CASE ANALYSIS

SAMPANTHAN V ATTORNEY GENERAL

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1. BACKGROUND AND OVERVIEW

The year 2015 witnessed a dramatic shift of political power in Sri Lanka, as the National Unity Government defeated the incumbent President Mahinda Rajapakse. The Unity Government,[1] headed by President Maithripala Sirisena, pledged its commitment to restore a more democratic form of constitutional politics by adopting a '100-day work programme' under the tagline 'good governance'. A centrepiece of this programme was the Nineteenth Amendment (19A) to the 1978 Constitution which introduced a suite of long-overdue structural changes that re-structured the Executive Presidency and strengthened Parliament. Despite the initial momentum, internal power struggles between the two rival coalition parties that formed the Unity Government, led to its slow disintegration.[2]

On 26th October 2018, President Sirisena, in an unprecedented move, removed from office the then Prime Minister (PM) Ranil Wickremasinghe

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[1] The National Unity Government was formed through a coalition of the United National Party (UNP) headed by PM Ranil Wickremasinghe and the United Peoples' Freedom Alliance (UPFA)-Sri Lanka Freedom Party (SLFP) headed by President Maithripala Sirisena.

[2] Jayadeva Uyangoda, 'Making Sense of the October Conflict and its Aftermath' in Asanga Welikala (eds) *Constitutional Reform and Crisis in Sri Lanka* (Centre for Policy Alternatives, 2019) 125.

and appointed former President[3] Rajapakse in his place. He thereafter prorogued Parliament, supposedly to prevent PM Wickremasinghe from demonstrating his majority and to buy time for the new government to broker a working majority.[4] When these attempts failed, on 9th November 2018, he issued a Proclamation[5] purportedly dissolving Parliament and calling for a General Election.

It was amidst the politically febrile atmosphere described above that the Supreme Court delivered its judgement in *Sampanthan v Attorney General*.[6]

This case analysis offers a critical examination of the cogency of the Court's reasoning with special emphasis on selected aspects of constitutional law.[7]

The argument is structured in three parts. Part I maps out the key legal issue that was at stake, and the judgement that the Court delivered. Part II analyses the rules of interpretation and founding principles of constitutionalism that informed the Court's reasoning. Part III evaluates the judicial approach to the ancillary issue of the justiciability of the President's exercise of powers of dissolution, which surfaced as a preliminary objection. The analysis takes the overall position that, despite the tremendous political pressure that prevailed at the time, the Court

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[3] And then sitting Member of Parliament (MP).

[4] *See*, Vidura Prabath Munasinghe, 'Around the Nation in Fifty Days: How the People Engaged with the Constitutional Crisis' (2019) 29 (347) LST Review 5 for details of socio-political events that unfolded from the 26th of October 2018 to 15th December 2018.

[5] Gazette Extraordinary 2096/70 dated 9th November 2018.

[6] *Sampanthan v AG* SC (FR) 351-361/2018, SC Minutes 13 December 2018.

[7] This analysis does not contain an exhaustive examination of all aspects of constitutional law that emerged in the judgement. Such an analysis would have to be the subject of a much larger work.

reached a correct conclusion that was anchored in sound legal reasoning. However, the analysis also points to, certain avenues of thinking that were overlooked by Court.

2. THE FACTS AND JUDGEMENT AT A GLANCE

The central legal question before the Court was whether the President could unilaterally dissolve Parliament before the expiration of its five-year term.[8] The decision primarily rested on the interpretation and implications of Articles 33(2), 62(2) and 70 of the Constitution, as amended by the 19A.

The clear and straightforward contention of the Petitioners was that, while Article 33(2) (c) recognises the President as the constitutional actor empowered to dissolve Parliament, it was merely a 'nude power' which was restricted by Article 70. The Respondents, in contrast, argued that Articles 33(2) (c) and 70(1) are two distinct provisions. According to them, Article 33(2) (c) bestowed upon the President sui generis, overreaching, and 'executive-driven' plenary powers of dissolution, whereas Article 70(1) provided for a 'legislature-driven' dissolution process. Harping on the phrase "In addition to", they maintained that the power of dissolution vested in the President by Article 33(2) (c) was unconstrained and independent of Article 70(1).

On 13th December 2018, a divisional seven-judge bench of the Supreme Court declared that the dissolution of 9th November was unconstitutional and that the Proclamation purporting to do so was null and void. Delivering a unanimous verdict, the Court agreed with the Petitioners that Article 33(2) (c) read with Article 70(1) makes it crystal clear that an early dissolution could be activated by the President only if four-years-and-six-

8 The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 62(2).

months have elapsed since the first sitting of Parliament, or if two thirds of Members of Parliament (MPs) have passed a resolution requesting an early dissolution. Considering that the Proclamation of 9th November failed to meet either of these conditions, the Court concluded that it had been issued outside legal limits. Consequently, the Court found that the Proclamation violated the Petitioners' right to equality, both in their capacity as parliamentarians legitimately elected to represent the People of Sri Lanka, and as citizens entitled to protection from arbitrary exercise of public power.

In reaching this conclusion, the Court employed a principled and morally grounded approach to adjudication that mostly centred around rules of statutory interpretation and interlocking principles of constitutionalism.

3. RULES OF STATUTORY INTERPRETATION

The initial response of the Court was to rely on a literal interpretation. The inclination towards literalism was underscored by the frequent use of phrases like 'plain meaning' and 'ordinary language' throughout the judgment. The emphasis was on the notion that when the language of the Constitution is clear and unambiguous, the interpreter's task is to derive the meaning of a provision directly from the text itself, without regard for potential consequences. Thereafter, the Court merged and supplemented the literal rule with the intent of the legislature by opining that the object of interpretation is to discover the intention of Parliament. The intentionalism aspect refers to an understanding that what is required of an interpreter is to give effect to the intention of the drafters of text.

However, it is important to acknowledge that this was a case which

seemingly fell within the realm of Dworkinian 'hard cases',[9] particularly due to certain loosely worded/ambiguous clauses in the 19A. For instance, as maintained by the Respondents, one could argue that the language in Article 33 (in addition to) is broad enough to confer the President with an untrammelled power to dissolve Parliament during times of exigency or deadlock. Likewise, as claimed by one of the added Respondents,[10] it could be argued that the first clause of Article 62(2) 'Unless Parliament is sooner dissolved, every Parliament shall continue for five years…', which was kept alive and intact even after the 19A, constitutes an automatic dissolution provision that empowers the President to dissolve Parliament regardless of its fixed term. Despite these apparent disparities, the Court portrayed this as a clear-cut case where the plain and ordinary words used in the Constitution aligned with the drafters' intent.[11] In taking this view, the Court was vehement in its argument that, in cases involving constitutional issues such as this, one must go beyond narrow technicalities and adopt a teleological interpretation (a literalism-cum-intentionalism approach) that aligns with the underlying values of the legal system and recognises the Constitution as a living organism capable of evolving and adapting to socio-economic and cultural developments.[12]

The second principle that the Court relied on was the harmony principle.

[9] According to Ronald Dworkin a 'Hard Case' refers to a legal suit which cannot be brought under a clear legal rule; *See*, Ronald Dworkin, '*Taking Rights Seriously'* (Harvard University Press 1978) Ch. 4.

[10] This was an argument advanced by President's Counsel Mr. Sanjeeva Jayawardena, on behalf of the 1st Added Respondent.

[11] Radhika Coomaraswamy, 'The Supreme Court's Tryst with Destiny' (2019) 29 (347) LST Review 33.

[12] *Sampanthan v AG SC (FR) 351-361/2018, SC Minutes 13 December 2018, 64 (Perera J) quoting NS Bindra, N S Bindra's Interpretation of Statutes (10th edn, N S Bindra) 1261.*

Drawing from the treatises of institutional writers, the Court highlighted the importance of adopting a holistic and harmonious interpretation of Articles 33, 62 and 70 given that all three provisions dealt with the same subject matter, leading to conflicting interpretations. The judgement is ripe with rhetoric which underscored that it is the healing art of harmonious construction,[13] as opposed to the tempting game of hair-splitting[14] that can clear up obscurities and ensure that none of the constitutional provisions are rendered superfluous or redundant. Additionally, the Court found support in the maxim *generalia specialibus non derogant*, in holding with the Petitioners that the general provision in Article 33(2) (c) is qualified by Article 70(1) with its specific reference of four-and-a-half years before a President can dissolve Parliament.

This remarkable convergence of rules of interpretation belied the traditional narrative of modern western liberal democracy which typically perceives the judiciary's role as being limited to interpreting and applying the law in an impartial and unbiased manner.[15] Instead, it demonstrated the Court's active involvement in determining fundamental questions of legitimacy and constitutionality.[16] The significance of this shift was heightened by the fact that this case arose during a period of political turmoil, where the very existence of the constitutional system was under threat.[17]

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13 *Fatehchand Himatlal v State of Maharashtra* (1977) MP LJ 201 (SC), 205 (Krishna Iyer J).

14 ibid.

15 Noel Cox, 'The role of the judiciary in a political crisis' (2008) 17 (2) The Commonwealth Lawyer (forthcoming).

16 ibid.

17 ibid.

4. FUNDAMENTAL CONSTITUTIONAL PRINCIPLES

In addition to its robust invocation of rules of statutory interpretation, the judgement is also striking for the way in which it asserted constitutional principles.

One of the key constitutional principles that guided Court was the 'rule of law' which entails the absolute supremacy or sovereignty of law over man,[18] and envisages a system of government that prevents persons in authority from exercising wide, arbitrary, or discretionary powers of constraint.[19] However, instead of articulating this principle in its own words, the Court took the circuitous route of quoting extensively from past precedent,[20] to arrive at the simple conclusion that the argument put forth by the Respondents - that Article 33 (2)(c) grants unfettered authority to the President to dissolve Parliament at his whim, is untenable, as it will not only place the President in a position of supreme power over Parliament, but also make the continuation of Parliament susceptible to executive manipulation. The extensive reference to well-known judicial authorities in Sri Lankan jurisprudence in buttressing this position was perhaps Court's way of reminding its readership that this is a judicial opinion that has been reiterated in numerous rulings.

In its final analysis, the Court moved the doctrinal parameters of 'equal

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[18] Hilaire Barnett, '*Constitutional and Administrative Law*' (4th edn,Cavendish Publishing Limited 2002) 73.

[19] Martyn Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds) *Oxford Handbook of Constitutional Law* (1st edn, OUP 2012) quoting A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, 1959), 188.

[20] *Wijeratne v Warnpala* SCFR 305 / 2008 SC Minutes 22nd September 2009; *Premachandra v Major Montague Jayawickrema* [1994] Sri LR 90; *Vasudeva Nanayakkara v Choksy* [2008] 1 Sri LR 134; *De Silva v Atukorale* [1993] 1 Sri LR 283; *Premalal Perera v Tissa Karaliyadda* SC FR 891/2009 SC Minutes 31st March 2016; *Sugathapala Mendis v Chandrika Kumaratunga* [2008] 2 Sri LR 339; *In Re the Nineteenth Amendment to the Constitution* [2002] 3 Sri LR 85.

protection of the law' from the orthodox terms of 'reasonable classification',[21] and referenced the 'new doctrine of equality' reasoning (as developed in the Indian case of *Royappa v State of Tamil Nadu),*[22] in conjunction with the public trust doctrine, to hold that the arbitrary exercise of the power of dissolution by the President amounted to a violation of the Petitioners' right to equality. The judgement championed administrative justice by reasoning that, 'In a Constitutional democracy where three organs of the State exercise their power in trust for the People, it is a misnomer to equate 'Equal protection' with 'reasonable classification'.[23]

Besides the 'rule of law', the Court also placed considerable weight on Montesquieu's liberty- model of 'separation of powers', 'constitutional supremacy' and 'judicial independence.' For instance, drawing from its own jurisprudence in In Re the Nineteenth Amendment to the Constitution,[24] the Court asserted how separation of powers is of central importance for the protection of political liberty and for the maintenance of a balance of power between the three organs of government. Likewise, citing the landmark US Supreme Court ruling in *Baker v Carr*,[25] the Court emphasized the importance upholding the integrity and supremacy of the Constitution, and in completely insulating itself, in fact and in appearance, from political entanglements. The Court seemed to be powerfully aware that such insulation is pivotal for yielding independent outcomes and

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[21] Deepika Udagama, 'Right to Equality: The New Frontier of Judicial Activism' in *Essays in Honour of Deshamanya H.L. De Silva P.C.* (Legal Aid Foundation 2003) 323.

[22] (1974) AIR 555.

[23] *Sampanthan v AG* SC (FR) 351-361/2018, SC Minutes 13 December 2018, 87 (Perera J.).

[24] *In Re the Nineteenth Amendment of the Constitution* [2002] 3 Sri LR 85.

[25] (1962) 369 US 186.

thereby strengthening the rule of law.[26]

Although the Court did not particularly make any novel arguments on aspects of constitutional law and mostly grounded its reasonings in orthodoxy by affirming, articulating or clarifying existing principles, what rendered the judgement a landmark authority was the Court's recognition of the judiciary not merely as a co-equal arm of government, but as the final arbiter and guardian of the meanings to be attributed to the Constitution.[27] This is undoubtedly a bold manoeuvre and a mark of a confident and forward-looking judiciary.[28]

However, the Court's approach is not without criticism. For instance, by mostly founding its reasoning on the rules of interpretation and general principles of constitutionalism, the Court failed to place sufficient emphasis on two important conceptual issues implicated in the reforms introduced by the 19A, namely, 'Semi-Presidentialism' and the 'Fixed-Term Principle.'

It is pertinent to note that the 1978 Constitution of Sri Lanka (in its original form) represented a Gaullist style, semi-presidential model of government,[29] with a dominant executive and a Parliament subordinate to the President.[30] Under this model, the popularly elected President

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[26] Maria Popova, *Politicized Justice in Emerging Democracies* (Cambridge University Press 2012) 14 -19.

[27] Radhika Coomaraswamy, 'The Supreme Court's Tryst with Destiny' (2019) 29 (347) LST Review 33.

[28] ibid.

[29] *See*, Rohan Edirisinha, 'Constitutionalism and Sri Lanka's Gaullist Presidential System' in A Welikala (eds) *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Centre for Policy Alternatives, 2015) for a detailed analysis of the nature of the Executive Presidency under the Second Republican Constitution of Sri Lanka.

[30] Reeza Hameed, 'Parliament in a Presidential System' in Asanga Welikala (eds) *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Centre for Policy Alternatives 2016) 55.

possessed considerable powers including the power to assign to himself Ministerial portfolios, dissolve the legislature one year into its term, and make appointments to high offices, including judges of Appellate Courts.

However, with the enactment of the 19A, Sri Lanka moved from a 'president-parliamentary' model to a 'premier-presidential' category of 'semi-presidentialism'.[31] As a necessary corollary of the change in regime type and transfer of power from the executive to the legislature, the 19A constitutionalised the 'Fixed-Term Principle' by restricting the President's authority to dissolve Parliament to the last six months of its five-year term, (unless where two-thirds of MPs voted in favour of the resolution).[32] The fixed parliamentary mandate, which constitutes a negative self-defence mechanism,[33] sought to usher in several benefits. Firstly, it strengthened separation of powers by preventing the President from using his wide discretionary powers to stymie Parliament from discharging its constitutional functions. Secondly, it reduced the political advantage of the ruling party in the timing of elections.[34] By fixing this timing in law, rather than leaving it to the sole discretion of the incumbent President, the 19A also alleviated executive dominance of the legislature.[35] Additionally, it provided a strong incentive for consensual relations among political

[31] Artak Galyan, 'The Nineteenth Amendment in Comparative Context: Classifying the New Regime-Type' in Asanga Welikala (eds) *The Nineteenth Amendment to the Constitution: Content and Context* (Centre for Policy Alternatives 2016) 251.

[32] The Nineteenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 70(1).

[33] See, NW Barber, 'Self-Defence for Institutions' (2013) 72(3) Cambridge Law Journal 558, for an in-depth analysis of positive and negative self-defence mechanisms/ constitutional devices that protect one institution from the attentions of another.

[34] Asanga Welikala, 'The Dissolution of Parliament in the Constitution of Sri Lanka' (*Groundviews*, 11 December 2012) <https://groundviews.org/2018/11/12/the-dissolution-of-parliament-in-the-constitution-of-sri-lanka/> accessed 23 June 2023.

[35] ibid.

parties.[36]

Therefore, rather than relying on a literalism-cum-intentionalism method, a more explicit consideration of the reforms introduced by the 19A through a purposive approach to interpretation, with special emphasis on the shift in regime type and the constitutional benefits of the 'Fixed Term Principle', would have enhanced the analytical clarity of Court's overall reasoning. It would have also solidified the conclusion that Article 33(2) (c) should be interpreted in conjunction with Article 70(1).

5. JUDICIAL REVIEW OF EXECUTIVE AND ADMINISTRATIVE ACTION

While the central legal issue revolved around the question of dissolution, a significant portion of the 88-page judgement was devoted to addressing the preliminary objections raised by the Respondents' disputing the Court's jurisdiction.

One of the main objections raised by the Respondents was that the application could not be maintained as it is the Parliament, through impeachment proceedings,[37] that ought to investigate into the President's decision to dissolve Parliament. This objection seemed to be founded on the belief that one of the key checks on the President's power, given that he is immune from suit during his period of office,[38] was his amenability to the jurisdiction of Parliament and the representatives of the People therein, by whom he might be impeached and removed from office under

[36] Galyan (n 31) 258.

[37] The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 38(2).

[38] ibid, art 35.

Article 38 for intentional violation of the Constitution.[39] The Respondents found support for this objection in Article 4(c) which declares that 'the judicial power of the people shall be exercised by Parliament through courts.' However, using Kelsen's taxonomy of the Grundnorm to describe the chapter on fundamental rights and linking it to sovereignty,[40] the Court rightly dismissed this objection by opining that, 'the limited fact-finding role under impeachment proceedings cannot be equated with the exercise of judicial power…in the protection of fundamental rights'.[41] Alongside the reference to Kelsen's Grundnorm theory, the Court could have drawn from Locke's efficiency model of separation of powers to emphasize that the legislature is structurally ill-equipped (even if it acted in good faith) to adjudicate on matters involving the rights of individuals,[42] and that only a competent judicial body has the legitimacy to undertake such task.

A related, and more interesting, objection was raised by the Secretary to the President who claimed that the basis on which the President formed his opinion to dissolve Parliament amounted to a 'political decision' which was unfit for judicial review. This objection was also dismissed by Court, on the basis that although the decision was politically motivated and had political implications, it involved a question of law that manifestly fell within the category of matters which were justiciable, namely, the 'scope' of the President's power to dissolve Parliament as spelt out in the Constitution, and whether its limits had been transgressed. Considering that the dividing line between the political and legal spheres of the Constitution is

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[39] Sachintha Dias, 'The Presidency and the Supreme Court: The Constitutional Jurisprudence of Presidential Powers under the 1978 Constitution' in Asanga Welikala (eds) *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Centre for Policy Alternatives 2016) 251.

[40] Coomaraswamy (n 26).

[41] *Sampanthan v AG* SC (FR) 351-361/2018, SC Minutes 13 December 2018, 32 (Perera J.).

[42] NW Barber, *The Principles of Constitutionalism* (OUP 2018) 54.

often thin, and given that fundamental principles inform both political questions and legal analysis,[43] the Court could have strengthened its position by relying on the UK Supreme Court ruling in *Miller II*[44] wherein it was affirmed that the mere fact that a question before a court 'is political in tone or context'[45] does not automatically render it non-justiciable.

6. CONCLUSION

Considered against the backdrop of the contentious political context within which it arose, the judgement in *Sampanthan v AG*[46] marks a triumph of legality over politics. Through a unique combination of rules of interpretation and the orthodox application of existing constitutional principles, not only did the judiciary prevent an unconstitutional regime change, but also blocked an attempt to capture the constitution, legislature and eventually the state, by a tactical coalition of two power blocs - one led by former President Rajapakse and the other led by President Sirisena.[47] Although President Sirisena's blatant disregard for and manipulation of constitutional procedures, which underscored the ongoing risks of democratic backsliding and the potential for constitutional vulnerability, the judiciary's robust resistance and temerity served as a beacon of hope, demonstrating the enduring institutional resilience of Sri Lanka's constitutional system.

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43 Mark Elliott, 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context' (2021) Cambridge Faculty of Law Legal Studies Research Paper 03/2021.

44 *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 ('Miller II').

45 ibid, 15.

46 *Sampanthan v AG* SC (FR) 351-361/2018, SC Minutes 13 December 2018.

47 Jayadeva Uyangoda, (n 2)154.