



Position Paper

Urgent Bills, Transparency and Human Rights

The passage of the Underperforming Enterprises and Underutilized Assets Act, coming just one year after the adoption of the 18th Amendment, made it clear that the current Government is willing to use Article 122 to pass contentious bills under an expedited process reserved for emergencies. Article 122 was meant to be used only in extreme emergencies, such as sudden war and natural disasters. Instead, in the last two years this emergency provision has been used to seize assets of political opponents and centralize Presidential power.

Many well regarded Sri Lankans have made their position clear on so called Urgent Bills. Unequivocal statements in opposition to the use of the Urgent bill provision to pass legislation that deserves significant debate and input have come from leading thinkers, professional organizations, students, professors, political parties and NGOs. ¹

1. www.lankabusinessonline.com/fullstory.php?nid=2133174175; Sri Lanka's leading Chambers of Commerce opposed the Revival of Underperforming Enterprises and Underutilized Assets Act; <http://www.groundviews.org/wp-content/uploads/students-statement-english.pdf>



Problem Statement

Because of the fact that Sri Lankan legislation is not subject to judicial review, the passage of urgent bills effectively cuts out the citizenry and the political opposition out of the democratic process. Under Article 21 of the Universal Declaration of Human Rights (UDHR), codified in Article 25 of the International Convention on Civil and Political Rights (ICCPR) of which Sri Lanka is a member, citizens have a fundamental human right to participate in governance. Therefore, the use of the Urgent Bills provision would appear to undercut fundamental rights enumerated in the UDHR, and this argument has in fact been made by the Sri Lankan Bar Association.²

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

However, the Urgent Bills provision does not contravene Article 1 on its face. Art 21 of the UDHR goes on to explain how the right to participation may be exercised.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

To date, no credible source has questioned the overall validity of elections in Sri Lanka. And while some concerns have been raised, these concerns do not rise to the level of denying Sri Lankans a meaningful role in government.

This critical reading of the UDHR presents a paradox. On the one hand, the government has, in fact, passed fundamentally important legislation of questionable constitutional validity without the input of the citizenry or the opposition. On the other hand the government continues to maintain a clear dominance in popular support and faces little backlash from voters. Neither local elections in 2011 nor the now common practice of MPs crossing over without consulting their constituents has raised any significant political backlash at the level of “the people.” If such political backlash occurred and was in turn repressed, then there is no question that the abuse of the Urgent Bills

provision would in fact constitute a violation of the basic human rights of Sri Lankans. However, the mechanisms of democratic representation in Sri Lanka continue to function in at least basic compliance with international norms.

The conclusion that must be drawn that the use of the Urgent Bills provision is, in fact, an acceptable abuse of power by the government, and until such time as legitimate political opposition is proven to have no impact on such abuse, the Government is justified in its Urgent Bills strategy.

Therefore, Transparency International Sri Lanka, (TISL), in its role as an independent voice for accountability and transparency in government, calls for the voting public to hold their member’s of Parliament responsible for the gross abuses of the Urgent Bills provision, and recognizes that until the public does so, the Government has not violated the democratic rights of its citizens.

Abuse of the Urgent Bills Provision

One hundred and twenty eight Acts of Parliament have been passed as urgent bills since 1978. According to the Constitution, it is the Cabinet that is responsible for determining when a bill is urgent in the national interest.³ Since the Cabinet is headed and appointed by the President, and hypothetically, “[The President] could remove the members of the Cabinet overnight with no explanation, and theoretically there can be a one-man or one-woman Cabinet...it is in our Constitution.”⁴ Therefore, the President can exercise almost unfettered control over the determination of which bills are urgent. As a result, the provision has been used repeatedly for questionable reasons.

An inspection of the list of ‘Urgent bills’ enacted since 1978, “one wonders how and why many of them have been considered urgent. These included Universities Act, Local Authorities Act, Motor Traffic Act, Passports Act, Parliament (Powers & Privileges) Act, Parliamentary Pensions Act, and most of the Constitutional Amendments.”⁵

Effects of Urgent Bill Abuse

When the Urgent Bills provision is used, improperly, it disrupts the proper flow of legislation in three key ways.

2. Under a Constitution that explicitly recognizes the “Sovereignty of the People” that process is not acceptable, especially when no convincing reasons have been given as to the need to expedite this process. A coalition of Professors echoed those comments, <http://groundviews.org/2010/09/07/university-academics-statement-on-the-proposed-18th-amendment-to-the-constitution/>
3. Constitution of the Democratic Republic of Sri Lanka Art. 122(1).

4. TISL Sambhashana Discussion Forum 1.24.12, JC Weliamuna.

5. TISL Sambhashana Discussion Forum 1.24.12, Secretary General of Parliament, Ms Priyani Wijesekera.

6. <http://cimogg-srilanka.org/2007/10/bills-and-urgent-bills/>

First, the Urgent Bills provision puts a great degree of pressure on the Supreme Court. Article 122(1)(c) forces the Supreme Court to make a determination on constitutionality of the urgent bill within 24 hours, unless the President at his discretion allows for three days.⁶ This is an extremely brief time for a high court to determine the merits of a piece of legislation. Furthermore, within the one day period, it is all but impossible for any legal opposition to the bill to be raised. Since urgent bills are not publicly released, it is impossible to generate a legal challenge. However, the Attorney General, arguing in favor of the bill receives the Bill at least 24 hours in advance, providing some time to prepare argument, a privilege not afforded potential challengers.

Second, the Urgent Bills provision denies citizens the right to participate in the bill making process. Of course, citizens have no input in the drafting stage, a common element of best practices in legislative drafting. In fact, in the case of the Revival of Underperforming Enterprises and Underutilized Assets Act, the bill was drafted in secret, and “outside the purview of the usual drafting sources.”⁷ Even more troubling is that an Urgent Bill precludes the citizens’ right to petition the Supreme Court under Article 121 of the Constitution. Such petitions grant the Supreme Court three weeks to communicate its determination on the bill to the President and Speaker.⁸

Instead of granting citizen’s the right to participate in the process of bill formation and judicial review, the most recent Urgent Bill was only made public “after the review by the Supreme Court and possibly after its verdict had reached the Speaker of Parliament.”⁹

The Role of Judicial Oversight

The standard procedure under Article 78 (1) of the Constitution, every Bill should be published in the Gazette at least 7 days before it is placed on the Order Paper of Parliament. Publication is important because it enables an Art. 121 challenge. The filing of a petition places a stay on related proceeding in Parliament for three weeks, allowing the Supreme Court to determine the constitutionality of the Bill at a notified public hearing. This process of “pre enactment review” is vitally important because under the terms of Article 80 (3) of the Constitution,

once the Speaker has certified that a Bill has been passed by Parliament, no court can in any manner call in question the validity of the constitutionality of such law.¹⁰

Using the recent Revival of Underperforming Enterprises and Underutilized Assets Bill as an example, the bill was approved by the Cabinet of Ministers on October 20, 2011, and the draft was submitted to the Supreme Court. A three-judge bench comprising Chief Justice Shirani A. Bandaranayake and Justices P.A. Ratnayake and Chandra Ekanayake examined the provisions of the Bill on October 24, and the court’s determination was announced on the 25th.¹¹

However, the Revival of Underperforming Enterprises and Underutilized Assets Act was of highly questionable constitutional status. Article 157 of the constitution guarantees safety of foreign investment, yet the Bill expropriated assets owned in part by foreign corporations.¹²

A challenge brought by eleven employees of the Sevenagala Sugar Industries (Pvt) Ltd (a domestically owned business identified for expropriation), argued that Bill was unconstitutional as it “seeks to vest in the legislature powers which are executive and is anathema to the rule of law and good governance.”¹³ A further fundamental rights petition argued that the bill deprived owners to their fundamental right to own property.¹⁴ It must be remembered that the backdrop to these challenges was the Government’s expropriation of several highly profitable businesses under the argument that they were assets underperforming so badly that Government seizure was urgent.¹⁵

The Collapse of the basic right to participation

The complete lack of citizen participation in the passage of Urgent Bills effectively short-circuits the democratic process. Citizens are excluded from the formation, debate, amendment, and judicial review of Urgent Bills, with no more than a brief nod towards the actual ‘urgency’ of the proposed legislation. Without judicial review, there is not even an opportunity for citizens to address the content of Urgent Bills after their passage. Despite these concerns, the Parliament’s passing the most recent urgent bill by a landslide vote of 122 votes in favor and 46 against, makes clear that the citizen’s

7. <http://groundviews.org/2011/10/31/a-prima-facie-critique-of-the-new-bill-to-vest-in-the-state-under-performing-enterprises-and-under-utilized-assets/>
8. <http://www.srilankamirror.com/english/features/8607-the-expropriation-bill>
9. <http://groundviews.org/2011/10/31/a-prima-facie-critique-of-the-new-bill-to-vest-in-the-state-under-performing-enterprises-and-under-utilized-assets/>
10. Sarath Silva <http://www.infolanka.com/news/IL/dm138.htm>
11. <http://sundaytimes.lk/111106/Columns/political.html>

12. <http://sundaytimes.lk/111106/Columns/political.html>

13. <http://sundaytimes.lk/111106/Columns/political.html>

14. <http://sundaytimes.lk/111106/Columns/political.html>

15. For more discussion on the profitability of seized assets see, <http://www.lankanewspapers.com/news/2011/11/72240.html>; <http://sundaytimes.lk/111106/Columns/political.html>

basic rights to democratic governance have been abridged.¹⁶

However, before decrying the use of the Urgent Bills provision, it is necessary to consider the government's perspective. Members of Parliament serve at the discretion of their constituents. They are expected to vote in those constituents' best interest as demonstrated in regular elections. In 2010, the UPFA won by a landslide, narrowly missing the necessary total for an absolute 2/3rds majority. Soon after, without a single challenge under the Standing Orders of Parliament, sufficient numbers of MPs crossed the aisle to grant the government the absolute majority it needed. Those cross-over MPs continue to serve and continue to support the Government's agenda, despite the fact they were elected to represent the opposition. Local elections in 2011 did little to suggest that the government MPs have any reason to worry about future electoral support.

In a parliamentary system, MPs must demonstrate a dual responsibility. On the one hand they are responsible for their constituents and on the other to the party which they serve. If neither the parties nor the voters hold the MPs responsible, can one be surprised if they choose to serve their party without question?

The truth is, despite how unsavory, unacceptable or even immoral one considers the abuse of the Urgent Bills provision, it is a political tool. And the citizens have the power to prevent its use. Already the 18th Amendment and the Underperforming Enterprises and Underutilized Assets Act have demonstrated that the Government is willing to abolish essential checks and balances of government and risk scaring away badly needed foreign investment for political gain. If use of the Urgent Bills provision is not stopped, there is no reason to believe that more of such legislation will be passed in the coming year. It is the responsibility of citizens to hold their MPs accountable and to insist that they be allowed to participate in the democratic process.

16. The Island, Nov. 10, 2011.

Statement of Position

Therefore, in consideration of the large body of knowledge available on urgent bills;

Recognizing the destructive impact such bills have had on democratic governance in Sri Lanka, and in light of the structure of democratic rights guaranteed by Article 21 of the Universal Declaration of Human Rights, TISL takes the position that the voting public of Sri Lanka must:

- Hold their MPs responsible for their acquiescence to the abuse of the Urgent Bills provision,
- Express their democratic rights through direct lobbying of their MP, in person, by letter and by phone,
- Demand accountability for those MPs that cross the aisle without seeking approval of their constituents, and
- Refuse to endorse those MPs who voted in favor of the two Urgent Bills presented in 2010-11 by granting their vote to another candidate, of any party, who pledges to vote for Urgent Bills only when their urgency has been clearly demonstrated.

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