



Centre for Asian Legal Studies
Faculty of Law

NUS Centre for Asian Legal Studies Working Paper 18/07

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[May 2018]

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A CONSTITUTIONAL COURT FOR SRI LANKA? PERSPECTIVES FROM SOUTH AFRICA

Ayesha WIJAYALATH*

Abstract

With the end of Sri Lanka's civil war and the defeat of an overpowering executive president, constitutional reforms to ensure the supremacy of the constitution and to provide enforceable rights, are currently underway. Establishing a constitutional court remains one of its concerns. Drawing parallels from the common legal heritage and state of transition, this paper explores the institutional design of the South African Constitutional Court and attempts to identify if such design would suit Sri Lanka. The paper discusses in detail the structure and powers and functions of the South African Constitutional Court, in relation to other organs and other courts. The paper equally highlights the significant changes made to the South African Constitutional Court under the 17th Amendment, in the light of which, the paper concludes that the design prior to the amendment, appears more appropriate for Sri Lanka.

INTRODUCTION

In a deeply divided country emerging from a thirty-year civil war, providing for a meaningful fundamental rights mechanism and judicial reforms in Sri Lanka's new constitution have gained wider attention.¹ As such, a Constitutional Court has been regarded as the effective judicial organ in adjudicating issues of constitutional importance, with jurisdiction on matters relating to the interpretation of the constitution, judicial review of bills, judicial review of laws and statutes, issues concerning the Centre and the Provinces, breach of parliamentary privileges and review of its own judgments.² South Africa, having equally emerged from an oppressive state of affairs, has been largely credited for establishing a Constitutional Court that performs a fundamental role as the guardian of the constitution and an active arbiter in safeguarding the rights of its people.³

The focus of this paper, therefore, is to identify whether the South African Constitutional Court's institutional design, particularly in respect of its structure and powers, would suit Sri Lanka. In pursuance of this study, Section I considers the importance of a constitutional court in Sri Lanka, particularly during a transitional phase towards deeper democratic commitment. Section II will then discuss, in detail, why the South African Constitutional Court (SACC) offers to be a suitable comparator and discuss its structure and functions. Section III will consist of an analysis of how such model could be situated in the Sri Lankan legal system.

I. A CONSTITUTIONAL COURT FOR SRI LANKA

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¹ Constitutional Assembly- Official Report (5 May 2016) 6, <http://english.constitutionalassembly.lk/images/pdf/5th_may.pdf>, accessed 7 February 2018.

² Report of the Sub-Committee on Judiciary, 6. <<https://english.constitutionalassembly.lk/images/pdf/02-Judiciary-stel.pdf>>, accessed 7 February 2018. The Sub-Committee Reports are based on the report of the Public Representative Committee. For process and report of the Public Representative Committee, see http://english.constitutionalassembly.lk/index.php?option=com_sppagebuilder&view=page&id=13.

³ South Africa- First 20 Years of Democracy (1994-2014). Available at <<https://www.sahistory.org.za/article/south-africa-first-20-years-democracy-1994-2014>> accessed 25 February 2018.

With the end of the civil war in May 2009, Sri Lanka entered a new phase in its political history – a new post-conflict beginning where reconciliation, transitional justice and economic development of the North took center stage.⁴ However, peacebuilding and transitional justice were greatly undermined by former President Mahinda Rajapakse.⁵ In fact, nationalistic triumphalism resulted in further divide between the ethnicities, including the Muslim minorities.⁶ Alongside this, the rule of law was rapidly eroding and the judiciary and public institutions were far from being genuine functional institutions.⁷

The erosion of democracy in the island resulted in a regime change in the January 2015 presidential elections- thereby, ensuing a new phase of Sri Lanka's politics – with a pledge by the new President Sirisena to draft a new constitution upholding the rule of law and safeguarding the fundamental rights of the people.⁸ In doing so, the role of the judiciary, its independence and its powers on judicial review is key as Sri Lanka's current system of judicial review which is limited to pre-enactment review, is largely considered restrictive.⁹

Meaningful judicial review is important for Sri Lanka, in avoiding the scourge of yet another ethnic conflict through effective protection of minority rights. During the war, the role of the judiciary when presented with a fundamental rights application appears to have made a distinction between 'ordinary' rights violations and those that involved minority rights in language and religious contexts.¹⁰ The elevated position attributed to 'emergency regulations' that significantly curtailed fundamental rights, further aggravated the situation.¹¹ Similarly, judicial deference towards public opinion and executive action against alleged Tamil Tigers questioned their impartiality.¹² Therefore, a need for an independent judiciary with significant constitutional review in Sri Lanka arises as fundamental means of countering majoritarianism. In *Makwanyane*¹³, the South African Constitutional Court, aptly highlighted the court's role, against majoritarianism, stating that 'the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts was to protect rights of the minorities and others who cannot protect their rights adequately through the democratic

⁴ Joint Statement by United Nations Secretary General, Government of Sri Lanka, (26 May 2009) <<https://www.un.org/press/en/2009/sg2151.doc.htm>>. Accessed 25 February 2018.

⁵ 'Reconciliation in Sri Lanka: Harder than Ever', (International Crisis Group: 18 July 2011). <<https://www.crisisgroup.org/asia/south-asia/sri-lanka/reconciliation-sri-lanka-harder-ever>> accessed 25 February 2018

⁶ 'Sri Lanka's government accused of turning a blind eye to attacks against minority Muslims', (Fox News World: 5 July 2014) <<http://www.foxnews.com/world/2014/07/05/sri-lanka-government-accused-turning-blind-eye-to-attacks-against-minority.html>> accessed 25 February 2018.

⁷ James Yap and Craig Scott, 'The Breakdown of the Rule of Law in Sri Lanka: An Overview', (Sri Lanka Campaign for Peace & Justice: 22 September 2010) 3-4.<https://sydney.edu.au/arts/peace_conflict/docs/reports/SL_campaign.pdf>accessed 27 February 2018.

⁸ 'Can a new constitution heal Sri Lanka's wounds', (Al Jazeera: 9 January 2016). <http://www.aljazeera.com/programmes/insidestory/2016/01/sri-lanka-constitution-160109163001630.html>. accessed 27 February 2018.

⁹ Cheryl Saunders, 'Constitutional Review in Asia: A Comparative Perspective', in Albert Chen (ed) (forthcoming), 16.

¹⁰ Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardhane and Gehan Gunatilleke, *The Judicial Mind in Sri Lanka- Responding to the Protection of Minority Rights*, (Law and Society Trust: January 2014) 20

¹¹ de Almeida Guneratne et al, (n 10) 196-197.

¹² See *Bindunuwewa* Case (S.C. Appeal 20/2003 (TAB)) in Human Rights Watch, 'Sri Lanka: Failure of Justice for Victims of Massacre', (New York: 2005) in Kishali Pinto- Still seeking Justice. See in general, Upasana Bhat 'Asian Centre for Human Rights on Bindunuwewa massacre', http://sangam.org/taraki/articles/2005/10-25_Asian_Centre_for_Human_Rights_on_Bindunuwewa_Massacre.php?uid=1268 accessed 12 March 2018.

¹³ *State v Makwanyane and Another*, 1995 (3) SA 391(CC); 1995 (6BCLR) 665(CC).

process'.¹⁴ Similarly, horrors of war provide an impetus towards constructing a regime that safeguards human rights.¹⁵

The other vital reason for a strong constitutional review in Sri Lanka, is to resolve the problems of separation of powers and multi-level governance. The 1978 Constitution of Sri Lanka was enacted with 'grandiloquent concepts' vesting the 'sovereignty of the people', whilst paving path to an absolute powerful Executive Presidency.¹⁶ A court equipped with wide scope of judicial review, therefore, becomes imperative to hold the executive in check. Such court could equally involve in coordination in multi-layered systems,¹⁷ especially in relation to disputes between the central government and provincial council competencies as proposed under the new constitution.¹⁸

Once the importance of establishing an effective constitutional review is decided, it duly entails a choice of a model, i.e. an institutional structure to implement judicial review. The two main models in constitutional democracies are the diffuse and the concentrated systems.¹⁹ Whilst a diffuse system determines *inter alia* the constitutional validity of legislation in a generalized court system, in a concentrated system, power to invalidate legislation is vested in a specialist body, namely a Constitutional Court.²⁰

The Supreme Court is the apex court in Sri Lanka. The Supreme Court of Sri Lanka currently exercises jurisdiction in respect of constitutional matters including interpretation of the constitution, sole and exclusive jurisdiction to hear fundamental rights matters, exercises consultative jurisdiction, jurisdiction for final appeals and jurisdiction in election petitions and in respect of breaches of parliamentary privileges.²¹ However, in the context of Sri Lanka, the essential issue arises as to whether constitutional review could not be achieved under the same court structure with enhanced powers vested on the Supreme Court, instead of establishing a separate Constitutional Court. Therefore, a case could be made that effective constitutional review could be achieved by vesting the Supreme Court with enhanced power of judicial review of legislation, supported by a Bill of Rights under the new constitution.

Nevertheless, a separate Constitutional Court is especially preferable in the socio-political context of Sri Lanka. Constitutional courts, often regarded as a 'product of upheavals and shocks'²² have been established to uphold and consolidate democracy throughout history.²³ Therefore, in the Sri Lankan context, this urgent need to uphold and consolidate democracy mainly arises in the aftermath of a violent civil war and in the defeat of an overpowering executive president.

Similarly, during a transition from an authoritarian or totalitarian regime, states attempt to establish new courts, to make a fresh start with new judges who are not tainted by the previous

¹⁴ Ibid, para 88 of the Judgment.

¹⁵ Tom Ginsburg, *Why Do Countries Adopt Constitutional Review*, 30 *Journal of Law, Economics and Organization* 587 (2014) 7.

¹⁶ de Almeida Guneratne et al, (n 10) 26.

¹⁷ Garrett, Geoffrey and Barry Weingast, "Ideas, Interests, and Institutions: Constructing the European Community's Internal Market" in Tom Ginsburg, "Why do countries adopt Constitutional Review", 30 *Journal of Law, Economics and Organization* 587 (2014) 8.

¹⁸ Sub-Committee Report on the Judiciary, (n 2).

¹⁹ Referred to as the US model and Kelsen model respectively in Mark Tushnet, *Comparative Constitutional Law*, (Edward Elgar Publishing:2014) 48.

²⁰ Saunders, (n 9) 3.

²¹ Art 118 of the Constitution of Sri Lanka of the Constitution of Sri Lanka, <<https://www.parliament.lk/files/pdf/constitution.pdf>>, accessed 25 February 2018.

²² Rait Maruste, 'The Role of the Constitutional Court in Democratic Society', (1997) 10. <<http://www.juridicainternational.eu/?id=12703>> accessed 8th March 2018.

²³ Ibid.

regime.²⁴ During the Rajapakse regime, judicial appointments were increasingly made on the basis of loyalty. President Rajapakse nominated his political ally Mohan Pieris as the Chief Justice soon after the illegal impeachment of Chief Justice Bandaranaike.²⁵ Thereafter, five judges of the Supreme Court nominated by the new Chief Justice validated the impeachment of Chief Justice Bandaranaike, marking the ‘lowest depth in the downward spiral of the Sri Lankan judiciary’.²⁶ Therefore, it is important to break from this past and establish an independent court that, in turn, will result in gaining legitimacy with wider public confidence.

Establishing a constitutional court is also an expressivist function, representing a sincere commitment to the constitution and rights protection.²⁷ It is equally argued that states conforming to global constitutional standards, receive recognition internationally.²⁸ Moreover, globally there had been increase recourse to constitutional courts.²⁹ By establishing a Constitutional Court in Sri Lanka and keeping in line with international best practices, Sri Lanka could gain international acceptance and legitimacy, as a rule abiding state - especially in face of international probes for alleged war crimes.³⁰

Equipped with more autonomy, a constitutional court could also be a solution for political uncertainties in the country. Parties who fear losing power in future, include constitutional review by an independent court which could be used as an alternate platform to challenge the future government.³¹ This is particularly relevant in view of the volatility in Sri Lankan politics with the possibility of the former president returning to power in light of the recent local government elections which brought his party a significant victory.³²

Another advantage of a constitutional court lies in its composition, with room for eminent persons such as academics and persons with political experience. This is linked to the idea that constitutional questions are inextricable from political and policy judgments.³³ Therefore, some degree of political experience is vital in handling constitutional matters consisting elements of policy and politics.³⁴

Finally, a constitutional court is not entirely a new institutional concept for Sri Lanka as a constitutional court was established in Sri Lanka under the 1972 constitution, albeit with limited powers.³⁵

II. THE SOUTH AFRICAN CONSTITUTIONAL COURT

²⁴ Saunders (n 9) 10

²⁵ ‘Sri Lanka: New Chief Justice Sworn In’, (New York Times: 15 January 2013) <<http://www.nytimes.com/2013/01/16/world/asia/sri-lanka-new-chief-justice-sworn-in.html>> accessed 14 March 2017.

²⁶ Nihal Jayawickrama, ‘Establishing a Constitutional Court: The Impediments Ahead’, (CPA Working Papers on Constitutional Reform No.13: January 2017) 3. <<http://constitutionalreforms.org/wp-content/uploads/2016/06/Working-Paper-13-1.pdf>> accessed 14 March 2018.

²⁷ Victor Ferreres Comella, “The European model of constitutional review of legislation: Toward decentralization?” (2004) 2 *I.CON* 461” in Saunders, (n 9) 10.

²⁸ Tom Ginsburg, ‘Why Do Countries Adopt Constitutional Review’, 30 *Journal of Law, Economics and Organization* 587 (2014) 11.

²⁹ Saunders, (n 9) 4.

³⁰ See ‘UN Human Rights Council urges Sri Lanka war crimes court’, (BBC:16 September 2016). <<http://www.bbc.com/news/world-asia-34266471>> accessed 16 March 2018.

³¹ Ginsburg (n 28).

³² ‘Mahinda Rajapaksa’s SLPP wins big in Sri Lanka’s local body polls: Is former president on comeback trail’ (Firstpost: 13 February 2018).

³³ Tushnet, (n 19) 55 – with reference to Kelsen’s argument where constitutional questions could be resolved only with reference to some policy and political elements.

³⁴ *Ibid.*

³⁵ Jayawickrama, (n 26) 12.

The South African Constitutional Court (SACC) is held in high esteem internationally owing largely to its success as a champion of social justice in the post-apartheid era.³⁶ Why the SACC offers to be a suitable comparator for deciding a constitutional court for Sri Lanka is owed to several reasons. The historical linkages due to the British colonial rule are a key consideration. Whilst both states inherited English law from the British, both Sri Lanka and South Africa have a 'hybrid' or mixed system with English law interweaving with Roman Dutch Law (RDL) and customary laws.³⁷ In addition, South African cases are persuasive precedents in the interpretation of RDL in Sri Lankan courts.³⁸

Both states stepped out of years of violence, hatred and chaos. South Africa wisely opted for a negotiated transition aimed at reconciliation, restitution and reconstruction.³⁹ Sri Lanka is currently on its path to reconciliation, transitional justice and good governance.⁴⁰ In this context, both the South African constitution (1996) and Sri Lanka's attempt to make a new constitution, could be identified as transitional constitutionalism, i.e. constitutions that transform into more democratic forms, functioning to make a new political agenda based on social consensus, giving 'legal expression to a new power structure'.⁴¹ Transitional constitutionalism also disregard the traditional ones.⁴² The South African constitution only retains from the past what it could legitimately and morally defend and it broke its links from the past that was racist and authoritarian.⁴³

Moreover, the two countries' good diplomatic relations have resulted in South Africa offering to share their experience of constitution making process with the Sri Lankans.⁴⁴ A technical team from Sri Lanka was also sent to South Africa to study the Truth and Reconciliation Commission process in South Africa, in addressing the issues of transitional justice after the civil war.⁴⁵ In light of this similar legal and socio-political context, a comparative study of the SACC seems both appropriate and timely.

1. Historical Background and SACC

³⁶ Heinz Klug, 'Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa's Constitutional Court', in Diana Kapisweski, Gordon Silverstein and Robert A. Kagan (eds) *Consequential Courts: Judicial Roles in Global Perspectives* (Cambridge University Press: 2013) 93.

³⁷ On South Africa, see Beat Lenel 'The History of South African Law and its Roman-Dutch Roots', 13, <<http://www.lenel.ch/docs/history-of-sa-law-en.pdf>> accessed 12 March 2017.

On Sri Lanka, see LJM Cooray, 'The Reception of Roman- Dutch Law in Sri Lanka', *The Comparative and International Law Journal of Southern Africa*, Vol. 7, No. 3 (NOV. 1974), 295-320, 295.

³⁸ *Ibid*, 300.

³⁹ Conor Colasurdo and Rebecca Marlin, 'Special Interview: South Africa's Constitutional Jurisprudence and the path to democracy: An annotated interview with Dikgang Moseneke, Acting Chief Justice of the Constitutional Court of South Africa' 37 *Fordham Int'l L.J.* 279 2013-2014, 284.

⁴⁰ See Sri Lanka Peacebuilding Priority Plan (August 2016)< <http://www.unpbf.org/wp-content/uploads/Sri-Lanka-Peacebuilding-Priority-Plan-August-2016-final.pdf>>accessed 15 December 2017.

⁴¹ Ulrich K. Preuss, 'The Politics of Constitution Making: Transforming Politics into Constitutions', 13 *Law and Policy* 107: 1991, 108, 113, 119.

⁴² Jiunn-Rong Yeh, 'The Emergence of Asian Constitutionalism: Features in Comparison', 4 *NTU L.Rev* 39: 2009) 42.

⁴³ *State v Makwanyane and Another*, para 26 in Klug, (n 37) 97.

⁴⁴ 'South Africa offers to share constitution making experience', (Colombo, Daily Financial Times: 23 January 2016). <<http://www.ft.lk/article/520728/South-Africa-offers-to-share-constitution-making-experience>.>accessed 17 March 2018.

⁴⁵ 'Sri Lanka sent a Technical Team to South Africa to study TRC process', (Sri Lanka Brief: 08.03.2016). <<http://srilankabrief.org/2016/03/sri-lanka-sent-a-technical-team-to-south-africa-to-study-trc-process/>> accessed 17 March 2018.

South Africa, a former British colony, situated in the southern tip of continental Africa is one of Africa's mostly multiracial nations⁴⁶ where legal segregation based on race resulted in massive oppressions of its population until 1994 when President Mandela was elected.⁴⁷ Before the 1994 elections, the 1993 Interim Constitution, provided for a Constitutional Assembly to draft a new constitution. It is under this Interim Constitution the SACC was established.⁴⁸

There was lack of public faith on the judiciary during apartheid, due to blatant disregard over the increasing deaths in police detention and repeated exoneration of the wrongdoers that the judiciary was internationally condemned for serving as 'instruments of repression'.⁴⁹ With the establishment of SACC, the SACC distinguished itself from this appalling past and attempted to emerge as a 'counter-model' to the previous court.⁵⁰

(a) The Structure of the SACC

Under the final constitution, the SACC structure was designed to create a system that is representative, accountable, accessible, and capable of providing justice to all South Africans notwithstanding race, gender or ethnicity.⁵¹ And a core part of this court structure lies in the appointment of judges to SACC.⁵² Any qualified woman or man of South African citizenship will be qualified for judicial appointments in the SACC,⁵³ highlighting the need for broader representation of the racial and gender composition of South Africa.⁵⁴ The President, in consultation with the Judicial Service Commission (JSC) and the leaders of the parties in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice to the SACC.⁵⁵ The remaining nine judges are appointed by the President after consulting the Chief Justice and leaders of the parties in the National Assembly, in accordance to a set procedure by referring to the list of names prepared by the JSC.⁵⁶ The input of the judiciary in the appointment process is equally notable. The JSC has been praised for circulating the application of nominees within the JSC and then publishing the names of the shortlisted candidates,⁵⁷ thereby demonstrating a commitment to transparency.

The term of the office is for a non-renewable term of 12 years.⁵⁸ The removal of a judge is contingent upon the findings of the JSC (on a judge's incapacity, gross incompetence or misconduct) and by 2/3rds majority supporting a resolution for removal in the National Assembly.⁵⁹

⁴⁶ Constitutional history of South Africa, (Constitutionnet). <<http://www.constitutionnet.org/country/south-africa>>. accessed 12 December 2017.

⁴⁷ Ibid.

⁴⁸ Diala Anthony Chima, 'Judicial Activism in South Africa's Constitutional Court: Minority Protection or Judicial Legitimacy', 18.

<https://www.academia.edu/2123795/Judicial_Activism_at_South_Africas_Constitutional_Court_Minority_Protection_or_Judicial_Illegitimacy> accessed 12 February 2018.

⁴⁹ International Commission of Jurists in *Helen Pastoor* case in Klug (n 37) 96.

⁵⁰ See *State v Makwanyane and Another*, (1995)(3) SA 391(CC); 1995(6) CC BCLR 665 (CC) para 26.

⁵¹ Penelope E Andrews, 'The South African Judicial Appointment Process', (2006), <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1288&context=ohlj>> accessed 1 March 2017.

⁵² Ibid.

⁵³ Section 174(1) of the Constitution of South Africa (as amended by the 17th Amendment).

<<http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>>.

⁵⁴ Section 174 (2), South African Constitution.

⁵⁵ Ibid Section 174(3).

⁵⁶ Ibid, Section 174 (4).

⁵⁷ Penelope E. Andrews, (n 51) 568-569.

⁵⁸ Section 176(1), South African Constitution.

⁵⁹ Ibid, Section 177(1).

2. Powers and Functions

(a) Powers in Relation to Other Organs of Government

At the heart of the apartheid order reigned the concept of the Parliament supremacy- a Parliament selected by a small minority of white population.⁶⁰ This was replaced by the principle of constitutional supremacy.⁶¹ Parliamentary supremacy limited judicial review that the previous Supreme Court of South Africa could only declare a legislation invalid if it did not comply with the procedural requirements.⁶² Under the 1996 Constitution, SACC was created primarily to deal with constitutional matters and with power to strike down both parliamentary and provincial legislation.⁶³ However, subsequent to the 17th Amendment to the 1996 Constitution (the 17th Amendment), the SACC was placed as the highest court in the country for all matters.⁶⁴

The scope of the SACC significantly expanded with the 17th Amendment in 2013, where SACC can now decide on both constitutional matters and the appeal of any other matter that raises arguable points of law of general public importance.⁶⁵ An extraordinary check is vested on the SACC over the Executive and the Legislature, where it can decide on whether the Parliament or the President has failed to fulfil a constitutional obligation.⁶⁶ The SACC also has the power to allow an individual to bring a matter directly to the Court when it is in the interest of justice.⁶⁷ In *Ferreira v Levin*⁶⁸, the SACC adopted its new role by broadening the standing of the applicant stating that a person's own constitutional rights need not be infringed in order to bring an action on his/her own interest before the court. This attitude of the SACC reflects that rights of the vulnerable communities will also be heard.

In order to carry out its functions independently and impartially, Section 165(2) specifies that Courts are only subject to the Constitution and the law, which they must apply 'impartially and without fear, favour or prejudice'. No person or organ of the State must interfere with its functions⁶⁹ and other organs must strive to protect the court to guarantee its 'independence, impartiality, dignity, access and effectiveness'.⁷⁰

(b) Powers and Functions in Relation to Other Courts

Changes to SACC jurisdiction made under 17th Amendment, markedly change its relationship with other courts when SACC was also vested with the power to hear appeals on non-constitutional matters. However, not all non-constitutional matters will be subject to the SACC appellate jurisdiction, but only those with general public importance,⁷¹ thereby retaining the

⁶⁰ See in general, Francois Venter, "'South Africa : Introductory Notes'.

<http://www.icla.up.ac.za/images/country_reports/south_africa_country_report.pdf> accessed 12 February 2018.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Section 167(4)(b).

⁶⁴ See 17th Amendment to the 1996 Constitution of South Africa.

<http://www.justice.gov.za/legislation/acts/const17th_2013gg36128no72.pdf>.

⁶⁵ Section 164 (3)(b) of the South African Constitution (Clause 3 in the 17th Amendment).

⁶⁶ Section 167(4)(e) of the South African Constitution.

⁶⁷ Subject to leave by SACC and as per national legislation and rules of SACC. See Section 167(6).

⁶⁸ 1996 (1) SA 984 (CC).

⁶⁹ Section 165(3) of the South African Constitution.

⁷⁰ Ibid-Section 165(4).

⁷¹ Section 167 (3)(b)(ii), South African Constitution.

general appellate jurisdiction of the Supreme Court of Appeal. It is said that the aim is to introduce a three-tier appeal system.⁷²

SACC shares concurrent jurisdiction with the High Court and Supreme Court of Appeals on challenges to the constitutionality of all legislation.⁷³ However, when the High Court or Supreme Court of Appeal determines that a legislation or conduct of the President is invalid as per the constitution, it must be confirmed by the SACC to take effect,⁷⁴ thereby SACC acts as the final decision-maker in matters falling under concurrent jurisdiction.

The SACC has exclusive jurisdiction *inter alia* to decide on constitutionality of both parliamentary and provincial bills⁷⁵ when the President or the Premier had referred a Bill to court to determine its constitutionality,⁷⁶ in deciding disputes between organs, constitutionality of Constitutional amendments and in deciding if the parliament or the president has failed to fulfil a constitutional obligation.⁷⁷

3. Success and Criticisms of the SACC

The early decisions of the SACC were politically important when it declared that the death penalty is unconstitutional in *Makwanyenne*.⁷⁸ In doing so the SACC sent a clear message that in the new order human rights and democracy are entrenched in the Constitution.⁷⁹

The SACC was equally bold to refuse the certification of the text of the new constitution (1996), thereby essentially ‘declaring the Constitution unconstitutional’.⁸⁰ In face of politically sensitive matters, the Court upheld its pledge to defend the constitution. For example, in the case of *Western Cape*,⁸¹ the Court invalidated President Mandela’s initiative to amend the Local Government Transition Act in order to favor the ANC in the Western Cape.⁸² And more recently, the SACC unanimously decided against the South African President for violating the constitution in using public money for home improvements, ordering President Zuma to reimburse the State.⁸³ This is a significant ruling as it checks the conduct of the executive which ultimately prompted the President to offer to pay some of the used state funds.⁸⁴

In its role as rights protector, the SACC has received mixed comments, especially in the realm of socio economic rights. In *Soobramoney v Minister of Health (KwaZulu-Natal)*,⁸⁵ regarding

⁷² Sipho Hilongwane, ‘No 17: A Constitutional Amendment (almost) everyone agrees on’, (Daily Maverick: 22 Nov 2012) <<https://www.dailymaverick.co.za/article/2012-11-22-no-17-a-constitutional-amendment-almost-everyone-agrees-on/#.WNSUwxJ95XQ>> accessed 19 February 2018.

⁷³ Section 172 (2) of the South African Constitution.

⁷⁴ Section 167(5) of the South African Constitution.

⁷⁵ Section 167(4) of the South African Constitution.

⁷⁶ Section 79(3) and (4) and Section 121 of the South African Constitution. High Courts too underwent changes where 17th Amendment established one single High Court of Africa with divisions in nine provinces in the country.

⁷⁷ Section 167(a) of the South African Constitution

⁷⁸ *State v Makwanyane and Another*, 1995 (3) SA 391(CC); 1995 (6BCLR) 665(CC).

⁷⁹ Klug, (n 37) 99.

⁸⁰ James L Gibson and Gregory A. Caldeira, ‘Defenders of Democracy? Legitimacy, Popular Acceptance and the South African Constitutional Court’, (February 2003), *Journal of Politics*, Vol 65, No.1, 7

⁸¹ *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*, 1995.

⁸² Gibson and Caldeira (n 80) 7.

⁸³ Normistu Onishi, ‘Jacob Zuma’s Home Improvements Violated South Africa’s Constitution’ (New York Times: March 2016). <https://www.nytimes.com/2016/04/01/world/africa/south-africa-court-president-jacob-zuma.html?_r=0> accessed 15 February 2018.

⁸⁴ Carol Hills, ‘Jacob Zuma offers to pay back some of the \$23million in state funds used to upgrade his private home’, (03 February 2016) <<https://www.pri.org/stories/2016-02-03/jacob-zuma-offers-pay-back-20-million-upgrades-his-private-home>> accessed 15 February 2018.

⁸⁵ 1998 (1) SA 765 (CC).

the right to access to health care services, the Court was criticized for rejecting the appeal on the ground that such right is dependent on the available scarce resources, rendering the constitutional guarantees meaningless.⁸⁶

Nevertheless, SACC was applauded in *Grootboom*,⁸⁷ and Treatment Action Campaign⁸⁸ for operationalizing socio-economic rights,⁸⁹ especially acting in ‘a context in which policy debate was stifled and the ruling party caucus in an ANC-dominated legislature prevented effective legislature oversight’⁹⁰. However, the enforcement of these decisions has been problematic as the government had drastically undermined the authority of SACC.⁹¹ Despite the problems of enforcement, however, SACC has managed to achieve legitimacy in successfully adjudging contentious political and social issues and taking the role of a ‘policy watchdog’.⁹²

III. IS ‘SACC’ A GOOD MODEL FOR SRI LANKA?

One key caveat in comparative constitutional studies is avoiding the danger of finding superficial similarities. As Frankenburg points out, differences appear with a closer look at the ‘peculiar arrangements of the different building elements’ in respect of their design and internal relations, in accentuating conceptual varieties and privileging certain archetypes.⁹³

Therefore, in understanding SACC, it is important to realize that the conceptual foundation of SACC was to establish a new court with representatives of South Africa’s diverse population, to protect the Constitution and the fundamental human rights after the end of apartheid.⁹⁴ Despite the factual differences, this conceptual foundation is not entirely different from what Sri Lanka aims to achieve. Sri Lanka too requires a Constitutional Court that protects the supremacy of the Constitution and that renders judgments establishing important principles on justice and plural democracy. However, the changes made under the 17th Amendment have a significant bearing over the adoption of a similar model in Sri Lanka. The following section will therefore examine the suitability of the SACC design to Sri Lanka and its powers and functions in relation to other organs of State and other courts.

1. SACC Design: Structure and Powers

(a) Appointments and Removals

The eligibility criteria for judicial appointments in the SACC aimed at reflecting racial and gender composition of South Africa, is significant under the multiracial fabric of Sri Lanka.

⁸⁶ Lyn Berat, ‘Constitutional court profile’, (3 Int’l J. Const. L 39: 2005) 66.

⁸⁷ *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC).

⁸⁸ 2002 (4) BCLR 3 56 (T).

⁸⁹ Stephen Gardhbaum, ‘Are Constitutional Courts Always a Good Thing for New Democracies’, 53 *Columbia Journal of Transnational Law* 285, 1298.

⁹⁰ A Butler, ‘The Negative and Positive Impacts of HIV/Aids on Democracy in South Africa’, *Journal of Contemporary African Studies*, 23 1 (2005) 13.

⁹¹ Lyn (n 86) 70.

⁹² Theunis Roux, ‘Constitutional Courts as democratic consolidators: Insights from South Africa after 20 years’, (2016) *Journal of Southern African Studies*, 15.

⁹³ Gunter Frankenburg, ‘Comparing Constitutions: Ideas, ideals, and ideology – towards a layered narrative’, (2006) 4 *International Journal of Constitutional Law* 439, 458.

⁹⁴ See ‘The establishment of the Constitutional Court of South Africa 1994’

<http://www.sahistory.org.za/article/establishment-constitutional-court-south-africa-1994> accessed 12 February 2018.

Currently, the Supreme Court bench is composed of judges belonging to the majority.⁹⁵ However, it is argued that less consideration was given to disability and sexual orientation diversity in the South African Constitution⁹⁶ - an aspect that the drafters of the new Sri Lankan constitution should take into account. The South African Constitution also provides for not only members of the existing judiciary but also for eminent persons. In this manner, judges with expertise in constitutional law and eminent former public officers in Sri Lanka could contribute to the jurisprudence of the Constitutional Court.⁹⁷

Regarding the appointment process, even though the South African JSC listing process is widely appreciated for its transparency, there is room for political influence because nominated names (prior to shortlisting), are not published. This process has been criticized for excluding people who do not share the same political opinion.⁹⁸ The current appointment process to the Supreme Court in Sri Lanka requires the President to make nominations to the Constitutional Council, on whose approval the President shall appoint the Chief Justice and other judges of the Supreme Court.⁹⁹ In the Interim Report, the constitutional court is proposed to consist of judges of the Supreme Court who are appointed by the Supreme Court.¹⁰⁰ However, the initial nominations for the Supreme Court by the President, too, give room to use his/ her discretion. Therefore, it is important to design an alternate mechanism to avoid political influence in the appointing process- perhaps by adopting the JSC list procedure in the SACC appointment process where the nominations too are published.

The removal process of judges is a key concern for Sri Lanka and learning for the past experiences, it is imperative to include constitutional safeguards against arbitrary impeachments of judges. The current process of removal of judges of the superior courts did not undergo any change by the 19th Amendment which is considered a critical omission.¹⁰¹ Removal is still limited to an order of the President, supported by a simple majority in Parliament.¹⁰² Instead, South Africa offers a better alternative by requiring a 2/3rds majority in the legislature.¹⁰³ Thus, the structure of the SACC provides meaningful insights for the drafters of the new constitution in relation to the appointment of judges to a constitutional court and their removal.

(b) Powers and Functions

Powers in Relation to Other Organs

⁹⁵ See Supreme Court of Sri Lanka, <http://www.supremecourt.lk/>.

⁹⁶ Penelope E. Andrews, (n 51) 566.

⁹⁷ Transparency International Sri Lanka, 'TISL Written Submission to the Public Representations Committee Proposed Recommendations for New Constitution', <<http://www.tisrilanka.org/tisl-written-submission-to-the-public-representations-committee-proposed-recommendations-for-new-constitution/>> accessed 15 March 2018.

⁹⁸ Penelope E. Andrews (n 51) 567.

⁹⁹ Art 41(c)(1) of the 19th Amendment to the Constitution of Sri Lanka.

http://slembassyusa.org/country_information_update/19th-amendment-to-the-constitution-of-sri-lanka/

¹⁰⁰ The Constitutional Assembly of Sri Lanka, 'The Interim Report of the Steering Committee' (21 September 2017), 30, <http://english.constitutionalassembly.lk/images/pdf/interim-report/ReportE%20CRR.pdf> accessed 21 October 2017.

¹⁰¹ *Sri Lanka BRIEF*, (29 June 2015) Prof. Savithri Goonesekere's key note address at "19A: Landmark of Democratic Revival", a panel discussion held on 16 June 2015 at Jaic Hilton, Colombo published as '19th Amendment and the future of Sri Lanka', [Online]. < <http://srilankabrief.org/2015/06/the-19th-amendment-and-the-future-of-sri-lanka-prof-savitri-goonesekere> > accessed 16 March 2017.

¹⁰² Provided such notice of resolution is signed by 1/3rd in Parliament before placing in the Order Paper (Article 107(2) of the Constitution of Sri Lanka).

¹⁰³ Section 177(b) of the South African Constitution

The South African Constitutional Chapter on Courts begins with a blanket prohibition regarding the interference of the judiciary by the other organs, and with an express provision stating that courts will only be subjected to the constitution and the law,¹⁰⁴ assuring their independence constitutionally. Referring to the South African Constitution, the Sub-Committee on judiciary has currently proposed to the Constitutional Assembly to adopt a similar express provision in the new constitution¹⁰⁵ - for which it is imperative to amend Article 4(c) of the Sri Lankan Constitution: 'the judicial power of the People shall be exercised by Parliament through courts'. Therefore, in essence, a Constitutional Court for Sri Lanka means a shift from the powerful executive and from the subordination of courts to the Parliament, into a Constitutional democracy; a more balanced system of separation of powers.

Judicial Review of Legislation

Judicial review is the core check by the Constitutional Court and a most controversial form of constitutional adjudication as the judiciary is raised to be the ultimate constitutional arbiter of all laws.¹⁰⁶ The SACC enjoys this power both in form of 'abstract' and 'concrete' review. Whilst 'abstract review' assess the constitutionality of a Bill in the abstract without reference to a particular case, a 'concrete review' involves assessing constitutionality in an actual dispute before court.¹⁰⁷ The abstract review is exclusively vested in the SACC in limited instances of referrals from the President or by the Premier in a province.¹⁰⁸ A similar abstract review is vested in the Supreme Court of Sri Lanka (SLSC) where the President may refer a Bill to the court or a citizen/ body may challenge the constitutionality of such bill in the SLSC.¹⁰⁹ However, the SLSC can only exercise pre-enactment judicial review. The impetus to establish a Constitutional Court in Sri Lanka is hence, primarily to empower such court with judicial review of legislation. Similarly, the broader access to the court provided by individual direct access to SACC¹¹⁰ is an innovative approach that Sri Lanka could adopt in the new constitution, in the realizing access to justice to all.

In addition to reviewing constitutionality of legislation, the SACC also enjoys exclusive jurisdiction to decide on disputes between organs of state in respect of their competencies.¹¹¹ This will be an important provision for Sri Lanka in view of potential disputes between central government and provincial councils- more specifically in identifying their scope of legislative power for matters falling under the Ninth Schedule.¹¹²

The scope of judicial review of the SACC also extends to parliamentary and presidential constitutional obligation¹¹³ – this wider scope of judicial review seems necessary for Sri Lanka

¹⁰⁴ Section 165(2) of the South African Constitution.

¹⁰⁵ Sub-Committee Report on judiciary, (n 2).

¹⁰⁶ Francois Venter, *Constitutional Comparison: Japan, Canada and South Africa as Constitutional States*, (Kluwer Law: 2000) 80.

¹⁰⁷ See Stark (1999) in Venter (n 106), 79, fn 92.

¹⁰⁸ Section 167(4)(b) of the South African Constitution.

¹⁰⁹ Art 121(1) of the Constitution of Sri Lanka. There was also provisions where the President refers an 'Urgent Bill' in the national interest to the SLSC to be determined within 24hrs-72hrs as per presidential order. This takes away the possibility of making individuals challenges to the Bill. This provision was later repealed by the 19th Amendment.

¹¹⁰ Sec 167(6) of the South African Constitution.

¹¹¹ Sec 167(4) (a) of the South African Constitution.

¹¹² Ninth Schedule delimits the legislative powers between the central government and provinces by way of three lists: Reserved List (Exclusive for central government), the Provincial Council List (Matters falling under the Provincial Councils with the possibility for for the Central Government to also enact legislation) and the Concurrent List (matters falling within the scope of both central government and provincial councils) See 13th Amendment – Ninth Schedule to the Constitution of Sri Lanka.

¹¹³ Section 167 (4)(e) of the South African Constitution.

especially in view of executive conduct. A significant impediment to reproduce this provision concerns Presidential immunity from legal proceedings in Sri Lanka. However, subsequent to the 19th Amendment, president loses his/her immunity against fundamental rights applications.¹¹⁴

Constitutional Rights

In respect of constitutional rights, the South African Constitution includes a Bill of Rights in Chapter 2 including justiciable socio-economic rights. In the Constitution of Sri Lanka, the economic and social rights are placed as a part of Directive Principles of State Policy¹¹⁵ which are only guiding principles for the State and, consequently, not justiciable. The Sub-Committee of Fundamental Rights has recommended the inclusion of the justiciable social and economic rights.¹¹⁶ Another key aspect in rights protection in South Africa, is that it equally applies to private actors. By contrast fundamental rights are justiciable only against executive or administrative action in Sri Lanka.¹¹⁷ Therefore, in order to enhance the scope of the constitutional court, an adoption of a comprehensive Bill of Rights similar to South Africa, is primordial.

In respect of international law and its effect in domestic law, customary international law is part of South African Law to the extent that it is consistent with the constitution¹¹⁸ and in interpreting legislation courts are required to do so in a manner that is consistent with international law.¹¹⁹ This judicial competence empowers the courts to interpret rights in accordance to international standards. In the absence of such provisions, the Sri Lankan judiciary can only enforce international law if the enabling legislation has been adopted after ratification of a treaty by the state.¹²⁰ Therefore, enabling similar competence for rights interpretations will further elevate the scope of a Constitutional Court in Sri Lanka.

In sum, the SACC's powers of judicial review of legislation and rights protection provide valuable perspectives to Sri Lanka.

Powers in Relation to Other Courts

As discussed earlier, SACC's relationship with other courts changed with the change in jurisdiction under the 17th Amendment. By removing its exclusive specialist character on constitutional matters and instead adding to it, appellate jurisdiction for non-constitutional matters, essentially shifted the concentrated judicial review of the SACC to a diffuse system. This has been criticized for defeating the valuable constitutional purpose the South African Constitutional Assembly sought to achieve at the time of drafting the constitution (1996) after having due regard to constitutional review mechanisms around the world.¹²¹ Moreover, SACC includes fewer experienced judges in general legal matters in order to accommodate other eminent persons in view of its specialist constitutional character.¹²² More experienced judges were required to adjudge appeals on general matters and hence the decision to maintain two

¹¹⁴ Clause 7 of the 19A, Article 35 of the Constitution.

¹¹⁵ Mario Gomez, 'Constitutionalizing Economic and Social Rights in Sri Lanka', (CPA Working Papers on Constitutional Reform No.7: September 2016) 3.

¹¹⁶ The Sub-Committee of Fundamental Rights. <<http://english.constitutionalassembly.lk/images/pdf/01-Fundamental-Rights-ste.pdf>.> accessed 12 December 2017.

¹¹⁷ Article 17 of the Constitution of Sri Lanka.

¹¹⁸ Section 232 of the South African Constitution.

¹¹⁹ Section 233 of the South African Constitution.

¹²⁰ Gomez, (n 115) 22-23.

¹²¹ Justice Ian Farlam, 'Should the ConCourt be our apex court' (13 April 2012).

<<http://www.politicsweb.co.za/news-and-analysis/should-the-concourt-be-our-apex-court>.> accessed 18 March 2018.

¹²² Section 174(5)- four out of eleven judges are from the ranks of the judiciary.

apex courts.¹²³ The 17th Amendment was passed with no regard to any of these concerns and nor was any reason given or public debate advanced to demonstrate any drawbacks in having a specialist constitutional court.¹²⁴

As evinced in Section 1, Sri Lanka is currently facing a similar transitional moment that the Constitutional Assembly of South Africa had to face. Therefore, a concentrated system of judicial review seems to be more plausible. Nevertheless, a new constitutional court, being new comers to the judiciary could easily prompt a “battle of the courts” where highest level ordinary courts would find the constitutional court intruding in their domain.¹²⁵ The issue at heart essentially involves on how judicial power is distributed between the old and new courts. The Kelsenian model resolved the issue by conferring constitutional matters to constitutional courts through abstract review of legislation and the application of ordinary legislation to ordinary courts.¹²⁶ However, with the advent of individual complaint and incidental review (referrals by ordinary courts on constitutional questions), the constitutional courts had to engage in adjudication of individual cases by ordinary jurisdiction.¹²⁷ In addition, with the difficulties in ascertaining what constitutes a constitutional matter, a constitutional court goes beyond its jurisdiction to visit other branches of law.¹²⁸ Therefore, as argued by Garlicki, a genuine separation of constitutional jurisdiction and ordinary jurisdiction is not possible under a modern *Rechtsstaat*.¹²⁹

Nevertheless, a concentrated system is free from the tasks of ordinary adjudication, enabling the judges of a constitutional court to engage in deep discussion involving the fundamental issues at hand.¹³⁰ In fact, under the current system in Sri Lanka, the Supreme Courts exercises exclusive jurisdiction in constitutional matters, that other courts when presented with one, are required to refer it to the Supreme Court.¹³¹ Therefore, conferring exclusive power on constitutional matters to a Constitutional Court and conferring final appellate jurisdiction on the Supreme Court, will not create tension amidst the other courts as such jurisdiction was never vested on them originally. A constitutional court could also reduce the volume of the caseload in the Supreme Court which is also the final court of all appeals, thereby avoiding delay in the resolution of other matters, pending the resolution of constitutional cases.

On the other hand, perhaps the problem of demarcating the scope of jurisdiction between courts was relatively addressed in South Africa prior to the 17th Amendment, by vesting concurrent constitutional review with the Supreme Court of Appeal and High Courts. Therefore, when issues consisting both constitutional and non-constitutional matters arise, it will be dealt with courts exercising constitutional and general jurisdiction (i.e. High Courts and Supreme Court of Appeal). This mechanism helps to reconcile the problem of the constitutional court encroaching on other branches of law. It is argued equally that this decentralized system of judicial review is in line with country’s common law background.¹³²

Thus, the decentralized system of judicial review could also be a model for consideration for Sri Lanka. It is desirable to confer concurrent jurisdiction on constitutional

¹²³ Farlam, (n 121).

¹²⁴ Ibid.

¹²⁵ Tushnet, (n 19) 52.

¹²⁶ Lech Garlicki, ‘Constitutional courts versus supreme courts’, 46.

<https://www.oxfordjournals.org/content/5/1/44.full.pdf> accessed 15 March 2018.

¹²⁷ Ibid.

¹²⁸ Ibid, 48.

¹²⁹ Ibid, 49.

¹³⁰ Victor Ferreres Cornella, *Constitutional Courts and Democratic Values*, (Yale University Press: 2009) 36

¹³¹ Article 124 and Art 125 (1) of the Constitution of Sri Lanka.

¹³² Kierin O’Malley, ‘The Constitutional Court’ in Murray Faure & Jan- Erik Lane (eds) *South Africa: Designing New Political Institutions*, (SAGE Publications:1996), 80.

matters to the Supreme Court and the Court of Appeal,¹³³ given the judicial experience and expertise in public law, as opposed to the District Courts or High courts with specialized jurisdictions in civil and criminal matters respectively. The final appeal of fundamental rights matters could be vested with the constitutional court, thereby addressing the current criticism of not having an appeal mechanism for fundamental rights decisions.¹³⁴

There is no single correct way to structure a constitutional court as it varies with the way in which countries would require, in relation to the jurisdiction and powers, access to those courts, mode of appointment and the effects of a judicial declaration of constitutionality.¹³⁵ In the Sri Lankan context, there is wider support for a constitutional court as evinced in the sub-committee report on the judiciary. Nevertheless, situating a specialist court has its in-built defects in discerning what constitutes a constitutional matter. As such, concurrent jurisdiction on constitutional matters is preferable in the judicial structure. But it is essential that the constitutional court exclusively deals with constitutional matters because by conferring ordinary appellate jurisdiction to the constitutional court, it defeats the very purpose of Sri Lanka's requirements in establishing a specialist court for constitutional matters as discussed in Section 1. Therefore, the SACC prior to 17th Amendment appears to be a more suitable model for Sri Lanka.

IV. CONCLUSION

The Constitutional Assembly of South Africa, by establishing the SACC, undoubtedly designed one of the formidable institutions of its time that manages to deliver amidst severe political pressure. Its robust judicial architecture therefore offers to be an exemplary model for Sri Lanka. The SACC basic structure including the appointment and removal process of judges, and the broader powers of judicial review of legislation and rights protection against other organs provide valuable insights. Yet, the 17th Amendment changes the jurisdiction of the SACC by conferring it general appellate jurisdiction. This significantly alters what Sri Lanka wants to achieve, i.e. a specialist court exclusively for constitutional matters. However, the study also reveals the inherent problem that exists in specialist courts in discerning constitutional matters from general legal matters. The judicial design of SACC prior to the 17th Amendment managed to relatively address this by vesting concurrent constitutional jurisdiction with the Supreme Court of Appeal and the High Courts, subject to the confirmation of the SACC-thereby, retaining its specialist constitutional character. In view of the arguments advanced in this paper, it therefore, appears that the SACC design prior to the 17th Amendment to be a more appropriate design for Sri Lanka, especially in consideration of the wider public support to establish a specialist constitutional court in Sri Lanka.

¹³³ The Court of Appeal jurisdiction includes Writ Jurisdiction (Art 140 and art 141).

¹³⁴ 'Sri Lanka's Judiciary: Politicised Courts, Compromised Rights', (International Crisis Group Asia Report No. 172: 30 June 2009) 6.

¹³⁵ Donald L Horowitz, 'Constitutional Courts: Opportunities and Pitfalls' 3-4, <http://www.constitutionnet.org/sites/default/files/E24ConstitutionalCourtsOppsPitfallsHorowitz.pdf> accessed 12 March 2018.