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LAW & SOCIETY TRUST

LAW REFORM

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Contents

Law Reform

This Issue of the Review focuses on law reform, offering analysis of laws that were recently passed as well as discussing proposed laws that will have a considerable impact on the rights of citizens in Sri Lanka.

Ermiza Tegal offers a critical analysis of the proposed Counter Terrorism Law that is based on an internationalized discourse on security and anti-terror, and warns of broad implications for liberty, human rights and the rule of law in Sri Lanka. Tegal rightly points out that *the broader question of governance and the way we deal with the subject of 'counter terrorism' is intrinsically linked and has bearing on the current debates on constitutional reform and transitional justice.*

Anushka Wijesinha offers an analysis of the new Inland Revenue Act discussing the need for a new law that will contribute to strengthening Sri Lanka's fiscal position. As Wijesinha points out, greater availability of financial resources to the State will in turn strengthen the *capacity of the state to deliver services to the broader population, and address emerging social spending gaps.*

Focusing on the Right to Information Act passed in 2016, Janith Nilantha of Transparency International Sri Lanka (TISL) reflects on what this Act means for good governance and accountability for Sri Lanka, as well as greater engagement of the citizen in governance. The analysis reminds us that the State fulfills its duty in terms of accountability by ensuring the right to information for all citizens, and that citizens have every right to question the actions of the State.

This Issue also includes a review of the film *Frangipani/Sayapethi Kusuma (2014)*. Shermal Wijewardene offers a critique of this film, described as the *'first overtly queer film from Sri Lanka'*. Wijewardene examines several 'queer' aspects of the film, highlighting in her article that the 'overtly queer' cachet that focuses solely on the gay relationship *reduces the overall import of what the film has to say about gender and sexuality, for example the role of the 'straight' woman in producing those 'queer meanings'.*

Additionally, this Issue carries brief reflections by colleagues, collaborators and friends remembering Vijay Nagaraj's life and work. In August 2017 LST bid farewell to Vijay, a dear friend and colleague. The outpouring of love and loss from those within Sri Lanka and beyond was testament to the love, dedication and excellence that Vijay practiced in his work, which was always close to his heart. As editors of the Review, we miss his valuable insight into the many issues and subjects that captured his attention.

Reflecting on Vijay's work with communities, Sarala Emmanuel talks of the many conversations shared with Vijay, especially in terms of *'building politicized mass movements that form the backbone of lobbying for national policy and laws'.* She reflects on how his access to global knowledge networks influenced the creation and support of 'barefoot feminist economists' that linked labour rights, land rights, caste struggles and women's movements; and how Vijay worked tirelessly to support local communities to push for people's rights in the proposed constitution. Continuing the conversation about Vijay, Ponni Arasu speaks of how Vijay's work falls on a continuum across national boundaries, characterized by *an ethos of social justice that fundamentally argues with, challenges, cautiously works with, and is acutely aware of people's relationship to the state and the nation.* Reflecting on Vijay's relationship with law, Andi Schubert and Vagisha Gunasekera reflect on how Vijay sought to *unsettle the disciplinary impulses of the law through an affective practice that centres and is informed by, critique, dialogue, and learning.* Linking their reflections to the theme of this Issue, Schubert and Gunasekera speak of how law reform captured Vijay's attention with his belief that law and law reform is inevitably limited unless it *centres rather than marginalizes the needs of the least powerful members of our societies.*

This belief of Vijay's is one that is reflected in the work of the Law & Society Trust. It also emerges as one of the predominant themes of this Issue of the Review. Sri Lanka is in the midst of a series of legal reform initiatives, including, most importantly, the ongoing Constitutional reform process. As the analysis offered in this Issue's articles on law reform (examples of some of the more significant initiatives) reflect, a common theme in terms of concerns relating to these reforms is their impact on the rights of the individual, particularly, the most vulnerable members of society. This concern is most certainly not unique to the legal reforms discussed here, or indeed, even to Sri Lanka. It is of no less importance, however, and particularly with Sri Lanka's current engagement in its Constitutional Reform process one that lawmakers, civil society, advocacy groups and citizens would do well to bear in mind.

Sri Lanka's New Inland Revenue Act: First Steps in the Right Direction?

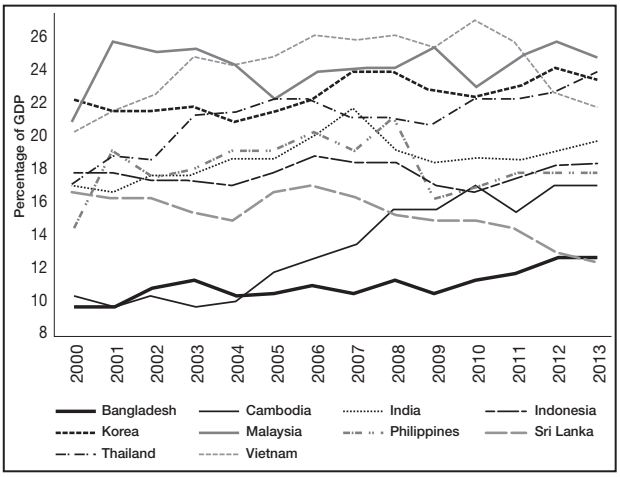
ANUSHKA S. WIJESINHA

Exploring a critical public policy issue, Anushka Wijesinha explores the need for the new Inland Revenue Act in strengthening Sri Lanka's fiscal position.

1. Introduction

Sri Lanka has one of the lowest tax revenue-to-GDP ratios in the world, and for decades now the country has been collecting proportionately less tax revenue compared to the expansion in economic activity and its peer economies. The country's tax revenue-to-GDP ratio, which was 24 per cent in 1978, declined to 14.5 per cent in 2000 and reached 12.4 per cent in 2016.[1] One of the consequences of this trend has been the constraints on new budgetary allocations for social sectors –health and education modernization for instance. Meanwhile, one of the main contributors to this trend has been the limited increase in direct tax collection; a problem which the new income tax act passed in Parliament in September 2017 aims to resolve.

Figure 1: Trend in Sri Lanka's Tax-to-GDP Ratio Compared to Peers



Source: International Monetary Fund[2] and Central Bank of Sri Lanka[3]

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2. Tax Collection in the Past

In the first couple of decades after independence, the Ceylonese exchequer was faring exceptionally well on tax collection (Moore 2017). The vibrant plantation crop sector contributed greatly to raising tax revenue at that time, and this helped to fund the mass provision of health, education, and subsidized food. The high tax revenue at the time helped finance a large welfare state, and helped attain the favourable human development indicators the country has enjoyed over the past half century. Yet, with two waves of economic liberalization (first in 1977 and then in 1990) and the lack of reform of tax policy and tax administration in line with a changing economy, tax revenue as a proportion of GDP steadily declined. Now, Sri Lanka is an outlier in its low 'tax take' among middle-income peers, where the average is above 18 per cent.

A mix of tax policy decisions during this period led to this decline, including generous concessions given to specific groups of income earners; *ad hoc* and poorly targeted corporate income tax holidays; a plethora of border taxes that hurt overall trade volumes; and complex lists of exemptions to indirect taxes like VAT and Excise duty. This was also accompanied by a steady inflow of 'easy money' from bilateral and multilateral aid donors, which meant that less attention was paid to domestic revenue mobilization. The first wave of easy funding was after Sri Lanka's liberalisation of the economy in 1977. Consequent to a deteriorating security situation and political instability, the international donor community substantially limited Overseas Development Aid (ODA) to Sri Lanka throughout the 1990s. Donor aid surged following the ceasefire between the Government and LTTE in 2002 and again following the Indian Ocean tsunami in December 2004. The combined effect of these was that ODA to Sri Lanka rose from US$ 330 million (2 per cent of GDP) in 1999 to $1.33 billion (5 per cent of GDP) in 2005 – reaching the highest level of aid to the country.[4] Following the end of the war, financing flowed steadily from bilateral sources like China. Post-war reconstruction and connective infrastructure expenditure were met by these generous donor funds, easing the pressure on public funds – and on tax collection. With Sri Lanka's graduation to middle income status, this inflow of aid financing has dried up, and Sri Lanka must rely on domestic revenue or foreign commercial borrowing. The latter cannot be avoided, but should not be the dominant strategy. The more sustainable path is to grow domestic revenues through a robust, progressive, and contemporary tax system, that minimizes exemptions, closes loopholes, ensures progressivity, and tightens collection.

3. Context of the New Act

The context in which the new Inland Revenue Bill was drafted is worth exploring. An International Monetary Fund (IMF) Extended Fund Facility (EFF) underpins Sri Lanka's current fiscal and monetary policies, and it places heavy emphasis on revenue-based fiscal consolidation. This essentially means that the fiscal consolidation path is to be achieved by generating greater revenue, rather than spending rationalization. With substantial leakages of government revenue through loss-making State-Owned Enterprises, the greater onus on revenue – rather than spending – to strengthen state finances can be questioned. At a time of tepid economic growth, multiple shocks on account of droughts and floods, and weak external markets, following such a strategy may be risky in the absence of growth-promoting initiatives.

Nevertheless, this programme should not be abandoned and cannot be derailed - it can have severe consequences for our sovereign rating and in turn, the cost of refinancing our external debt obligations. Nearly 50 per cent of the country's public debt stock is external, and Sri Lanka has approximately US$ 4 Bn in sovereign debt falling due in 2019. Possessing a strong fiscal position and sovereign rating would be key to rolling over much of this debt successfully. Following the passage of the Bill in Parliament in September, Moody's – an international ratings agency – hailed the achievement and noted that, "*The reforms of the Inland Revenue Act offer prospects of higher revenues. The implementation of revenue reforms that foster long-term fiscal consolidation will be critical to shoring up Sri Lanka's credit profile*" (Daily Mirror, 12 September 2017).

3.1 Genesis of the New Act

The complete overhaul of Sri Lanka's income tax legislation was a key element contained in the IMF's Extended Fund Facility (EFF) arrangement with Sri Lanka, and both the IMF and Government of Sri Lanka signed on to it. In its first review of the EFF in November 2016, the IMF observed that, "The new Inland Revenue Act scheduled for early next year should result in a more efficient, transparent, and broad-based tax system" (IMF 2016). The IMF argued that, "*Under the new IRA, the government should: broaden the tax base by removing excess tax incentives and expanding the sources of income; modernize rules related to cross- border transactions to address base erosion and combat tax avoidance; reduce complexity through an improved principles-based drafting style; and strengthen and clarify existing powers of the IRD to improve enforcement*" (Ibid).

A draft Bill was presented to the Cabinet of Ministers in early May 2017, but was not subsequently presented to Parliament. Largely on account of the delay in presenting the new IR Bill to Parliament (an agreed milestone under the EFF programme), the IMF delayed the release of the third tranche of US$168 million (out of the total US$1.5 Billion)[5].

After many months of work, the new tax Bill was published in the Government Gazette on June 19th 2017. However, the process thereafter was not linear and many discussions ensued – both with taxpayers (private sector), as well as with other stakeholder groups like trade unions of the IRD.

In July 2017, ten petitioners (including Parliamentary members of the Joint Opposition) filed petitions in the Supreme Court against the proposed Bill, citing clauses in the draft – primarily relating to implementation matters and certain powers granted to the Commissioner General of Inland Revenue - that they argued were in violation of the Constitution. Following this challenge, a three-member bench of the Supreme Court heard the case and later determined that these clauses were indeed inconsistent with the Constitution, and these clauses may either be passed by a special majority as per Article 84(2) of the Constitution or be amended. The Government subsequently decided to make the necessary amendments suggested in the Supreme Court determination, and proceed with the Bill.

In Parliament, the revised Bill with amendments was due to be debated in Committee Stage, and voted on, on August 25th 2017. However, due to the large number of amendments (close to 100) that needed to be incorporated, and the requirement to have those translated into Sinhala and Tamil prior to tabling the final Bill in Parliament, the vote was postponed

to September 7th. Finally, on September 7th the first reading, Committee stage, and third reading of the Bill was held. In the first reading, 100 votes were cast in favour and 41 against. In the third and final reading, 90 votes were cast for and 25 against. It was noteworthy that for the ultimate vote on the important piece of economic policy legislation, nearly one-third of all legislators were absent from the House.

The new Act (Inland Revenue Act of 2017) would replace the Inland Revenue Act of 2006, and will be effective from April 1st 2018[6].

3.2 Key Features of the New Act

The new Act brings in some significant changes to tax policy. Firstly, it brings in accelerated depreciation allowances and investment relief as the key tax incentive tool, rather than corporate income tax holidays and concessionary tax rates. This is an important shift. As highlighted in Wijesinha *et al.* (2013), 'blanket' tax holidays have been a drain on the exchequer and have not proven to deliver the desired economic outcomes. Targeted tax incentives for investment can have a more pronounced effect on FDI attraction and a smaller drain on revenues.

The Board of Investment (BOI) has been regularly criticized for granting extensive tax holidays and concessionary tax rates for long periods as the primary way of attracting foreign investors. Yet, annual FDI hovered between US$ 500 Mn and US$ 1.5 Bn over the last two decades. Moreover, much of these tax regimes were granted as special schemes, outside the scope of regular income tax provisions. IMF studies have shown that as countries move to middle income from low income status, fewer and fewer of them apply incentives outside tax laws (IMF 2015). For some time, the Treasury had signaled that it is keen to stem the erosion of revenue from the existing tax incentives regime. Last year, the government suspended granting of tax incentives under a controversial 'Strategic Development Projects Act', which afforded substantial discretion to Ministers to decide rates and durations of tax concessions. A 'Tax Expenditure Statement' filed alongside the Budget 2017 by the Finance Minister noted that in 2017, LKR 71 Bn is projected to be 'revenue foregone' from corporate income tax holidays and concessions (around 0.6 percent of GDP)[7].

Other key changes relate to changes in tax rates. The tax rate on IT firms, previously enjoying zero tax, was raised to 14 per cent, the taxation of agricultural activities and exports raised from 12 to 14 per cent, and capital gains tax has been re-introduced on most asset classes except for listed shares (it was last in place prior to 2001, after which the then UNF regime removed it in 2002). Overall, the corporate income tax structure has been streamlined. While tax rates are currently levied at 10 per cent, 12 per cent, 15 per cent, 20 per cent and 40 per cent, under the new Act it will be just three – 14 per cent, 28 per cent, and 40 per cent. On the Pay-As-You-Earn (PAYE) tax, paid by all private sector employees, the tax-free threshold has been raised substantially from the current LKR 750,000 to LKR 1.2 Million.[8] This means that employees earning less than LKR 100,000 a month would not be liable for tax.

Significantly, under the new Act, income tax is applicable on the President's emoluments for the first time, and can be considered a clever political move, to signal that all citizens must pay tax. The need to widen the tax base, and ensure more people pay direct tax, has become a key challenge of contemporary tax policy in the country today. Sri Lanka has a notoriously low number of direct tax payers. In fact, the

previous Minister of Finance had reportedly stated that the Inland Revenue Department has tax files on only 694,000 taxpayers.

Other parts of the new Act relate to stronger penalties and rules. For instance, a fine not exceeding LKR 10 Million or imprisonment up to two years, or both, would be enforced on taxpayers who are convicted of tax evasion. Furthermore, on transfer pricing (a tax manipulation seen among companies operating overseas), a Sri Lankan company violating transfer pricing rules can be fined up to 2 per cent of the total value of transactions between related parties.

Meanwhile, contentious issues like the taxation of statutory pension contributions were removed from the final Bill due to heavy opposition. Yet, a controversial provision that allows the Minister of Finance to call for and check any taxpayers' file remained in the final Bill.

One problematic area remains, relating to the new tax structure faced by exporters. Under the new Act, firms will only be eligible for the lower 14 per cent tax rate if it earns more than 80 per cent of its revenue from exports (deemed to be 'predominantly engaging in exports'). If so, the remaining 20 per cent of earnings would also be eligible for tax at the concessionary 14 per cent rate. However, this threshold might be problematic for those exporters who do not meet the 80 per cent threshold. Often, firms are part engaged in the domestic market and part engaged in exports. Moreover, with a national objective of increasing exports in general, and across the board, it becomes important to recognise all exporters when it comes to tax treatment. For instance, a firm could be making 60 per cent of its total revenue from exports and equivalent to US$ 50 Million in export earnings; whereas another firm could be making 80 per cent of its total revenue from exports but equivalent to just US$ 5 Million in earnings, and only the latter firm will qualify for the concessionary tax rate, and the former will not. If the policy objective of the government is to boost export earnings overall, then what should matter is how much export earnings are being generated for the country. In such a case, the provisions of the old Act were much more sensible, where the export earnings component was taxed at the concessionary rate (12 per cent under the previous law), while the domestic earnings was taxed at the regular rate, *pro rata*.

3.3 Consultative Process?

Given the scale and implications of the new tax act, the need for a consultative process seemed obvious. However, the initial period of the formulation of the Bill provided little space for consultation with key stakeholders, particularly the private sector. Although the drafting of the tax bill reportedly commenced in late 2016, even by the first quarter of 2017 no formal mechanism had been established to consult the private sector. Consultations with the Ministry of Finance were *ad hoc*, infrequent, and lacked structure. This was somewhat in contrast to a parallel legislative reform process under the same Ministry – the change of the 150 year-old Customs Ordinance to a modern Customs Act – where industry consultative Committees were appointed, industry views were sought through open calls for submissions, and drafts were circulated among stakeholders for comment. While individuals and selected stakeholders were consulted from time to time, the Ministry of Finance was unable or unwilling to institute a robust consultative mechanism to elicit views from the spectrum of taxpayers likely to be impacted by the provisions of the proposed new Bill. Given the substantial change of this

nature, a policy 'white paper' could have been first published in order to create a discussion around the basis for, and orientation of, the new Bill. Although the IMF played a leading role in the technical drafting of the framework for the Bill, the IMF's' client' was the Government of Sri Lanka and was therefore not obliged to initiate any stakeholder consultations; that is the responsibility of the Ministry of Finance.

However, following a change of leadership at the Ministry of Finance, there was a visible shift in approach. The new Minister and State Minister began to consult with key private sector stakeholders – like the Ceylon Chamber of Commerce – more proactively and openly. Progressively, key officials of the Ministry of Finance tasked with preparing the new law engaged cooperatively with the private sector. Trade Chambers and business associations were afforded opportunities to provide inputs to shape elements of the Bill. Because the reform effort was anchored to clear objectives of reducing and removing exemptions, streamlined rules, increasing direct tax collection, and removing a plethora of special tax schemes and concessions, and because this was communicated to private sector associations, that ensured the final Bill was not shaped by narrow industry interests alone. Industry groups understood that their proposals would need to be anchored to these national objectives, and aligned their submissions accordingly.

4. 'Proof of the Policy is in the Administering'

Sri Lanka's current tax administration is complex and inefficient, and could become the 'Achilles heel' of the ongoing tax reform effort to collect more direct tax. Much of the present system relies heavily on self-reporting for direct taxes, and anecdotal evidence suggests tax evasion by professional service providers like doctors, lawyers and tuition masters. A more robust and sophisticated audit mechanism needs to be introduced, and penalties for non-compliance need strengthening. Encouragingly, though, the Inland Revenue Department has launched a digitization effort known as the 'Revenue Administration Management Information System' or RAMIS, which enables information sharing, integrates tax payer information from 22 government institutions, and enables online tax filing for the first time. Sri Lanka currently ranks 158th on 'paying taxes' according to the 2017 PWC World Bank Paying Taxes Report. These rankings are comparable to South Asian comparators (India is 172nd and Pakistan is 156th), but below MIC comparators Thailand and Malaysia (109th and 61st, respectively).

If Sri Lanka is to truly gain more from direct taxation, tax administration and ease of tax payment must become a priority. As Wijesinha and Ekanayake (2017) reveal, an overwhelming majority of firms surveyed in the Western Province (96 per cent) agreed or strongly agreed that the prevailing tax laws and procedures to fulfill compliance are too complex. According to respondents in this survey, the process of tax compliance, from initial registration with the IRD all the way through to the filing of returns and making payments is complex and long drawn. While the new Income Tax law is not expected to address all these administrative issues, a parallel initiative by the IRD of automating procedures (the Revenue Administration Management Information System – or 'RAMIS') is expected to bring about a substantial improvement in tax administration and simplify tax payment.

Table 1: Paying Taxes – Compliance of Corporate Income Tax		
Country	**No. of hours**	**No of payments**
Sri Lanka	**16**	**5**
India	**45**	**1**
Thailand	**160**	**2**
Pakistan	**40**	**5**
Malaysia	**26**	**2**
Singapore	**24**	**1**
Bangladesh	**144**	**5**

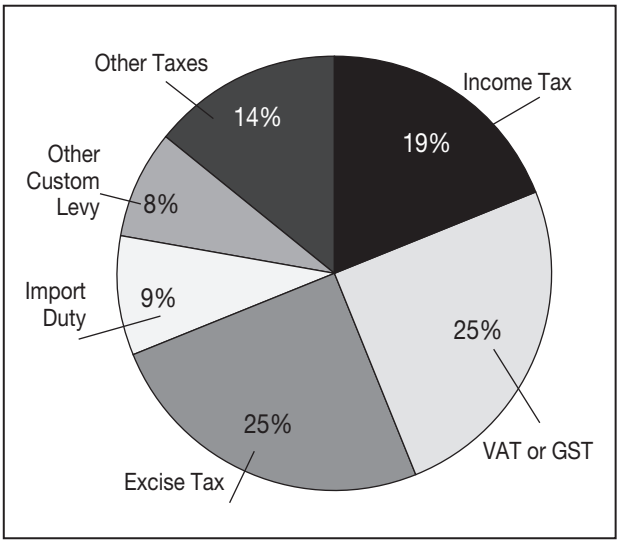
Source: Pricewaterhouse Coopers[9]

5. Shifting the Tax Burden

Through this new Act, Sri Lanka has taken important steps in the direction of tax reform. Sri Lanka has lower-than-expected revenues from taxes on income, profits, or capital (direct taxes) and higher collections from international trade and from goods and services (indirect taxes) than its peers, both as a share of total revenues and as a share of GDP (Figures 2 and 3). The new Act will focus on reforms to corporate and personal income tax (known collectively as direct taxes); a category that had steadily become a smaller and smaller part of annual tax revenue. By 2016, direct taxes constituted just 17 per cent of total revenue, while indirect taxes constitute 83 per cent (Economic Intelligence Unit 2017). The government's stated goal is to bring this ratio closer to 40:60. Dependency on indirect taxes limits a country's ability to expand the tax base and has important implications for the equity of the system and how the tax burden is distributed among social groups.

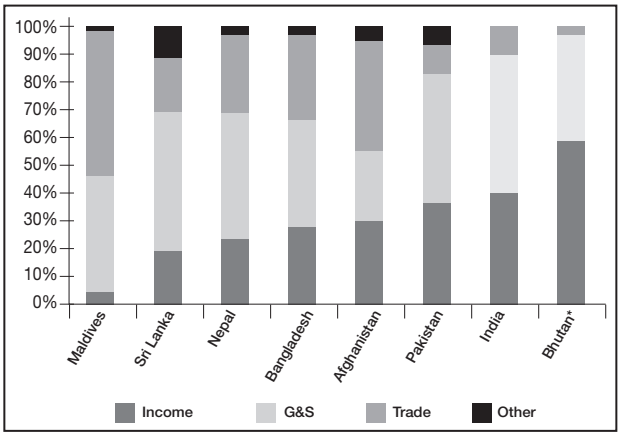
The 'tax burden' of indirect taxes falls equally on everybody, regardless of their income status. For example, the Value Added Tax (VAT) on a grocery item at a super market. A poorer household would pay the same rate of VAT on that item as a richer household would, but as a share of a poorer household's income it would be much higher than the richer household. The same applies for motor vehicle imports, or any other good or service that is liable for indirect tax. Therefore, relying more and more on indirect taxes (for example, Value Added Tax - VAT, Nation Building Tax - NBT, Port and Airport Levy - PAL, and Customs Duty) is inherently regressive and inequitable. Meanwhile, direct taxes are progressive in nature and are inherently more equitable. Higher income earners pay steadily higher amounts of tax as a share of their earnings. So a country that relies more on direct versus indirect tax collection could be said to have a more progressive tax system. Weak direct tax collection – due to exemptions, tax holidays, weak administration, etc. – is a hallmark of an inequitable tax system that has not kept pace with changes to the economy.

Figure 2: Composition of Tax Revenue in Sri Lanka



Source: Ministry of Finance and Planning

Figure 3: Composition of Tax Revenue – Sri Lanka vs. Peers



Source: International Monetary Fund[10]

6. Concluding Remarks

With steadily declining donor aid financing and obvious risks of overreliance on external debt financing, resources to finance Sri Lanka's development needs would increasingly have to come from within. The capacity of the state to deliver services to the broader population, and address emerging social spending gaps, would depend on greater and better availability of financial resources to the state. In this context, improving the state's tax revenue becomes a critical public policy issue. Within this, the hitherto heavy reliance on indirect taxes to generate over 80 per cent of tax revenue needs to be reversed, in order to avoid adverse equity implications. Direct taxation is now a key priority. To that end, the enactment of a new Inland Revenue Act is a significant policy reform initiative of the incumbent government. Its effective implementation would ensure that the advertised gains of the new law – widening of the direct tax base, reduction of exemptions and leakages, and reducing the indirect tax burden, is on a firmer footing.

Notes

[1] Author's calculations based on Ministry of Finance Annual Report (various years)

[2] IMF (various years), *World Economic Outlook*, Washington D.C.: International Monetary Fund

[3] CBSL (various years), *Annual Report*, Colombo: Central Bank of Sri Lanka

[4] Author's background reports for the World Bank. 2016. "Sri Lanka: A Systematic Country Diagnostic".

[5] Disbursement of the EFF occurs in seven tranches. The third tranche was due to be disbursed in April, but was delayed till July.

[6] In the version of the Bill passed in Parliament, some elements of the Act were to be effective from the 1st of October, and the rest from 1st April 2018. However, following strong lobbying from taxpayers, the Ministry of Finance subsequently announced that all provisions would be effective from 1st April 2018.

[7] Ministry of Finance. 2016. "Speech by the Finance Minister on Budget 2017".

[8] This follows a trend seen over the past decade, of steady increase of the tax-free threshold. In 2007 the tax-free threshold was LKR 300,000, but was raised to LKR 600,000 in 2011 and thereafter to LKR 750,000 that is currently applicable.

[9] PWC. 2017. *PWC-World Bank Paying Taxes Report*, London: Pricewaterhouse Coopers

[10] IMF Fiscal Affairs Department (FAD) Database.

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දැනුවත්වීමේ අයිතිය සහ අභියෝග

ජනිත් නිලන්ත

මෙම සටහනේ අරමුණ වන්නේ තොරතුරු දැනගැනීමේ අයිතියේ භාවිතාව සහ එහි ප්‍රවර්ධනය සම්බන්ධයෙන් TISL ආයතනය ලැබූ අත්දැකීම් විමසා බැලීමයි.

1. තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත - මෙතෙක් ජයගත් හා ජයගත යුතුව ඇති අභියෝග

නූතන ප්‍රජාතන්ත්‍රවාදී ආණ්ඩුකරණය තුළ ක්‍රියාත්මක වන, රාජ්‍යයන් මැන බැලෙන මිම්මක් බවට තොරතුරු දැනගැනීමට පුරවැසියනට ඇති හැකියාව පත්වී හමාරය. ප්‍රජාතන්ත්‍රවාදයේ සිද්ධාන්ත අනුව නිරායාසයෙන්ම ජනතාව සතු අයිතියක් විය යුතුව තිබූ තොරතුරු වෙත ප්‍රවේශවීමේ අයිතිවාසිකම රජයන් විසින් නූතන පාලන ක්‍රමවේදය තුළ යොදාගන්නේ ජනතාවට සපයනු ලබන අර්ථලාභයක් වශයෙනි. ජනතාවට වගවීම ඔප්පු කිරීමේ ප්‍රවේශයක් වශයෙනි. කෙසේ වෙතත් තොරතුරු දැනගැනීමේ අයිතිවාසිකම ජනතාව සතු අවියකි. මෙම අවිය පනතක් ලෙස ශ්‍රී ලාංකේය පුරවැසියා සතු වූයේ වර්ෂ 2016ක් වූ අගෝස්තු මස 04 වන දිනයි. නිල වශයෙන් මෙම පනත හරහා පොදු ජනයා හට සක්‍රීයව ක්‍රියාත්මකවීමේ ක්‍රියාපටිපාටිය 2017 පෙබරවාරි 03 වන දින සිට ගැසට් ගත කෙරිණ.

මෙම පනත ප්‍රායෝගිකව ක්‍රියාවට නංවමින් ජනතාව අතරට ගෙනයාමේ මෙහෙවර මෙන්ම පනත ගෙන ඒමට සිදුකළ යුතුව තිබූ කාර්යභාරයද එක ලෙස අභියෝගාත්මක විය. මෙම සටහනේ අරමුණ වන්නේ තොරතුරු දැනගැනීමේ අයිතියේ භාවිතාව සහ එහි ප්‍රවර්ධනය සම්බන්ධයෙන් පුරෝගාමිත්වයෙන් කටයුතු කල මාධ්‍යවේදීන්, සිවිල් සමාජ ක්‍රියාධරයින්, දේශපාලඥයින් අතර TISL ආයතනය ලැබූ අත්දැකීම් විමසා බැලීමයි.

පී.බී. ජනිත් නිලන්ත ශ්‍රී ලංකා නීති විද්‍යාලයේ අවසන් වසර නීති ශිෂ්‍යයකු ලෙස අධ්‍යාපනය ලබන අතර මානව හිමිකම් පිළිබඳ ගෝලීය ප්‍රවණතා, ජාත්‍යන්තර නීතිය සහ අපරාධ නීතිය කතුවරයාගේ ප්‍රියතම ක්ෂේත්‍ර වේ.

ට්‍රාන්ස්පේරන්සි ඉන්ටර්නැෂනල් ආයතනයේ තොරතුරු දැනගැනීමේ අයිතිය සම්බන්ධ ඒකකයේ සාමාජිකයකු ලෙසද මොහු කටයුතු කරන අතර ඒ ඔස්සේ ලබාගත් න්‍යායාත්මක දැනීම සහ ව්‍යවහාරික භාවිතාවන් පිළිබඳ අත්දැකීම් මෙම ලිපිය සම්පාදනය කිරීම කෙරෙහි බුද්ධිමය මූලාශ්‍ර ලෙස යොදාගෙන තිබේ.

මෙම ලිපිය සඳහා සංකිතා ගුණරත්න සහා හිරාන් ගීතගේ දායකත්වය ලැබී ඇත.

2. පොදු ගැටළු සම්බන්ධ තොරතුරු ඉල්ලීම් - TISLහි තොරතුරු දැනගැනීමේ අයිතියේ භාවිතය

ශ්‍රී ලංකාව දශක ගණනාවක් පුරාවට පොදු අධිකාරීන් හරහා තොරතුරු වෙත ප්‍රවේශය අහිමිව තිබී ඉතා මෑත කාලයක එම අයිතිය අත්පත් කරගත් රටකි. මෙම සටහන ලියවෙන මොහොත වන විටත් තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනතට වසරක් හෝ සම්පූර්ණ වී නොමැත. මහජනතාවගේ අවධානය නාහිගත විය යුතු ඇතැම් කාලීන සිදුවීම් සහ ආයතන හා සබැඳුණු තොරතුරු කරා ළඟාවීමට තොරතුරු දැනගැනීමේ පනත යොදාගත හැකිය. කෙසේ නමුත් මෙහි භාවිතාව කෙතරම් ප්‍රායෝගික වුවත්, බොහෝ අනෙකුත් නීති මෙන් මහජන සහභාගීත්වයේ අඩුවක් ආරම්භයේදී නිරීක්ෂණය කළ හැකිය. මහජන අර්ථසාධක නඩුකර සංකල්පයේ ආභාෂය ලැබූ නීති ක්‍රමයක් සහිත රටක් වශයෙන්, පුරවැසි යහපත උදෙසා මැදිහත් වීමේ පරමාර්ථය පෙරදැරිව TISL ආයතනය උක්ත කාලීන කතාබහට ලක්වූ සිදුවීම් සම්බන්ධයෙන් අදාළ ආයතන වලින් තොරතුරු ඉල්ලූම් කිරීමට යෙදිණි. එවන් ප්‍රධාන අවස්ථා කිහිපයක් මෙසේ දැක්විය හැක.

ජනාධිපතිවරයාගේ සහ අග්‍රාමාත්‍යවරයාගේ වත්කම් බැරකම් ප්‍රකාශ ඉල්ලා ගොනු කළ තොරතුරු ඉල්ලූම්පත්.

අග්‍රාමාත්‍යවරයාගේ සහ ජනාධිපතිවරයාගේ වත්කම් - බැරකම් ප්‍රකාශ ඉල්ලා TISL ආයතනය විසින් 2017 පෙබරවාරි 3 වන දින ජනාධිපති ලේකම් කාර්යාලයට හා අග්‍රාමාත්‍ය ලේකම් කාර්යාලයට තොරතුරු ඉල්ලූම්පත් යොමු කරන ලදී.

අග්‍රාමාත්‍ය ලේකම් කාර්යාලයෙන් 2017 මාර්තු 01 වන දිනත්, ජනාධිපති ලේකම් කාර්යාලයෙන් 2017 මාර්තු 6 වන දිනත් ඒ සම්බන්ධයෙන් ලැබුණු ප්‍රතිචාර අනුව තොරතුරු ලබාදීම ප්‍රතික්ෂේප වුයේ පාර්ලිමේන්තු කතානායකවරයාගේ නියෝග පදනම්ව වන අතර තොරතුරු දැනගැනීමේ පනතේ 5 වන වගන්තියේ සඳහන් මුක්තීන් ප්‍රකාරව නොවේ. නම් කල නිලධාරියා වෙත අභියාචනා කල අවස්ථාවේදී ජනාධිපති ලේකම් කාර්යාලය විසින් පනතේ 5(1)(a) සහ 5(1)(ට) යන මුක්තීන් තොරතුරු ලබාදීම ප්‍රතික්ෂේප කිරීමට හේතු වශයෙන් දක්වන ලදී.

ලැබූ ප්‍රතිචාර සම්බන්ධයෙන් TISL ආයතනය සෑහීමකට පත් නොවූ බැවින් ඒ සම්බන්ධ අභියාචනා තව දුරටත් තොරතුරු කොමිසම ඉදිරියේ විභාග වෙමින් පවතී.

දේශපාලන පක්ෂවල මූල්‍ය වාර්තා ඉල්ලූම්කරමින් මැතිවරණ කොමිසම වෙත යොමුකළ තොරතුරු ඉල්ලූම්පත.

මෙතෙක් TISL ආයතනය විසින් පොදුජන යහපත උදෙසා පොදු අධිකාරීන් වෙත යොමු කරන ලද තොරතුරු ඉල්ලීම් අතුරින් වඩාත්ම සාර්ථක ඉල්ලීම ලෙස මැතිවරණ කොමිසම වෙත ඉදිරිපත් කරන ලද තොරතුරු ඉල්ලීම හඳුනාගත හැකිය. ඉල්ලීමට ධනාත්මක ලෙස ප්‍රතිචාර දක්වමින්, පනතෙහි එන නියමිත කාලරාමු තුළ අදාළ තොරතුරු ලබා දීමට මැතිවරණ කොමිසම ක්‍රියා කළේය. මේ සම්බන්ධ තොරතුරු RTI Watch අඩවිය මගින් සපයනු ලබයි වෙබ් (RTI Watch 2017).

මීට අමතරව 2017 පෙබරවාරි 03 වන දින,

- ඉඩම් ප්‍රතිසංස්කරණ කොමිසම වෙත පවතින ඉඩම් ප්‍රමාණය හා ඒ පිළිබඳ වාර්තා සම්බන්ධයෙන් යොමු කළ තොරතුරු ඉල්ලීම
- අල්ලස් හා දූෂණ කොමිසම වෙත ඉදිරිපත් වූ පැමිණිලි සහ කොමිසම පැවරූ නඩු සම්බන්ධයෙන් යොමු කළ තොරතුරු ඉල්ලීම
- ශ්‍රී ලංකා රේගුව වෙත එහි ක්‍රියාපටිපාටිය සහ බදු අයකිරීමේ ක්‍රියාවලිය සම්බන්ධයෙන් යොමු කළ තොරතුරු ඉල්ලීම
- ශ්‍රී ලංකා මහ බැංකුව වෙත සේවක අර්ථසාධක අරමුදල සම්බන්ධයෙන් යොමු කළ තොරතුරු ඉල්ලීම

මහජන සුභසිද්ධිය උදෙසා TISL ආයතනය මගින් ගොනු කළ ප්‍රධානතම තොරතුරු ඉල්ලීම් කිහිපයකි. මෙහි විශේෂත්වය වන්නේ පනත ගැසට්ගත කර නව රෙගුලාසි මහජනතාවට හඳුන්වාදුන් පළමු දිනයේ සිටම TISL ආයතනය අදාල නීතිමය ප්‍රතිපාදන පොදුජන යහපත උදෙසා ක්‍රියාවේ යෙදවීමයි.

- මැයි දින රාජ්‍ය දේපල අවභාවිතය සම්බන්ධයෙන් 2017 ජූලී මස 13 වන දින ශ්‍රී ලංකා ගමනාගමන මණ්ඩලය සහ ශ්‍රී ලංකා දුම්රිය දෙපාර්තමේන්තුව වෙත ගොනුකළ තොරතුරු ඉල්ලීම් ද මෙහිදී වැදගත් වේ.

තොරතුරු පනත කරළියට ආ විගස පුරවැසි සුභසිද්ධිය උදෙසා මෙසේ ගොනු කළ තොරතුරු ඉල්ලීම් තුළින්, ඕනෑම මහජන අධිකාරියක් ප්‍රශ්න කිරීමට ඕනෑම පුරවැසියෙකුට අයිතිවාසිකමක් ඇත. යන පණිවිඩය මහජනතාව වෙත ලබා දීම මෙන්ම පනතෙහි ප්‍රතිපාදන තොරතුරු අත්පත් කරගැනීම කෙරෙහි යොදාගන්නා ආකාරය සහ එම ක්‍රියාවලියේදී මුහුණ දීමට සිදුවන අභියෝගවලට පුරවැසියා සුදානම් කිරීම ද මින් අපේක්ෂා කෙරිණ.

3. වැදගත් නිරීක්ෂණ

පනතෙහි ධනාත්මක ලක්ෂණ මෙන්ම පිළියම් කළ යුතු දුර්වලතා ද රාශියක් නිරීක්ෂණය කල හැකිය. මේවා බහුල වශයෙන් හරයාත්මක අන්තර්ගතයන්ට වඩා ප්‍රායෝගික කාර්ය පටිපාටිය පිළිබඳ දුර්වලතා වේ. මෙකී දුර්වලතා පනත භාවිතයේ දී, අපේක්ෂිත අරමුණු කරා ළඟාවීමේදී ප්‍රතිරෝධකයක් ලෙස ක්‍රියාකිරීම නොවැලැක්විය හැකි සංසිද්ධියකි. මෙහි ප්‍රතිඵලයක් ලෙස සිදුවන පනත භාවිතා කරන්නන් අධෛර්යමත් වීම සහ ක්‍රමවේදය පිළිබඳ විශ්වාසය බිඳවැටීම තොරතුරු දැනගැනීමේ අයිතියෙහි ඉදිරි ගමනට එතරම් සුභදායී තත්ත්වයක් නොවනු ඇත.

3.1. පරිවර්තන දෝෂ

තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනතෙහි ත්‍රෛභාෂික මුහුණුවරෙහි දුර්වලතා ප්‍රායෝගික භාවිතයේදී ගැටළුකාරී තත්වයන් උද්ගත කරන අවස්ථා සුලභව අත්දැකිය හැකිය. පරිවර්තනයේදී පැන නගින ව්‍යාකූලතා හේතුවෙන් වන වරදවා වටහාගැනීම් බොහෝවිට අවසාන වන්නේ පුරවැසියා සහ පොදු අධිකාරිය අතර ඇතිවන ඝට්ටනයකිනි. උදාහරණයක් ලෙස පුරවැසියෙක් විසින් යොමු කරන ලද තොරතුරු ඉල්ලීමක් මත තොරතුරු USB දත්ත පරිවාහකයකට පිටපත් කරදීම සඳහා රු. 40,000 ඉක්මවූ ගාස්තුවක් ගෙවන මෙන් එක්තරා මහජන අධිකාරියක් දන්වා තිබිණ. මෙම සිද්ධිය වැඩිදුරටත් අධ්‍යනය කිරීමේදී හෙළිවූයේ පනතෙහි ඉංග්‍රීසි සහ සිංහල පරිවර්තන අතර වූ ගැටලූකාරී තත්ත්වයක් මත මෙසේ සිදුවූ බවයි (තොරතුරු දැනගැනීමේ අයිතිවාසිකම පිළිබඳ කොමිෂන් සභා රීති 2017).

ඉහත කී සිද්ධිය උද්ගත වූයේ තොරතුරු දැන ගැනීමේ අයිතිවාසිකම පිළිබඳ විශේෂ ගැසට් පත්‍රය තුළ වූ භාෂාමය පරස්පරතාවක් හේතුවෙනි.

මෙම තත්වය වැඩිදුරටත් සලකා බලනකල, පනතෙහි සිංහල සහ දෙමළ පරිවර්තනයන් අතර පරස්පරතාවක් ඇතිවුවහොත් බලපැවැත්විය යුත්තේ සිංහල පරිවර්තනය බවට වන ප්‍රතිපාදනය පැහැදිලිව පනතෙහි ඇතත් (තොරතුරු දැනගැනීමේ අයිතිවාසිකම පිළිබඳ පනත 2016, ව. 44), සිංහල/ඉංග්‍රීසි භාෂා අතර පරස්පරතාවක් ඇතිවිට බලපැවැත්වෙන්නේ කුමන භාෂාවද යන්න මෙම පනතෙහි මෙන්ම සම්මත වෙනත් පනත්වලද සඳහන්ව නැත.

මෙම ගැටලූකාරී තත්වය සහ එය මගහරවාගත හැකි ආකාර සලකා බැලීමේදී, තොරතුරු නිලධාරීන් සහ පුරවැසියන් වෙත අඛණ්ඩ පුහුණු වැඩසටහන් හරහා ලබාදෙන දැනුවත්භාවය සහ පුහුණුව මේ සඳහා ගත හැකි සාර්ථකම පියවර ලෙස හඳුනාගත හැකිය.

3.2. මන්දෝත්සාහිභාවය සහ නොදැනුවත්භාවය

තොරතුරු දැනගැනීමේ අයිතිය ක්‍රියාත්මක වන රටක් වශයෙන්, පුරවැසියන්ගෙන් යොමුවිය හැකි තොරතුරු ඉල්ලීම්වලට පූර්ව සූදානමක් ඇතිව ක්‍රියාකිරීම මහජන අධිකාරීන් වෙතින් අපේක්ෂා කෙරෙන්නකි. දත්ත හා ලේඛන ප්‍රවේශවීමට පහසු ආකාරයට සංවිධානය කිරීම සහ පනත ක්‍රියාත්මක කිරීමෙන් පසුව ඉදිරිපත්වන තොරතුරු ඉල්ලීම් පිළිබඳ ක්‍රියාත්මක වීමට පුහුණුවීම මීට අයත්වේ. ඒ ආකාරයෙන්, බිහිවීමට නියමිත නව ක්‍රමවේදයට අනුකූලව පොදු අධිකාරීන් ස්වකීය කාර්ය පටිපාටික ආකෘතිය හැඩගස්වාගත යුතු අතර පනත සම්මතවීමෙන් අනතුරුව ඒ පිළිබඳ මනා දැනුමකින් යුක්තව වඩාත් සාර්ථක ලෙස ක්‍රියාත්මකවීම ඉලක්කගත කළ යුතුය.

කෙසේ නමුත් අපේක්ෂිත තත්වය හා සසඳා බැලීමේදී ශ්‍රී ලංකාවේ තොරතුරු දැනගැනීමේ අයිතිය ක්‍රියාත්මක කිරීමේ කාර්යක්ෂමතාවය පිළිබඳ පොදු අධිකාරීන් නියෝජනය කරන නිලධාරීන් බහුතරයකගේ වර්තමාන දැනීම සහ උත්සුකභාවය ඉතා පහළ මට්ටමක පවතී. වර්තමානය වන විට ජනමාධ්‍ය අමාත්‍යාංශය, රාජ්‍ය තොරතුරු දෙපාර්තමේන්තුව වැනි ආයතන හරහා තොරතුරු නිලධාරීන් වෙත පුහුණුවීම් සංවිධානය වුවද ඔවුන් තුළින් පහළ දැනුම් මට්ටමක් පමණක් නොව ඉන් ඔබ්බට ගිය මන්දෝත්සාහිභාවයක්ද අත්දැකිය හැකිය. මීට හේතුව පනත මගින් සමාජගත කරන ලද පුරවැසි අයිතියෙහි බලගතුබව පිළිබඳව දැනීමක් ඔවුන් හට නොවීමයි. ආරම්භයේදී තොරතුරු ඉල්ලූම්කරුවන් ලෙස ක්‍රියාත්මක වූ TISL ආයතනය සහ පුරවැසියන්ගේ අත්දැකීම අනුව මහජන අධිකාරීන් නියෝජනය කරන ඇතැම් නිලධාරීන්ගේ ප්‍රතිචාර බොහෝ විට පොදු මුහුණුවරක් ගනී.

- *එහෙම පනතක් ගැන අපි දන්නේ නැහැ.*
- *අපිට ඉහළින් උපදෙස් ලැබිලා නැහැ.*
- *තොරතුරු නිලධාරියෙක් කියා අයෙක් අපේ ආයතනයේ පත්කර නැහැ.*

මෙම සටහන ලියැවෙන මොහොත වන විටත් බහුතරයක් වන රාජ්‍ය ආයතන වලට තොරතුරු නිලධාරීන් අණ්යුක්ත කර තිබේ. තත්වය එසේ තිබියදීත් මෙවැනි ප්‍රතිචාර තොරතුරු ඉල්ලීමක් ඉදිරිපත් කිරීමට මහජන ආයතනයක් කරා යන අවස්ථාවලදී සුලභ ලෙස අත්දැකිය හැකිය. මෙවැනි සිදුවීමකින් අධෛර්යමත් වන පුරවැසියෙකු සිය ව්‍යවස්ථාපිත අයිතිවාසිකම පිළිබඳ සැක-සංකා ඇතිකරගන්නා අතර නැවත වරක් තොරතුරු දැනගැනීමේ අයිතිය භාවිතා කිරීමට මැළි වනු ඇත.

කෙසේ වෙතත් තොරතුරු කොමිසමේ වාර්ෂික වාර්තාව නිකුත්වනතුරු මෙම ක්‍රියාවලියේ සාර්ථක/අසාර්ථක බව පිළිබඳව නිගමනයකට එළඹීමට නොහැකිවනු ඇත.

3.3. පනතෙහි මන්දගාමී ජනතාගමනය

එදා-මෙදා තුර ශ්‍රී ලාංකේය දේශපාලන විකාශනය තුළින් රාජ්‍යය සහ රාජ්‍යයේ නියෝජිතයන්ගේ කල්ක්‍රියාව හරහා මහජනතාවට සම්ප්‍රේෂණය වී ඇත්තේ, රාජ්‍යය පුරවැසියාට වඩා බලවත්ය, යන පූර්ව නිගමනයයි. ඒ අනුව ශ්‍රී ලංකාව සාක්ෂරතාවය වැනි නිර්ණායක අතින් අනෙකුත් රටවලට වඩා බොහෝ ඉදිරියෙන් සිටියද, දේශපාලන සහ පුරවැසි සවිඥයානිකත්වය අතින් ගත්කල ඉතා පහළ මට්ටමක පසුවේ. පුරවැසියා පොදු අධිකාරියක් වෙත තබා ඡන්ද පොළ වෙත පිවිසෙන්නේද උක්ත පූර්ව නිගමනය මනසෙහි පෙරදැරි කරගෙනය. මෙවැනි වාතාවරණයක් තුළ සම්මතවන තොරතුරු පනත පුරවැසියෙක් හරහා තවත් පුරවැසියෙකු වෙත බිම් මට්ටමින් විහිදීම පිළිබඳ ගැටළුවක් පවතී.

මේ වන විටත් තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත ප්‍රවර්ධනය කිරීම, ජනතාව දැනුවත් කිරීම සහ ප්‍රායෝගික පුහුණුව ලබා දීම රාජ්‍ය හා සිවිල් සංවිධාන මට්ටමින් දිවයින පුරාම ක්‍රියාත්මක වේ. එසේ වුවත් පනත ප්‍රායෝගික භාවිතයේ යෙදවීම සම්බන්ධයෙන් මහජනතාව තුළ වන උනන්දුව එතරම් ප්‍රශස්ත මට්ටමක නොපවතී.

තොරතුරු පනත ප්‍රායෝගික නීතිමය මෙවලමක් ලෙස ජනතාව අතරට ගෙනගොස් ඒ කෙරේ ජනතා විශ්වාසය ගොඩනැංවිය යුත්තේ එය භාවිතා කිරීම ඵලදායී විය හැකි අත්දැකීමක් බවට වන පූර්ව නිගමනය ඔවුන් තුළ ස්ථාපිත කිරීමෙනි. ඉහත දී සඳහන් කළ, රාජ්‍ය සහ රාජ්‍යයේ නියෝජිතයන් පුරවැසියාට වඩා බලවත් ය, වැනි සෘණවාදී පූර්ව නිගමන ජනතාව අතරින් තුරන් කිරීම තුළින්, තොරතුරු දැනගැනීමේ අයිතිය වැනි ව්‍යවස්ථාපිත අයිතිවාසිකම්වල උපරිම ඵල නෙලා ගැනීමට ජනතාව වැඩි වැඩියෙන් යොමුවනු ඇත.

3.4. 'ආණ්ඩුවේ කන්තෝරු' ආකල්පය

දශක ගණනාවක් පුරාවට මහජන ආයතන පුරවැසියන් හා ගනුදෙනු කිරීමේදී දක්වන ආකල්පය බොහෝවිට උදාසීන හා නොසැලකිලිමත් ස්වරූපයක් දැරූ බව නොරහසකි. කෙසේ වෙතත් තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත ගෙන ඒමත් සමඟ ජනතාවට තොරතරු වෙත ප්‍රවේශවීමේ අයිතිය තහවුරු කරදුන් අතරම උක්ත උදාසීන හා නුරුස්සනසුළු කන්තෝරු ආකල්පය වඩා කාර්යක්ෂම මහජන අධිකාරියක තත්ත්වයට ගෙන ඒමටද ශක්තිමත් පදනමක් සැපයෙන ලදී.

එබැවින්, ඉහත කී සාම්ප්‍රදායික නිලධාරීවාදී ආකල්පය සහ නව ක්‍රමවේදය අතර පැහැදිලිවම ඇති සටිටනයක් හරහා තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත වර්තමානයේදී ගමන් කරමින් සිටී. මෙම සටිටනයේ ප්‍රතිඵලයක් ලෙස නව ක්‍රමවේදය කෙරේ විශ්වාසය තබන මහජනතාව තොරතුරු ලබාගැනීමට පොදු අධිකාරීන් වෙත පිවිසෙන විට, සාම්ප්‍රදායික 'ආණ්ඩුවේ කන්තෝරු' ආකල්පයෙන් පිටතට එමින් සිටින පොදු අධිකාරීන් සහ නිලධාරීන් පනත අනුකූලව ක්‍රියා කිරීමට බැඳී සිටියත්,ඔවුන්ගේ මුල් ප්‍රතිචාරය බොහෝවිට උදාසීන ස්වරූපයක් ගන්නා අවස්ථා ද දක්නට ලැබේ.

රජය විසින් පොදු අධිකාරීන්වල සේවයේ නියුතු අදාළ තොරතුරු නිලධාරීන් වෙනුවෙන් නිරන්තර පුහුණු වැඩමුළු සංවිධානය කිරීම සහ මහජන සේවය පිළිබඳ ආකල්ප යාවත්කාලීන කිරීම මගින් මෙම තත්වය මගහැරිය යුතුව ඇත.

3.5. සංශෝධනය වීමේ අවදානම

තොරතුරු දැනගැනීමේ අයිතිය ජනසතු වී අදට වසරක් හෝ සපිරී නොමැත.පනත ගෙන ඒමෙන් පසු එකවර මහා රැල්ලක් ලෙස පුරවැසි පිබිදීමක් සිදු නොවූවද, මෙරට පුරවැසියා කෙමෙන් කෙමෙන් කාලය සහ අත්දැකීම් සමඟ එවන් සන්ධිස්ථානයකට පිවිසෙනු ඇත. මෙතෙක් අඳුරේ තැබුණු රහස් අඩංගු සේප්පු මහජනයා අතින් විවෘත කෙරෙනු ඇත. මේ ආකාරයේ වාතාවරණයක් ගොඩනැගීම ආරම්භ වන කල මෙතෙක් රහස්‍යභාවයේ සෙවනැල්ලට මුවා වී සිටි රාජ්‍ය නිලධාරීන් සහ දේශපාලකයන් හට එම රැකවරණය අහිමි වනු ඇත. පොදු අධිකාරීන් සිය රාජකාරී සම්බන්ධයෙන් වගවීමට නියමවීම අවශ්‍ය නොවන බවට වන සාම්ප්‍රදායික පැරඩයිමය බිඳ වැටුණු කල ඔවුන්ගේ ආධිපත්‍යයට එල්ලවන පහර දරාගැනීමට නොහැකිව තොරතුරු දැනගැනීමේ අයිතියේ මූලාශ්‍රය අඩපණ කිරීමේ තීරණයට එළඹීම ස්වභාවික දේශපාලනික උපක්‍රමයකි.

එක්සත් රාජධානියේ තොරතුරු දැනගැනීමේ අයිතිය ස්ථාපිත කිරීමට සිය හඬ නැගූ හිටපු බ්‍රිතාන්‍ය අග්‍රාමාත්‍ය ටෝනි බ්ලෙයාර් විසින්, පනත ගෙන එමෙන් පසු එහි ශක්නුතාවය තමා අවතක්සේරු කල බවත් පනත ගෙන ඒමට ක්‍රියා කිරීම තම ජීවිතයේ සිදු කළ ඥානාන්විත නොවන ක්‍රියාවක් බවටත් සිය ස්වයං චරිතාපදානයේ සඳහන් කරන ලදී. (බ්ලෙයාර් 2010)

වර්තමාන ගරු අග්‍රාමාත්‍ය, පාර්ලිමේන්තු මන්ත්‍රී රනිල් වික්‍රමසිංහ මහතා වරක් Sri Lanka Guardian වෙබ් අඩවිය සමඟ සම්මුඛ සාකච්ඡාවකට එක්වෙමින් කියා සිටියේ, අපි බලයට පැමිණියාම අපිට අවශ්‍ය වුණා තොරතුරු පනත ගෙන එන්න. එහි දුර්වලතා රාශියක් තිබෙනවා. නමුත් මේ සම්බන්ධයෙන් මගේ මතය වුණේ පළමුව තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත ක්‍රියාවේ යොදවා, එහි දුර්වලතා හඳුනාගෙන වසර දෙකකට පසු එය සංශෝධනය කලයුතු බවයි (Sri Lanka Guardian 2017).

ඒ ආකාරයෙන් මෙරට තොරතුරු දැනගැනීමේ පනත සංශෝධනයට සැලසුම් වී ඇති බව ඉහත ප්‍රකාශයෙන් සනාථ වේ. මෙවන් සංශෝධනයක් මගින් පුරවැසියන්ට ලබාදී ඇති අයිතිය අඩපණ කිරීමක් මිස වැඩි දියුණු කිරීමක් සිදු නොවන බව නොඅනුමානය. මෙසේ සිදුකරන සංශෝධනය පනතෙහි සෘජු සහ ස්වාධීන බලතල කප්පාදුවකට මග පෑදිය හැකිය. මේ හේතුව නිසා පනත සංශෝධනය වීමෙන් රැකගැනීම ශ්‍රී ලාංකේය පුරවැසියන් ගේ තොරතුරු දැනගැනීමේ අයිතිය ආරක්ෂා කරගැනීමට අතිශය තීරණාත්මක වනු ඇත.

3.6. කොමිසමෙහි මූල්‍ය ප්‍රතිපාදන ස්වාධීන නොවීම

පනත අනුව කොමිසමෙහි ප්‍රයෝජනය උදෙසා මුදල් වෙන් කෙරෙනුයේ පාර්ලිමේන්තුව හරහා සම්මත කෙරෙන මූල්‍ය ප්‍රතිපාදන හරහා සහ දෙස්/විදෙස් මූලාශ්‍ර වලින් ලැබෙන පරිත්‍යාග මගිනි (ව. 16(1)). තොරතුරු දැනගැනීම පිළිබඳ කොමිසමෙහි මූල්‍යමය ප්‍රතිපාදන 2016 වර්ෂය සඳහා වෙන්වූයේ ජනාධිපති අරමුදල මගිනි. මේ තත්වය මත කොමිසමක ස්වෛරීත්වය විදහාපාන එක් සාධකයක් වන ස්වාධීන මූල්‍යමය ප්‍රතිපාදන සංකල්පය මෙහිදී එක්තරා ආකාරයට පළුදු වී තිබේ. කෙසේ වෙතත් ජනාධිපති අරමුදලින් සැලසෙන ප්‍රතිපාදන මත කොමිසම එළඹෙන තීන්දු සම්බන්ධයෙන් කිසිදු ආකාරයක වෙනසක් සිදු නොකළ යුතු අතර තීන්දු තීරණ ගැනීමේදී කොමිසමෙහි ස්වාධීනත්වය රඳවා ගත යුතුය.

තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත මෙතෙක් ආ කෙටි ගමන්මග දෙස යළිත් වරක් හැරී බලන කල ජයගත් සහ මුහුණ දුන් අභියෝග පිළිබඳ සවිස්තරාත්මක අදහසක් ලබාගත හැකිය. ඉදිරියේදී ලබා ගැනීමට අපේක්ෂා කරන ජයග්‍රහණ සහ මුහුණ දීමට සිදුවන අභියෝග ජයගැනීමේදී මෙකී මඟ සලකුණු මනා පිටුවහලක් වනු ඇත.

4. ප්‍රගතිශීලී අන්තර්ගතයක්

4.1. පුළුල් පරාසයක විහිදුණු ප්‍රවේශ අයිතිය

3. (1) මෙම පනතේ 5 වන වගන්තියේ විධිවිධානවලට යටත්ව, පොදු අධිකාරියක සන්තකයේ, භාරයේ හෝ පාලනයේ ඇති තොරතුරු වලට ප්‍රවේශවීමේ අයිතිවාසිකම සෑම පුරවැසියෙකුට ම තිබිය යුතු ය.

මේ අනුව ඕනෑම පොදු අධිකාරියක් සන්තකයේ හෝ භාරයේ ඇති තොරතුරු වෙත ඕනෑම පුරවැසියෙකු හට ප්‍රවේශවීමේ අයිතිය පනත මගින් තහවුරු කර තිබේ.පනතෙහි දෙවන කොටසෙහි දක්වා ඇති ව්‍යතිරේඛී අවස්ථාවලට පරිබාහිරව පවතින ඕනෑම තොරතුරක් ලබා ගැනීමට පුරවැසියා හිමිකම් ලබයි. පනතට පෙර පැවති තත්වය හා සන්සන්දනය කර බැලීමේදී මෙය අතිශය විප්ලවීය වෙනසකි.මේ අනුව සෞඛ්‍ය, අධ්‍යාපන, පරිපාලන ආදී ඕනෑම ක්ෂේත්‍රයකට අදාළ තොරතුරු ලබාගැනීමට හැකියාව පවතී. වඩාත් වැදගත් වනුයේ පෙර පැවතියාක් මෙන් හේතු රහිතව තොරතුරු ලබාදීම ප්‍රතික්ෂේප කිරීමේ හැකියාව වෙනුවට පනතෙහි සඳහන් ව්‍යතිරේඛ මත, පදනමක් ඇතිව පමණක් තොරතුරු ඉල්ලීම් ප්‍රතික්ෂේප කිරීමට පොදු අධිකාරීන් හට වන බැඳීමයි.

4.2. මහජන සුභසිද්ධියට මුල් තැන

පනත මගින් පුරවැසියා හට තොරතුරු වෙත සලසා ඇති ප්‍රවේශ අයිතිය යම්තාක් දුරකට නිශ්චිත වූ සීමාකිරීම් වලට ද භාජනය කර තිබේ (ව. 5).

උදා: රාජ්‍ය ආරක්ෂාව සම්බන්ධ තොරතුරු, පුද්ගලික තොරතුරු...

එවැනි සීමාකිරීම් හමුවේ වුවද අදාළ තොරතුරු හෙළිදරව් කිරීම තුළින් සිදුවන හානියට අභිබවා පොදු මහජන සුභසිද්ධිය වැදගත් වේ නම් ඒ උදෙසා උක්ත සීමිත ගනයේ සංවේදී තොරතුරු පවා අනාවරණය කරගැනීමේ හැකියාව පනත තුළින් ජනසතු වී තිබේ. මේ නිසා තොරතුරු දැනගැනීමේ පනත හරහා ව්‍යවස්ථාපිත පුරවැසි බලය මැනවින් විදහා දක්වන ප්‍රබල ප්‍රතිපාදනයක් ලෙස මෙය දැක්විය හැකිය.

4.3. ප්‍රගාමී අනාවරණය

යම් ඉල්ලීමක් ඉදිරිපත්වීමට පෙර පොදු අධිකාරියක් මගින් ස්ව-පෙළඹවීමෙන් ම මහජනයා වෙත කෙරෙන තොරතුරු අනාවරණය ප්‍රගාමී අනාවරණය වේ (ව. 8-10). මෙය තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ නීතියේ අතිශය වැදගත් සංකල්පයකි. පනතෙහි මෙන්ම ගැසට් පත්‍රයේ නියෝග අංක 20 (තොරතුරු දැනගැනීමේ අයිතිවාසිකම පිළිබඳ කොමිෂන් සභා රීති 2017 නියෝග අංක 20) යටතේ මේ පිළිබඳ ප්‍රතිපාදන වැඩිදුරටත් දක්වා ඇත. යම්කිසි පොදු අධිකාරියක ආයතනික තොරතුරු, සංවිධාන තොරතුරු හා අයවැය වැනි අභ්‍යන්තර තොරතුරු වෙත මහජනයාට ප්‍රවේශවීමට ඇති හැකියාව අදාළ පොදු අධිකාරියේ විනිවිදභාවය සහ වගවීම පිළිබිඹු කරන ලක්ෂණයකි. මේ අනුව ප්‍රගාමී අනාවරණය තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනතෙහි අඩංගු ඉතා ප්‍රගතිශීලී ප්‍රතිපාදනයක් ලෙස හඳුනාගත හැකිය.

4.4. පැය 48ක් තුළ තොරතුරු ලැබීමේ හිමිකම

ඉදිරිපත් වන යම් තොරතුරු ඉල්ලීමක් පුරවැසියෙකුගේ ජීවිතය සහ පෞද්ගලික නිදහස සම්බන්ධයෙන් වන විටදී, තොරතුරු ඉල්ලූම්කරු පැය හතළිස් අටක් තුළ අදාළ තොරතුරු ලැබීමට හෝ ඒ සම්බන්ධ නිශ්චිත ප්‍රතිචාරයක් ලැබීමට හිමිකම් ලබයි. මෙවන් තොරතුරු ඉල්ලීම් ඉදිරිපත්වීම තුළින් සීමිත කාලයක් තුළ ඉතා සංවේදී තොරතුරකට ප්‍රවේශවීම අපේක්ෂා කෙරේ. සීමිත කාල සීමාවක් තුළ කාර්යක්ෂම සේවාවක් ලබාගැනීමට ඇති හැකියාව මෙන්ම එසේ කාර්යක්ෂම සේවාවක් සැලසීමට ලේඛන හා දත්ත පෙර සුදානමක් ඇතිව සංවිධානය කර තැබීම වැදගත් වේ. එබැවින් මෙම ප්‍රතිපාදනය තුළින් සංවිධානාත්මක දත්ත සංරක්ෂණයට මග විවර වනු ඇත.

උදා: අතුරුදන් වුවන් සම්බන්ධයෙන් තොරතුරු සොයා යාමේදී, ඔවුන්ගේ පවුල්වල සාමාජිකයන් හට මෙසේ කඩිනම් තොරතුරු ලබාගැනීමට ඇති හිමිකම අතිශය ප්‍රයෝගික සහ ප්‍රයෝජනවත් ප්‍රතිපාදනයක් ලෙස හඳුනාගත හැකිය.

කෙසේ වෙතත් මේ වගන්තිය යටතේ තොරතුරු ලබාගත් අවස්ථාවක් සම්බන්ධයෙන් මේ වනතුරුත් TISL ආයතනය වෙත තොරතුරු වාර්තා වී නොමැත.

4.5. අවස්ථානුගතව වෙන්කළ තොරතුරු ලබාගැනීමේ හැකියාව

පනතෙහි 6 වන වගන්තියට අනුව, හෙළිදරව් කිරීම ප්‍රතික්ෂේප කරන කවර හෝ තොරතුරක කොටසක් ලෙස හෙළිදරව් කිරීමෙන් හානියක් සිදු නොවන වෙන් කල හැකි තොරතුරක් ඇති විට එම තොරතුර වෙන්කොට ලබා ගැනීමේ පහසුව සැලසේ. මේ අනුව කවර හෝ හේතුවක් මත අනාවරණය කිරීම ප්‍රතික්ෂේප කළ ලේඛනයක, ප්‍රතික්ෂේප නොවන තොරතුරු වෙත ප්‍රවේශවීමේ පහසුව පුරවැසියාට හිමි වේ.

4.6. අමාත්‍ය මණ්ඩල සංදේශ/ තීරණ/ ලේඛන වෙත සලසා ඇති නම්‍යශීලී ප්‍රවේශය

තොරතුරු දැනගැනීමේ අයිතිය ස්ථාපිත කර ඇති බොහෝ රටවල තොරතුරු පනත් තුළ කැබිනට් (අමාත්‍ය මණ්ඩල) ලේඛන ගණයට වැටෙන තොරතුරු ලබාදීම ප්‍රතික්ෂේප කෙරේ (ඔස්ට්‍රේලියාව, කැනඩාව, ඇමෙරිකා එක්සත් ජනපදය, එක්සත් රාජධානිය සහ තවත් රටවල්). මේ හේතුව නිසා අදාළ රටවල් තුළ සංවර්ධන ව්‍යාපෘති, ප්‍රතිපත්ති සම්පාදනය, විදේශ සම්බන්ධතා වැනි ක්ෂේත්‍රයන් වෙත සිදුවිය යුතු ජනතා සහභාගීත්වය වක්‍රාකාරයෙන් යම්තාක් දුරකට සීමාකර තිබේ. කෙසේ නමුත්, ශ්‍රී ලංකාවේ තත්වය සලකා බැලූ කල මෙය වඩාත් සුභදායී බව නිරීක්ෂණය කළ හැකිය. පනත ප්‍රකාරව පුරවැසියෙකුට ලබාගත නොහැක්කේ මෙතෙක් තීරණයක් ගෙන නොමැති අමාත්‍ය මණ්ඩල සංදේශ සම්බන්ධ තොරතුරු පමණි. ඒ අනුව නිශ්චිතව තීරණය වී තිබෙන අමාත්‍ය මණ්ඩල සංදේශ වලට පවා ප්‍රවේශවීමට පුරවැසියන් හිමිකම් ලබා තිබේ. මේ හරහා විවෘත ආණ්ඩුකරණයක් කෙරේ සක්‍රීයව දායක වීමට ශ්‍රී ලාංකික පුරවැසියන් හට ස්වර්ණමය අවස්ථාවක්

හිමිවන අතර මේ හරහා වඩාත් විනිවිදභාවයකින් යුතුව තීන්දු තීරණවලට එළඹීමට රජයන් පෙළඹෙනු ඇත. මේ තුළින් ඒකාධිපති ස්වභාවයේ, ප්‍රජාතන්ත්‍ර විරෝධී තීරණවලට එළඹීමට රජයන් වෙත තිබූ ඉඩහසර අහුරා තිබේ.

4.7. නිශ්චිත, හඳුනාගත් සහ වගකිවයුතු නිලධාරීන්

පොදු අධිකාරියකින් තොරතුරක් ලබාගැනීමේදී හෝ යම් සේවාවක් ලබාගැනීමේදී මහජනයාට 'නිලධාරිවාදයේ' ගොදුරක් වීමට සිදුවූ අවස්ථා බහුල වීම නිසා පොදු අධිකාරීන් කෙරෙහි තිබූ විශ්වාසය බිඳවැටීම අදටත් අත්විඳිය හැකි සංසිද්ධියකි. කෙසේ නමුත් තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත කරලියට පැමිණීමත් සමඟම ජනතාවට තොරතුරු ලබාදීමේ ක්‍රියාවලිය සම්බන්ධයෙන් සෘජුව වගකිවයුතු නිලධාරීන් දෙපළක් (තොරතුරු නිලධාරියා හා නම්කළ නිලධාරියා) සෑම පොදු අධිකාරියක් තුළම අනියුක්ත කර තිබීම අනිවාර්ය විය. මෙම නිලධාරීන් අකාර්යක්ෂමව ක්‍රියාකළ විට හෝ අසාධාරණ ලෙස තොරතුරු ලබාදීම ප්‍රතික්ෂේප කළහොත් ඉහළට (කොමිසම) අභියාචනා කිරීමේ ක්‍රියාවලිය ඉවතලිය නොහැකි නිර්ණායක් බවට පත්විය. මේ නිසා ඉල්ලුම් කරන තොරතුරු සම්බන්ධයෙන් අදාළ නිලධාරීන් ජනතාවට සෘජුවම වගවියයුතු අතර නිලධාරිවාදයේ අවමවීමක් මේ තුළින් අපේක්ෂා කළ හැකිය.

4.8. නිශ්චිත කාලරාමු

තොරතුරු ඉල්ලීමකට ප්‍රතිචාර දැක්වීම, තොරතුරු ලබාදීම, අභියාචනා වලට ප්‍රතිචාර දැක්වීම ඇතුළු තොරතුරු ලබාගැනීමේ ක්‍රියාවලියේ මුල සිට අගට සෑම ක්‍රියාවකටම නිශ්චිත කාලරාමුවක් තුළ ක්‍රියාත්මක වීමට පනත ප්‍රකාරව තොරතුරු නිලධාරියා බැඳී සිටී. මෙම ප්‍රතිපාදනය හේතුවෙන් තොරතුරු ඉල්ලීම් මගහැරීමේ හෝ කල්මැරීමේ සංස්කෘතිය වෙනුවට වඩාත් කාර්යක්ෂම සහ ඵලදායී සේවාවක් ලබාදීමට නිලධාරීන් පෙළඹෙනු ඇත (ව. 25).

4.9. ප්‍රතික්ෂේප කිරීමට හේතු දැක්වීම

නිලධාරීන් ලබාදීමට ප්‍රතික්ෂේප කරන තොරතුරු සඳහා ඔවුන් පුරවැසියා හට නිශ්චිත හේතු ඉදිරිපත් කළයුතු බවට (ව. 28) වන ප්‍රතිපාදනය අතිශය වැදගත් එකකි. එම වැදගත්කම වූ කලී නිලධාරීන් හරහා තොරතුරු ඉල්ලීම් ප්‍රතික්ෂේප වන්නේ පනතේ දක්වා ඇති නිශ්චිත කරුණු මත පමණක් වීමයි. මෙකී ප්‍රතිපාදනය හරහා පොදු අධිකාරියකට ජනතාවගේ තොරතුරු වසන් කිරීමට තිබූ ඉඩ/හසර නීත්‍යානුකූලව වළකා ඇත.

4.10. විශ්වාසනීය තොරතුරු

පනත ප්‍රකාරව ව්‍යාජ, යාවත්කාලීන නොවූ හෝ නොමගයවනසුලු තොරතුරු ජනතාවට ලබාදීම දඬුවම් ලැබිය හැකි වරදකි (ව. 39(1)). සෑම අවස්ථාවකදී ම සත්‍ය තොරතුරු ලබාදීමට පොදු අධිකාරීන් බැඳී සිටින අතර මේ හේතුව නිසා උක්ත තොරතුරුවල විශ්වසනීයත්වය ඉතා ඉහළ මට්ටමක පවතී. විශේෂයෙන් සත්‍ය තොරතුරු වන බවට අදාළ මහජන අධිකාරියෙන් සහතික කරගත් තොරතුරු ලබා ගැනීමට ඇති හැකියාව මෙන්ම අදාළ තොරතුරු වල සත්‍යතාවය තවදුරටත් තහවුරු කරගැනීම උදෙසා එම ස්ථානයට ගොස් තමා විසින්ම අදාළ ප්‍රස්තුතය පරීක්ෂාවට ලක් කළ හැකි වීම වැදගත් සාධක වේ. මෙම විශ්වසනීය බව නිසා එලෙස ලබාගත් තොරතුරු, සාක්ෂි හෝ සංඛ්‍යාලේඛන ලෙස නැවත භාවිතා කිරීමේදී පිළිගත් මූලාශ්‍රයකින් ලබාගත් තොරතුරු ලෙස සැලකේ.

4.11. හේතු දැක්වීමට බැඳීමක් පුරවැසියාට නොමැත

තමන් විසින් සිදුකරන තොරතුරු ඉල්ලීමකට පොදු අධිකාරියට කිසි ලෙසකින්වත් හේතු ඉදිරිපත් කිරීමට පුරවැසියා බැඳී නොමැත (ව. 24(5) (ඈ)). මෙකී ප්‍රතිපාදනය හේතුවෙන් තොරතුරු ලබාදීම පුද්ගලබද්ධ අරමුණු මත ප්‍රතික්ෂේප කිරීමට පොදු අධිකාරියකට ඇති ඉඩකඩ අහුරා ඇත.

4.12. අභියාචනා කිරීමේ ක්‍රියාපටිපාටිය

යම්කිසි තොරතුරු ඉල්ලීමක් සම්බන්ධයෙන් තොරතුරු නිලධාරියෙකුගේ තීරණයක් සමඟ එකඟ නොවන ඉල්ලුම්කරුවෙකු හට ඒ පිළිබඳව වඩාත් ඉහළ පරිපාලන ස්ථරයන් වෙත අභියාචනා කිරීමේ හැකියාව ලැබී තිබේ.තොරතුරු නිලධාරියෙකුගේ තීරණයක් සම්බන්ධයෙන් සෑහීමකට පත් නොවන අවස්ථාවල දී නම්කළ නිලධාරියා වෙත ද (ව. 31(1)), නම්කළ නිලධාරියාගේ තීරණය සම්බන්ධයෙන් සෑහීමකට පත් නොවන අවස්ථාවලදී තොරතුරු කොමිසම වෙත ද (ව. 32(1)), තවදුරටත් අභියාචනා කිරීමේ අවශ්‍යතාවයක් මතුවේ නම් අභියාචනාධිකරණය වෙත යොමුවීමේ අයිතිය (ව. 34(1)) පුරවැසියෙකු සතුය. මේ අනුව යම් පොදු අධිකාරියකින් ප්‍රදානය කරනු ලබන තීරණයක් එකහෙළාම පිළිගැනීම වෙනුවට වඩාත් විශ්ලේෂණාත්මක මනසකින් ඒ පිළිබඳව කටයුතු කිරීමේ නිදහස පොදු ජනතාවට හිමිවේ.

මේ සියලු කාරණා සලකා බැලීමේදී තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත බොහෝදුරට ප්‍රායෝගික සහ පරිශීලනයට පහසු පනතක් ලෙස හඳුනාගත හැක. මෙය පරිපූර්ණ මහජන මිත්‍රශීලී පනතක් ලෙස හැඳින්වීම අතිශයෝක්තියක් විය හැකිය. නමුත් මෙම පනත තවත් 'සුදු අලියෙකු' නොවන බව කරුණු සලකා බැලීමේදී ප්‍රත්‍යක්ෂ වේ.

5. උගත් පාඩම්

තොරතුරු දැනගැනීමේ පනත භාවිතයට පැමිණ ගත වූයේ කෙටි කලක් වුවත් එම කෙටි කාලය තුළ පනත හා සම්බන්ධ ප්‍රායෝගික ක්‍රියාවලිය සම්බන්ධයෙන් දැනුම් සම්භාරයක් එක්රැස් කරගැනීමට හැකිවිණ. පනතේ සහ ප්‍රායෝගික භාවිතයේ එන දුර්වලතා, ප්‍රතික්ෂේප වීම්, අත්කරගත් සාර්ථක අත්දැකීම් වැනි විවිධාකාර පැතිකඩ ආවරණය වී ඇත.

5.1. තොරතුරු වෙත ප්‍රවේශවීමෙන් පසු පුරවැසියා වෙත පැවරෙන කාර්යභාරය

සත්‍ය වශයෙන්ම තොරතුරු වෙත ප්‍රවේශවීම පනත අනුව පහසු කටයුත්තකි. පනතෙහි ප්‍රතික්ෂේප කර ඇති ගනයේ තොරතුරු සහ සාම්ප්‍රදායික ආකල්ප දරන නිලධාරීන්ගෙන් යුත් පොදු අධිකාරීන් ගෙන් එල්ලවන සුළු බාධක හැරුණුවිට, තොරතුරු අත්පත් කරගැනීම දිනෙන් දින පහසු වෙමින් පවතී. රාජ්‍ය සහ රාජ්‍ය නොවන සංවිධාන මගින් සිදුකෙරෙන පුරවැසි දැනුවත් කිරීම් සහ පුහුණු කිරීම් සමඟ තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ දැනුම අවස්ථානුකූලව බිම් මට්ටමටද ගලා යනු ඇත.

නමුත් තොරතුරු ලබාගත් පසු එම තොරතුරු නිසියාකාරව භාවිතා කරන්නේ කෙසේද යන්න පිළිබඳ ප්‍රමාණවත් දැනීමක් පුරවැසියන් හට තිබේද යන්න ගැටලුවකි. තොරතුරු දැනගැනීමේ අයිතිය මගින් ලබාගත හැක්කේ රාජ්‍ය යාන්ත්‍රණයේ නිශ්චිත කොටසක තොරතුරකි. මෙම නිශ්චිත කුඩා කොටස ප්‍රමාණයෙන් විශාල රාජ්‍ය යාන්ත්‍රණය හා ගලපා ගැනීමට එක්තරා අන්දමකට සාමාන්‍ය මට්ටමින් ඔබ්බට ගිය දැනුමක් සහ අවශ්‍යතාවයක් තිබිය යුතුය.

තොරතුරු ඉල්ලීමක් කර ලබාගන්නා තොරතුරු විශ්ලේෂණය කිරීම සහ වර්ගීකරණය කිරීම තුළින් අදාළ රාජ්‍ය යාන්ත්‍රණයේ ක්‍රියාකාරීත්වය සම්බන්ධයෙන් නිගමනයකට එළඹිය හැකිය. නමුත් ගැටලුව වන්නේ සෑම පුරවැසියෙකුහටම මේ මට්ටමේ තොරතුරු සමග ගනුදෙනු කිරීමේ හැකියාවක් පවතින්නේද යන්නයි.

උදා: දේශපාලන පක්ෂ සිය මැතිවරණ ව්‍යාපාර සඳහා වැය කරනු ලබන මූල්‍යමය ප්‍රතිපාදන සම්බන්ධ අක්‍රමිකතා.

මෙවැනි ප්‍රස්තුතයක් ඔස්සේ තොරතුරු සොයා යන පුරවැසියෙකු හට එම තොරතුරු අත්පත් කරගැනීමෙන් පසුව අදාළ දත්ත විශ්ලේෂණය කිරීම්, වර්ගීකරණයකට ලක්කිරීම් කාලීන සිදුවීම් හා යාවත්කාලීන වීම්, දේශපාලකයන්ගේ වත්කම්

හා බැරකම් ප්‍රකාශ පිළිබඳ අවධානයෙන් සිටීම, මැතිවරණ නීති සහ බදු ප්‍රතිපත්තීන් සමඟ අදාළ සිදුවීම් සැසඳීමේ හැකියාවක් සහ උත්සුකබවක් තිබිය යුතුය.

ශ්‍රී ලංකාවේ තොරතුරු දැනගැනීමේ අයිතිය තවම පසුවන්නේ සංක්‍රාන්ති අවධියකයි. මේ හේතුව මත තොරතුරු ලබාගැනීමෙන් ඔබ්බට මෙවන් බුද්ධිමය දායකත්වයක් ලබාදිය යුතු මට්ටමක මෙරට පුරවැසියන් බහුතරයක් නොමැත. මෙම තත්වය මත ලබාගන්නා තොරතුරු හැසිරවීම පිළිබඳ අත්දැකීමක් සෑම පුරවැසියෙකුම ලබා තිබීම තීරණාත්මක වේ.

මීට අමතරව බොහෝ තොරතුරු ඉල්ලීම් මේ වනවිට ඉදිරිපත් වන්නේ පුරවැසියන් හට රජය විසින් ලබා දිය යුතු දීමනා සහ සේවාවන් ආදිය පිළිබඳවයි. එවන් ක්‍රියාවලීන් තුළ ඇති දූෂණ, වංචා සහ අකාර්යක්ෂමතා වැනි දේ කෙරෙහි අවධානය යොමු කිරීමට සහ ඒ සම්බන්ධයෙන් තොරතුරු ලබා ගැනීමට මෙම අයිතිය භාවිතා කළද, ඉන් ඔබ්බට එම තොරතුරු භාවිතාකොට පුරවැසියාට අවශ්‍ය විසඳුම කරා යාමට ලැබෙන දැනුම සහ සහය එතරම් ප්‍රමාණවත් නොවේ.

5.2. අභියාචනා කිරීමේ ක්‍රමවේදය පිළිබඳ පුරවැසියන්ගේ උදාසීන ආකල්පය

මහජන අධිකාරීන් පිළිබඳ බහුතරයක් පුරවැසියන්ගේ විශ්වාසය පවතින්නේ ඉතා අවම මට්ටමක බව නොරහසකි. පොදු අධිකාරීන්හි දිගු කලක සිට ස්ථාපිත නිලධාරීවාදී ආකල්ප සහ 'රාජ්‍යය යනු පුරවැසියන්ගේ පාලකයන්ය' වැනි මහජන ආකල්ප හේතුකොටගෙන මෙවන් තත්වයක් හටගෙන තිබේ. තොරතුරු දැනගැනීමේ පනතේ ආගමනයත් සමග මෙම තත්ත්වය යම්තාක් දුරට යහපත් අතට හැරෙමින් පවතින අතර පුරවැසියන් හට පොදු අධිකාරීන්ගෙන් වඩා යහපත් ප්‍රතිචාර බලාපොරොත්තු විය හැකිය යන නිගමනය කෙමෙන් සමාජගත වෙමින් පවතී.

කෙසේ නමුත් තොරතුරු ලබාගැනීමේ මූලික පියවරේදී ඉල්ලීමක් ප්‍රතික්ෂේප වූ විට ඉන් සැලකිය යුතු ප්‍රතිශතයක් තමුන් ලැබූ තීරණයට විරුද්ධව අභියාචනයක් සිදු කිරීමට ඉදිරිපත් නොවන බව හඳුනාගත හැකිය. බහුතරයක් පුරවැසියන් තොරතුරු ඉල්ලීමක් සිදු කරන්නේ පනතට පෙර ක්‍රියාත්මක වූ ක්‍රමවේදය පිළිබඳ පූර්ව නිගමනයක් සමගය. එනම් සිය ඉල්ලීමට ලැබෙන ධනාත්මක ප්‍රතිචාරයක් පිළිබඳව අවිනිශ්චිතතාවයක් පෙරදැරිවය. කුමන හෝ හේතුවක් මත සිය ඉල්ලීම ප්‍රතික්ෂේප වූවහොත්, පුරවැසියාහට නව ක්‍රමවේදය කෙරෙහි තිබූ උද්‍යෝගය බිඳ වැටෙනු ඇත. මෙයින් අධෛර්යට පත්වන ඔහු නැවත සිය අභියාචනා කිරීමේ අයිතිය උදාසීන මනසකින් යුක්තව අතහැර දමයි.

තොරතුරු නිලධාරියාගෙන් ප්‍රතික්ෂේප වූ තොරතුරු ඉල්ලීම පිළිබඳ අභියාචනය නම්කළ නිලධාරියා වෙත රැගෙන ගියත්, ඉන් ඔබ්බට අභියාචනයක් ගෙනයාමට යොමුවන්නේ ඉතා සුළු පිරිසකි. කොමිසම සහ අභියාචනාධිකරණය වෙත යොමු වීමට ඔවුන් විශේෂයෙන් මැලිකමක් දක්වයි. විශේෂයෙන් අභියාචාධිකරණය දක්වා සිය අභියාචනය ගෙන යන්නේ ඉතාමත් අතළොස්සකි. ප්‍රායෝගිකව ගත්කල අධිකරණයක් ඉදිරියට සිය ගැටලුව රැගෙන යාම සාමාන්‍ය ආදායම්/උගත් මට්ටමක පසුවන පුරවැසියෙකු මැළිවන්නේ සිය කාලය, ශ්‍රමය සහ මුදල් ඒ සඳහා වැය කිරීමට සිදුවන නිසාවෙනි. මෙය පොදුවේ මුළු නීති ක්‍රමය තුළම අත්දැකිය හැකි කරුණකි. විශේෂයෙන් මෙය තොරතුරු නීතියට බලපා ඇත්තේ මුල සිට ක්‍රම-ක්‍රමයෙන් අභියාචනාධිකරණය දක්වා විහිදෙන දීර්ඝ ක්‍රමවේදය නිසාවෙනි. තවද, අභියාචනා ක්‍රියාවලිය සම්බන්ධයෙන් පුරවැසියා සතුව ඇති අඩු දැනුවත්භාවය ද මේ සම්බන්ධ උදාසීන ආකල්පයක් ගොඩනැගීමට හේතුවී තිබේ.

5.3. පනතෙහි බලය බැහැර කිරීමේ ප්‍රවණතාවය

තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනතෙහි සාධනීයම ලක්ෂණය ලෙස හැඳින්විය හැක්කේ තොරතුරු වෙත ඇති පුළුල් ප්‍රවේශ අයිතියයි. මෙම පනතේ විධිවිධාන වෙනත් ලිඛිත නීති අභිබවා බලපවත්වන අතර (ව. 4) සීමිත අවස්ථා කිහිපයක් යටතේ හැරුණුකොට කිසිදු මහජන අධිකාරියක් මින් නිදහස නොලබයි. රාජ්‍ය සහ පුරවැසියා අතර රාජ්‍ය ක්‍රියාවලිය පිළිබඳ ඇති දැනුම් පරතරය අවම වීම මේ තුළින් අපේක්ෂිත ප්‍රධාන ප්‍රතිඵලයකි.කෙසේ නමුත් මෙම තත්වයට අභියෝග කරමින් නව ප්‍රවණතාවයක් ස්ථාපිත වීමේ අවදානමක් මේ වනවිට මතුවෙමින් පවතී. එනම් තොරතුරු දැනගැනීමේ පනතට පසුව සම්මත වන පනත්වල බලය බැහැර කිරීමේ වගන්ති ඇතුළත් කිරීම මගින් තොරතුරු දැනගැනීමේ පනතෙහි බලය මගහැර යාමයි.

උදා: 'අතුරුදහන් වූ තැනැත්තන් පිළිබඳ කාර්යාලය' පනතෙහි 15 වන වගන්තියට අනුව රහසේ දැනුම්දෙන තොරතුරු සම්බන්ධයෙන් වන විටදී. තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනතෙහි විධිධාන අදාළ නොවේ (අතුරුදහන් වූ තැනැත්තන් පිළිබඳ කාර්යාලය (පිහිටුවීම, පරිපාලනය කිරීම සහ කර්තව්‍ය ඉටු කිරීම 2016).

මෙම බලය බැහැර කිරීමේ වගන්ති ඇතුලත් කිරීම තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනතෙහි අධිකාරී බලය කෙරෙහි ගෙන එන්නේ එතරම් සුභදායී බලපෑමක් නොවේ. පුරවැසියාගේ තොරතුරු දැනගැනීමේ බලය කෙරේ මහජන අධිකාරීන්ගේ දොරපියන් ව්‍යවස්ථානුකූලව වසා දැමීමේ උපායශීලී ක්‍රියාමාර්ගයක් ලෙස මෙම බලය බැහැර කිරීමේ වගන්ති හඳුනාගත හැකිය.

5.4. RTI යනු ගැටලූවට විසඳුම නොව විසඳුමක කොටසකි

ශ්‍රී ලාංකේය පුරවැසියාගේ 'තොරතුරු දැනගැනීමේ අයිතිය' ස්ථාපිතව ගතවී ඇත්තේ සුළු කාලයකි. මෙම කාලය තුළදී ගොනු වූ තොරතුරු ඉල්ලීම් මූල්‍ය, සෞඛ්‍ය, පරිපාලන, අධ්‍යාපන ඇතුළු බොහෝ ක්ෂේත්‍රවල ගැටළු සම්බන්ධයෙන් ඉදිරිපත් වූ ඒවා විය. කෙසේ නමුත් මෙසේ ඉදිරිපත් වූ තොරතුරු ඉල්ලීම් සම්බන්ධ ගැටළු වලින් විසඳී ඇත්තේ අතිශය සුළු ප්‍රමාණයකි. මීට හේතුව නම්, පුරවැසියන් විසින් තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත මගින් එහි බල ප්‍රමාණයට වඩා වැඩි කාර්යභාරයක් බලාපොරොත්තු වීමයි. පනත ගෙන ඒමත් සමග ඇති වූ උද්යෝගීමත්භාවයත් සමඟ සමාජගත වූ වැරදි මතයක් වන්නේ තොරතුරු දැනගැනීමේ අයිතිය සියලූ ගැටළුවලට විසඳුමක් වේල යන්නයි.

මෙය යථාර්ථයට බොහෝ දුර මතයකි. තොරතුරු දැනගැනීමේ අයිතිය පුරවැසියාට හිමිවීමත් සමඟ එතෙක් අඳුරේ තැබුණු තොරතුරු වෙත ප්‍රවේශ වීමේ හැකියාව පමණක් පුරවැසියාට හිමිවිය. නමුත් ගැටලූව එසැණින් හමාර වන්නක් නොවේ. ලබාගන්නා තොරතුර මත පුරවැසියාගේ මීළඟ පියවර කුමක්ද යන්න තීරණය වේ. මහජන අධිකාරියක් ඉදිරියට ගොස් තොරතුරු ඉල්ලීමක් ගොනු කිරීමට පුරවැසියා තුළ ඇති වූ ආකල්පමය වෙනස, ලබාගත් තොරතුරු අදාළ ගැටලූව නිරාකරණය කිරීමට හෝ අදාල තොරතුර භාවිතා කරමින් අධිකාරියේ/නිලධාරියාගේ ප්‍රතිපත්ති අභියෝගයට ලක් කිරීම සම්බන්ධයෙන්ද ඇතිවිය යුතුය.

උදා: තොරතුරු ඉල්ලීමක් තුළින් යම් අධිකාරියක අක්‍රමිකතාවයක් අනාවරණය කරගන්නා පුරවැසියෙකුගේ මීළඟ පියවර විය යුත්තේ ඒ සම්බන්ධයෙන් අල්ලස් කොමිසම හෝ පොලිසිය හෝ අදාළ වෙනත් ආයතනයක් වෙත යොමුව මේ සම්බන්ධයෙන් පැමිණිලි කොට වැරදිකරුවන් නීතිය හමුවට පැමිණවීමයි.

ලබාගන්නා තොරතුරු අදාළ ගැටලූව විසඳෙන ආකාරයට නිසි ලෙස ක්‍රියාවේ යෙදවීම තොරතුරු දැනගැනීමේ අයිතිය භාවිතා කරන සියලූ පුරවැසියන්ගේ යුතුකමක් ලෙස සැලකිය යුතුය. පුරවැසියන්ගේ දායකත්වය වඩාත් සක්‍රීය මට්ටමින් ආණ්ඩුකරණය සඳහා යොදාගත හැක්කේ එවිටයි.

5.5. ජාතික ආරක්ෂාවී පිළිබඳ ව්‍යතිරේඛයේ රැකවරණය

තොරතුරු පනත සම්මත වීමෙන් පසු පොදු අධිකාරීන් පනතෙහි තොරතුරු ඉල්ලීම් ප්‍රතික්ෂේප කළ හැකි ව්‍යතිරේඛී අවස්ථා (ව. 5(1)) අතරින් සුලභ වශයෙන් භාවිතා කරනු ඇතැයි අපේක්ෂා කෙරුණේ ජාතික ආරක්ෂාවි පිළිබඳ ව්‍යතිරේඛයයි. කෙසේ නමුත් මේ වන තුරුත් පොදු අධිකාරියක් විසින් උක්ත ව්‍යතිරේඛී අවස්ථාව යොදාගත් අවස්ථාවක් පිළිබඳ TISL වෙත වාර්තා වී නොමැත.

උදා: 2017/07/13 දින සිවිල් ආරක්ෂක බලකාය වෙත කළ තොරතුරු ඉල්ලීම වෙත 2017/07/17 වන දින සියලු ඉල්ලීම් වලට අදාළ තොරතුරු TISL වෙත ලබා දෙනු ලැබිණ. ජාතික ආරක්ෂාව. පිළිබඳ ව්‍යතිරේඛය මෙහිදී යොදා නොගැනිණ.

5.6. RTI කෙරෙහි සිවිල් සමාජ දායකත්වය

තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනත සමාජය තුළ ප්‍රචලිත කිරීම කෙරෙහි සිවිල් සංවිධාන දැක්වූයේ ප්‍රශංසනීය දායකත්වයකි. පනත පුරවැසියන් අතර ප්‍රවර්ධනය කිරීමේදී විවිධ සිවිල් සංවිධානවල මෙම දායකත්වය ප්‍රධාන වශයෙන් කොටස් දෙකකට බෙදේ.

1. පුරවැසියන් දැනුවත්කිරීම සහ පුහුණුව ලබාදීමේ වැඩසටහන්.

2. පොදු යහපත උදෙසා පුරවැසියන් නියෝජනය කරමින් මහජන අධිකාරීන් වෙත තොරතුරු ඉල්ලීම් ගොනු කිරීම.

සිවිල් සමාජ සංවිධාන තුළින් පනත ප්‍රවර්ධනය කිරීමට ප්‍රශංසනීය කාර්යභාරයක් ඉටු වුවද මහජනයා නියෝජනය කරමින් පොදු කාලීන ගැටළු සම්බන්ධයෙන් තොරතුරු ඉල්ලීම් ගොනු කිරීම සම්බන්ධයෙන් ප්‍රමාණවත් කාර්යභාරයක් ඉටු කිරීමට හැකි වී නැත. පනත ප්‍රායෝගික භාවිතයට පැමිණ එතරම් කාලයක් ගතව ගොස් නොමැති මෙවන් සංක්‍රාන්ති සමයක, පුරවැසියාගේ දැනුවත්භාවය වැඩි කිරීම පමණක් ප්‍රමාණවත් නොවන අතර ඉදිරි ගමන්කරුවකු ලෙස පුරවැසියා හට නායකත්වය ලබා දීමට ද සිවිල් සමාජ සංවිධානයකට වගකීමක් තිබේ. කෙසේ නමුත් මේ සම්බන්ධයෙන් වන මෙතෙක් දුර අත්දැකීම අනුව පනත ප්‍රවර්ධනයට පමණක් සිවිල් සමාජ සංවිධාන වල අවධානය යොමුවී ඇති නමුත් එය ප්‍රායෝගිකව සිය ආයතන විසින්ම ක්‍රියාවේ යෙදවීම සිදුවී ඇත්තේ අතිශය අවම මට්ටමකිනි.

තත්ත්වය සිවිල් සමාජ සංවිධාන මට්ටමින් එසේ වුවද, බිම් මට්ටමේ ප්‍රජා මූලික සංවිධාන තොරතුරු දැනගැනීමේ අයිතිය ප්‍රායෝගිකව භාවිතයේ යෙදවීම අතින් යම්තාක් දුරකට උත්සුක වී ඇති බව නිරීක්ෂණය කල හැකි විය.

6. සමාප්ති සටහන

දූෂණ, වංචා සහ අක්‍රමිකතා මැඩලීමට ස්ථාපිත අල්ලස් කොමිසම, ආදායම් බදු දෙපාර්තමේන්තුව සහ අනෙකුත් ඒකක හරහා පොදු අධිකාරීන්, දේශපාලනඥයන් මෙන්ම පොදු ජනතාව වෙතද විහිදුණු එක් ප්‍රබල බලපෑමක් වේ. එනම්, දූෂණකාරී ක්‍රියාවක් කෙරේ යොමුවීමට පෙර උක්ත ඒකකයන් වෙත ඒ සම්බන්ධයෙන් ක්‍රියාත්මකවීමට ඇති බලය පිළිබඳ ස්වයං අනතුරු ඇඟවීමක් ඕනෑම පුද්ගලයකු තුළ හටගැනීමයි. මෙහි ප්‍රතිඵලයක් ලෙස එවන් විෂමාචාරී ක්‍රියා කෙරෙහි යොමු නොවීමේ නැඹුරුතාවයක් ඇතිවේ.

සෘඔෂ සම්බන්ධයෙන් වන තත්ත්වය ද මෙවන් ස්වරූපයක් ගැනීමට එතරම් කලක් ගත නොවනු ඇත. වගවීම සඳහා ස්ථාපිත නෛතික බැඳීම ඉදිරියේදී ඕනෑම තැනැත්තෙකු සිදුකරන ක්‍රියාවක විනිවිදභාවය ප්‍රශ්න කෙරෙනු ඇත. සෘඔෂ මගින් බොහෝ වේදිකාවන්හි තිර ගලවා ඉවත්කර හමාරය.

තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳ පනතෙහි ආගමනය යුගයක ආරම්භයකි. එය අන්ධ මිනිසෙකුගේ පයෙහි ගැටෙන මාණික්‍යයක් මෙන් අවතක්සේරු කොට මගහැරිය යුත්තක් නොවේ. ශ්‍රී ලංකාවේ නූතන වෙස්ට්/මිනිස්ටර් ක්‍රමයේ

ආරම්භය නව දේශපාලන යුගයක ආරම්භය ලෙස ද සැලකුනද, රාජාණ්ඩු ක්‍රමයෙන් ඔබ්බට ගිය ප්‍රශංසනීය දේශපාලන වෙනස අත්විඳීමට පුරවැසියන් හට අවස්ථාව නොලැබුණේ සිය අයිතීන් අඩුතක්සේරු කිරීමේ ප්‍රතිඵලයක් ලෙසය. දූෂණය, නීතියේ ආධිපත්‍යයේ බිඳ වැටීම හා ඒකාධිපතිත්වය වැනි අඳුරු සෙවණැලි රාජ්‍යයක් වසාගැනීම ඡන්ද අයිතිය වැනි පුරවැසි අයිතීන් නිසි ලෙස භාවිතා නොකිරීමේ ප්‍රතිවිපාක වේ. තොරතුරු දැනගැනීමේ අයිතිය පිළිබඳව වර්තමානයේ පුරවැසියාගේ දැනුවත්භාවයේ අඩුවක් පැවතියද ක්‍රමිකව එය පුරවා ගත යුතුව තිබේ.

තොරතුරු දැනගැනීමේ අයිතිය රාජ්‍යය විසින් හුදෙක් සිය යහපාලන ප්‍රතිපත්ති හුවා දැක්වීම උදෙසා පුරවැසියා වෙත ප්‍රදානය කරනු ලබන වරදානයක් ලෙස නොසැලකිය යුතුය. උක්ත ආකල්පය වූ කලී පුරවැසි නොදැනුවත්භාවය සහ පාලක හිතකාමී රාජ්‍ය ප්‍රතිපත්තීන් යන සාධකයන්හි ඵලයකි. දැනගැනීමේ අයිතිය යනු රාජ්‍යයක වගවීමේ යුතුකම සහතික කරනු වස් ජනතාවට එම රාජ්‍යය ප්‍රශ්න කිරීමට ඇති අයිතිවාසිකමකි. එම අයිතිවාසිකම හඳුනාගැනීම සහ ඊට නිසි පිළිගැනීම ලබාදීම රාජ්‍යයේ යුතුකමක් ලෙස සැලකිය යුතුය.

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A Knockout Punch by Security on Liberty: The Proposed Counter Terror Law

ERMIZA TEGAL

The author analyses the proposed Counter Terrorism Law in reference to legal theory and comparative practices and states that, within the context of internationalized discourse on security and anti-terror, this law would have broad implications on liberty, human rights and the rule of law in Sri Lanka.

1. Introduction

'*We have to be vigilant from the very beginning; if you concede the next step every next step will lead to erosion of the rule of law and disregard for human dignity*'[1]

Sri Lanka is conceding yet again on the question of security. The latest concession - a counter terrorism law. It will be a permanent concession. This article will make the case for standing in opposition to the proposed counter terror law. It will argue that by even contemplating such a law, even to debate its strengths and weaknesses, we are missing an opportunity to focus on rebuilding an eroded rule of law and introducing to Sri Lankan governance a regard for human dignity.

There have been a series of critiques to the proposed Counter Terrorism Act (CTA), mainly on the basis that the proposed law does not live up to the human rights standards and expectations of the Sri Lankan people. The critiques have favoured a review of the legislation to bolster human rights protections. I take the position that the proposed law in itself is fundamentally destructive to the fabric of governance in Sri Lanka. This is demonstrated by foregrounding Sri Lankan legal history, and the international and domestic contexts in which the law is contemplated. The legal theory

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and comparative practices this paper draws on helps to frame the proposition and understand the various latent and manifest implications.

The proposed law follows a colonial legal tradition of control and must be understood as part of a legal regime that responds to extraordinary or emergency situations. While the response is extraordinary, the law itself proposes to be part of our ordinary law. This law and any law similar to it in nature becomes a tool of governance. In hoping to foster good governance, these tools cannot escape serious scrutiny. In evaluating the need for such legal reform, if it is reform at all, we must also react to contradictions in the language of the law on the purpose, the redundant criminalization of certain acts, and the exceptionalizing of human rights protection.

2. Theory on Security Powers

During times of unrest a handful of liberal democracies have been quick to draw on emergency powers, straining the relationship between security and rights. It is a reaction that has been responsible for shaping the discourse on security, advocating aggressively Schmittian[2] notions of authoritarian executive power as the only effective response.[3] This trend has been described as 'the West is in the midst of a fundamental shift in its criminal and constitutional law from a paradigm of liberty to a paradigm of security'.[4] The novelty in the exercise of emergency, now security, powers post 9/11 lies in the justification for permanence of such powers.[5]

If the executive in wielding power during emergency is impartial and aims only at dealing with the emergency at hand in order to restore 'normalcy', the shift in power in favour of the executive would not be problematic. Yet, history has shown us that time and time again the unchecked executive is blinded by the task at hand to human rights concerns and becomes comfortable with the ease of wielding unbridled power. In the worst case the executive, perhaps motivated by personal political gain, digresses completely from principles of democracy and human rights. This reality has been described and documented extensively.[6]

Schmitt framed emergency discourse within the juridical problem of the limits of law. By placing the 'exception' outside the scope of law and recognizing that the 'sovereign' (or in other words the executive) may operate outside the scope of the law, Schmitt removes the sovereign from being subject to law. In the modern revival of Schmittian logic a more legally restrained approach is taken by scholars such as Oren Gross and Mark Tushnet. Gross identifies a 'business as usual' model and three forms of accommodating emergency: constitutional, legislative and interpretive accommodation, before proceeding to develop an 'extra-legal measures' model. The 'business as usual model' represent constitutions which are silent on emergency having the effect of a constitution that is applicable regardless of the situation the State faces, the constitutional accommodation model regulates emergency through constitutional provisions, the legislative model by enactment of emergency legislation and the interpretive model through the interpretive jurisprudence of courts (Gross and Ní Aoláin 2006, 35-79). Gross's case for an extra-legal measures model[7] is based on creating an environment in which public officials are able to act 'extra legally' in times of crisis provided that they later acknowledge their actions. This idea attracted much criticism including criticism highlighting the difficulty of maintaining a separation between exception

and normalcy and impractical onus on public officials to subject themselves *ex post facto* to judicial review (Scheuerman 2006, 72). Sri Lanka has constitutional provisions for regulating emergency, being a common law jurisdiction there is case law, though limited, that has developed the legal application of emergency provisions, and finally there are legislative enactments, the Public Security Ordinance(PSO) and the Prevention of Terrorism Act (PTA) which all form part of the ordinary law.

Tushnet draws our attention to political controls on emergency on the justification that they are more consistent with democratic and constitutional components of modern democracies than judicial controls (Tushnet 2007, 277). He relies on the potential of bargaining power within parliaments to lobby for human rights and parliamentary process for rights-vetting, such as non partisan advice from the Attorney General and pressure from specialized bureaucracies and adverse publicity for anti-human rights measures which would force governments to establish commissions of inquiry and address transgression of rights. Tushnet concedes that these political controls may not work in countries with unified or majoritarian governments, as there are no groups to strongly oppose and successfully question governmental actions. Sri Lanka exhibits several features that do not favour such political control, such as a single chamber legislature and the fact that members of parliament are liable to lose their seat if they do not toe party lines. The sentiment that "authoritarian regimes and popular mobilization are by no means necessarily opposed" (Scheuerman 2006, 74) rings true for Sri Lanka. This means that public deliberation or outcry may not be able to mount a sufficient check. This is demonstrated with the passing of the PTA when 'Despite the protests of Amnesty International, CRM and other civil libertarians many Sri Lankans did not question the law initially because they believed it applied only to Tamil separatists' (Udagama 1998, 277-8). Dyzenhaus points out that we cannot also rely solely on judicial supervision, and suggests 'institutional experiments' governed by the rule of law, whereby public officials are empowered to ensure that emergency powers are employed within the spirit of the constitution (Dyzenhaus, 2008).

Nesiah discusses in detail the dominant approaches to emergency power in liberal constitutional law and solutions of better law, institutions and norms that it proposes and observes that theorists are united in their subscription to political legitimacy towards ensuring that emergency powers are constrained rather than authorized (Nesiah 2010, 122). She concludes that 'the remedy is not about devising doctrinal and other strategies to extend the rule of law further in the zone of the exception: emergencies are already expressive of the rule of laws underbelly' and that we need to not only bring in rule of law to emergencies but also scrutinize the rule of law – interrogate the normal (Nesiah 2010, 144-145).

3. International Discourse on Security Powers

There are two international discourses on emergency or security powers. (1) **international standards** for protecting human rights during periods of emergency and (2) **internationalization of emergency policy** by way of security and anti-terrorism concerns. The difference is that the former is a cautious and responsible approach to emergency power whereas the latter has less restraint and

proposes a variety of models having an extra-legal character.

3.1 International Standards

These standards have developed less as a response to crisis situations and more as a comparative and collective effort of learning from emergency experiences. These standards are found in the form of treaties and their subsequent interpretation. Four major treaties[8] are directly relevant and there are differences in standards advocated by each. The difficulty in reaching universal acceptance has favoured the promulgation of non treaty based standards (Fitzpatrick 1994, 50). Two significant sources are the United Nations International Covenant on Civil and Political Rights[9] together with the Siracusa Principles;[10] and the Paris Minimum Standards of Human Rights Norms in States of Emergency.[11]

3.2 Internationalization of Emergency Policy or 'Contemporary International Practice'

Internationalized emergency theory on the other hand is a direct response to particular crises and gains credence as an international measure addressing a 'global threat', based on the specific attacks faced by the US and UK. Sri Lanka's security regime has not had the benefit of input from international standards on emergency rule. However internationalized emergency theory is reflected in many of the recent developments in this area: Emergency Regulations No.7 of 2006 was justified also by reference to Sri Lanka's international legal obligations in particular the UN Security Council Resolution 1373 (2001) in relation to terrorism, and in UN General Assembly Resolution A/HRC/RES/30/1 (2015) which states, the UN "Welcomes the commitment of the Government of Sri Lanka to review the Public Security Ordinance Act and to review and repeal the Prevention of Terrorism Act, and to replace it with anti-terrorism legislation in accordance with **contemporary international best practices**" (emphasis added).

4. Security Powers in Sri Lanka

4.1 A Legal Framework Evolved from Fear and Repression

Britain's use of martial law represented the non statutory extraordinary powers of the executive to cope with violent crises. It was primarily employed against any perceived threat in the colonies where governors maintained authority with a limited number of soldiers (Townshend 1982, 168). The British parliamentary debates over martial law proclamations and consequent measures during the 1848 Kandyan riots in Ceylon expose the "tension between British constitutional ideals and the grittier exigencies of imperial rule, especially in the non-white dominions" (Kostal 2000, 2). Britain's own legal development is insightful, with the Defence of the Realm Act (DORA) of 1924 enacted days after the outbreak of World War I, which later resulted in 'patently ludicrous' regulations such as a prohibition on dog shows and the supply of cocaine to actresses and overly broad application extending to 'spreading of false rumours and alleged 'hostile origin or association'. When the DORA lapsed the Emergency Powers Act was enacted and the legislative accommodation of security powers has only continued to grow. It is a British mix of a constitutional framework devoid of complex formalities regulating emergency power and the extensive use of legislative enactments enabling emergency power that is transplanted in the colony of Ceylon.

The Ceylon (State Council) Order in Council (1931), entrusted the Governor of Ceylon with 'reserve powers' amongst which were extensive emergency powers. Section 30 of the Ceylon (Constitution) Order in Council 1946 as recommended by the Soulbury Commission ensured that emergency powers remained with the Crown and justified this on the basis that it would be necessary for the Crown to legislate in the event of war or grave national emergency and the breakdown of the constitutional machinery (Ceylon: Report of the Commission on Constitutional Reform 1945, 93). It was in operation for merely three months before being revoked by the Ceylon Independence Order of 1947. Contemporaneously the Public Security Ordinance of 1947 (PSO) was enacted 'with the aid and advice of the State Council' which provided for the Governor of Ceylon to issue emergency regulations. The PSO, a response to the general strike of 1947, is the 'final law of (the) colonial era' (Sri Lanka Briefing Paper 2009, ii). It was passed as an 'urgent bill' in ninety minutes (Manoharan 2006, 22) and drew warnings from the floor of the house that the matter required careful consideration.[12]It was this Ordinance that was incorporated into the Ceylon Independence Order and carried forward by the 1972 Republican Constitution and the present 1978 Constitution of Sri Lanka.

The PSO is divided into three parts. Part one deals with proclamations of emergency, Part two with Emergency Regulations and Part three with special powers of president. The powers in part three appear to be available to the President without necessarily being preceded by a state of emergency being declared. The powers include calling out all or any of the armed forces to maintain public order (Section 12), seizure and removal of offensive weapons (Section 13), declaring curfew (Section 16), declaring any service as an essential service (Section 17) and for police officers, to arrest without a warrant persons violating curfew or interfering with 'essential services' (Section 18).

Sri Lanka's first declaration of formal emergency since British rule was in 1953[13] in response to a Left initiated hartal in response to UNP budget proposals. Since then, Sri Lanka has been governed longer under emergency than it has not, the longest period under emergency rule being from 1983 to 2001 (Coomaraswamy and de los Reyes 2004, 272). Under President J. R. Jayawardene, the extant emergency framework was strengthened by the introduction of the Prevention of Terrorism Act (PTA) of 1979. Enacted as a temporary piece of legislation, the statute was made permanent in 1982. In May 2000 a new set of emergency regulations (under the PSO) were issued after the LTTE captured a military base in the Northern Province of Sri Lanka. In July 2001 when the state of emergency lapsed following a ceasefire agreement, emergency powers continued to be exercised by the government regardless of the absence of a state of emergency (Edirisinghe 2004, 23). Edirisinghe states that the government resorted to implementing arrest and detention powers provided for in Part II of the Public Security Ordinance and utilized Section 27 of the PTA to enable ministerial enactment of regulations. In 2003 regulations under the PTA included the creation of 'high security zones',[14] restriction of areas for fishing[15] and the extension of police powers to keep in custody persons who surrendered.[16] Between 2006 and 2009 over 20 new emergency regulations were gazetted (International Commission of Jurists 2009).

By operation of law the state of emergency lapsed by 30th August 2011. It was a significant step for Sri Lanka to formally recognize that the

extraordinary conditions of threats to security no longer existed. However the PTA continues to operate today. On 6th August 2011 the President of Sri Lanka under the PSO by Order published in an Extraordinary Gazette called out all of the armed forces for the purpose of maintaining public order in specified areas. On 8th August 2011, two regulations cited as the 'Emergency (Administration of Local Authorities) Regulation' were gazetted by the President. One caused the term of office of Councillors and Members of specified local authorities to cease having effect as long as the said regulations were in force (Emergency Regulation No. 6 of 2011). The other regulation transferred the administration of affairs by specified officers of the local authorities to the respective Divisional Secretaries (Emergency Regulation No. 7 of 2011). On 29th August 2011, a regulation cited as the Prevention of Terrorism (Extension of Application) Regulations No. 3 of 2011 was published, by which the emergency regulations on administration of local authorities mentioned above and the appointment of the Commissioner-General of Rehabilitation were re-enacted as PTA regulations. The scramble to adopt a range of emergency powers into ordinary legislation, contemporaneous with the ceasing of the state of emergency, is evident. It is precisely this institutionalizing and normalizing of emergency powers that international standards aim to prevent.

4.2 Security Mindedness of Governance in Sri Lanka

Coomaraswamy and de los Reyes (2004, 274) capture succinctly the way in which the Sri Lankan State has since the 1940s used emergency power and security justification for overriding civil liberties to 'protect' public services such as food distribution, transportation, and communication services. A recent example of this is the Government's response to the garbage crisis earlier in 2017. Following the tragedy at Meethotamulla, Colombo's garbage was redirected towards sites on the outskirts of Colombo in Wattala, Kesbewa, Dompe, etc. This was met with protests from concerned local communities and elected local government representatives, including blocking roads to prevent trucks from dumping garbage.[17] Instead of taking prompt and reasonable action to re-assure communities and engage with their legitimate concerns, the government chose to promulgate a Presidential order under the PSO. On April 20th 2017 the President passed an order declaring garbage disposal an essential service (Gazette Extraordinary 20 April 2017). The order stipulated that this included "*All services, work or labour or any description whatsoever, necessary or required to be done in connection with any undertaking performed or maintained by any local authority or for and on behalf of any such local authority, for the clearance, collection, transportation, temporary storage, processing, separation, treatment, disposal and sale of street refuse, house refuse or other similar matter.*"

The implications of the order, detailed in Section 17 of the PSO, were summed up in a statement released on the website of the office of the President. According to the statement, the order effectively makes it an offence to "*[T]hreaten, obstruct or delay anyone who is engaged in or block any property on which these persons are engaged in the aforementioned duties by force or in a defamatory manner, verbally or in writing, or by any other means.*"[18] After the order there were reports of several arrests having been made.[19] The order went unnoticed and unquestioned. The arrests drew little media attention and no outrage on the repressive rule it represented. This is deeply disturbing from the point of view of democratic norms and civil liberties. The use

of the PSO highlights a disturbing tendency of the government at securitising public democratic protests and expressions of concern over development issues. The interpretation by the office of the President (in the statement from the official website quoted above) that the order also criminalises verbal or written expression of protest as defamatory runs contrary to freedoms enshrined in the Constitution, at the very least. It is one example of the manner in which a culture of rule by fear and repression has become an accepted norm, an accepted form of governance.

It is in the above context, together with other trends of widespread police torture and lack of accountability, minimalist judicial intervention in matters claimed to be concerning 'security' and an overall weak political and legal framework for redress for rights violations, that the counter terror law is proposed.

5. The Proposed Counter Terrorism Act

In October 2015, the Sirisena-Wickremasingha coalition government co-sponsored with the US and the UN Resolution A/HRC/RES/30/1 containing the commitment of the Government of Sri Lanka to "*review the Public Security Ordinance Act and to review and repeal the Prevention of Terrorism Act, and to replace it with anti-terrorism legislation in accordance with contemporary international best practices*".

The Cabinet approved a first draft of the Counter Terrorism Act (CTA) policy framework[20] in October 2016. Thereafter in April 2017 a second draft[21] was hastily approved by Cabinet in anticipation of a vote at the European Union on a motion to deprive Sri Lanka of the GSP+.

Critiques of the proposed law have mainly taken the position that the proposed law must be amended to improve human rights safeguards. In May 2017, a joint paper by the Foundation for Human Rights (FHR) and the University of Pretoria's Institute for International and Comparative Law in Africa (ICLA) states *"further amendments should be made to transform the PLFCTA into a human rights compliant framework for countering terrorism."* In July 2017, the position of the UN Rapporteur on Human Rights and Counter Terrorism after his visit to Sri Lanka was that *"There is still time to get this legislation right, and for it to become the cornerstone of a new order in Sri Lanka."*

Below are some observations highlighting the problematic nature of the provisions of the CTA. It is not an exhaustive list or analysis as this article is concerned with the stage on which the CTA is proposed.

The definition of "terrorism" that has been adopted by the latest version of the CTA is that contained in the Draft Comprehensive Convention on International Terrorism (CCIT). The current draft states that *"In view of the vagueness of the previous definition of 'terrorism', the definition has been amended..."*. The fact that the draft CCIT being first proposed in 1996 by India continues to be debated without resolution on mainly the definition of 'terrorism' that is to be adopted in the convention, does not bode well for the clarity that the drafters of the proposed legislation refer to. One of the definitional concerns is that it fails to recognize legitimate struggle and right to self-determination. There is also controversy over whether acts of armed forces during armed conflict can constitute a terrorist offence and whether 'state terror' is recognized. These controversies must be carefully

considered for appropriateness of application in Sri Lanka.

The proposed law clearly states two broad objectives; addressing domestic terrorism and international terrorism. Under the objective of domestic terrorism, the law seeks to protect Sri Lanka's national security, the security of its people, territorial integrity, and to prevent such terrorism. Under the international terrorism objective, it seeks to "protect other countries and areas from the scourge of terrorism" and prevent the use of Sri Lanka and its people for the perpetration of terrorism overseas. It is proposed that these objectives must be separately evaluated and addressed. There is no value in recognizing and attempting to address 'domestic terrorism' when there is a clear change in level of threat and there being sufficient domestic law, including the Public Security Ordinance, to address threats and situations of emergency from time to time. By continuing to shine a legal spotlight on domestic terrorism, an excuse and justification is created for law enforcement officials to wield extraordinary power in ordinary criminal matters. The fact that this might be the case has been recognized by the proposed law which states *"Provisions of the Act shall not be enforced to ...prosecute persons who may have committed offences unrelated to acts of terrorism ..."*. However we know this protective language will be weak in implementation. There have been instances in which the police have used the PTA and reference to detention orders to arrest and detain suspects in ordinary criminal matters. Reference to terrorism also has the effect of dissuading the use of judicial discretion, a tendency that no doubt will carry forward into the implementation of this law if it is to pass.

The proposed law empowers (in Section IV of the current draft) members of the armed forces or the coast guard to question persons, carry out searches and their assistance may be sought by police officers to carry out an arrest. The explicit role of military officers dealing with civilians opens up a number of possibilities for abuse of this power.

Judicial supervision of arrests and detention has been removed in cases where there is an ex facie valid Detention Order. The Magistrate's role is administrative in that he can inspect the Detention Order and then must direct the handing over of the suspect for detention. The culture of ousted judicial scrutiny over arrests under the CTA is of serious concern. Even where there is no Detention Order and the officer in charge makes an application for detention, the magistrate is empowered to direct detention if he/she concludes that grounds for remand are reasonable. Given the practice of Magistrates to defer to the opinion of the police in matters involving allegations of 'terrorism' as has been borne out by the practice under the PTA, it is extremely unlikely that discretion will be exercised in the manner contemplated in the proposed law. This is likely to lead to many cases of prolonged detention. These are the very trends in practice that Sri Lanka must move away from. In enacting laws that further protect and strengthen such practice, and create an opportunity for abuse of power, we are failing to improve the standards of criminal procedure. We are instead creating new opportunities for human rights violations under the cover of law reform.

6. Conclusion

'Those who would give up essential Liberty, to purchase a little temporary Safety, neither deserve Liberty nor Safety'. Letter of Pennsylvania Assembly to Governor Robert Morris, November, 11, 1775.

These words are demonstrably true for Sri Lanka. Moving towards these ideals ought to be part of the conversation and this paper attempts to frame just that position.

The broader question of governance and the way we deal with the subject of 'counter terrorism' is intrinsically linked and has bearing on the current debates on constitutional reform and transitional justice. It is linked to the everyday in the way we as Sri Lankans experience widespread torture, arrests made in the name of essential services and police intimidation by threat of extended periods of detention under the prevailing anti terror law. It is an opportunity to learn from our past, and the histories of countries with similar experience which are coded in international standards on dealing with 'terror'. It is the internationalized discourse on security and anti-terror that has been applied to our context. To what extent this internationalized consciousness of security and anti-terror, and the deeply divisive and repressive nature of the tools it promotes, has been evaluated for application in Sri Lanka is a question we must ask ourselves. In answering this question for myself, I see only redundancy, deterioration of human rights protections and strengthened impunity in the proposed counter terror law.

A way forward, similar to the proposals by Nesiah in tackling the issue of emergency, and broadly of security, is to scrutinize Sri Lanka's current legal and political framework before proposing what appears to be a stand alone solution to dealing with 'terror'. Legislation, once deemed necessary for specific objectives or addressing of specific gaps, must take a form that fits into the broader existing legal framework relating to emergency. The language and approach couched as a series of restraints as opposed to authorizing power must be only undertaken after or parallel to efforts to strengthen the rule of law and address impunity and abuse of such powers.

Notes

[1] Arthur Chakalson, President of the Constitutional Court of South Africa from 1994 to 2001 and Chief Justice of South Africa from 2001 to 2005. He is quoted by Mary Robinson (Former UN High Commissioner for Human Rights) in Connecting human rights, human development and human security, Human rights in the 'war on terror', Edited by Richard Wilson, New York: Cambridge University Press, 2005, p, 308.

[2] Carl Schmitt was one of the early commentators on emergency power. Schmitt's work is considered the ideological foundation of the Nazi regime. His book Political Theology (originally "Politische Theologie" published in 1922) and the now popular first phrase in his book 'sovereign is he who decides on the exception' captures his contribution to the scholarship on emergency power. See Schmitt, Carl. Political theology: Four chapters on the concept of sovereignty. Edited by George Schwab. University of Chicago Press, 2006.

[3] The findings of the International Commission of Jurists (ICJ) in 2009 establish that liberal democracies have been at the forefront of undermining human rights protections on the basis of 'exceptional threat'; Assessing Damage, Urging Action : Report of the eminent jurist panel on terrorism, counter- terrorism and human rights. Geneva: International Commission of Jurists, 2009, p 12. Found at http://icj.org/IMG/EJP-report.pdf. (Accessed on July 1, 2009)

[4] The findings of the International Commission of Jurists (ICJ) in 2009 establish that liberal democracies have been at the forefront of undermining human rights protections on the basis of 'exceptional threat'; Assessing Damage, Urging Action: Report of the eminent jurist panel on terrorism, counter-terrorism and human rights. Geneva: International Commission of Jurists, 2009, pg 12. Found at http://icj.org/IMG/EJP-report.pdf.

[5] Ferejohn, John, and Pasquale Pasquino. "The law of the exception: A typology of emergency powers." International Journal of Constitutional Law (Oxford University Press and New York University School of Law) Vol. 2, no. 2 (2004): 210-239, pg 228. Ramraj, Victor. "The Emerging Security Paradigm in the West: A Perspective from South East Asia." 16th International Conference of the International

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[6] Case studies reported by the International Commission of Jurists, in their 2009 report; "Assessing Damage, Urging Action : Report of the eminent jurist panel on terrorism, counter-terrorism and human rights, Geneva, 2009," http://icj.org/IMG/EJP-report.pdf.

[7] The extra-legal measures model here is different from the model proposed by political realists who advocate 'a no holds barred' strategy to emergency, which gives governments unrestrained freedom to deal with emergency situations; Gross and Ní Aoláin. *Law in times of crisis*, pp. 110-111

[8] International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights and the Geneva Conventions of 1949 in their common Article 3. For an overview of the emergency related human rights standards in these four treaties see Fitzpatrick. *Human rights in crisis*, pp. 51-55.

[9] This covenant was adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. (Hereinafter referred to as 'ICCPR')

[10] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984). These principles were drafted to assist in the interpretation of the limitation and derogation provisions of the ICCPR.

[11] The Paris Minimum Standards of Human Rights Norms in States of Emergency (hereinafter referred to as 'Paris Minimum Standards') were drafted by the International Law Association Committee on the Enforcement of Human Rights Law and was reprinted in Volume 79 American Journal of International Law (1985) pp. 1072 – 1081.

[12] Parliamentarian Dr. A. P. de Zoysa, Member of Colombo South, noted, "An unscrupulous Minister, and unscrupulous Prime Minister, could make use of this very law to detain innocent people". - Hansard of the State Council debate, 10 June 1947. Quoted in Manoharan, Counter terrorism legislation in Sri Lanka, p.22.

[13] Queen's University Belfast, School of Law Website, "States of Emergency Database: Sri Lanka", http://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/Resources/html/Filetoupload,53194,en.htm. (Accessed on August 16, 2009). See Manoharan, Counterterrorism legislation in Sri Lanka, p.24.

[14] PTA regulation No. 3 of 2001 declaring Colombo a high security zone and prohibiting lorries and trailers entering or parking therein without a permit.

[15] PTA regulations No 7 and 8 of 2001 (applicable to certain areas).

[16] PTA regulation No.11 of 2001.

[17] http://www.hirunews.lk/159419/protest-launched- against-dumping-colombo-garbage- in-dompe
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[18] http://www.president.gov.lk/garbage-disposal- declared-an-essential-service/

[19] http://newsfirst.lk/english/2017/04/sigh-relief-victims-meethotamulla- not-much-protestors- video/166047,
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[20] http://srilankabrief.org/wp-content/uploads/2016/10/sri-Lanka-leaked-copy-of-draft-legal-framework-for-new-Counter-Terrorism-Law.pdf

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Unfinished Conversations with Vijay Nagaraj: Intersections, Inspiration, Influence, Confluence, Challenges and Debates

SARALA EMMANUEL

This reflection by Sarala Emmanuel focuses on Vijay's work with communities. The article draws on various conversations the author had with Vijay. She reflects on how his access to global knowledge networks influenced the creation and support of 'barefoot feminist economists' that linked labour rights, land rights, caste struggles and women's movements. She also discusses how Vijay worked to support local communities' advocacy in relation to the proposed constitution.

Vijay had many unfinished conversations. It was through these conversations that he built enduring relationships and deep friendships. One such conversation was around ways to build politicized mass movements that form the backbone of lobbying for national policy and laws. This emerged from deep frustrations we both shared around civil society processes of lobbying which were often devoid of any movement building or any process to ground itself in a broad-based legitimacy within communities. We spoke of the default strategy of using our own elite networks, school contacts and informal relationships to get things done and the deep discomfort around it. We spoke of the ways in which women's movement and human rights activist communities had moved away from the everyday work of conscientization; of the arduous work of enabling community women's voices to be spoken and heard; of how, without all this, the elites easily become the 'representative voices'.

These conversations influenced our collective work around socio-economic rights. We spoke of the importance of bringing in people's everyday lived experiences of poverty into our debates on socio-economic rights. We spoke of the importance of framing experiences of poverty in terms of marginalisation or denial

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of entitlements. Drawing from existing legacies of thought and practice, we spoke of bringing in women's experiences, such as women's care work and reproductive labour into debates on socio-economic rights. We worked on reconceptualising poverty from experience and not just rely on data and predefined frameworks.

My contribution to the LST Review on Queering the Law "A Biography of the political Economy of Gender Relations in Post-War Eastern Sri Lanka" (Vol. 27, Issue 341, December 2016) was one of the outcomes of these conversations. I documented my conversations with a community leader in Batticaloa and placed her reflections as an articulation of a 'radical new social contract'.

Another long conversation was around the right to social security, specifically Samurdhi – as an entitlement rather than anunqualified component of the capitalist economy. In the post war context, development plans remained within market models and had had a huge impact on women's increasing debt, increased vulnerability/exploitation, dispossession, sexualised nature of engagement with the markets as well as the state (including sexual bribery) and experiences of violence.

With several other feminist activists and scholars we tried to envision a process of designing a pedagogy of feminist learning on concepts such as 'social security as entitlement'. We wanted to make feminist theories accessible to community women leaders and local women activists. We wanted to develop a co-learning space, where knowledge was going to be collectively built from everyday life experiences. Following traditions of feminist knowledge building, the idea was to create a space for this form of knowledge to be brought in conversation with feminist theories. Through this we hoped to build a new knowledge and language. This in turn would feed back into a mass based mobilisation among women. We designed a method to create a core team of 'barefoot feminist economists', linking across struggles - such as labour rights, land rights, caste based struggles and women's movements.

We linked up with bilingual (English and Tamil) feminist activists and scholars from the women's movement in Sri Lanka such as Sitralega Maunaguru, Niyanthini Kadirgamar, Menaha Kandasamy, Subathra Yogasingham, Vasuki Jeyasankar, Jegatheeswary Gunasingham, Anuradha Rajaratnam, Elangeswary Arunasalam among others. We also reached out to feminist thinkers such as K Kalpana from Chennai, in designing the course. One of the heated discussions in the initial stages of developing the process was whether to involve the women leaders themselves from the very outset of the process of designing the course. Vijay felt strongly that they must be involved.

At the end of this process we aimed to have a conceptually strong and articulate group of women community leaders who would be able to engage with the state on labour rights and socio-economic rights on the wholeat all levels. We were targeting the Parliamentary processes of budget formulation and the debates around the new constitution as the forums for this work to come to fruition.

On the 24th August he was driving up to Batticaloa to participate in the first meeting with the women community leaders and feminist activists. It was the moment where all our conversations over the past year, were finally taking form. It is then that we lost him.

His influence on this work emerged, also from his easy access to global knowledge networks. He drew from South Asian - specifically Sri Lankan academic knowledge - to strengthen our community work, campaigns and lobbying with state bodies. An example of this transformation within our own work and movements was when our debates around *Samurdi* and social security got infused with perspectives that came from feminist economics' articulations, as well as concepts of citizenship rights and labour rights.

In very practical and important ways he transformed institutional spaces to enable broad-based movement building and activism. Along with Dinushika and Sandun, he helped create an ethos of openness and movement based work ethics at LST. For small organizations and collectives, not based in Colombo, it was always important to have supportive spaces to meet, organize, to freshen up and rest during our trips to Colombo.Some such moments include the time when families of the disappeared in Batticaloa were welcomed to use the LST space to strategize and debrief after their official meeting with the Human Rights Commission; or when the Suriya editorial team used the LST office space over a weekend, working into the night, to finalize the editing of our 25th anniversary book, Kootru.

The Campaign for a People's Constitution

Perhaps one of the most emotionally demanding conversations we had was around our engagement with the new constitution making process. We had both, independently and together, been in conversation with those who were engaged in the consultations for the new constitution. Our conversations centered around Suriya's work on making the constitution a document over which community women could feel a sense of ownership. We worked with groups over many weeks on understanding the constitution and its importance to their lives and rights. We had supported six different women's groups to make submissions to the consultations' process on the new constitution.

We were slowly realising that there were many closed door and back door submissions as well as meetings with regards to what should be included in a draft constitution. One of the most challenging moments was the realisation that in the draft proposals, socio-economic rights and rights of women may be diluted, if included at all.

We had many conversations about how we can mobilize a mass movement to push for people's rights in the constitution. We were part of a core organizing team including networks and organisations from outside Colombo. He always paid attention to the power and politics around language and class within Colombo based civil society work. These aspects of hierarchy within our structures and our movement spaces was fundamental to his politics and how he worked. This broad-based mobilisation meant a coming together of traditional trade unions, The Red Flag Union, Domestic Workers Union, fisheries collectives, media, women movement activists from different districts of the country, northern and eastern based strong feminist movements, collectives working on sexual rights, and collectives working with people with disabilities. This was one the most memorable and fulfilling experiences for me as a feminist activist.

As part of the core team, we brought hundreds of people together in Colombo for a public meeting and rally. There was clarity among

those who came both in terms of the shared significance of the people's constitution along with the diversity of rights we were asking for. Personally, it was the first time that I was part of a process with such a diverse group of collectives and movements. The opening statement at the public meeting was made by representatives traditionally marginalised from movement spaces, such as a leader working for rights of those with disabilities. The opening statements also strongly and directly advocated for the rights of those of varied sexual orientations and gender identities to be enshrined within the constitution. The front banner in the public rally was carried by many of the women leaders and feminists across ethnic identities. Behind this banner was the Suriya cultural group singing activist songs in Tamil and drumming. Vijay was an integral part of the group of us that envisioned and prioritised such symbolic acts that made this historic moment very significant for me.

These times were also fraught with political differences within civil society. We were mobilizing across ethnic identities, movement politics and gender hierarchies. Within our own movements, there were divisions on which rights to prioritize. Some of the preliminary meetings were about bridging some of these differences. For us, as movements based in the North and East, there was an added challenge of confronting critiques such as – why are we focussing on socio-economic rights and issues such as Samurdi, when the 'burning question' was the devolution of political power, self determination and political equality to ethnic minority communities.

Despite the differences, strong friendships and networks grew from this process. It was during this week that my mother suddenly passed away, and her funeral was the day before the public rally. As a moving testament to the friendships within the core organizing team, some of the planning meetings were shifted to the funeral parlour to enable us to be there together.

Reflecting on how Vijay did his political work, he was often the catalyst that pulled groups together- he worked behind the scenes, focussing on the details of process, structure, language and space. Through his friendships and relationships of trust, he was able to bring groups to work together who hadn't previously done so. He was rarely the face of things – only people who knew his style of writing would know he was behind a statement. He was very aware of his position as a foreigner in Sri Lanka.

The e-mail below, in a nutshell, shows how Vijay built and sustained political relationships with warmth and trust.

On behalf of Sandun, Dinushika and myself, I just wanted to say a very warm thank you to each one of you for all your hard work in making yesterday's event what it became. We should sit down and talk about it next week--what all of us felt about it, what we learnt from it and also more importantly what it means for us going ahead-as individuals, a team and an org. I think we would all learn from listening to appreciation, questions, doubts, and whatever else...

For me personally, distributing leaflets was so important. Even if it meant being snubbed by some people (especially but not only those in big cars) so many others took them, reaching out from within buses, trishaws, cars...Yes, only some may read it seriously but eventually it is on the streets that democracy will be saved. It is there that every important struggle for liberation in the world has been waged...and everything we do must make sure that it strengthens the hands of those who work in the sun and rain and build this country

with their hands but for whose death no palace flies a white flag (that beautiful Sinhala song Roy's group sang outside Temple Trees)...

I hope next week we can all sit down, over Marie biscuits and tea/coffee, to reflect a little bit on yesterday...

Thank you again

(On the 21st of September 2016, the day following the Action for People's Constitution Rally.)

Feminist politics of activism and institution building

Vijay's close engagement with institutions and networks in Colombo, meant many conversations with different generations of feminist activists about the history and nature of feminist work in Sri Lanka. The debates centered around the critique of work based on a gender perspective - its NGO-isation and professionalization of donor driven projects which didn't necessarily embody feminist politics; the slow demise of feminist politics and activism; the disillusionment around institution building with older organisations struggling to function. On the other hand, younger women shying away from investing their time and knowledge into building institutions and traditional movements.

Our conversations around these debates were really important to me, as through them, we were able to articulate the importance of space, structures and institutions that enabled and ignited movements. We spoke of balancing labour rights of women working in local organisations (such as job security, salaries and benefits) and the taxing demands of movement-based activism. We spoke of class politics as they existed among feminist collectives. We spoke of the lack of political and historical memory and understanding among younger feminists. The conversations were stimulating and enabled me to move away from a stagnant debate on feminist movement building in Sri Lanka.

Our conversations in turn enabled Vijay to slow down and curb his frustrations around getting things done quickly and with his understanding of 'efficiency'. He learned about the complexities of everyday politics around women's rights work. I would talk to him about particularly challenging legal cases, or the complex choices women made to respond to violence in the home. We spoke about the everyday violence in the courts. We spoke about being slowed down by the complexities of maintaining networks and collectives against many odds.

Making new ideas, making space

He discussed with me his ideas around mobilizing the urban poor in Colombo, with regard to evictions and their housing rights. I would challenge him about his own role in advocating for their rights with state bodies, parliamentarians and other powerful actors, instead of focussing on organizing and educating community members. We strategized on how he could work with young girls and boys on documenting the histories of their settlements such as the one in Mayura Place in Colombo. I pushed him to think outside the circle of the known civil society actors while building a small coalition to continue work on housing rights. He was always inspired by the women's collectives and struggles in the North and East, in relation to justice and truth;

reforming Muslim Personal Laws; addressing labour and debt, and housing rights.

He said that it was in Batticaloa that he first publicly spoke about his work with Mazdoor Kisan Shakthi Sanghtan (MKSS) on the mobilisation around the right to information act. He showed a film and spoke of his own experience within that struggle. He spoke about how it wasn't about getting the information from state bodies. It was something more fundamental, namely that it was about changing mindsets within people and communities and renegotiating the social contract between the people and the state. It was about the consciousness that 'I can question my government... I can hold the state accountable'. He spoke at great length about the importance of a movement on the Right to Information, and using song and music to mobilise communities. He was very inspired that women's groups like Suriya still had strong women's cultural groups that used theatre and song for community mobilizing and campaigns at a time when many other communities had abandoned such efforts.

Conversations: To be continued…

I would like to end with a draft of an article that I had started writing following another unfinished conversation with Vijay. He strongly felt that one of the ways of creating a powerful discourse around socio economic rights in the constitution was by sharing personal narratives.

> *Shanthi lives in a small village near Batticaloa. Displaced several times during the war, having lost many family members, Shanthi labours from morning to night—selling vegetables and short eats from a small shop out of her home; working in a local women's group; driving an auto; weaving baskets...Married off very young, dropped out of school, she barely manages to take care of her family, which also includes her aged parents. Shanthi's family has no permanent house of their own. They are not on the list of Samurdhi beneficiaries. Shanthi's story could well be the story of any one of the thousands of women in the North and East. She brought her story, questions and hopes to the Public Representations Committee on Constitutional Reforms (PRC) when it held its sittings in Batticaloa last year. She told me, "I never knew what was in the constitution. I didn't even know what 'constitution' meant. I wanted to know if the problems of women like me were in there? And if not, I felt strongly that my problems should be addressed in the constitution. I too have rights... "When I went in front of the constitutional committee I wanted to ask 'give me my rights!' I spoke about the value of my work, about why Samurdhi should be my right, and why we need elders' support." Shanthi's demand was an articulation of the need for the constitution to be a social contract between citizens and the state. For it to play that role, it must then recognise her struggles and her rights.*
>
> *It has been argued that constitutionalising social and economic rights will not guarantee that it is the poor or most deserving who will benefit. I fear that the debate on recognising economic and social rights as fundamental rights in the constitution has become very detached from the lived experiences and hopes of hundreds of thousands of women and other marginalised persons.*
>
> *When people ask what difference constitutionalising social and economic rights will make they are only thinking*

of concrete, visible outcomes in a narrow way. The process of recognising an issue and enshrining rights for those affected lends dignity to a certain lived experience. That recognition—in Shanthi's words, "if the problems of women like me were in there"—is inherently important. This recognition in turn can enable further mobilising by those otherwise unseen and unheard.

As for outcomes, yes, no doubt it will be a struggle to make-real the constitutionalising of economic and social rights and making sure it benefits those who are most deserving. But this is equally true of civil and political rights. We all know that we may be 'equal before the law' but that if you can hire a good lawyer you are likely to be 'more equal'.

The debate around constitution is really about the kind of government, state, and society we want to live in. This debate will benefit greatly from grounding itself in everyday lives of the marginalised. It will also benefit from the acknowledgement that recognition in itself is a beginning of justice. A constitution that protects all is good for all of us because of how it shapes the character of the state and our citizenship.

Vijay, the conversations will continue...

Remembering Crossed Oceans

PONNI ARASU

Ponni Arasu discusses Vijay's work, focusing particularly on how it spanned national boundaries.

I met Vijay for the first time in the early 2000s when I began my own public political work as a young queer feminist activist- as a member of multiple collectives that were part of the Voices Against 377, a coalition set up to challenge Sec. 377 of the Indian Penal Code. The network asked for decriminalising adult consensual same sex sexual activity in private. I remember him being one among the group of us doing the grunt work of the network in his capacity as Director at Amnesty in Delhi. He was a self-reflexive and dignified ally who was unrelenting in making his institution throw its weight behind what was still a nascent campaign. He chose carefully when to speak and when to listen. In this space, I heard of his work with the Mazdoor Kisan Shakthi Sanghatana (MKSS), which, interestingly were one of the first grassroot level social justice organisations in India to extend its support to the campaign against Sec. 377 and to publicly embrace us queers and our movement as being one for social justice. This was a bold move in the early 2000s.

I met him again in my life in Colombo, Sri Lanka close to a decade later. By then, he had lived in Sri Lanka for many years and had a life there. I, myself had visited Sri Lanka, since 2003 and had worked there, primarily in Eastern Sri Lanka and at the Law & Society Trust where Vijay was the Research Head. Unlike me, Vijay moved and lived in Sri Lanka- a choice that has always shadowed my own personal, political, and professional life.

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His work in India and in Sri Lanka embodied certain key themes. He stood to critique, make accountable and efficient the ways in which the state must assure lives that were fair and just for the most marginalised in our societies. He organised and was an analyst of law, policy, democracy, and social thought from the perspective of land, poverty, labour, conflict etc. with a keen awareness of issues of caste, gender, sexuality and ethnicity. In many ways Vijay's work falls on a continuum across national boundaries.

As I helped Sarala Emmanuel finish the arduous task of memorialising her friend, my response was to acknowledge that which was important to me about him- that which connects us. Her outlining of his political life reminded me, not just of his and my shared interest in Sri Lanka as two people officially from another nation- India; but also of the political legacy that we shared in a broader sense.

Vijay was one among those of us who saw the continuum of work that can be done anywhere in the world, whether it is the place your passport declares you to be from or not. But this choice is not random either. For those of us who go to Sri Lanka from southern India, we have a longstanding public discourse around the island that we grow up with- consciously or otherwise. Once there, we make political choices with a keen awareness of this history as well as the privilege we had by virtue of having an Indian passport, especially during the war years. Further, for those of us engaged in working with the Law & Society Trust, critical legal perspectives, such as the writings of significant thinkers like Neelan Tiruchelvam are a huge inspiration. We are also well-aware or the island and its longstanding history with human rights - the brave struggles and enormous losses. These are all that we are aware of, either by chance or by choice. I don't know what of these aspects, if any, were important to Vijay. This list is more my own than his. But I do know that he did not live there as a foreigner. He did the work of learning a new place, placing his roots there in every way while also not losing sight of the context and learning that he had from his life previously, of where he came from as it were.

An ethos of social justice that fundamentally argues with, challenges, cautiously works with, and is acutely aware of the people's relationship to the state and the nation is not bound by national boundaries. Vijay's work is testament to that. Even within Sri Lanka, Vijay was significant in bringing focus to issues of class and poverty in an arena otherwise flooded with ethnicity being the key, and often only, frame of reference and focus of work. His writing makes it abundantly clear that, while having an acute awareness of the ethnic dimensions of life, work, and history on the island- he made a conscious choice to address issues of the economy, class, poverty and the plight of the poor. Unsurprising for an activist emerging from the MKSS, he grounded himself simultaneously in those from more privileged backgrounds working in civil society organisations in Colombo and in specific marginalised communities; plantation workers: or the women in Batticaloa he was going to see on that fateful morning, he passed away.

Simultaneously, he, like many of our male comrades in myriad social movements in India, was made aware, by his feminist friends, of the trials and tribulations of working with the realities of women's lives. I smiled to myself as I read of the slowing and calming down that Sarala and his relationship inspired in him when it came to work from a gender perspective. It

reminded me of so many conversations of the same nature in my life.

This political intervention in seeing, acknowledging, and living this continuum of politics across national boundaries is important to recognise. This recognition must go hand in hand with acknowledging the profound network of love and support amidst which he lived in Sri Lanka. On that morning, activists in Colombo, Batticaloa and elsewhere rallied together instantly, holding and helping one another to get through what they have been through ever so many times death. They knew the nitty-gritties of what he loved- places, music, food, movies. Vijay is survived by an entire community of activists in Sri Lanka who were his comrades, friends, loved ones. His political and personal self was made by them as much as it was by his myriad friends and loved ones among those who live in 'India'. To affirm all their grief, including my own, is important here. It is important to take small note of how his world was spread across, personally and politically, with deep roots, emotional and political, in various places: Rajasthan, Delhi, Bangalore, Colombo, Batticaloa and Kandy among many others. In this age of activism, which is either bound by national location, or free-wheeling in ways unrooted in the details of any place or movement, his travels - intellectual, emotional and political - are an important legacy for us/for me to remember. The one-page notice of his funeral in Bangalore read: "Always Remembered: Inspiration. Pathbreaker. Confidante. Pillar. Catalyst. Joygiver. Guide. Soulmate. Friend. Uncle. Brother. Son." It is this - people, and places, rather than nations - that we live in, and that we should also be remembered by.

So rest now, Vijay, a passionate thinker, quiet do-er, friend, lover and comrade. These lands, the trees, the leaves, flowers, oceans, and rivers will miss you. May you live among them now and may we feel you in the cool evening Colombo breeze, a soft drizzle in Bangalore, in the soil of Rajasthan and in the warmth of a Delhi winter afternoon.

A Practice of (In) Discipline: A Farewell Conversation with Vijay Nagaraj

ANDI SCHUBERT & VAGISHA GUNASEKERA

Andi Schubert and Vagisha Gunasekera reflect on Vijay's relationship with the law. In keeping with this Issue's theme of Law Reform, Schubert and Gunasekera discuss how law reform captured Vijay's attention with his belief that law and law reform are inevitably limited unless they centre rather than marginalize the needs of the least powerful members of our societies.

"... those of us who are engaged in reflection on how to change the world we live in for the better, must be prepared to reflect on every aspect that influences the way we want to change it" – Vijay Nagaraj [1]

The task of writing this essay for Vijay was taken up in the wake of our dreams of his spirit (*imagine Vijay asking you not to be so melodramatic*). Vijay's spirit and presence have shaped the conversations we have had, the silences we have sought to fill, and the critiques we have attempted to foreground. And yet, a few months after his untimely demise, the loss of Vijay is felt more keenly than ever. What then are the lessons we can take away from Vijay's interventions in the spaces he generously shared with us? And how can we sketch an intellectual and methodological roadmap for building the kind of world that centres rather than marginalizes the needs of the least powerful members of our societies? In other words, how do we take up Vijay's work in the absence of his moral compass, irreverent playfulness, capacity for bridging erudition and grounded advocacy, and vision to change the world we live in for the better?

In the months prior to his death, Vijay appeared to be thinking seriously about a postgraduate degree. However, he was struggling to decide on the area in which he

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wished to pursue his PhD and the oft heard lament was that he didn't "have a discipline" (*imagine Vijay fervently arguing with you that he has now decided what his discipline is*).This essay could have been written about any of the disciplines that Vijay so frequently crossed (*imagine Vijay asking you whether you can cross disciplines like you cross-dress, and if so, does that make you trans-disciplinary?)*. But to locate this essay in conversation with the theme for this issue - legal reform - we focus our attention on Vijay's crossing of the discipline of law and its implications for (re)visioning the task of legal reform.

Vijay shared what can be best described as a complicated relationship with the law. The law was central in his work at the Law & Society Trust, in his advocacy and support for constitutional reform in the country and in the alliances he sought to mobilize and build. Yet, Vijay's unique blend of idealism and pessimism made it impossible to ignore the power structures that the law produces, disciplines, and normalizes. In fact, it is highly probable that had he finalized his contribution to this issue, he would have outlined how legal reform is often an exercise in and excuse for the reinforcement of a neoliberal regime of power and its exclusionary impulses.

Vijay saw that law, as a discipline, pushes impulsively towards privilege rather than access, towards restraint rather than empowerment, and towards control rather than emancipation. He strongly believed that one reason why attempts to reform the law often fall short is because it rarely goes hand in hand with efforts to transform the law at the level of practice. In his spirited advocacy for the justiciability of Economic, Social, & Cultural Rights in the new Constitution and in the numerous legal reform efforts he sought to spur, Vijay drew our attention to the pitfalls of dichotomizing law from a socially-grounded and ethical practice. His advocacy (of which law was only one component) sought to transform the regressive, disciplinary impulses of the law through a people-centred, informed, humane, and empowering practice. Therefore, in this short essay, we hope to interrogate how Vijay sought to unsettle the disciplinary impulses of the law through an affective practice that centres and is informed by, critique, dialogue, and learning.

The reflections we share here are necessarily partial since our encounters with Vijay are shaped by our affiliation with him as an academic colleague and collaborator. But our reflections here are also intended as a posthumous riposte to Vijay's lament about his lack of disciplinary focus. Therefore, we engage with some aspects of Vijay's practice as a way of helping us to think through the kinds of questions he was seeking to pose of us and our own entanglements in the disciplinary baggage that we bring to our academic interventions.

A Practice of Critique

One of the hallmarks of Vijay's practice was his enduring struggles to transform well-established conventional research focuses such as poverty analysis or law into incredibly political touchstones for mobilizing research and activism. During his time at the Centre for Poverty Analysis (CEPA) for example, Vijay went to great lengths to mobilize groups and individuals around issues of poverty, an area branded over the years as apolitical. He sought to breathe politics into ideas of, and thinking about, poverty. At LST, Vijay started his job as Head of Research by lecturing the Executive Director on the need for transforming the priorities of the Organization by re-focusing

on the 'society' aspect of The Trust. Vijay understood better than many that behind the seemingly apolitical, apparently non-ideological, and avowedly pragmatic priorities for studying these areas, stood a far more pernicious movement to entrench the exclusion of marginalized communities by arresting their capacity to inform knowledge production and thereby demarcate the terms of their mobilization. Therefore, one major reflection on Vijay's practice is that any attempt at legal reform would be exclusionary if its priorities were determined by the pragmatics of legal considerations rather than serious consideration of how these reforms would impact the daily lives of people in their communities.

Vijay would also likely have cautioned us about our investment in tinkering with the existing legal system in the hope that we can arrive at a liberal, democratic utopia in some distant future. He was deeply ambivalent about the capacity of institutions to bring about sustainable and effective change in people's day-to-day lives, even though he was smart enough to see that they could be strategically useful. His discomfort stemmed from his conviction that institutions often work to atomize solidarities and discipline individuals into docile functionaries who follow rather than engage. He constantly drove home the importance of galvanizing networks and solidarity on political issues, shaking institutions out of their comfortable silos. Therefore, Vijay challenges those of us who heavily invest in bringing about institutional change through legal reform to consider how deeply unsuccessful such investments often prove to be (*imagine Vijay quarrelling with you that you shouldn't use the word 'investment' in that sentence because it's too neoliberal)*. Vijay's practice cautions us that sans the humility to be reflexive about the privilege we bring to our positioning, our stances on legal reform cannot help but reinforce the heteropatriarchal, neoliberal, normative, and disciplinary impulse that the law keeps working towards.

Central to Vijay's practice of (in)discipline was a deeply ethical conviction about what kinds of interventions were needed and what kinds of strategies should be pursued to make these interventions a reality. His practice was borne out of a conviction that in the absence of a sound moral compass, it would become easier to confuse strategy for principle, and sacrifice our principles on the altar of political expediency. For example, Vijay would no doubt be reminding us today that it is ethically impossible to claim an identity as defenders of democratic freedoms while actively or tacitly supporting the indefinite postponement of elections to pursue constitutional reform. He would pointedly ask us to provide a valid basis for determining which regime should be criticized for its anti-democratic practices. And in doing so, he may well have gone so far as to call out the partiality, privilege, and perniciousness of our understanding of democratic freedoms. This often caused a great deal of tension and friction for those in his circle of influence. But Vijay never allowed friction or discomfort to determine his ethical priorities. In the absence of his moral compass we must find ways to keep challenging ourselves and our allies to be clear about the ethical positions we bring to bear in our advocacy, research, and politics. Foucault famously explained critique as "the movement by which the subject gives himself (*sic*) the right to question truth on its effects of power and question power on its discourses of truth" (1997, 47). What we can learn from Vijay's practice of critique is that the only way to ensure that we don't confuse our questioning of

truth with our questioning of power is through a sound ethical commitment to the vision we pursue.

A Practice of Dialogue

His ambivalence about institutions was tempered by his limitless optimism about the value of individual conversation. His strategy of investing in people yielded visible results, and often in a way that interrogated the ethics and existence of institutions. Many of those who hold Vijay's memory most dear are those who have benefitted from many hours of open and honest conversation with him. Vijay invested his energy in building small-scale interventions, advanced by loose coalitions of diverse individuals, that were often (if at all) extremely tenuously linked to an institution. For example, his idea of training a coterie of barefoot political-economists was pitched to anyone willing to listen, until of course, someone finally came onboard and things moved forward at a heady pace. This practice of conversation sprung out of deep reserves of generosity of both time and intellect. He was never too busy to read a draft of an essay or discuss an idea for research or a publication; never too burnt out to take seriously an intervention you never thought was worth taking seriously. And almost certainly, never too far away for a conversation. We believe that he intuitively sensed that there was little hope of success for any type of serious legal reform if it was not based on open and honest dialogue with those who may not enjoy the privilege required to participate in these processes. This is perhaps why Vijay would often remind us that the reason we are taken by surprise by the ways people find to express their desires and mobilize for change is because we are too caught up in our own privilege to pay attention to them. (*Imagine Vijay reminding you that subalterns always speak, but that you may be the one unwilling to listen).*

How then can those of us he left behind attempt to cultivate the practice of conversation that Vijay embodied? One possible place to start is by being reflexive about our own positions in the conversations we take up. Vijay's practice of politics reflexively pushed the tension between the individual and the collective as a way of questioning conventional power dynamics in knowledge production. For example, during his time at CEPA Vijay was deeply unsettled by how the emphasis on fluency in English worked to relegate many non-English speaking/ writing researchers to the status of data collectors rather than knowledge producers. He pointed out that the relatively de-valued work in research labour is conducted by those without English skills, and that the financial and intellectual returns on this work are relatively low. In contrast, the English-speaking researchers conduct the more "value-added" labour, yielding higher financial and intellectual returns. As a result, he worked with others to create an environment where researchers whose function was primarily field-based data collection, became part of data analysis and writing of research outputs. Like this example demonstrates, Vijay possessed an enviable capacity to transform reflexivity about his own position into a political practice that empowered others. Perhaps a better way to frame Vijay's practice of conversation is offered by Stuart Hall, who called for "a practice which understands the need for intellectual modesty" and which is rooted in the recognition that "there is all the difference in the world between understanding the politics of intellectual work

and substituting intellectual work for politics" (1996, p. 274). And so, if we are to take our cue from Vijay's practice of dialogue in thinking through legal reform, we may need to consider how a reflexive orientation may shift our approach to changing the law. What if we saw legal reform less as a goal to strive towards and more as a constantly evolving conversation that reflexively seeks to transform the law into a mechanism of empowerment rather than restraint and control? We may perhaps then be closer to asking the kinds of questions that Vijay often pushed up against.

A Practice of Learning

In the months since his death, we have felt the loss of Vijay most keenly in our own attempts to grow and learn. Being in Vijay's orbit was often exhausting and time consuming. Vijay never met a reading group that he didn't want to be a part of and during his time in the country, actively pushed us to join him in reading and discussing issues ranging from gender to law to poverty analysis and political economy. He was constantly pushing us to read more, write more, think more and to be more critical of ourselves, our work and others, all at the same time.

At the core of this engagement was a man who understood that real growth was only possible through an intellectual and political practice of grounded learning, i.e. learning aimed at deepening political awareness. Vijay's deployed his love of learning as a stimulant for developing more radical ideas and strategies for affecting change. In this sense, Vijay was one of the few people we knew who actively emphasized a dialectic between learning and action. For example, Vijay's attempts to advocate that researchers at CEPA pursue more deeply political work began to bear fruit after he started organizing reading groups with interested researchers. With his colleagues, he organized reading groups on Marx and Engels as well as on different epistemologies of poverty research. Vijay understood that it was only in building a practice of grounded reading, that it was ultimately possible to break free from the entrenchment in existing methodologies that served to reproduce the kind of work that he saw as disengaged and disconnected from the world around it. Conversely, he was also equally convinced that it was impossible to place faith in piecemeal interventions that lacked rigor and depth in thinking. Vijay's practice of learning was marked by a singular belief that true emancipation from the whale-boned corsets of disciplinary mediocrity was only possible through the dialectic of learning and political action. Therefore, if we are to use Vijay's practice of learning to re-conceptualize legal reform, we may have no choice but to ask ourselves whether limiting ourselves to the reading of the dusty tomes of legal research alone would help us to envision and give breath to a truly emancipatory vision for the role of law in a society.

Vijay's practice of learning was also marked by an almost pathological dislike of intellectual satisfaction. No amount of time spent engaged in field research would convince him that we had finally arrived at the proverbial turtle.[2] To be fair, he was equally demanding of himself and constantly lamented that he wasn't writing or reading as much as he should. Vijay saw satisfaction (in intellectual terms at least) as an admission of defeat and a problem that must be called out ruthlessly. We believe that this may have been due to his deep-seated conviction that there was always room for growth and improvement. However, this was often an exhausting experience for those of us who had the privilege of sharing

his intellectual burdens. We often saw him haring after a new approach to writing or thinking about an issue, dragging a few friends in his wake, and then with nary a pause for a breath, haring off again in the opposite direction with them and a few others in tow. If you had the (mis)fortune of being one of the friends he managed to convince (or badger) into joining him on these escapades, this often left you feeling like a football being kicked from one side of the field, and then finally arriving at your intended destination, only to find (*imagine Vijay bursting in to your office to force you to stop what you're doing to watch a YouTube clip of the Nooran Sisters)* yourself being kicked in a completely different direction. However, if you were patient enough to withstand the storm, the results were transformative, both in terms of writing and emotional (and even spiritual) strength. His enjoinder that we must never be happy with what we have written because it was "the root of mediocrity" will shape our self-critique for years to come. Vijay has left us with many things to ponder on and consider, but it is probably only in retrospect that we have come to appreciate the deep distaste for intellectual satisfaction that he infected us with. His discomfort with satisfaction may have also shaped his view of legal reform as merely one of many strategies that can be deployed in struggles with the most marginalized sections of society. Vijay's practice of learning reminds us that legal reform must be approached with a sense of humility about its capacity to make a difference. The law, like knowledge, was always partial and incomplete and Vijay was constantly searching for ways in which law, *alongside* numerous other complementary strategies and methodologies, could be wrought together to bend the arc of history towards justice for all sections of a society.[3]

Building an Affective Practice

And so, we fear that it is time to bring our conversation with Vijay's spirit to a pause for now. He may continue to haunt our dreams and his voice will echo in our ears each time we raise our hands to carry the intellectual and political burdens he challenged us to bear in his all too short a time with us. Writing about Vijay brought back a raft of emotions and memories that choked us up and kept reminding us of the immense dreams that he dreamed for each of our lives and engagements.

Vijay was a complex human being, he provoked complex responses, often making people uncomfortable with his demands on their time, intellect, and practice. But at the same time, many of those who feel his loss most keenly also understood that beneath the bluster and the whirr of movement that seemed to accompany him everywhere he went, was a man with an endless capacity for love. His love for people who inhabited the margins of society challenged us to consider our own privilege and ethical commitments. His love of dialogue fostered in us the conviction that conversations should never be foreclosed. And his love of learning keeps reminding us that our research will only bear fruit when it emerges from a dialectic of political action. He entered our lives through love and he abided with us in love. For Vijay, love was a deeply political action which had the capacity to transform, critique, and empower.

Vijay could sometimes be found photographing trees and flowers. He loved watching sunsets and some of us had the rare privilege of sharing a sunset with him as he grew quiet to watch the transformation that was taking shape in front of us. He pressured us to work but would as quickly and intensely pause to take care of us if

we fell ill or needed his help. He sought to bring us into conversations that we would rather not have because he possessed a tremendous capacity to see past our own reluctance and push us towards truly meaningful, serious, and critical interventions. He held us up with an encouraging word or a sudden hug when we were confronted with the gap between the dreams he dreamed for us and our desire for quiet, atomized, privileged, and safe existences. He charmed us with his irreverence, infected us with his distaste for satisfaction, challenged us with his practice, and changed us through his love. He is sorely, deeply, and unquestionably missed.

(Imagine sharing a drink with Vijay one last time so you can watch the sunset and bid him a final, thankful goodbye.)

Notes

[1] https://www.opendemocracy.net/5050/vijay-nagaraj/human-rights-fundamentalism-power-and-prejudice

[2] Clifford Geertz explains this proverbial story thus: "There is an Indian story – at least I heard it as an Indian story – about an Englishman who, having been told that the world rested on a platform which rested on the back of an elephant which rested in turn on the back of a turtle, asked (perhaps he was an ethnographer; it is the way they behave), what did the turtle rest on? Another turtle. And that turtle? 'Ah, Sahib, after that it is turtles all the way down.'" (1973, pp. 28-29). (Imagine having to explain to Vijay that you hadn't intentionally included a story about an Indian just to annoy him).

[3] In his speech "Our God is Marching On" delivered in Montgomery, Alabama in March, 1965, Martin Luther King Jr reminded his listeners that the "the arc of the moral universe is long, but it bends toward justice" (See *https://kinginstitute.stanford.edu/our-god-marching*). However, as has been pointed out, King was paraphrasing Theodore Parker's much longer assertion (1853, pp. 84-85)

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Why is Issi so Unwell Lately? Illness, Pregnancy, and the 'Straight' Woman in Frangipani's Queer Cinematic Narrative

SHERMAL WIJEWARDENE

The author reviews the film Frangipani/ Sayapethi Kusuma (2014). In her critique Wijewardene examines several 'queer' aspects of the film, examining how it deals with various aspects of gender and sexuality, beyond that of the homosexual relationship it portrays.

1. Introduction

Since its release in 2014, the Sinhala film, *Frangipani/Sayapethi Kusuma* has gained an international profile on the lines of being the "first overtly queer film from [Sri Lanka]" (O'Brian 2015, 40). I first became interested in this status attributed to the film, out of curiosity over these very terms. What did it mean to categorise a film as its country representative for the most 'out' 'queer' cinematic production? '[O]vertly queer' qualifies the claim, acknowledging that this is not the first 'queer' Sri Lankan film but the first such film distinctive for its 'outness' as 'queer'. Clearly, the recognition of the 'queer' cachet of the film could not be disentangled from the familiar trope of 'coming out' or disclosing one's sexuality or gender.

It seemed to me, then, that 'queerness'/'outness' is a metric, a means of evaluating the thing that *Frangipani* did as a 'queer' film that set it apart from other Sri Lankan queer films before it. Not surprisingly, this thing is usually taken to be the decision to make a film which revolved around an erotic relationship between two men (one of whom is not always male-identified). In short, it had a "buzz as Sri Lanka's first

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feature film to put a gay relationship front and centre" (O'Brian 2015, 41). Few would deny the centrality of the men's relationship and the aesthetic and political importance of that representation. However, that portrayal derives significance from its interconnectedness with the film's other 'queer' iterations, and to lift it out of that network of meanings would be to miss the point.

The "overtly queer" cachet serves to surgically separate out and surface only the gay relationship, not only disrupting the interconnected ways in which the film's 'queer' methodology works but also reducing the overall import of what the film has to say about gender and sexuality by narrowing those meanings down to one focus. The more explicit focus of this essay is on what can be overlooked in all of that, one aspect of which is the role of the 'straight' woman in producing those 'queer' meanings. I contend that the metrics of 'queerness/outness' can miss what a character like Issi/Sarasi contributes to the 'queer' cinematic narrative. As depicted for instance in the character of Alma de Mar in *Brokeback Mountain*, the representation of the straight woman character who plays the wife or the girlfriend of one of the men in a gay male relationship is quite deliberate and connected to the film's overall composition. I explore how, in its self-styling as a queer film, *Frangipani* makes decisions about employing the character of the straight woman in conjunction with two conditions—being ill and being pregnant.

2. Uses of Queer

Let me begin with a word on the discourse which I refer to when I invoke the term 'queer'. 'Queer' has been understood in different ways since scholar Teresa de Lauretis' elaboration of it in the formulation 'queer theory' at a US academic conference in 1990. Her use of the term has been traced to the history of 'queer' as an epithet flung at gays and lesbians and recuperated by them in a "gay-affirmative sense" (Halperin 2003, 339). It is also by now commonplace to acknowledge the problems of definition that attend it, "indeterminacy being one of its widely promoted charms" (Jagose 1996, 3). Broadly speaking, 'queer' is known for its "antinormative sensibility", where the norm is understood to be "domination, homogenization, exclusion, hegemony, identity, or more colloquially, the familiar, status quo, or routine" (Wiegman 2015, 1). Plummer proposes that it is "a radical stance around sexuality and gender that denies any fixed categories and seeks to subvert any tendencies toward normality" (201).

In Doty's (1993) influential exploration of the term, "[q]ueerness is related to any expression that can be marked as contra-, non-, or anti-straight", which "includes specifically gay, lesbian, and bisexual expressions; but ... also includes all other potential (and potentially unclassifiable) nonstraight positions" (xv-xvi). This definition, as Dilley (1999) remarks, "serves not to identify people as much as forms of communication, and the positions that inform that expression" (457). Yet 'queer' is also used as an overarching description by people who identify as lesbian, gay, bisexual, and transgender.

In terms of the use of 'queer' as a verb, a useful description of it would be "those gestures or analytical models which dramatise incoherencies in the allegedly stable relations between chromosomal sex, gender and sexual desire. Resisting that model of stability--which claims heterosexuality as its origin, when it is more properly its effect--queer focuses on

mismatches between sex, gender and desire." (Jagose 1996, 3). I return to Doty's (1993) promotion of "those uses of "queer" that make it more than just an umbrella term in the ways that "homosexual" and "gay" have been used to mean lesbian or gay or bisexual, because queerness can also be about the intersecting or combining of more than one specific form of non-straight sexuality" (xvi). This is the lens through which I explore the queer stance that Sarasi, as a straight woman, adopts; it is also the means by which I investigate how *Frangipani* uses this character to builds its specific queer outlook, and the extent to which the character is a participant in it.

3. Frangipani's Stories

Frangipani unfolds with the linked stories of three lower-middle-class Sinhala characters in a village—two men, Nalin and Chamath/Bassa, and a woman, Issi/Sarasi. Longtime friends, Chamath and Sarasi share a playful familiarity with an element of flirtation that is initially mutual but changes with the arrival of Nalin and with Chamath's growing closeness to him. The individual life story of each of the characters plays out along the lines of an identifiable script which makes their choices in terms of gender, sexuality and relationships more meaningful. For instance, Nalin's approach is scripted from the perspective of a character who is an orphan and wants to taste the comforting normality of family life, start his own business, and put down roots. Chamath's ambitions are to leave the village, learn fashion design, and travel overseas. Sarasi's script is more fateful, over determined by unfavourable astrological predictions which compound what is already a gendered position, as shown in her search for security in marriage. Supporting characters are played by Chamath's family (including a brother who is a Buddhist monk) and a 'queer' circle of friends. Sarasi's mother also has a role, as do the young men whom Nalin meets in secret.

Frangipani effects a series of shifts in its characters' desires and decisions to enter relationships. The initial intimacy between Chamath and Sarasi is followed by the entry of Nalin which leads to a controversial (if veiled) intimacy amongst three people. The connection between the two men eventually develops into something more which excludes Sarasi. Disappointed in her expectations of marriage with Chamath, Sarasi becomes estranged from him and turns to Nalin. An offer of marriage is made to Nalin for whom it represents not only the bait of a financial foundation but also the longed-for normality of a family and children—desires for which Chamath despises him. Their marriage alienates Chamath who feels betrayed by both friends in different ways.

Unable to continue to stay in the village, Chamath leaves for the city and enrolls in a fashion design course. In the city, he begins to more fully explore 'queer' understandings of gender and sexuality—something he had begun in the village. Nalin and Chamath's relationship continues after the marriage in secret, Sarasi, in the meantime, becoming pregnant, ill, and increasingly despondent. But Nalin's decision not to disclose their relationship to Sarasi results in Chamath ending their relationship. Ironically, though, Nalin is forced into disclosure by other means and his family life crumbles. Sarasi's illness brings the three friends together at the end of the film.

4. The Queer Cinematic Narrative

Frangipani attempts to show that categories of gender and sexuality are not as they are usually projected and taken for granted, which is as unitary, binary, singular, pure, sealed off, continuous, stable, predetermined, apprehensible as identity, separated as 'normal'/ other, hetero/homo, and so on. An important part of Sarasi's role (and Chamath's as well), for some of the film at least, is to queer "the social processes that not only produced and recognized but also normalized and sustained identity" (Eng et al 2005, 2). This is evident, for instance, in scenes from the dressmaking class where Chamath glues sequins on dresses with Sarasi and a few other women. Sarasi and Chamath banter with each other silently, exchanging glances before Sarasi touches the dress that Chamath is labouring over at his table. Not only is this gesture sensual, but, in its mock expression of workplace rivalry, it is also casually transgressive in terms of not seeing Chamath's presence in an otherwise all-female dressmaking class as anomalous and not recognizing the binaries of gendered labour.

Sarasi's next act is to hold the sequined wedding dress-like dress up against her, a somewhat coy moment which suggests that she is angling for the offer of marriage which she expects from him. But the moment passes quickly and she flings the dress in his face, Chamath doing his part by holding it against himself as if he were the bride, also mimicking Sarasi's theatrical turn, in a scenario subtly indicating the characters' and the film's "antinormative sensibility" (as Wiegman puts it) towards identity. Similarly, Sarasi mock-sternly tells Chamath, "Boys don't use cutex (nail varnish)", then observes that his nails are painted and playfully runs away with the nail varnish remover before he can remove evidence of it. In the scene of Chamath chasing Sarasi to retrieve the nail varnish remover, we may see a cliché representation of heterosexual sex. But for those who want to see it, there is also the sly disruption of that impression with the bright red nail varnish winking at us from Chamath's hand on Sarasi's breast in their brief moment of intimacy.

These are only a few representative scenes which illustrate that the dynamic between Chamath and Sarasi defies explanation in terms of binary gender and sexuality, and identity. Sarasi's romantic and erotic interest in Chamath does not discipline him into a more traditional gender role and bring him into line with being a more plausible object of desire for opposite-sex attraction. Rather than evoking a heterosexualised masculinity, it allows the portrayal of an ostensibly 'straight' woman's queer desires for an unconventionally gendered character. Of course, there is a suggestion that Sarasi is unable to 'read' Chamath's difference at the outset and, thus, is not aware of this difference to the extent of being considered to be attracted to it. But of the three pairings that play out in the film—Chamath-Sarasi, Chamath-Nalin, and Nalin-Sarasi—it is the Chamath-Sarasi relationship that is methodologically closest to the kind of queer narrative which *Frangipani* wants to construct. Chamath's role in that may be clear enough, but it *is* a dynamic as I explain above, and Sarasi plays an important part in it. Queer understandings of gender and sexuality continue to resonate with her character even after her marriage to Nalin, for instance when she follows Chamath's TV programme on hair and makeup and when she fondly shows Chamath's brother, the Buddhist monk, a photograph of Chamath in makeup and an evening dress during a visit to her in hospital. "So this is the lady who visited you the other

night?" Chamath's brother asks Sarasi while Chamath looks on.

The contrast is evident with the Chamath-Nalin pairing. The role played by Nalin as a gay man is leavened by the character's desire for heteronormative privilege and security and his conviction that assimilating with the mainstream is the best defence, even as his sexual desires are at odds with it. Of course, his character is more complex and rendered more sympathetically than that, and, as I mention above, there is some attempt to psychologise his desire for the 'normal' with reference to a backstory of being an orphan and of never having experienced family life. My use of 'heteronormativity' follows Herz and Johansson's (2015) broad mapping of the term. Their definition encompasses the dominant understanding of the term, which is the endorsement of "heterosexuality as something natural and unquestioned on different societal levels", and the disciplining of gender nonconformity and "sexual behaviors that do not fit into the normative sex/gender system" (1103). They emphasize that it is a "system", manifest at the level of social organization, wherein "society is organized on the basis of heterosexuality" and there is "sanction[ing] as well as condemn[ation of] people who do not fit in and fail to behave according to an "acceptable" and "given" societal value system" (Herz & Johansson 2015, 1013).

Alongside these meanings, I also draw on their extended definition of the concept which is that it "is sometimes used as fuel for criticizing the lives of both homosexual and heterosexual families that do not diverge from what is perceived to be a "heterosexual way of life"" (Herz & Johansson 2015, 1011). This meaning is derived in part from their reading of Lisa Duggan's (2003) conceptualization of the "*new homonormativity*" which they understand to be "a critique of tendencies among homosexuals to privilege consumption, privacy, and domesticity over far-reaching social and cultural change"(Herz & Johansson 2015, 1010). The Sarasi-Nalin pairing is portrayed as an example of this, particularly in the retreat into a framework of bourgeois heterosexual private family life, complete with a child, a home, and a small business. The irony of that framework, of course, is that it is enabled because each opts to abide by heteronormative conventions but for their own reasons and on different terms, and this ultimately exposes the hollowness of those conventions.

5. The 'Straight' Woman, Illness, and Pregnancy

As I have attempted to demonstrate, the character of Sarasi does not exist *in spite of* the film's methodology of queering; she is an important actor in it. Yet *Frangipani* is full of contradictions and ambivalence (which film is not?) in how it deploys its 'straight' woman character. The most prominent instances of this are in the film's association of illness and pregnancy with Sarasi's development. Feminist critics have long exposed the misogynist and patriarchal workings of the metaphor of chronic illness in the literary depiction of female characters (Price Herndl 1993). The inevitability to the physical and emotional decline of Sarasi's character resonates with a similar metaphorical feel, as if illness is a ready figurative expression for a range of oppressive situations to do with being a woman.

It is this decision to place illness and pregnancy in conjunction with its 'straight' woman character that I want to highlight as being potentially problematic from a feminist and

queer perspective. Our very first perception of Sarasi is of an ill person. In the opening scenes which introduce us to the three protagonists, she is lying prone on a hospital bed, moaning weakly and gasping for breath, being wheeled down a hospital corridor with her anxious mother hovering over her. This is a flashback to the later scenes, as we are to discover, when her story becomes scripted in relation to an undisclosed illness. That sense of malaise extends to the portrayal of her pregnancy — she is similarly slow-moving, silent, listless and wan. The narrative arc of her story shifts, from portraying her as a queer character who pushes the film's methodology of queering gender and sexuality in certain directions, to positioning her in much more conventional terms as a 'straight' woman, a familiar Sinhala cinematic stereotype of the romantically betrayed and long-suffering wife.

That Sarasi, too, has a queer trajectory may be eclipsed by a focus on the individual stories of Chamath and Nalin and the development of their relationship narrative. This trajectory is also obscured when the progress of her character is made contingent on the plot of a sham marriage and represented through the lens of a married gay man's dilemmas. But as an *ostensibly* 'straight' Sinhala woman living in a certain class-ed village context, Sarasi, too, is shown as experiencing the pressures of heteronormative convention. As I have argued, above, the film's methodology of queering is also contingent on the direction taken by this narrative—of how the woman character who is hailed as straight, but is not so straight (in her desires and in her three-way and two-way relationships), is constrained by heternormativity and has to push against and negotiate it.

This storyline, in particular, helps to undo the binaries of straight/gay and traditionally gendered/unconventionally gendered and to introduce a much more queer antinormative sensibility. If we suppose that Sarasi's interest in Chamath is a scenario of her misgendering him, we slide back into the straight/gay and traditionally gendered/unconventionally gendered binaries that the film tries to dismantle; we also fail to do justice to her character. But if we look at that interest not as misplaced but as interestingly inconvenient all round, we can see that it makes it difficult for her to conform to the expectations of marriage. Chamath is unwilling to be the object of affection for what he supposes to be opposite sex attraction on her part, and the film slyly suggests that that could be *his* misreading, and that her desires may very well not be that 'straight' after all. In Sarasi's affective attachment to Chamath, there is no indication that she would wish he were a better 'fit' for her as a more conventionally gendered man; in fact, she does not disparage or even question his gender presentation and its continuities and discontinuities with opposite-sex desire. This contrasts with the gay relationship between Chamath and Nalin, wherein Nalin tries to weed out the visible non-masculine signifiers in Chamath. In one scene when Nalin questions Chamath's choice of wearing a necklace and indicates that he does not like it, Chamath replies, unperturbed, "But I like it, you see".

At one level, there is room to read such pat seeming ironies in the film, such as the 'straight' woman's queer progressive stance and the gay man's reactionary heteronormative outlook. But *Frangipani* ultimately indicates that these are not ironies at all, and that the gender and sexual ideology of its characters should not be reconciled so easily with their subject positions. Its methodology of queering is concerned

with showing the complex, contradictory, incommensurable and unexpected relationships to heteronormativity formed by its characters.

6. Implications

In addition to representing a queer relationship, *Frangipani* asks us to consider the circumstances of a woman who is married to a man who pursues other men. The film is at its best when it approaches this as a structural problem which both individuals negotiate in terms of their subject positions and within their dynamic. The social system shown in the film is such that a man may feel constrained in expressing his desires but still be able to follow them, even if not openly, after he has nominally conformed to social expectations (not to mention actively subscribing to heternormativity) by marrying and having a child. This is why the film, although sympathetic to outlawed sexualities, still urges us to see that that marginalization is neither overdetermined nor all-encompassing for Nalin's character. As a man, he still has some room to negotiate within his constraints, and may not feel the need to interrogate vectors of inequality, such as patriarchal privilege, which benefit him.

There is a fine line to tread in telling this story in terms of representing the individual's negotiation. *Frangipani* offers traction for the reading that Nalin creates more room to manoeuvre by being complicit with systemic patriarchal privilege—for instance, enjoying the possibility of being a hands-off husband and father because of a gendered division of labour, wherein the care work of child rearing, offering pastoral care and running a household is always already feminized (run by his mother-in-law and Sarasi). Thus, little is expected from him to begin with, in terms of building 'family life', which contributes to normalizing his detachment (although not for long). This does not inevitably make him an unsympathetic character, and highlights more the form of social organization that gives rise to such inequalities. However, the possibilities that he has for negotiation within his constraints, largely through mobilizing patriarchal privilege in public and in the private sphere, are shown to further constrain the room that Sarasi's character has to manoeuvre within her circumstances as a 'straight' woman with a child, in an unorthodox marriage.

But *Frangipani* is not consistent in focusing on the structural issues and the differences in individuals' situated capacities to negotiate them. While that approach clearly helps avert the depiction of this scenario through a phobic view of Nalin as exploitative and a patriarchal view of Sarasi as victimized, *Frangipani* is not always able to hold that line. *Frangipani* offers enough to indicate that Sarasi is not always a victim and can resourcefully negotiate her desires within the love triangle, ambiguous as they are. But this narrative, which is crucial to constructing the film's queer feminist take on the story, falls away in the next set of developments concerning marriage, illness and pregnancy. Those elements with which Sarasi's character contributed to the film's methodology of queering—her playfulness and feistiness around sexual and gender dissidence and conventional coupledom, and even her ambivalence towards her contrived marriage—are somehow forgotten as her character becomes imagined on increasingly less queer lines. In the 'square' role of the wronged wife, the script that Sarasi has to follow has less to do with the development of her character in its own right, with its queer view of things, than with her relationship to her husband's dilemmas. She has to play being disappointed and betrayed by her husband, and to be silently resentful and

reproachful about his infidelities with men to the point of becoming seriously ill.

Why is an illness narrative used to capture her circumstances? What are the aesthetics and politics of configuring the negotiations of the 'straight' woman character in a love triangle with two 'gay' men, through an illness narrative? The implications are a conservatizing of the film's narrative and of Sarasi's character. Gradually, the film's storytelling becomes much more conservative, mimicking the sort of lurid tabloid feature which it had tried so hard to avoid, about the poor unsuspecting wives victimized by marriage to gay men who are themselves forced to hide their sexuality and marry because of social expectations. Sarasi's character's ability to queer the storyline about gender and sexuality is exploited and then abruptly dropped. Similarly, the development of her character is also shifted away from its queer location through a feminized narrative of illness.

Sarasi's illness and pregnancy play a crucial role in this turn. In a post-coital scene between Nalin and Chamath which takes place after Nalin's marriage, Chamath says, "I can't live hiding like a thief. Are you going to tell Sarasi about this?" Nalin replies, "How can I tell Sarasi about this? She has some illness every day. And the other thing is, she is pregnant." Far from being a queer female character in her own right, and one whose story has thickened and made complex the film's methodology of queering, Sarasi is portrayed as someone who is suddenly especially vulnerable and requiring protection from queer knowledge. This is a gendered and sexualized portrayal, I would argue, in that it is a conceptualization of Sarasi as a woman in terms of the idea that women as a class are always innocent of men's 'deviant' desires, and of her being a 'straight' woman, in terms of the idea that 'straight' people are never privy to queer understandings and desires. Ironically, she is now the embodiment of the oppressive heteronormative conventions that both Nalin and Chamath would wish to escape. One can argue that this is just a dramatization of Nalin's perspective, not one that the film as a whole endorses. But the fact that Sarasi's illness and pregnancy are *there* in the first place, permitting such articulations, is significant.

Pregnancy is also aligned with infirmity. The undisclosed illness is ostensibly a conventionally gendered 'woman's' somatic response to being wronged and enfeebled within the conjugal arrangements. Both conditions are constructed as emotionally manipulative—the somewhat absurd contrivance that the two men cannot be together because Sarasi could not physically withstand that knowledge—and is gendered in that respect as well, in the sense of emotional blackmail being seen as a feminine tool and as the weapon of the weak. In short, even though Sarasi does not explicitly voice her opposition to their love, her very physical condition as a woman speaks for her!

Of course, illness is also associated with Chamath's character, especially in the efforts of his family to exorcise the gay away. In one telling scene, Chamath's brother barks at him, "We have become the laughing stock in the village because of your shameless drama! Get up! I know how to cure your sickness!" But Chamath is able to retort, "I don't have a sickness", and this and other developments in his story negate the figurative use of illness to refer to his sexuality and gender. That negation is an important articulation, given the association of same-sex sexuality and gender transgression with illness.

7. Conclusion

To its credit, *Frangipani* tries to create a much broader and complex cinematic frame of living against the grain of heteronormativity than might be evident if we only focus on what is 'most out' about it—its gay relationship. There is less likelihood that the kind of queering (of gender and desire) effected by the 'straight' (but oh-so-queer) female character in this film would be valued (even recognized) if we only used the trope of 'coming out' to understand what the film is able to accomplish with its methodology of queering. What *Frangipani* does differently in its genre, I would argue, is that, for much of the film, it does not treat the 'straight' woman as secondary or a hindrance or an object of pity and so on. She has an interestingly exploratory and queer role to herself, and her kind of queering is inextricable from and feeds into the film's overall methodology of critiquing heteronormativity (much more than one of the gay male characters, and this, as I pointed out, is not intended to be ironic but is part of the deployment of a queer analytic). It is disappointing that the film eventually loses its way in knowing how to develop her narrative arc while foregrounding the dilemmas of the gay relationship.

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Law Reform

This Issue of the Review focuses on recent legal reform initiatives and proposals. Ermiza Tegal offers a critical analysis of the proposed Counter Terrorism Law discussing its broad implications for liberty, human rights and the rule of law in Sri Lanka. Anushka Wijesinha offers an analysis of the new Inland Revenue Act discussing the need for a new law that will contribute to strengthening Sri Lanka's fiscal position. Janith Nilantha of Transparency International Sri Lanka (TISL) discusses the Right to Information Act passed in 2016, reflecting on its implications on good governance, accountability for Sri Lanka and citizen engagement. This Issue also includes a review of the film Frangipani/Sayapethi Kusuma (2014) by Shermal Wijewardene.

The Review carries brief reflections by colleagues, collaborators and friends remembering the life and work of Vijay Nagaraj - LST's Head of Research who passed away in August 2017. Sarala Emmanuel writes reflecting on Vijay's work with communities. Ponni Arasu writes reflecting on how Vijay's work falls on a continuum across national boundaries. In keeping with the theme of law reform, Andi Schubert and Vagisha Gunasekera reflect on Vijay's relationship with the law and law reform.

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