period of 1996-1999 and since 2010. In fact, it is argued that there have been instances where the People of Sri Lanka have been 'betrayed' by all arms of the state resulting in a total violation of the public trust. Although it is not possible to discuss all such occasions within the confines of this paper, one instance which negatively affected the country's fundamental constitutional structure needs to be at least briefly discussed.

### ***The 18<sup>th</sup> Amendment and PTD***

Although there have been many instances over the last four years where PTD could have been applied to uphold People's sovereignty,<sup>162</sup> the 18<sup>th</sup> Amendment was, in this writer's perception, the most damaging to good governance and constitutionalism. As such, this instance reflects the most notable failure of the judiciary to uphold PTD in the recent past. Hence, a brief discussion on two salient aspects of the

<sup>158</sup> *LMSL* judgment is 49 pages long whereas *SLIC* judgment is 64 pages long.

<sup>159</sup> *Vasudeva Nanayakkara v. K.N Choksy and Others* (2008)1 Sri L.R. 134, p.181.

<sup>160</sup> See, Samararatne, op., cit., pp.1-6 for a discussion on these two cases.

<sup>161</sup> *Ibid*, pp.26-47.

<sup>162</sup> Other such recent incidents are the impeachment of the 43<sup>rd</sup> Chief Justice in early 2013, a process which raised many substantive and procedural questions, passing of the Divineguma Act No.1 of 2013 and the passing of Revival of Underperforming Enterprises or. Underutilized Assets Act, No.43 of 2011.

amendment is undertaken.<sup>163</sup>

The 18<sup>th</sup> Amendment brought far reaching changes to the Constitution. One of its main changes was the repealing of Article 31(2) of the Constitution which limited the number of terms of the Executive President to two. After the repealing of this provision, a person could be elected any number of times. The actual effect of this amendment cannot be completely understood by mere reference to the black letter word of the law, as the manner in which the amendment was brought in was in accordance with the 'positive law'. However, given the prevalent political culture in Sri Lanka which allows whatever the incumbent regime to abuse state resources, including state media, for their election campaigns, it is evident that by the use of such resources public opinion could be manipulated in such a way to have the incumbent re-elected for multiple terms. Although Article 31(2) operated as a check on this, now that it is repealed, there is nothing in the Constitution to prevent the continuous reelection of an incumbent President, abusing state resources.<sup>164</sup>

Further, the 18<sup>th</sup> Amendment also replaced the 17<sup>th</sup> Amendment's Constitutional Council with an ineffectual Parliamentary Council. As a result, now, as per Article 41A, the appointments to high level offices, such as the Election Commission, Commission to Investigate Allegations of Bribery or Corruption and Human Right Commission, are made by the President. The scheme of the 18<sup>th</sup> Amendment was unequivocally to concentrate all state power within the office of the President while giving the incumbent President countless opportunities to be re-elected. Despite this being the effect of the amendment, the Supreme Court held that the amendment was in harmony with the Constitution, and that the repealing of Article 31(2) does not affect the franchise, a component of People's sovereignty, in any way.<sup>165</sup>

It is contended that this decision of the Supreme Court was palpably wrong. This amendment was violative of the sovereignty of the People as it adversely affected the franchise and rule of law, and as such, violates the public trust. The Directive Principles stated in Article 27(1)(b) and 27(7) were disregarded since the 18<sup>th</sup> Amendment effectively prevented the establishment of a just social order and had the potential of leading to the exploitation of the People. It is evident that although in the *Waters-Edge case*<sup>166</sup>, it was held that even strictly legal measures could be violative of PTD if it is not in accordance with the Directive Principles, the same Supreme Court a few years thereafter, held that the 18<sup>th</sup> Amendment was consistent with the Constitution.

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<sup>163</sup> It is noted that the 18<sup>th</sup> Amendment gave rise to a number of substantive and procedural issues, although they are not discussed here due to space constraints. Some such procedural issues are the urgency with which the bill was referred to the Supreme Court under Articles 121 and 122, and its hurried passing in the Legislature and also whether the bill should have been submitted to the People's approval at a referendum in terms of Article 85 of the Constitution.

<sup>164</sup> See, N.Wijesundara, 'In Defence of Commonsense: Critique of the Universality of Liberal Constitutionalism', BALJ,(Colombo) (2011)Vol.XVII, pp.116-126, at pp.120-121.

<sup>165</sup> See, *In Re the Eighteenth Amendment to the Constitution*, S.C.(Special Determination) No.01/2010, Supreme Court minutes 31 August 2010.

<sup>166</sup> *Supra*.

### *Possible reasons for the inconsistent application of PTD*

One possible reason for the inconsistent application of PTD could be the uncertainty prevalent in some quarters vis-à-vis the doctrine's parameters and basis. It is a common misconception in Sri Lanka that PTD is a concept associated exclusively or principally with environmental protection. As argued in this paper, there is a formidable case to suggest that the basis of PTD is the idea of sovereignty of the People and social contract theory. Even the landmark cases on environmental protection have used PTD on the basis of People's sovereignty.<sup>167</sup> However, this fact is often overlooked, and hence, PTD is looked as a narrow concept with limited application.

Further, PTD is often criticized as a 'judicial pilgrimage' and as an instance where the judiciary had 'overstepped' its jurisdiction.<sup>168</sup> Such criticism could have an adverse effect on the usage of the doctrine. However, this is an understandable, yet unfounded fear, since a number of judgments involving PTD do not adequately discuss its parameters, although the doctrine has been applied in a wide spectrum of cases. However, from an analysis of the case law it is evident that the doctrine's constitutional basis is the idea of People's sovereignty. Therefore, the above criticism has no real credibility, since upholding the sovereignty of the People under a constitutional structure which recognizes the inalienable sovereignty of the People in a representative democracy, cannot be considered as the judiciary overstepping its domain.

Most importantly, for a concept such as PTD as developed in Sri Lanka to take root and flourish, there needs to be a high level of judicial independence. This is because PTD is a progressive concept which has a crushing effect on corruption and mismanagement at the *highest echelons* of the state. In Sri Lanka, the development of PTD can be attributed principally to the activism of a few judges such as Mark Fernando J, Tilakawardane J, Amerasinghe J and to an extent, S.N. Silva CJ.<sup>169</sup>

### **5. Conclusion**

PTD, an ancient concept, which possibly has its origins in Roman Law, is popularly known as an instrument used by the judiciary to curb environmental pollution and degradation.

The 1970s saw the revival of PTD in the USA, after, quite possibly, by the seminal work by Sax. However, PTD as used in the USA is limited to environmental protection only (wetlands, water ways, wild life, etc.). The idea of PTD was first seen in India in the mid-nineties. The Indian jurisprudence on PTD was more progressive than the USA since, in India, the doctrine has been read into Article 21 of the constitution which guarantees right to life. One may argue that PTD in India has a wide scope for development given that it is recognized as part of right to life, although regrettably, this has not been utilized proactively. As demonstrated by a host of Indian case law, PTD, albeit part of right to life, is

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<sup>167</sup> See, *Bulankulama, op., cit.*; *Watte Gedara Wijebanda, op., cit.*

<sup>168</sup> *Samararatne, op., cit.*, pp.1,65-66.

<sup>169</sup> However, other Lordships of the Supreme Court and Court of Appeal have relied on the doctrine on occasion, albeit without consistency

applied only to environmental issues,<sup>170</sup> despite the potential to extend the doctrine to corruption, right to liberty and other human rights, given that all these elements are included in the right to life in the international legal order.

However, it is argued in this paper that, PTD as developed in Sri Lanka, has wider connotations than mere environmental protection. Sri Lanka has used PTD in battling corruption, abuse of power and mismanagement of national and natural resources.

The scheme of this paper was to look at PTD as an instrument to restrain abuse of state power in general, additionally to its traditional role played in the sphere of environmental protection. For the purposes of this paper, PTD is looked at through the prism of sovereignty of the People, and by extension, the idea of social contract theory as propounded by Locke. It is contended in this paper through the development of a theoretical framework and survey of case law, that the basis of PTD in Sri Lanka is the mutually complementary ideas of sovereignty of the People and social contract theory.

The Lockean social contract theory envisages a free people who lived in a 'state of nature', but with time it gave rise to conflict. Hence, the People contracted amongst themselves to create a 'state' which would protect their rights and interests and maximize their benefit. When this state was formed, the People surrendered some of their rights to the community of People and this community of People granted the state the power to protect the rights of the People. Although the state was granted the power of the People on trust, the sovereignty remained with the People. The state holds the power of the People on trust and is expected to use such power only for the correct purposes and when the state derogates from this, it amounts to a violation of PTD.

Such derogations also amount to a violation of the social contract and sovereignty of the People because as per the contract, the state was granted power only to use for the benefit of the People and to maximize the enjoyment of their rights. The Directive Principles of State Policy (stated in Article 27 of the Constitution) form the 'guidelines' to be followed by the state in its exercise of power and the effect of PTD is enhanced by the Directive Principles. Every exercise of state power has to be in conformity with the Directive Principles, and to satisfy the high threshold set by PTD, the mere adherence to the black letter word of the law may not be sufficient if there is no compliance with Directive Principles. The theoretical framework developed in this paper could be seen in the Sri Lankan jurisprudence when the case law pertaining to PTD is considered as a whole. The fact is, no single case (perhaps, with the exception of the *Waters-Edge case*) engages in all the elements in the theoretical framework, although they deal with some aspects of it.

However, despite Sri Lanka's adoption of a relatively progressive approach towards PTD, its application has not been consistent. Hence, there have been a number of occasions where the courts conspicuously failed to apply PTD and uphold the sovereignty of the People.

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<sup>170</sup> There has been one September 2012 case which applied PTD in a matter pertaining to municipal property, although it is simply too early to say whether this portrays a new trend or a mere 'quirk' of a single judgment from a High Court.

## 6. Recommendations

It is possible to make certain recommendations to make the application of PTD more consistent and give the doctrine a firm constitutional basis.

Although PTD has been read into the sovereignty provisions of the Constitution, this has not been sufficient to placate the adherents of 'positive law' in Sri Lanka who would not recognise the doctrine unless it is clearly stated in the written law. Therefore, it is recommended that PTD be expressly recognized in the Constitution for the sake of clarity.

For this purpose, it is recommended that the legislators consider the amendment of Article 4 of the Constitution to include PTD in a suitable manner. This should not give rise to any difficulty or complications given that such an amendment could be technically incorporated into the Constitution by way of a two-thirds majority vote, as unlike Article 3, Article 4 is not an entrenched provision which requires approval of the People at a Referendum.<sup>171</sup> Thus, such an amendment could be done with the least amount of difficulty. Such an amendment does not affect the constitutional values or the structure in any way as PTD has already been accepted by courts as part of sovereignty of the People.

As some claim that there is uncertainty as to the parameters of PTD, it is recommended that the legislators clearly set out the parameters and purposes of PTD. This too could be achieved by a simple amendment to Article 27 which sets out the Directive Principles, by adding suitable wording to indicate that the Directive Principles form part of PTD. The fact is, as demonstrated in the previous chapters of this paper, the judiciary had already accepted that PTD and Directive Principles are closely connected and that the violation of one could lead to the violation of the other. Such an amendment as proposed will only acknowledge the position of PTD in black letter word of the law and will unambiguously state the parameters of PTD.

PTD has been accepted as a new ground of review in *Heather Mundy*.<sup>172</sup> It is recommended that this approach be followed by the Court of Appeal in its judicial review of executive action. Adopting PTD as a new ground of review is consistent with the Sri Lankan constitutional structure. As demonstrated, the basis of PTD is the ideas of sovereignty of the People and social contract theory. Although one may argue that social contract theory is not a strictly legal concept which could be relied on by courts, there is no dispute that the notion of People's sovereignty can be relied on by courts.

Also, there is no argument that the Sri Lankan Constitution revolves around the concept of People's sovereignty. Therefore, it is only logical that a ground of review based on People's sovereignty be adopted as it would give the Court of Appeal an opportunity to scrutinise the actions of the state based on a foundational feature of the Constitution, instead of relying on *ultra vires*, which is a fundamental principle of the British constitutional process. It is observed that even in the UK, judicial review is, ultimately,

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<sup>171</sup> See, Constitution, Article 83.

<sup>172</sup> *Supra*.

based on the idea of parliamentary supremacy, which is the hallmark of the British constitutional tradition.

However, what is advocated in the above recommendation is not that the Court of Appeal should adjudicate upon constitutional matters, which, by virtue of Article 118, is the exclusive domain of the Supreme Court. What is suggested by the above recommendation is that the Court of Appeal adopts PTD as a ground of review based on the constitutional principle of sovereignty of the People as enshrined in Articles 3 and 4.

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