

# Ensuring Good Administration through the Development of Judicial Review in Sri Lanka

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**Abstract-** Administrative Law relating to judicial control in Sri Lanka has developed several principles such as proportionality, legitimate expectation, public trust doctrine and right to equality by two ways of challenging the discretionary powers of public authorities: writs and fundamental rights. Application of these grounds reflects the tendency of upholding the rule of law. However these have nurtured the scope of exercising the power of judicial review of a given jurisdiction and accordingly have given finer meaning to the exercise of judicial power of the people by the judiciary and attempt to uphold the concept of 'good administration'. In this discussion, though defining the concept of good administration is one of the objectives of the research, it is a difficult task. Good administration is a polysemic and evolutionary concept which means different things in different national systems and its content tends to evolve according to the necessary changing social and economic environments and community interests. In this backdrop, the study seeks to define the concept within the scope of Administrative Law in Sri Lanka. Further, the study will look at the concept as an aspect of lawfulness and from its function perspective. Hence, the development of judicial review has been considered mainly for an in-depth analysis. Therefore, the main problem of the research is that does the development of judicial review is compliance with the principles of good administration and if so to what extent the standards of judicial review contribute to the attainments of the regulatory goals of administrative law. For providing an answer, the study examines the relationship between administrative procedures, the duty of giving reasons, and the citizens' participation in relation to the quality of the administrative behavior. Further, the research takes into account some national experiences and will reflect about crucial issues connected with fundamental rights and writs to challenge administrative actions and how those ensure good administration. In line with these reasoning, researcher attempts to draw the relationship between good administration and the development of judicial review and suggest recommendations to ensure good administration. The research will adopt a qualitative approach and as sources of the research, secondary resources such as library research and internet that

include books, journal articles are utilized. In addition, as primary sources, the study will consider the role of the Constitution and other relevant legislation. Case law intervention is discussed for analyzing the compliance with the concept.

**Key Words-** Good Administration, Judicial Review, Fundamental Rights, Public Authorities

## I. INTRODUCTION

Administrative Law relating to judicial control in Sri Lanka has developed several principles such as proportionality, legitimate expectation, public trust doctrine and right to equality by two ways of challenging the discretionary powers of public authorities: writs and fundamental rights. Application of these grounds reflects the tendency of upholding the rule of law. However these have nurtured the scope of exercising the power of judicial review of a given jurisdiction and accordingly have given finer meaning to the exercise of judicial power of the people by the judiciary and attempt to uphold the concept of 'good administration'.

The emergence of welfare state resulted in the emergence of administrative agencies without a statutory basis. Under this, more power had to be accorded to the agencies in view of the wide range of functions assigned to them. In this background, though the wide range of powers assigned to these agencies required judicial intervention, which could not be rationalized on parliamentary intent. Therefore, judiciary intervention was justified on broad principles of good administration. The concept ascertains the idea that "a framework concept draws together a range of rights, rules, and principles guiding administrative procedures with the aim of ensuring procedural justice, public administration adherence to the rule of law and sound outcomes from administrative procedures.<sup>31</sup> These principles have been developed with close relationship

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<sup>31</sup> H.C.H. Hoffman, G.C. Rowe, A.H. Turk, Administrative Law and policy of the EU, Oxford University press, 2011, p.190

with the rule of law and percept of procedural justice in public administration. Under the European administrative law good administration is considered as two perspectives which includes as a general principle and as a fundamental rights.

Considering the applicability of the concept to the Sri Lankan Law, it can be seen that there is no direct applicability of the concept due to the reason that Sri Lanka is not a member state of European Union. However, the positive argument can be raised based on the English Law applicability. In the case *Abdul Thasim vs. Edmond Rodrigo*<sup>32</sup> held that the words 'according to law' in section 42 of the Court Ordinance directs the court to issue the writs according to English Law. This interpretation was established by the decision in *Nakkuda Ali vs. Jayarathne*<sup>33</sup>. In light of this basis it is clearly express the view that Sri Lankan administrative law is based on English Law. If this applicability extends to present scenario, UK is being as a member state of EU, several grounds of judicial review have been developed such as legitimate expectation and proportionality. However, these developments are grappled by the Sri Lankan judiciary in a considerable extent at present and these grounds are promoting principles of good administration. The paper is arguing that this approach has facilitated the adoption of the principles of good administration.

Therefore, the purpose of this article is three fold. Firstly, paper will try to find out the meaning, nature and functions of the principles of good administration. Secondly, the interplay between good administration and judicial review and further qualitatively assess till what degree they mold each other with regard to their legal content. Thirdly, the paper provides possible suggestion to ensure good administration through develop grounds of judicial review.

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<sup>32</sup>Howard CJ stated :This writs specified in the section are unknown to Roman Dutch and Ceylon law and without calling in aid the English law the mandate could not issue and the legislature must be deemed to have enacted a meaningless provision.[1947] 48 NLR 121

<sup>33</sup>[1950] 51 NLR 457

## II.THE CONCEPT OF GOOD ADMINISTRATION

### A. *Grappling the Meaning*

Good administration is a complex and multi faceted concept<sup>34</sup> and it has been gradually developed with the certain legal actions of European Union. Under the concept several principles were defined such as equality, good administration as useful administration ( in the meaning of proportionality and legitimate expectations), proper functioning of public administration, establishing procedures for hearing users before hand and providing them with information, the principle of appointing an ombudsman, justifications of administrative decisions, the principle of access to administrative documents, the principle of establishing independent administrative authorities, and principle of establishing judicial protection.<sup>35</sup> The concept has been codified in two legal documents which are The European Ombudsman's Code of Good Administration Behaviour and the EU Charter of fundamental rights. In this background, good administration is considering both as a general principle of EU administrative law and as a fundamental right.

In addition, the Council of Europe recommendation 2007 of the Committee of Ministers to Member states on Good Administration was a recent effort to promote the relationship between administrative agencies and public. That notion is accepted by KlaraKanska, who says that "the notion 'good administration' developed as an umbrella principle, comprising an open-ended source of rights and obligations"<sup>36</sup> Article 41 of the EU Charter of Fundamental Rights lays down good administration as a fundamental right by declaring the right of every person to have his or her affairs handled in a certain way by the institutions and bodies of the Union. But, as per this article few procedural rights and duties are included. As defined in this article paragraph one, good administration is based on the principles of impartiality, fairness, and reasonable time limit.

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<sup>34</sup>Joana Mendes, Good administration in EU Law and the European Code of Good Administrative Behavior, EUI Working Papers, Law 2009, p.4

<sup>35</sup>Fortsakis,T., Principles of Governing Good Administration, European Public law, vol 11, no02, 2005, pp.207-217

<sup>36</sup>KlaraKanska: Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights. European Law Journal, Vol. 10. No. 3. Blackwell Publishing Ltd. 2004. p. 305

On this basis, two features of good administration can be identified. It comprises procedural guarantees that are primarily directed at protecting the substantive rights of the persons dealing with the European administration. And also it encompasses legal rules that structure the exercise of the administrative function primarily by reference to the objective interests.<sup>37</sup>

#### B. *Philosophical Basis of the Concept*

Considering the underlying philosophy of good administration, it is pertinent to take in to account the procedural aspects of administration and its rationales. Searching of an answer for this, one may argue that it is linked with the personal dignity because the administrative procedure is directly combined with the outcome of the decision. If that decision will affect the rights of an individual, he should have a proper remedy for that. Concerning this dignified approach, it can be discussed on the basis of Kant's idea of human dignity.<sup>38</sup> According to him, "free will" is essential; human dignity is related to human agency, the ability of humans to choose their own actions<sup>39</sup>. Further, the extension this idea in the light of administrative agencies, when there is an imbalance of power that exists between the public administrative authorities and individuals needs to be effectively controlled to restore citizens' rights, which have been infringed by an administrative authority. It is the judicial control of administrative actions, which guarantees that the State is fully subject to the law.<sup>40</sup> On this basis, author argues that the control of administrative discretion which is one of the core functions of administrative law has taken the philosophical foot print from the idea of human dignity. Moreover, this idea is facilitated as an evidence of recent grounds of judicial review such as legitimate expectation, proportionality and reasonableness that are checking the quality of the decision.

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<sup>37</sup>Page 05, Supra 04

<sup>38</sup> P.P. Craig, *Procedures and Administrative Decision Making, A Common law Perspective*, 5, *European review of Public law*, 55, (1993)

<sup>39</sup>O'Hara, Phillip Anthony (1999). "Human dignity". *Encyclopedia of political economy*. Routledge. p. 471.

<sup>40</sup> Council of Europe, *The Rule of Law and Justice – Achievements of the Council of Europe*, Strasbourg 1997: *Judicial Control of Administrative Acts*, Madrid, 13-15 November 1996 (p. 93)

Promotion of citizen participation is another underlying philosophy of the concept which reflects both deliberative democracy of Heberma's and participatory democracy of Pateman's. Simply, participatory democracy outlines as democratic legitimacy is exclusively based on an active and enduring participation of ordinary citizens. Deliberative democracy characterizes "political choice, to be legitimate, must be the outcome of deliberation about ends among free, equal and rational agents (Elster, 1998.5). Therefore, it implies that deliberative democracy rest on argumentation, not only in the sense that it proceeds by arguments, but also in the sense that it must be justified by arguments. In the purview of this rationale, reasonably argue that principles of natural justice were developed associated with this idea. Natural justice represents higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency must follow while taking any decision adversely affecting the rights of a private individual. It encompasses two rules which are no one should be made a judge in his own cause or the rule against bias (*Nemojude excusasua*) and hear the other party or the rule of fair hearing or the rule that no one should be condemned unheard(*audialterempartem*). In addition, the right to be given reasons for an administrative decision is an essential component of a fair administrative procedure in a democratic state. This is emerging as a third rule of natural justice. It encourages rational and structured decision-making, while minimizing arbitrary and biased outcomes thereby facilitating accountability and openness on the part of the administration.

This philosophical background has finally crystallized the view that rationale behind the concept of good administration is directly linked with the protection of the rights of individuals against public authorities and focuses the procedural fairness of the administrative decision making process.

#### C. *Good Administration as a General Principle of Law*

These principles were incrementally developed with the close relationship of the role of European Ombudsman. In July and September 1999, the Ombudsman made draft recommendations to 18 Community institutions and bodies adopt rules concerning good administrative behaviour for their officials in their relations with the public.<sup>41</sup> This draft contained twenty Seven articles. With

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<sup>41</sup> Special Report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of

minor modifications, European parliament was approved the draft in 2001. Under Article 03 of the draft code has demarcated material scope of the application. In terms of that this Code contains the general principles of good administrative behaviour which apply to all relations of the Institutions and their administrations with the public, unless they are governed by specific provisions. The rules are a combination of general principles of administrative law, principles of administrative procedure and non-legal standards related to service ethics. In the purview of general administrative law principles, lawfulness, non-discrimination, absence of abuse of power, impartiality and independence, objectivity, fairness, proportionality, legitimate expectation and right to a hearing before and adverse decision taken by a public authority. However, in the nature of the code, these principles are not legally binding. Therefore, this has only a guiding role and difficult to enforce it. It is reasonably argued that though these principles are effectively protect the rights of citizens in countries like Europe, it would be less effective in developing countries like Sri Lanka. The reason is that there is a huge gap between the political culture and personal liberty in these two segments.

#### D. Good Administration as a Fundamental Right

Initially, the EU Charter of Fundamental Rights had been listed right to good administration as a fundamental right. Article 41 of the EU Charter of Fundamental Rights lays down good administration as a fundamental right by declaring the right of every person to have his or her affairs handled in a certain way by the institutions and bodies of the Union.<sup>42</sup> Under article 41(1), the right defines as every person has the right to have his or her affairs handled impartially, fairly and within reasonable time. Further, article 41(2) stipulated sub rights including the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions. These rights are closely related with principles of natural justice which include

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Good Administrative Behaviour (OI/1/98/OV), Available at [http://www.pedz.uni-mannheim.de/daten/edz-b/omb/07/special\\_11-4-2000\\_en.pdf](http://www.pedz.uni-mannheim.de/daten/edz-b/omb/07/special_11-4-2000_en.pdf), Accessed on

<sup>42</sup>Margrét Vala Kristjánsdóttir, "Good Administration as a Fundamental Right", Icelandic Review of Politics and Administration Vol. 9, Issue 1, 2013, Pp.237-255)

*audi alteram partem* and duty of giving reasons for the decision made. On the basis of these rights, it can be reasonably argued that natural justice has been enforced by the right to good administration. Further, 'the right provided by the charter concerning good administration implies the explicit and visible confirmation of the existence of a legal duty for public authorities to be in the best position to be able to make appropriate decisions, thereby resulting in a common European inheritance. Therefore this duty implies important support for the procedural issues, which have now passed to a higher position.<sup>43</sup>

Concerning the relevancy of the right in Sri Lanka context, it was noticed that there were many issues on violating proper administrative procedure. The removal of former chief justice Shirani Bandaranayake was created a big controversy. The Parliamentary Selection Committee which was appointed for the purpose of investigating the charges against her was problematic. Allegations against the this PSC included personal bias of some PSC members against the Chief Justice, not informing the Chief Justice or her lawyers of the procedure to be adopted, not providing the Chief Justice adequate time to respond to the charges, and treating the Chief Justice in a derogatory manner. From the outset it was clear that some allegations against the Chief Justice were deeply flawed, which created apprehensions about the entire process. These apprehensions were further fuelled by the hurried manner in which the proceedings of the PSC were terminated and the report released overnight.<sup>44</sup> In this scenario, it is essential such a right to good administration to protect the individual rights of the citizens against administrative authorities.

#### 1.3 Case Law Jurisprudence

European Court has decided the necessity of adhering to the principles of good administration. In the case of *Interpoc vs. commission*<sup>45</sup> court finds that compliance with certain rules, principles or rights are "in conformity with the interest of good administration", or in a restricted version are "in the interests of sound

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<sup>43</sup>Juli Ponce, Good administration and administrative procedures, Indiana journal of Global Legal Studies, vol.12, Issue 02, 2005

<sup>44</sup><http://groundviews.org/2013/01/10/a-legal-primer-the-impeachment-of-the-chief-justice-in-sri-lanka/>

<sup>45</sup> [2003] ECR I-2125

administration of the fundamental rules of the Treaty. Further, the same view is taken by Advocate General Slynn in his opinion in *Tradax*.<sup>46</sup>

“Nor do I consider, as is submitted, that there is any generalized principle of law that what is required by good administration will necessarily amount to a legally enforceable rule. To keep an efficient filing system may be an essential part of good administration but is not a legally enforceable rule. Legal rules and good administration may overlap (e.g. in the need to ensure fair play and proportionality); the requirements of the latter may be a factor in the elucidation of the former. The two are not necessarily synonymous. Indeed, sometimes when courts urge that something should be done as a matter of good administration, they do it because there is no precise legal rule which a litigant can enforce.”<sup>47</sup>

*Tillack v Commission* [2006] ECR II-3995 held that the principle of sound administration, which is the only principle alleged to have been breached in this context, does not, in itself, confer rights upon individuals (Case T-196/99 *Area Cova and Others v Council and Commission* [2001] ECR II-3597, paragraph 43), except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000.

### III INTERPLAY BETWEEN THE GOOD ADMINISTRATION AND JUDICIAL REVIEW

Second objective of this study is to figure out the interplay between these two concepts. This section discusses about judicial review in light of promoting good administration. Administrative law deals with the powers and functions of administrative authorities, the manner in which the powers are to be exercised and remedies which are available to the aggrieved persons when those powers are abused by these authorities. In order to fulfill these tasks, Administrative law deals with one of its main aspects<sup>48</sup> which are prescribes the procedure to be followed by these authorities in exercising such powers. Focusing on this aspect, Administrative Law it is

suggested the judicial review litigation as a regulatory mechanism in pursuit of good administration with in government. Empowering this goal, administrative law embodies the principle of good administration is sufficiently prominent with in UK administrative law and scholarship that positing of good administration as a regulatory goal for judicial review.<sup>49</sup>

According to John Laws, “In the elaboration of principles of good administration the courts have imposed and enforced judicially created standard of public behavior. Their existence cannot be derived from the simple requirement that public bodies must be kept to the limits of their authority given by parliament.”<sup>50</sup> An important function of administrative law, including the contribution of the courts, is the vindication of the rule of law. The challenge is to amplify the concept in a way that is compatible with the democratic claims of majoritarian government and the tasks with which it has charged the modern administrative state, including the regulation of private power, the promotion of social equality, and the redistribution of wealth. That is where the situation can good administration play a major role. For achieving this objective judiciary has created certain new grounds of review rather than the doctrine of *ultra vires*.

The significance of changes in judicial review was reflected to the *Wednesbury* case<sup>51</sup>, *Ridge v Baldwin*<sup>52</sup> and the *GCHQ* case<sup>53</sup>. This, in turn, raises important questions relating to placing limits on judicial intervention. The *Wednesbury* test imposed a high threshold, keeping the courts from being drawn into the political process. The HRA and proportionality has tended to increase the profile of the courts. The principle of Legitimate Expectation has achieved an important place in developing the law of administrative fairness. The procedural legitimate expectation highlights the fact that ‘... when a public body has promised to follow a particular procedure, it is in the interests of good administration that it should act fairly and implement its promise, so long as implementation does not interfere with its statutory

<sup>46</sup> [1984] ECR 1385-6

<sup>47</sup> *Ibid*

<sup>48</sup> Jain & Jain , Administrative Law

<sup>49</sup> Simon Halliday, *Judicial review and Compliance with Administrative Law*, Hart Publishing, 2004

<sup>50</sup> John Laws, *Law and Democracy*, Public Law 72, 1995 ,

<sup>51</sup> [1948] 1 KB 223

<sup>52</sup> [1964] AC 40

<sup>53</sup> [1985] AC 374

duty...<sup>54</sup>.

#### A. Good Administration and Administrative Discretion

Administrative discretion, it is ordinarily meant that there are various alternatives that the executive authority can choose to take in a situation. This confers a wide power to choose a course of action and smells of arbitrary power being given in this case. However, the law has imposed a check such that this discretionary power is subject to fetters in the sense that the authority must exercise power within parameters laid down by the statute. This context is proved a famous statement called, where statute ends, tyranny begins. Therefore, only effective tool for the protection against tyranny is judicial review.

English law developed based on a theory of judicial review of administrative action. However, scholars began to recognize that smooth governance required that discretion be not eliminated completely, but check by the courts against improper exercised. Therefore, traditional administrative law is not specially interested in good administrative decisions but in the judicial review of illegal decisions.<sup>55</sup> Balancing point here is that discretion cannot be eliminated completely from the hands of the executive and similarly neither can unfettered discretion be granted. This was held in the case of *Padfield vs. Minister of Agriculture, Fisheries and Food*<sup>56</sup>.

Traditional notion of judicial review was mainly based on the doctrine of *ultra vires* and it was the central ground for questioning the lawfulness of an administrative decision. The doctrine of *ultra vires* means that discretionary powers must be exercised for the purpose which they were granted. Therefore, traditional *ultra vires* model is based on the assumption that judicial review is legitimated on the ground that the courts are applying the intent of the legislature.<sup>57</sup> This approach is negative in the sense of good administration.

However, new view point is concerned with the quality of

decisions. This trend focuses merits of the decision rather than the issue of legality. It is important that public administration makes both legal and correct decisions with proper reasoning back to them.<sup>58</sup> Particularly, welfare states have to balance development policies and individual rights both. Cases where mega development projects such as highway constructions, generating power plants and building new airports citizen's rights are severely affected and they expect good decisions in this regard. Therefore, it can be argued that new grounds of judicial review such as proportionality, legitimate expectation, non discrimination, fairness are catered for achieving this goal.

#### IV. DEVELOPMENT OF JUDICIAL REVIEW IN SRI LANKA

The Constitution of Sri Lanka has carried into effect the frame work of judicial review. Article 140 of the Constitution grants the power to Court of Appeal to issue writs and Article 154 P (4) of the constitution grants powers to Provincial High Court to issue writs. Article 140 explicitly provides that 'Subject to the provisions of the constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any court of first instance or tribunal or other institution and grant and issue, according to law orders in the nature of writs of *certiorari*, *prohibition*, *procedendo*, *mandamus and quo-warranto* against the judge of any court of first instance or tribunal or other institution or any other person.' In addition, Supreme Court in the exercise its entrenched fundamental rights jurisdictions from the Concept of People's Sovereignty.<sup>59</sup>

In this scenario, judicial review of administrative actions in Sri Lanka hardly met the development of English Law. This was highlighted Dr. Shivaji Felix as follows; 'In Sri Lanka the foundation of judicial review is constitutional and it is not referable to an incremental development of the Common Law.'<sup>60</sup> Whereas, it is necessary to argue that there is no obstacle to admit development in English Law .Because by judicial interpretation 'according to the

<sup>54</sup> Attorney General of Hong Kong vs. Ng Yuen Shui [1983] 2 A.C.629

<sup>55</sup> *Supra note 13*

<sup>56</sup> [1986] QB 716

<sup>57</sup> Chamila Thalagala, The Doctrine of Ultra Vires and Judicial Review of Administrative Action, Bar Association Journal of Sri Lanka, Vol. XVII, 2011

<sup>58</sup> *Supra note 13*

<sup>59</sup> Article 3 read with Article 4(c) and (d) of the Constitution of Sri Lanka, Gunarathne J.A., "The Scope and content of the Doctrine of Legitimate Expectation", Junior Bar Law Journal, [Bar Association of Sri Lanka-]

<sup>60</sup> Felix. S, "Substantive Protection of legitimate Expectation in Administrative Law", Sri Lanka Journal of International Law, [university of Colombo-2006], p.75

law' means English Law. In the case *Abdul Thasim vs. Edmond Rodrigo*<sup>61</sup> Howard CJ stated :This writs specified in the section are unknown to Roman Dutch and Ceylon law and without calling in aid the English law the mandate could not issue and the legislature must be deemed to have enacted a meaningless provision.

Having reminded this argument, it is important to notice that Sri Lanka has currently developed its own improvements; the use of administrative law concepts to define constitutional rights, the reliance of constitutional provisions to expand the ambit of the writ jurisdiction, adopting merit base review in judicial review etc. As per, Dr. Mario Gomez pointed out these developments have been accompanied by a relaxation in the rules of standing and the permitting of a larger category of persons to bring claims before courts.<sup>62</sup>

Though these developments are facilitated by the process of judicial interpretation, on the other hand recent cases were reflected the negative approach on protecting individual rights based on political bias. That is why Sri Lanka needs a proper framework for promoting good administration in the country.

#### A. Compatibility with Good Administration

This part of the paper scrutinise that to what extent develop grounds of judicial review are compatible with the requirement of good administration in European notion. As traditional grounds of review, Sri Lankan courts assert the view of administrative acts must be lawful, reasonable and comply with the rules of natural justice. In conventional approach, natural justice applied only in cases of judicial and quasi judicial action and not in cases of administrative action. Recent decisions have taken a different approach. In *Dissanayake vs. Kaleel*<sup>63</sup>, the Supreme Court stated that article 12 demanded an expansive, rather than a restrictive interpretation of the principles of natural justice. Further, in *Rajakaruna vs. University of Ruhuna*<sup>64</sup> Justice Sri Pavan held that natural justice is an integral part of equality assured by Article 12 and actions taken by the respondents must fair, just and reasonable.

<sup>61</sup> 48 NLR 228

<sup>62</sup> Mario Gomez, Blending Rights with Writs: Sri Lankan Public Law's New Brew,

<sup>63</sup> 1993 2 SLR 135

<sup>64</sup> Court of Appeal Minutes of 19<sup>th</sup> July 2004

Pertaining to the doctrine of legitimate expectation, When analyzing Sri Lankan case law, the generally emerge idea is that earlier courts were reluctant to explicitly recognize the doctrine of legitimate Expectation. This negative minded view of the courts reflected in the case *Laub vs. A.G.*<sup>65</sup>. This was a matter regarding grant of an extension for petitioner's visa. The controller for immigration and emigration was refused to grant a further extension. As per Ismail J, 'A foreign alien has no right and I could add no legitimate expectation of being allowed to stay. He can be refused; without reasons and without hearing once his time has expired he has to go.'<sup>66</sup>

In the case of *Gunawardana vs. Perera*<sup>67</sup> and *Meril vs. De Silva*<sup>68</sup> it is apparent that the substantive character of legitimate expectation has been recognized by our judiciary. Ensuring, this progressive development is in *Wickramarathne vs. Jayarathne*<sup>69</sup> case, Gunawardana J. provided explicit recognition of substantive legitimate expectation. According to his statement; "The doctrine of legitimate expectation is not limited to cases involving a legitimate expectation of a hearing before some right or expectation was affected but is also extended to situations even where no right to be heard was available or existed but fairness required a public body or officials to act in compliance with its public undertakings and assurances."

The new approach of Sri Lanka is that Supreme Court has also made use of the concept of substantive legitimate expectations where the fundamental right to equality was engaged.<sup>70</sup>

*Danapala vs. Disnayake* case<sup>71</sup>, the doctrine of legitimate expectation was interpreted with Article 12 (1) of the Constitution. These developments indicate that the judicial review based on legitimate expectation also gradually turning in to merit based review. However, it

<sup>65</sup> [1995] 2 SLR 88

<sup>66</sup> *Ibid* p.96

<sup>67</sup> [1997] 2 SLR 222

<sup>68</sup> [2001] 2 SLR 11

<sup>69</sup> [2001] 3 SLR 161

<sup>70</sup> . *Supra* note 3, Felix, P.79

<sup>71</sup> .[1997] 1 SLR 400

may argue that unlike Canada<sup>72</sup>, Sri Lanka has not transplanted the doctrine of legitimate expectation from English law to Sri Lankan Law. We have developed our own way with the constitutional basis.

As my opinion, this new approach can also be subjected to critic. In light with fundamental right jurisprudence; the decisions that affect fundamental rights are covered by judicial review. However, the Sri Lankan law should be developed in a way that how to protect the rights which are not guaranteed by the Constitution.

The principle of proportionality requires a reasonable relationship between an administrative or legislative objective and particular legislative or administrative means.<sup>73</sup> Therefore, the principle would be an effective principle to examine the effectiveness of action taken by the executive and administration ensuring that the executive's interference to the individual's interests is necessary and proportionate.<sup>74</sup> In the context of administrative law, this ground is based upon the assertion that 'a public authority may not impose

obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.<sup>75</sup> However, in Sri Lankan approach reveals that though this ground has used several judicial decisions, it is too lack an analysis of the scope of the doctrine.<sup>76</sup>

Focusing on the application of the ground of proportionality, it is noticed that case law interpretations are drawing a line of relationship between the offence and the punishment. It is hardly to see the analysis of the applicability and scope of the principle within the context of controlling discretionary power. Therefore, with regard to the applicability of the ground in judicial review as a mean of questioning administrative discretion, we are far behind.

Several recent cases brought examples that administrative actions should be within the scope of article 12(1) of the Constitution in Sri Lanka. In *Perera vs. Prof. Daya Edirisinghe*<sup>77</sup> stated that;

"Article 12 of the Constitution ensures equality and equal treatment even where a right is not granted by common law, statute or regulation, and this is confirmed by the provisions of Articles 3 and 4(d). Thus whether the Rules and Examination Criteria have statutory force or not, the Rules and Examination criteria read with Article 12 confer a right on a duly qualified candidate to the award of the Degree and a duty on the University to award such degree without discrimination and even where the University has reserved some discretion, the exercise of that discretion would also be subject to Article 12, as well as the general principles governing the exercise of such discretions." This statement caught up equality as a limitation of discretionary power. Public authority can exercise its discretion till this requirement fulfills.

Examining the existing position in Sri Lanka, it is reasonably noticed recent development in judicial review. Several grounds were developed in their own nature. Though the applicability of these grounds is not

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<sup>72</sup> .Wright,D., "Rethinking the doctrine of Legitimate Expectations in Canadian Administrative Law", Available at [https://doc-10-94-docviewer.googleusercontent.com/viewer/securedownload/dsn1aovipa7l846lsfcf94nedj8q2p4u/mt189p2ddrr6q1il0k9qvpigmufv9em6/1333607400000/Ymw=/AGZ5hq8BgbJY1gwaOYx83cPOdNw6/QRHRUVTaGxEN1dIMlhvay14OHZnY1lZZIVXeI9vSUFBSVU4ZE1xdEwwV0F1RHUzbG1DTVEyNDRkrR3ZueEkwNzEwbGRYVFJGU3VOUjd1bzQ4ckFXX3FDckVWWWdLR2pyNnUzWGNYN2JaRURwSkNIM0VoNkxka2hUcnZmNXJOBvc1LTFCsXdDUXR0Qlg=?docid=f804e2595d2630a3b0c028187a8b2887&chan=EAAAAG9RUGNOKHHFLz6SiP/y1L8iRBAXReo/1/aCIWvsThtX&sec=AHsqida721vFWNiIA7lxR8235rMV1mx3A5Q3p\\_CrHjNhUD43FH1oXafJuUraydWJjvl\\_PRXvcp\\_&a=gp&filename=35\\_1\\_wright.pdf&nonce=lon4h8dmdtfds&user=AGZ5hq8BgbJY1gwaOYx83cPOdNw6&hash=91t3r5ntb8t252dbl6j703b6h0bos4bc](https://doc-10-94-docviewer.googleusercontent.com/viewer/securedownload/dsn1aovipa7l846lsfcf94nedj8q2p4u/mt189p2ddrr6q1il0k9qvpigmufv9em6/1333607400000/Ymw=/AGZ5hq8BgbJY1gwaOYx83cPOdNw6/QRHRUVTaGxEN1dIMlhvay14OHZnY1lZZIVXeI9vSUFBSVU4ZE1xdEwwV0F1RHUzbG1DTVEyNDRkrR3ZueEkwNzEwbGRYVFJGU3VOUjd1bzQ4ckFXX3FDckVWWWdLR2pyNnUzWGNYN2JaRURwSkNIM0VoNkxka2hUcnZmNXJOBvc1LTFCsXdDUXR0Qlg=?docid=f804e2595d2630a3b0c028187a8b2887&chan=EAAAAG9RUGNOKHHFLz6SiP/y1L8iRBAXReo/1/aCIWvsThtX&sec=AHsqida721vFWNiIA7lxR8235rMV1mx3A5Q3p_CrHjNhUD43FH1oXafJuUraydWJjvl_PRXvcp_&a=gp&filename=35_1_wright.pdf&nonce=lon4h8dmdtfds&user=AGZ5hq8BgbJY1gwaOYx83cPOdNw6&hash=91t3r5ntb8t252dbl6j703b6h0bos4bc), Accessed by 05.03.2012

<sup>73</sup> H.A. Barnett & M. Diamantides, *Public Law Study Guide*, [London: University of London Press-2004], p.227

<sup>74</sup> R. Thomas, *Legitimate Expectation and Proportionality*, [Oxford: Hart publishing-2000], p.77

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<sup>75</sup> J. Jowell , "Is Proportionality an Alien Concept", *European Public Law*, Vol.2, [Netherlands: Kluwer Law International-1996], p.401

<sup>76</sup> See *Premarathne vs. UGC* [1993] 3 SLR 395, *Caldera vs. University of Peradeniya* (C.A. Writ No.572/2004), *Niedra Fernando vs. Ceylon Tourist Board and Others* [2002] 2 SLR 69

<sup>77</sup> [1995] 1SLR 148



similar with the applicability of English Law and European Law, Sri Lankan judiciary has tried to internalize the rationale of these grounds in Sri Lankan administrative law.

1) *Adopting the Concept of Good Administration in Sri Lanka*

When adopting the concept certain issues are remaining to resolve. The major issue is that the possibility of adopting European concept in to Sri Lankan legal system. Prima facie, it seems to be a persuasive authority only. Another problem here is that Code of Good Administrative Behaviour which includes general principles of good administration and European Charter of Fundamental Rights which includes right to good administration both are not internationally binding legal documents. Therefore, this cannot be done in a similar way of adopting international law in to domestic law. Moreover, it is difficult to build up a rationale link to adopt European regional law in to our legal system. These difficulties push our argument towards establishing our own Code of good administrative behavior within the boundaries of our Constitution. In this regards, Code of Good Administrative Behaviour can be considered as a model law.

On the other hand right to good administration can be ensured through fundamental rights under the constitution. It would be a better approach in a country like Sri Lanka. This right is closely linked with a set of other rights such as right of every person to have access to his or her file, give reasons for their decisions etc. Though the principle of natural justice was established by judicial decisions, if the constitution protects individual rights against arbitrary administrative actions it will gain a trust of people in a highly bureaucratic society. Moreover, as an umbrella right of certain other sub rights Constitutional recognition provides undisputable acceptability for it.

However, it is worth to look at the gradual development of judicial review in Sri Lanka. Though there are differences between English law and our law, any one cannot argue the fact that English law development did not influence for the development of Sri Lankan Law. Applicability was justified in earlier parts of the paper. As a member of EU, UK adopts its rules and principles. It is argued that as a member of commonwealth, Sri Lanka can import and associate with rules and principles which are

applying to them. On that basis, it is a possibility to adopt UK development in to our law.

Finally, it is interesting to note that Sri Lanka should draft their own code on good administration and include it in to the constitution by considering inherent factors of the country. EU examples should take in to account as a model.

#### V.CONCLUSION

The analysis of the concept of good administration in Sri Lankan context shows that it is not kept in with the phase of EU context. In European Union and United Kingdom the concept is ensured and applied in a very formal manner. As a result of that they have a codified law relating to that. It leads to establish procedural fairness, justice and human dignity and participation in a decision making process. Sri Lankan judiciary also has acquired its own developments in the field of judicial review by using certain grounds which leads to merit review such as legitimate expectation, proportionality and right based approach. The development of judicial review has tried to enforce the rationale of good administration; it is entirely depend on the interpretation of the judiciary and creative role of the judges. It reflects the uncertainty of the applicability and inequality. Therefore, it is remains that the necessity of a written law of ensuring good administration while balancing the administrative discretion. Finally, the paper suggests that codification of the principles of good administration as a right or as a general principle; but with certain exceptions to exercise administrative discretion will provide a better and novel approach for protecting individual rights against arbitrary actions of the administration.

#### BIOGRAPHY OF AUTHOR



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