JUNIOR CONTRIBUTIONS

ගබ්සාව පිළිබඳ ශ්‍රී ලංකාවේ වත්මන් නීති තත්ත්වය සහ එය ව්‍යුහාත්මකව සංවර්ධනය විය යුතු ආකාරය පිළිබඳ නීතිවිද්‍යාත්මක විමර්ශනයක්

නීතිඥ සුරංග බණ්ඩාර සෙනෙවිරත්න
එල් එල්.බී. (ගෞරව) කොළඹ විශ්වවිද්‍යාලය

"සමාජය යනු ඉතා වේගයෙන් වෙනස් වන විෂමජාතීය වූ ගතික ප්‍රපංචයකි. නීතිය සහ පවත්නා සමාජ තත්ත්වය සංසන්දනයේදී පැහැදිලිවම පෙනී යන්නේ, පවත්නා සමාජ තත්ත්වය නීතිය අභිභවා සිටින බවයි".[1]

පවත්නා සමාජ තත්ත්වයට අනුරූපීව නීතිය යාවත්කාලීන වියයුතුය. නීතිය පිළිබඳව තාර්කික සහ විද්‍යාත්මක විශ්ලේෂණයක් කරනු ලබන ඕනෑම අයෙකුට නීතිය සර්වකාලීනව භාවිත කළ නොහැක්කක් බවට අවබෝධ වනු ඇත. කාලානුරූපීව විවිධ වූ නෛතික ගැටලු සහ සමාජ ගැටලු සමාජය තුළින් උද්ගතවේ. එකී සමාජ ගැටලු සහ නෛතික ගැටලු වෙනුවෙන් පෙනී සිටීමට නම් පවත්නා නීතිය යාවත්කාලීන කළ යුතුය.[2] මෙකී තත්ත්වය අවබෝධ කරගත් Talcott Parsons ප්‍රකාශ කරන්නේ, නීතියක් නිර්මාණය කරන විට සමාජ දත්ත එක්රැස් කළ යුතු බවත් ඒවාට ගරු කළ යුතු බවත්ය.[3] එබැවින් නීතිය හා සමාජය අතර පවත්නා අන්‍යොන්‍ය සබඳතාව පිළිබඳව සාකච්ඡා කිරීමේදී සමාජවිද්‍යාත්මක නීතිවේදීන්ගේ අදහස් බෙහෙවින් වැදගත්වේ. සමාජවිද්‍යාත්මක නීතිවේදීන් පිළිගන්නා පරිදි ප්‍රායෝගික ගැටලුවක් නිරාකරණය කළ හැකි අවසානාත්මක ක්‍රමවේදය වන්නේ, අදාළ ගැටලුව යථාර්ථය සමග ගැළපීමෙනි.[4] එබැවින් අදාළ ගැටලුව යථාර්ථය සමග ගැළපීමට නම් සමාජය පිළිබඳව පුළුල්ව අධ්‍යයනය කළ යුතුවේ. අදාළ අධ්‍යයනය තුළින් ගොඩනඟා ගන්නා නීතිය හරහා සමාජය තුළ ජීවත් වන එක් එක් පුද්ගලයාගේ පෞද්ගලික අභිමතාර්ථයන් සහ පොදු සමාජ අභිමතාර්ථයන් අතර ඇතිවන තරඟයේදී සාර්ථක තුලනයක් ඇති කළ හැකි වේ.[5]

නව නීතියක් පැනවීමට හෝ පවත්නා නීතියක් ප්‍රතිසංස්කරණය කිරීමට පූර්වයෙන් සමාජ අභිමතාර්ථයන් හඳුනා ගැනීමේදී සහ පවත්නා සමාජ තත්ත්වය අවබෝධ කරගැනීමේදී වඩාත් උපකාරී වන්නේ, විද්‍යාත්මක ක්‍රමවේදයකි (scientific method). සමාජය පිළිබඳ ව සාර්ථකව අධ්‍යයනය කළ හැකි විද්‍යාත්මක ක්‍රමවේදයක් මුල්වරට සමාජගත කරන ලද්දේ, Auguste Comte විසිනි. Herbert Spencer නම් නීතිවේදියා විසින්ද ප්‍රකාශ කරන ලද්දේ, මානව ප්‍රගතිය, නීතිය සහ සමාජ සංවර්ධනය යන ප්‍රපංචයන් අධ්‍යයනය කිරීම උදෙසා වඩාත් උපයෝගී ක්‍රමවේදය වන්නේ, විද්‍යාත්මක ක්‍රමවේදය වන බවයි.[6] Comte විසින් ඉදිරිපත් කළ විද්‍යාත්මක ක්‍රමවේදය පරීක්ෂණය, නිරීක්ෂණය, සංසන්දනය සහ ඓතිහාසික ක්‍රමවේදය යන සිව්වැදෑරුම් පියවරයන් හරහා සිදුකළ යුතුය.[7] මීට අමතර ව Rosco Pound විසින්ද මේ හා සමාන ප්‍රායෝගික ක්‍රමවේදයක් (empirical method) නීතිය හා සමාජය පිළිබඳව අධ්‍යයනය කිරීම උදෙසා හඳුන්වාදී ඇත. ඔහු විසින් නීති සම්පාදනයේදී අනුගමනය කළ හැකි මාර්ගෝපදේශයන් කිහිපයක් මේ තුළ දක්වා ඇත. එනම්, පැනවීමට නියමිත නීතිය මඟින් සිදුවන සත්‍ය සමාජ බලපෑම පිළිබඳව අධ්‍යයනය කිරීම, සමාජයට අනුරූප වන පරිදි නීතිය පැනවීම, නීතිය බලාත්මක

[1] Kermit L. Hall, *The Oxford Companion to American Law* (Oxford University Press, Oxford 2002) 751
[2] M.D.A. Freeman, *Lloyd's Intriduction to Jurisprudence* (6th, ELBS with Sweet and Maxwell, London 1994) 509
[3] Ibid, 535
[4] Ibid, 531
[5] Ibid, 514
[6] Ibid, 511-512
[7] Ibid, 511

කළ පසු එමඟින් අපේක්ෂිත අරමුණු ඉටුවන්නේද? යන්න අධ්‍යයනය කිරීම, පැවති නීතීන්හි අතීත බලපෑම පිළිබඳව අධ්‍යයනය කිරීම, බොහෝ අවස්ථාවලදී පනවන නීතිය සාධාරණ ව භාවිත කළ හැකි ද? යන්න අධ්‍යයනය කිරීම සහ පනවන නීතිය මඟින් සමාජ පාලනය නිසි අයුරින් ඉටුවනවාද? යන්න අධ්‍යයනය කිරීම ඒ අතර වේ.[8]

වර්තමාන සමාජය තුළ දැකිය හැකි ප්‍රබල සමාජ ගැටලුවක් ලෙස ගබ්සාව සම්බන්ධයෙන් පවත්නා නීති තත්ත්වය පෙන්වා දිය හැකිය. මෙම ගැටලු සමාජය දෙසට ව්‍යුත්පන්නව ඇත්තේ, ඊට අදාළ නීතියෙහි පවතින දැඩි සීමාකිරීම් ඔස්සේය. තායිලන්තය, ඇෆ්ගනිස්ථානය වැනි බොහෝ ආසියාතික රටවලට සාපේක්ෂව ගබ්සාව සම්බන්ධයෙන් ශ්‍රී ලංකාව තුළ පවතින්නේ දැඩි සීමාන්තික නෛතික ප්‍රතිපාදනයන්ය. එබැවින් ශ්‍රී ලංකාවේ මේ සම්බන්ධ නීතික්ෂේත්‍රයෙහි පවතින සීමාන්තිකභාවයට පිළියම් සෙවීම උදෙසා විද්‍යාත්මක ක්‍රමවේදය යටතේ එන පරීක්ෂණය, නිරීක්ෂණය, සංසන්දනය සහ ඓතිහාසික ක්‍රමවේදය යන පියවරයන් උපයෝගී කරගත හැකිය. එමඟින් අදාළ නීති තත්ත්වය සමාජ මතයට ඔබින පරිදිත් ගැටෙන අයිතිවාසිකම් තුලනය වන පරිදිත් ප්‍රතිසංස්කරණය විය යුත්තේ කෙසේද? යන්න පිළිබඳව නිශ්චිත අවබෝධයක් ලබාගත හැකිවේ.

ගබ්සාව යන්නෙහි සරල අර්ථය වන්නේ, ගර්භණීභාවය අවසන් කිරීමයි. ගබ්සාව පිටුපස බලපවත්නා නොයෙකුත් සමාජ, ආර්ථික, සංස්කෘතික කරුණු රාශියක් තිබෙන බව නොරහසකි. ගබ්සාවට එරෙහිව දැඩි සීමාකාරී වූ නෛතික ප්‍රතිපාදන පවත්වාගෙන යෑම තුළ ශ්‍රී ලාංකේය කාන්තාව මුහුණ පා ඇති අසරණ තත්ත්වය නූතන සමාජය තුළ වඩාත් ප්‍රබල ලෙස විද්‍යමාන වෙමින් පවතී. ඊට ප්‍රථමයෙන් ගබ්සාව සම්බන්ධයෙන් දැනට බලපවත්නා නීතිතත්ත්වය නිරීක්ෂණය කළ යුතුය. 1883 දණ්ඩනීති සංග්‍රහ පනතෙහි 303 වන වගන්තියේ සිට 307වන වගන්තිය දක්වාවූ ප්‍රතිපාදන තුළ ගබ්සාව සම්බන්ධයෙන් වන නීතීන් අන්තර්ගත වේ. එයට අනුව සද්භාවී චේතනාවෙන් යුක්තව කාන්තාවගේ ජීවිතය බේරා ගැනීම උදෙසා හැරුණු විට සිදුකරන සියලු ගබ්සා කිරීම් නීතිවිරෝධී වන අතර වසර 10ක උපරිමයකට යටත්වූ සිරදඬුවමකට සහ දඩයකට යටත් කිරීමේ හැකියාව පවතී. මෙම ප්‍රතිපාදන දෙස බලන විටි පෙනී යන්නේ, ශ්‍රී ලාංකේය ස්ත්‍රියකට ගර්භණීභාවය අවසන් කළ හැක්කේ, දරුගැබ හේතුවෙන් තමාගේ ජීවිතයට හානියක් වන අවස්ථාවකදී පමණි.

නීතියක යහපත් හෝ අයහපත්භාවය හෙවත් උපයෝගීතාව තීරණය කරනුයේ, නීතිය අදාළ වන සමාජයයි. ශ්‍රී ලංකාවේ ගබ්සාව සම්බන්ධයෙන් පවතින නීති තත්ත්වය ලංකාවේ සංස්කෘතික පදනම නියෝජනය කළ ද ඒ තුළින් සමාජ අවශ්‍යතාවයන් තෘප්ත නොකරන බව නූතන සමාජ සන්දර්භය පිළිබඳව අධ්‍යයනය කිරීමේදී වඩාත් හොඳින් නිරීක්ෂණය කළ හැකිය. රෝම සම්මුතියෙහි 7(1)(g) අනුව්‍යවස්ථාවට අනුව කාන්තාවකට දරුගැබක් දැරීමට බලකිරීම මනුෂ්‍යත්වයට එරෙහි අපරාධයකි. ඒ අනුව යමින් නිරීක්ෂණය කළ හැක්කේ, ශ්‍රී ලංකාවේ පවතින මෙකී සීමාකාරී නෛතික ප්‍රතිපාදන මානුෂිකත්වය යටපත් කර ඇති බවයි.

ගබ්සාව නීතිගත කිරීමට එරෙහි වන්නන් හෘදයසාක්ෂිය, ආගම, වගකීම් සහගත බව යන කරුණු සිය මතය සාධාරණීකරණයට යොදා ගනී. කොන්දේසි සහිත ව ගබ්සාව නීතිගත කළ යුතු බවට වන මතය දරන්නන් වෛද්‍ය විද්‍යාත්මක සාධක සහ ස්ත්‍රියට එරෙහි ප්‍රචණ්ඩත්වය යන සාධක සිය මතය සාධාරණීකරණයට යොදා ගනී. ඊට අමතර ව ගබ්සාවට පූර්ණ අවසරය තිබිය යුතුය යන මතය දරන පිරිස් සිය මතය සාධාරණීකරණයට ස්වයංනිරණ අයිතිය යන්න පාදක කොටගනී.[9] මෙහිදී නිරීක්ෂණය කළ හැකි සාධකයක් වන්නේ, ගබ්සාව සම්බන්ධයෙන් වන සමාජ මතය පුද්ගල ආකල්ප මත හැඩගැසී ඇති බවයි.

ගබ්සාව ශ්‍රී ලංකාව තුළ අපරාධ වරදක් ලෙස හුවාදක්වා ඇති අතර සමාජයෙහි ඇතැම් පිරිස් ගබ්සාව සම්බන්ධයෙන් දරන මතය මිනීමැරීම නම් අපරාධයෙන් වෙන්කොට හඳුනාගෙන නැත. මනුෂ්‍ය ඝාතනය නීතියෙන් තහනම් කරඇත්තේ, මිනිස් ජීවිත ආරක්ෂා කිරීම යන පොදු අවශ්‍යතාවය සමාජය වෙත පැවරෙන හෙයිනි. නමුත් ගබ්සාවත් මනුෂ්‍ය ඝාතනයත් අතර පැහැදිලි වෙනසක් පවතී. මනුෂ්‍ය ඝාතනයකදී වින්දිතයා වන්නේ, ඝාතකයාගේ සිරුරින් පරිබාහිර ස්වාධීන ජීවියෙකි. නමුත් ගබ්සාවකදී වින්දිතයා වන්නේ, ජීවියෙකු නොව ඝාතකයාගේ සිරුර හා සහසම්බන්ධවූ පැවැත්මක් පමණි. එනම්, වෛද්‍ය විද්‍යාත්මකව ගත්කල කළලයක පුද්ගලභාවය

[8] Mathieu Deflem, *Socialogy of Law: Vision of A Scholarly Tradition* (Cambridge University Press, Cambridge 2008) 100

[9] M.R. Mpeli and Y. Botma, *"Abortion- related services: Value clarification through 'Difficult dialogues' strategies"* [2015] 10 (3) Education, Citizenship and Social Justice 278 at 282

හටගන්නේ, කළලය පිළිසිඳ ගැනීමෙන් සති 22-24 අතර කාලයේ දී වන හෙයිනි.[10] එසේ හෙයින් වෛද්‍ය විද්‍යාත්මක මතය වන්නේ, උක්ත කාලසීමාව ඇතුළත කළලයක් ගබ්සා කිරීම වෙනුවෙන් කාන්තාවට ස්වාධීන තීරණයක් ගැනීමට අනන්‍ය වූ අයිතියක් හිමි විය යුතු බවයි. එබැවින් ගබ්සාව තවදුරටත් මනුෂ්‍ය ඝාතනයක් හා සමාන වන බවට දරන සමාජ ආකල්පය වෙනස් විය යුතුය.

ගබ්සාව සම්බන්ධයෙන් වන මෙරට නීතිතත්ත්වය ප්‍රතිසංස්කරණය කළ යුතු වන්නේ, ස්ත්‍රියගේ සමාජ තත්ත්වය පෙරදැරි කරගෙන මිස අනෙකුත් අවශේෂ කරුණු මත පදනම්ව නොවේ. යම් සමාජයක ස්ත්‍රියගේ ආරක්ෂාව උපරිම ලෙස තහවුරු කර ඇත්නම් හෝ ස්ත්‍රියකට පුරුෂයෙකුට හා සමානව සමාජයෙහි තනිව ජීවත් විය හැකි සමාජ වටපිටාවක් සකසා ඇත්නම් ගබ්සාව සම්බන්ධයෙන් දැඩි නීති පැනවීම සාධාරණය. නමුත් ශ්‍රී ලංකාවේ සමාජ වටපිටාව දෙස නිරීක්ෂණය කර බැලීමේදී පෙනී යන්නේ, ශ්‍රී ලාංකේය සමාජය තුළ ස්ත්‍රිය තවදුරටත් අනාරක්ෂිත බවයි. ශ්‍රී ලංකා පොලිස් දෙපාර්තමේන්තුවෙහි සංඛ්‍යාලේඛනයන්ට අනුව 2012, 2013 සහ 2014 යන වර්ෂයන් තුළ සිදු වූ ස්ත්‍රීදූෂණ සංඛ්‍යාව පිළිවෙළින් 460[11], 2,181[12] සහ 2,008[13]කි. මෙම දත්ත නිරීක්ෂණය කිරීමේදී පුරෝකථනය කළ හැක්කේ, ස්ත්‍රියගේ ආරක්ෂාව නීතිය හරහා තෘප්ත නොවී ඇති බවයි. Pound ප්‍රකාශ කරන්නේ, අනාගත අවශ්‍යතා නෛතිකව පූර්වේක්ෂණය කර නීතීන් සකස් කළ යුතු බවයි.[14] මෙහි දී පූර්වේක්ෂණය කළ හැකි වන්නේ, ස්ත්‍රීදූෂණ වින්දිතයින් ප්‍රමාණය දිනෙන් දින වැඩි වන බවත් ඊට අනුරූප ව ඔවුන්ගේ ජීවිත ආලෝකමත් කිරීම උදෙසා ගබ්සාව සම්බන්ධයෙන් දැනට පවත්නා නීතිතත්ත්වය ප්‍රතිසංස්කරණය කළ යුතු බවයි.

ගර්භණීභාවය අවසන් කිරීම සම්බන්ධව දැඩි නීති පැනවීම තුළ පුද්ගල නිදහස සීමාකිරීම සහ ස්ත්‍රී පුරුෂ සමානාත්මතාවය අහිමි කිරීම සිදුවන අතර ඒ මත සමාජය අසමතුලිතවේ.[15] නමුත් නීතිය මඟින් සිදුවිය යුත්තේ, සමාජයෙහි ගටෙන අයිතීන් තුලනය කිරීමත් සමාජ යුක්තිය ඉටුකිරීමත්ය.[16] එසේ හෙයින් ගර්භණීභාවය හේතුවෙන් ස්ත්‍රියගේ ජීවිතයට තර්ජනයක් පැවතීම, කාන්තාවගේ මානසික, ශාරීරික සෞඛ්‍යයට දැඩි බලපෑමක් ඇති විට, දරුප්‍රසූතියේදී කාන්තාව මිය යා හැකි බවට පූර්වේක්ෂණය කළ හැකි නම්, ස්ත්‍රීදූෂණයක වින්දිතයෙකු නම් වැනි අවස්ථාවන්හිදීවත් කාන්තාවට සිය දරුගැබ සම්බන්ධයෙන් ස්වාධීන තීරණයක් ගැනීමට අවකාශය ලබා දිය යුතුබව බොහෝ නීතිවේදීන්ගේ මතයයි.[17] ඊට අමතර ව 21වන සියවසේ දී හටගත් සමාජ මතයක් වන්නේ, පවුල් සැලසුම් ක්‍රමවේදයක් ලෙස ගබ්සාව නීතිගත කළයුතු බවයි. එහිදී පවුලකට අවශ්‍ය දරුවන් සංඛ්‍යාව තීරණය කිරීමේ තනි සහ අනන්‍ය අයිතිය ස්වාමිපුරුෂයාට සහ භාර්යාවට හිමි විය යුතුය යන සමාජ ආකල්පය බටහිර සමාජයන් තුළ දැඩිලෙස මුල්බැසගෙන ඇත.[18] ශ්‍රී ලංකාව වැනි බෞද්ධාගමික පදනමක් සහිත රටකට උක්ත මතය සාධාරණීකරණය කළ නොහැකි වුවත් මින් පෙර දැක්වූ පරිදි කාන්තාව සම්බන්ධයෙන් වන සංවේදී අවස්ථාවන්හිදී නීතිය පවතින තත්ත්වයට වඩා නම්‍යශීලී වියයුතුය. ශ්‍රී ලංකාවේ ගබ්සාවන් සම්බන්ධයෙන් පවත්නා නීතිය ප්‍රතිසංස්කරණය වියයුතු බව සංඛ්‍යාත්මක දත්ත නිරීක්ෂණයේදී අවබෝධ වේ. 2012 වර්ෂයේදී සෞඛ්‍ය අමාත්‍යාංශය විසින් නිකුත් කරන ලද Hospital Based Study on Unintended Pregnancies in Sri Lanka නම් වාර්තාවට අනුව ගබ්සා කිරීම් සඳහා බලපාන ආසන්නතම හේතූන් අනුව ගබ්සා කිරීම් ප්‍රතිශතය පැහැදිලිව නිරීක්ෂණය කළ හැකිය.[19]

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[10] Michelle Murray, *Antepartal and Intrapartal Fetal Monitoring* (3rd, Springer Publishing Co., New York 2007) 132

[11] http://www.police.lk/images/others/crime_trends/2012/grave-crime-abstract-for-01st-quarter-for-the-year-2012.pdf

[12] http://www.police.lk/images/others/crime_trends/2013/grave_crime_abstract_2013.pdf

[13] http://www.police.lk/images/others/crime_trends/2014/grave_crime_abstract_for_the_2014.pdf

[14] M.D.A. Freeman, *Lloyd's Intriduction to Jurisprudence* (6th, ELBS with Sweet and Maxwell, London 1994) 528

[15] Ruth Dixon-Muller, *Population Policy and Women's Rights: Transforming Reproductive Choise* (Greenwood Publishing Group, London 1993) 46

[16] M.D.A. Freeman, *Lloyd's Intriduction to Jurisprudence* (6th, ELBS with Sweet and Maxwell, London 1994) 510

[17] Susan D. Ross, *Women's Human Rights: The International and Comparative Law Case Book* (University of Pennsylvania Press, Pennsylvania 2008) 571

[18] Ibid, 572

[19] Ministry of Health and UNFPA, *Hospital Based Study on Unintended Pregnancies in Sri Lanka* (United Nations Population Fund 2012) xii

ගබ්සාවට යොමු වීම සඳහා බලපෑ ආසන්නතම හේතු	ප්‍රතිශතය
නීත්‍යානුකූල ව විවාහ වී නොතිබීම හා වැන්දඹුවන් වීම	8%
අවසන් දරු ප්‍රසූතිය සිදුකර සැලකිය යුතු කාලයක් ඉක්ම නොයෑම	11%
ප්‍රජනන වයස් සීමාව ඉක්මවා සිටීම	11.5%
දරුවා හදාවඩා ගැනීමට සැමියාගේ සහයෝගය නොලැබීම	14%
ආර්ථික අපහසුතා	29.5%

ඊට අමතරව Annual Health Bulletin නම් වාර්තාවට අනුව 2012 වර්ෂයේදී ශ්‍රී ලංකාවේ ගබ්සා කිරීම් 51,229ක් සිදුකර ඇති අතර ඒ අතරින් 99.4%ක් වයස අවුරුදු 17-49 අතර වයස් කාණ්ඩයේ පසුවන කාන්තාවන්ය. 0.6%ක් වයස අවුරුදු 16ට අඩු දැරියන්ය. ශ්‍රීලංකා නීතියෙහි පවතින දැඩි ස්වභාවය ශ්‍රීලංකාවේ කාන්තාවගේ අවශ්‍යතා තෘප්ත නොකරන බව උක්ත සංඛ්‍යාත්මක දත්ත නිරීක්ෂණයේදී තවදුරටත් පැහැදිලිවේ. ඒ අනුව ශ්‍රීලංකා නීතිය ප්‍රතිසංස්කරණයේදී මූලික පියවරක් ලෙස කළ යුතු වන්නේ, පවත්නා දණ්ඩ නීති සංග්‍රහයෙහි අඩංගු ප්‍රතිපාදනයන්ට නව ව්‍යතිරේඛයන් කිහිපයක් ඇතුළත් කිරීමය.

ශ්‍රීලංකාව කාන්තාවන්ට එරෙහි සියලුම ආකාරයේ වෙනස්කම් පිටුදැකීමේ සම්මුතියෙහි (CEDAW) පාර්ශ්වකාර රාජ්‍යයක් වන හෙයින් එම සම්මුතියට අදාළ නිර්දේශයන්ට ගරු කළ යුතුය. එම සම්මුතියෙහි 12වන ව්‍යවස්ථාවට 1999 වර්ෂයේදී එක්සත් ජාතීන්ගේ සංවිධානය විසින් ගෙන ආ පොදු නිර්දේශයන්හි 31(c)හි දක්වෙන්නේ, කාන්තාවන්ගේ අනවශ්‍ය ගැබ්ගැනීම්වලදී එම ගර්භනීභාවය අවසන් කිරීම සම්බන්ධයෙන් පාර්ශ්වකාර රාජ්‍යයන්හි පවතින දැඩි නෛතික ප්‍රතිපාදන සංශෝධනය කළ යුතු බවයි.[20] ගබ්සාව සම්බන්ධයෙන් වන ශ්‍රී ලංකා නීතිය ප්‍රතිසංස්කරණය කිරීමේදී ශ්‍රී ලංකාවෙන් පරිබාහිර අධිකරණ කලාපයන්හි මේ සම්බන්ධව පවත්නා නෛතික තත්ත්වය පිළිබඳව අධ්‍යනය කළයුතුවේ.

දකුණු අප්‍රිකාව සහ බොට්ස්වානා යන රාජ්‍යයන් ද්විත්වය ස්ත්‍රී දූෂණ බහුලව සිදුවන රාජ්‍යයන් අතර පෙරමුණේ සිටී.[21] එබැවින් මෙහි ප්‍රතිඵලයක් වශයෙන් අදාළ රාජ්‍යයන් තුළ අනවශ්‍ය ගැබ්ගැනීම්වලට ලක් වන කාන්තවන් ප්‍රමාණය ද ඉහළ අගයක් ගනී. නමුත් මෙම රාජ්‍යයන් ද්විත්වය තුළ උක්ත තත්ත්වය තුලනය කර ඇත්තේ, ගබ්සාව සම්බන්ධයෙන් වන නීතීන් ලිහිල් කිරීම තුළිනි. දකුණු අප්‍රිකාවේ 1996 අංක 92 දරන Termination of Pregnancy Actහි 2(1) උපවගන්තියෙහි දක්වා ඇත්තේ, පිළිසිඳගෙන පළමු සති 12 තුළ කාන්තාවට සිය දරුගැබ පිළිබඳව ඕනෑම තීරණයක් ගතහැකි බවයි. ඉන්පසු 13වන සතියේ සිට 20වන සතිය දක්වා ගබ්සා කිරීමට අවකාශය ලැබෙනුයේ, කාන්තාවගේ ජීවිතය පිළිබඳ අවධානමක් පවතීනම් හෝ කාන්තාවගේ මානසික හෝ ශාරීරික සෞඛ්‍යයට හානියක් වේනම් හෝ ස්ත්‍රීදූෂණයක් තුළින් ගැබ්ගෙන තිබේනම් හෝ කාන්තාවගේ සමාජ සහ ආර්ථික වටපිටාව යන කාරණා සම්බන්ධව පමණි. එමෙන්ම මෙම උපවගන්තියට අනුව, පිළිසිඳගෙන 20වන සතියෙන් පසුව කාන්තාවට ගබ්සා කිරීමට අවකාශය ලැබෙනුයේ, කළලයට දැඩිලෙස හානි වී තිබේනම් (malformation of the fetus) පමණි. බොට්ස්වානා රාජ්‍යයෙහි ගබ්සා නීති ලිහිල් කිරීමට ප්‍රධානම හේතුව වූයේ, අනවශ්‍ය ගැබ්ගැනීම් හේතුවෙන් සියදිවි නසා ගන්නා ප්‍රමාණය ඉහළයෑම, අනාරක්ෂිත ගබ්සාවලට යොමු වීමෙන් වන ජීවිත හානි සංඛ්‍යාව ඉහළයෑම වැනි සාධකවල බලපෑමයි. ඒ අනුව 1991 වන තෙක් බොට්ස්වානාහි නීතිවිරෝධී ව පැවති ගබ්සා කිරීම් 1991 බොට්ස්වානා දණ්ඩ නීති සංග්‍රහයට ගෙන ආ සංශෝධනය මඟින් යම්තාක් දුරට ලිහිල් කරන ලදී.[22] එම සංශෝධනය මඟින් **එරට දණ්ඩ නීති සංග්‍රහයෙහි 160(1) උපවගන්තිය** හරහා පිළිසිඳගැනීමෙන් පළමු සති 16 තුළ සිය කැමැත්ත මත ගබ්සා කිරීමට කාන්තාවට ඉඩ ලබා දී ඇත. ඊට අමතර ව ගැබ්ගැනීම ස්ත්‍රීදූෂණයක ප්‍රතිඵලයක් බව ප්‍රමාණවත් සාක්ෂි මඟින් පෙන්වාදීම, ගැබ්ගැනීම කාන්තාවගේ ජීවිතයට තර්ජනයක් බව පෙන්වාදීම සහ දරුවා ඉතා බරපතල ශාරීරික හෝ මානසික අපහසුතාවයකින් පෙළෙන බව පෙන්වාදීම යන සීමාකිරීම් යටතේ ගබ්සා කිරීමට අවකාශය සලසාදී ඇත.[23]

[20] A/54/38/Rev.1,chap. 1

[21] www.nationmaster.com/countryinfo/stats/Crime/Rape-rate #2010

[22] Stephanie S. Smith, *"The Challenges Procuring of Safe Abortion Care in Botswana"* [2013] 17 (4) African Journal of Reproductive Health 43 at 44-45

[23] Ibid, 45-46

මේ හැරුණුවිට ඇමරිකා එක්සත් ජනපදයෙහි නීති තත්ත්වය පිළිබඳ ව විමසා බැලීමේදී 1973 වර්ෂය වන තෙක්ම ප්‍රාන්ත 30ක ගබ්සාව එනයින්ම නීතිවිරෝධී වූ අතර ප්‍රාන්ත 20ක සීමා කිරීම් සහිතව ගබ්සාව නීතිගත කර තිබිණි. නමුත් මෙකී නීතිතත්ත්වය අධිකරණයෙහි මැදිහත්භාවය මත සමාජයට උචිත වන අයුරින් ප්‍රතිසංස්කරණය විය. එනම්, *Roe v. Wade*[24] නඩු තීරණයේදී කාන්තාවගේ කළලය ගබ්සා කිරීම සම්බන්ධ ව ප්‍රශ්නගතවිය. නමුත් ටෙක්සාස් ප්‍රාන්තයේ නීතිය අනුව මවගේ ජීවිතයට හානියක් වන අවස්ථාවකදී හැර සෙසු අවස්ථාවලදී ගබ්සාව නීතිවිරෝධී විය. නමුත් කාන්තාව තර්ක කළේ, ඇය ස්ත්‍රී දූෂණයක විඳින තැනැත්තියක් බවයි. මෙහිදී අධිකරණය ප්‍රකාශ කළේ, ඇමරිකානු ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 14වන සංශෝධනය යටතේ එන ජීවත් වීමට ඇති අයිතිය නෛතික පුද්ගලභාවයක් නොමැති භ්‍රෑණයකට (fetus) නොපවතින බවයි. එබැවින් පෞද්ගලිකත්වයට ඇති අයිතිය යටතේ අදාළ කාන්තාවට ගබ්සාව සම්බන්ධයෙන් ස්වාධීන තීරණයක් ගතහැකි බව අධිකරණයේ මතය විය. මෙම නඩුතීරණයෙන් පසු ඇමරිකාවේ සියලුම ප්‍රාන්තවල ගබ්සා නීති ලිහිල් කිරීමට පියවර ගෙන ඇත. කෙසේවෙතත් මෑතකදී ඇමරිකා එක්සත් ජනපදය Pain-Capable Unborn Child Protection Act හරහා ගබ්සාව සම්බන්ධයෙන් තවත් සීමා කිරීමක් එකතු කරන ලදී. එම පනත මඟින් යෝජනා කර ඇත්තේ, පිළිසිඳගෙන සති 18-20 කට පසුව කරන ගබ්සා කිරීම් නීතිවිරෝධී වන බවයි.[25] Eugen Ehrlich ප්‍රකාශ කරන පරිදි නීතිය සම්බන්ධයෙන් කටයුතු කරන පුද්ගලයින් පවත්නා නීතීන්වල සමාජයීය පදනම සම්බන්ධයෙන් තේරුම් ගෙන තිබිය යුතු අතර එම නීතීන් සමාජයීය පදනම සමග අනුගත නොවේ නම් නිවැරදි මාවතට ගැනීමට කටයුතු කළ යුතුය.[26] ඇමරිකානු අධිකරණ තීරණ දෙස බැලීමේ දී මේ බව මනාව අනාවරණය වේ.

Max Weber විසින් ප්‍රකාශ කරන ලද්දේ, සමාජයෙහි සිදුවන ක්ෂණික විපර්යාසයන්ට සාපෙක්ෂ ව නීතිය ද වෙනස් විය යුතු බවයි (spontaneous emergence of norms).[27] බ්‍රසීලයෙහි ගබ්සාව සම්බන්ධයෙන් වන නීතිතත්ත්වය පරීක්ෂා කිරීමේදී මෙම තත්ත්වය පිළිබිඹුවේ. 2013දී සංශෝධිත Brazillian Crimanal Codeහි දක්වා ඇත්තේ, ස්ත්‍රීදූෂණවල විඳිදිතයන්ට ගබ්සාකිරීමට අවසර ලබාදී ඇති බවයි. මේ හැරුණුවිට මෑතකදී සිකා වෛරසය හේතුවෙන් බ්‍රසීලයට දැඩි බලපෑමක් එල්ලවිය. එහිදී බ්‍රසීල කාන්තාවන් එරට ව්‍යවස්ථාදායකයෙන් ඉල්ලා සිටියේ, සිකා වෛරසයේ බලපෑම මත ගර්භාෂයේ සිටින දරුවන් microcephaly නම් රෝගයට ගොදුරුවීම නිසා ගබ්සාකිරීමට ඉඩ ලබාදිය යුතු බවයි. මෙහිදී බ්‍රසීල විනිසුරුවරයෙකු වන Jesseir Coelho de Alcántara ප්‍රකාශකළේ, මෙහිදී ප්‍රමුඛතාවයක් ලබාදිය යුත්තේ, දරුගැබ තුළ සිටින දරුවන් microcephaly නම් රෝගයට ගොදුරුවීම යන සමාජ ගැටලුව විසඳීම සඳහා වන අවස්ථාව ලබාදීම කෙරෙහි වන බවයි.[28]

R v. Davidson[29] ඔස්ට්‍රේලියානු නඩුතීරණයේ දී අධිකරණය විසින් ප්‍රකාශ කරන ලද්දේ, කාන්තාවගේ භෞතික ශරීරයට හෝ මානසික තත්ත්වයට ගර්භනීභාවය හේතුවෙන් අවධානමක් පවතී නම් ඉන් මිදීමට සිදුකරන ගබ්සාව නීත්‍යානුකූල වන බවයි. ඊට අමතරව *R v. Wald*[30] නඩුතීරණයේදී අධිකරණය ප්‍රකාශ කරඇත්තේ, කාන්තාවගේ භෞතික ශරීරයට හෝ මානසික තත්ත්වයට හානියක්වීම, සමාජ, ආර්ථික ගැටලු මත පදනම්ව ගබ්සාව නීත්‍යානුකූල වියයුතු බවටය. මීට අමතරව ඔස්ට්‍රේලියාවේ 2004 Human Rights Actහි 9(1)[31] සහ 9(2)[32] උපවගන්තීන් තුළ දක්වෙන්නේ, ජීවත් වීමට ඇති අයිතිය උපත ලබා ඇති පුද්ගලයින්ට පමණක් අදාළ වන බවයි. එමෙන්ම Crimes (Abolition of offence of Abortion) Act හරහා එතෙක් අපරාධමය වරදක් වූ ගබ්සාව නිර්අපරාධකරණය කෙරිණි.

තවද, එක්සත් රාජධානියෙහි නීති තත්ත්වය විමර්ශනය කිරීමේදී **1967 Abortion Act** සඳහා සුවිශේෂී ස්ථානයක් හිමිවේ. එහි 1(1) උපවගන්තිය අනුව දරුවෙකු පිළිසිඳ ගැනීමෙන් අනතුරුව **දරුවා බරපතල ලෙස ආබාධිතනම්** සහ එම ආබාධය හේතුවෙන් **දරුවාගේ ජීවිතයට සැලකියයුතු**

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[24] 410 US 113

[25] http://www.theatlantic.com/politics/archive/2015/01/a-look-at-late-term-abortion-restrictions-state-by-state/448098/

[26] M.D.A. Freeman, *Lloyd's Intriduction to Jurisprudence* (6th, ELBS with Sweet and Maxwell, London 1994) 524

[27] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, Cambridge 2009) 193

[28] http://www.nytimes.com/2016/02/04/world/americas/zika-virus-brazil-abortion-laws.html?_r=0

[29] [1969] VR 667

[30] [1971] 3 DCR (NSW) 25

[31] Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life

[32] This section applies to a person from the time of birth

අවධානමක් පවතීනම් ඕනෑම අවස්ථාවක ගර්භණීභාවය අවසන් කළ හැකිය. නැතිනම් වෙනත් අවස්ථාවකදී ගර්භණීභාවය අවසන් කළ හැක්කේ, පිළිසිඳ ගැනීමෙන් මුල් මාස 06 තුළදී පමණි. මෙම නීතිය අනුව සාමාන්‍ය ආබාධිත තත්ත්වයක් සහ සාමාන්‍ය අවධානමක් පැවතීම ගබ්සාවට හේතුවක් කරගත නොහැකිවීම තුළ නූපන් දරුවන්ගේ සහ මව්වරුන්ගේ අයිතිවාසිකම් යම්තාක් දුරට තුලනය කර ඇති බව විශදවේ.[33] නමුත් *H v. Norway*[34] නඩුතීරණයේ දී යුරෝපා මානව හිමිකම් අධිකරණය ප්‍රකාශකළේ, ගර්භනීභාවය සම්බන්ධයෙන් තීරණ ගැනීමේ අයිතිය කාන්තාව සතු වන බවයි. ඉන්දියාවේ ගබ්සාව සම්බන්ධයෙන් වන නීතිතත්ත්වය විමර්ශනයේදී **1971 Medical Termination of Pregnancy Act** වැදගත්වේ. 1964දී Central Family Planning Board of the Government of India යන කමිටුව විසින් ඉදිරිපත් කළ වාර්තාව තුළ සඳහන්වූයේ, ගබ්සාව සම්බන්ධයෙන් පවතින නෛතික ප්‍රතිපාදන සමාජවිද්‍යාත්මක සහ වෛද්‍ය විද්‍යාත්මක සාධක මත ප්‍රතිසංස්කරණය වියයුතු බවයි. එහි ප්‍රතිඵලයක් ලෙස **1971 Medical Termination of Pregnancy Act** හඳුන්වාදෙන ලදී. මෙම පනතට අනුව සති 12ක් නොඉක්මවන දරුගැබක් කාන්තාවගේ තනි කැමැත්ත මත ගබ්සා කළහැකිය. නමුත් සති 20ක් ඉක්මවූ දරුගැබක් ගබ්සා කළ හැක්කේ, කාන්තාවගේ ශාරීරික හෝ මානසික සෞඛ්‍යයට තර්ජනයක් පවතීනම්, උපත ලැබීමට නියමිත දරුවා අංගවිකල (handicapped) නම්, ස්ත්‍රීදූෂණයක විත්දිතයෙකුනම්, අවුරුදු 18ට අඩු අවිවාහක දරුවෙක් ගැබ්ගෙන ඇත්නම්, ගර්භණී කාන්තාව උන්මන්තක තැනැත්තියකනම්, වන්ධ්‍යාකරණ සැත්කමක් (sterillization) අසාර්ථක වූයේනම් පමණි.

සිම්බාබ්වේහි Termination of Pregnancy Act මගින් ගබ්සා කිරීම සඳහා අවස්ථා කිහිපයක් සලසාදී ඇත. එනම්, කාන්තාවගේ ජීවිතයට තර්ජනයක් පවතිනවිට, කාන්තාවගේ භෞතික ශරීරයට ස්ථීර හානියක් වනවිට, දරුවා අංගවිකල හෝ දරුණු ආබාධයකට ලක්ව ඇත්නම්, ස්ත්‍රී දූෂණය හෝ ව්‍යභිචාරය හේතුවෙන් කාන්තාවක් ගැබ්ගෙන ඇත්නම්ය. මේ අනුව අධ්‍යයනය සඳහා පාදක වූ රාජ්‍යයන්හි නෛතික තත්ත්වයන් ශ්‍රී ලංකාවේ ගබ්සා කිරීම වෙනුවෙන් පවතින නෛතික ප්‍රතිපාදන සමග සංසන්දනයේදී අනාවරණය වන කරුණක් වන්නේ, ශ්‍රී ලාංකේය සමාජය ලාංකේය නීතිය අභිභවා සිටින බවයි. නමුත් විය යුත්තේ, නීතිය සමාජය අභිභවා සමාජ අපේක්ෂාවන්, සමාජ යුක්තිය තහවුරු වන අන්දමින් හැඩගැස්වීමයි.

ඓතිහාසික තත්ත්වය පිළිබඳව විමසා බැලීමේදී ගබ්සාව සම්බන්ධයෙන් වන නීතිතත්ත්වයෙහි මුල්කාලීන පරිචය වූයේ, ආගමික නීතීන්වලට මූලිකත්වය දෙමින් ගබ්සාවට අවසර නොදීමය. ඇංග්ලෝ-සැක්සන් අවධියෙහි පැවති ආගමික නීතීන් මෙයට කදිම නිදසුනකි.[35] එසේම මධ්‍යකාලීන යුගයෙන් පසු 8 හා 19 යන සියවස්වල ගබ්සාව පිළිබඳව පැවති සමාජ ආකල්පය වූයේ, එය සාපරාධී ක්‍රියාවක්වන බවටය. 19වන සියවසෙහි මධ්‍යභාගයේ පමණ සිට කාන්තාවාදීන්ගේ හඬනැඟීමේ ප්‍රතිඵලයක් වශයෙන් කාන්තාවකට නීත්‍යානුකූලව ගබ්සා කිරීමට අවසර තිබියයුතු බවට වන ආකල්පය සමාජගත විය. ශ්‍රී ලංකාවේ බ්‍රිතාන්‍යයන් විසින් හඳුන්වා දෙන ලද දණ්ඩ නීති සංග්‍රහයෙහි අඩංගු ප්‍රතිපාදන මේ වන තෙක් භාවිතාවේ පවතින බව දැකිය හැකිය. අදාළ ප්‍රතිපාදනයන්හි සීමාන්තිකභාවයට ප්‍රබල හේතුවක් වී ඇත්තේ, බ්‍රිතාන්‍යයන් විසින් පනවන ලද නීතිවල ක්‍රිස්තියානි ආගමික බලපෑම අඩංගු වීමය.

Rosco Pound ප්‍රකාශ කළේ, පවතින සමාජ සන්දර්භයට අනුව නිවැරදි ස්ථානයක නීතිය ස්ථාපනය කළයුතු බවයි.[36] ඒ අනුව ශ්‍රී ලංකාවේ ගබ්සාව සම්බන්ධයෙන් පවත්නා අයහපත් සමාජ ආකල්පය බැහැරවන පරිදි ගබ්සාව සම්බන්ධයෙන් වන දැඩි නීති ප්‍රතිසංස්කරණය කිරීම කඩිනමින් කළ යුතුව ඇත. ශ්‍රී ලංකාවේ ආගමික බලපෑම් හමුවේ බටහිර අධිකරණ කලාපවල මෙන් ගබ්සාව නිර්අපරාධකරණය කිරීමට මෙරට තුළ අවකාශයක් නොමැති බව උක්ත අධ්‍යයනයෙන් පැහැදිලිවේ. එබැවින් ගබ්සාව සම්බන්ධයෙන් පවත්නා නීතිය ලිහිල් කිරීමට සහ පහත සඳහන් ආකාරයේ සීමාකිරීම්වලට යටත් ව ගබ්සාව සඳහා අවසර දීමට ව්‍යවස්ථාදායකය විසින් කඩිනම් පියවර ගත යුතුය. එනම්, ගර්භණීභාවය ස්ත්‍රීදූෂණයක ප්‍රතිඵලයක්නම්, දරුගැබ හේතුවෙන් මවගේ ජීවිතයට තර්ජනයක් පවතීනම්, වන්ධ්‍යාකරණ සැත්කම් අසාර්ථකවී

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[33] http://www.bbc.co.uk/ethics/abortion/legal/when_/.shtml

[34] [1992] 73 DR 155

[35] Rebecca J. Cook and Bernard M. Dickens, *"Human Rights Dynamics of Abortion Law Reform"* [2003] 25 (1) Human Rights Quarterly 01 at 08

[36] M.D.A. Freeman, *Lloyd's Intriduction to Jurisprudence* (6th, ELBS with Sweet and Maxwell, London 1994) 538

ඇත්නම්, භ්‍රෑණයට බරපතල ලෙස හානි වී ඇත්නම්, අධිකරණයට අවසර දිය හැකි අන්දමේ අනෙකුත් සමාජයීයහේතු ඇත්නම්, ගර්භණීභාවය වෛද්‍ය විද්‍යාත්මකව අවසන් කිරීමට නීතියෙන් අවසර ලබාදිය යුතුය.

DUTY OF ARBITRATORS TO GIVE REASONS; FAILURE AND ITS CONSEQUENCES UNDER THE ARBITRATION ACT

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The practice of Arbitration, and its importance in Sri Lanka's legal landscape has developed steadily in the recent past. Foreign investment in Sri Lanka has shown an increase in the last two decades and there has also been an increase in accessibility to global commerce and trade. In the backdrop of this development, the relevant stakeholders have raised concerns in connection with delays in enforcement of contracts and the resolution of commercial disputes. This has resulted in contracting parties preferring to enter into arbitration agreements or to incorporate arbitration clauses in agreements. Consequently, there has been an increase in the number of disputes involving parties from Sri Lanka that have been referred to both domestic and international Arbitration.

In this backdrop, the role of the Arbitrator has become significantly more important. Although an Arbitrator who is called upon to determine a dispute plays a more informal role than a judge,[1] this does not mean that Arbitrators are exempt from adhering to fundamental principles of Natural Justice. One such fundamental principle that an Arbitrator must keep in mind, is the Duty to give reasons.

Duty to give reasons

It is a fundamental principle of law that any court, tribunal, or any other body or person determining disputes should give reasons when making an order, judgement, award or any decision of such nature.[2] Therefore, just like in court proceedings, unless the parties otherwise agree, the Arbitrator is duty bound to give reasons, when making an award.

The Arbitration practice in Sri Lanka is governed by the **Arbitration Act No. 11 of 1995**. The Arbitration Act is based on the **United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985** and was the first such Arbitration law in South Asia.[3] The influence of the Model Law is evidenced by provisions similar or identical to those in the Model Law being found in the Arbitration Act, as will be seen below.

Whilst **Section 25 of the Arbitration Act** sets out the form and content of an Arbitral award, **Section 25(2)** provides as follows;

> *"(2) The award shall state the reasons upon which it is based,*

[1] K.C. Kamalasabayson, P.C., 'Powers and Duties of the Arbitrators', in K Kanag-isvaran PC and S.S. Wijeratne, *Arbitration Law In Sri Lanka* (3rd edn, 2011)

[2] *Wijepala v Jayawardene* S.C. (Application) No. 89/95, S.C. Minutes of 30.06.1995; *Karunadasa v Unique Gemstones* [1997] 1 Sri L.R. 256; *Hapuarachchi and others v Dissanyaka and the AG* S.C. (FR) Application No. 67/2008, S.C. Minutes of 19.03.2019; *Wijeratne v Amarasinghe and others* SC Appeal No. 40/2013, S.C. Minutes of 12.11.2015

[3] S.S. Wijeratne, 'Arbitration in Sri Lanka', in K Kanag-isvaran PC and S.S. Wijeratne, *Arbitration Law In Sri Lanka* (3rd edn, 2011)

unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 14."

Accordingly, **Section 25(2)** of the said Act specifically imposes a duty on Arbitrators to provide the reasoning upon which the Arbitral award has been arrived at. Although such a duty is imposed, it is not absolute in its application. The said Act provides that a duty to give reasons would not exist in the event the award is an award on agreed terms or, taking into consideration the autonomy of parties to determine the procedure adopted in Arbitrations, in the event the parties agree that no reasons are to be given.[4]

In certain respects, the justifications for a reasoned award parallel those applying to a reasoned judgment of a Court. The reasoned determination tells the parties why they won or lost, and assists to satisfy the expectation that justice be seen to be done.[5]

While this duty to give reasons is imposed on Arbitrators under the Sri Lankan Arbitration Act, the application of this duty is universally recognized. **Section 25(2)** is similar, if not almost identical, to provisions found in the UNCITRAL Model Law,[6] the **Indian Arbitration Act**,[7] the **Commercial Arbitration Acts** in the states and territories of Australia,[8] the **Singaporean Arbitration Act**[9] and the **Arbitration Act of the United Kingdom**[10] to name a few, as all these statutes have been influenced by the Model Law. Furthermore, the introduction of this duty in the **Arbitration Act of UK** has been recognized as what "justice to the parties required".[11] Judiciaries in foreign jurisdictions have been forthcoming in recognizing this duty.[12]

Although there is no reported landmark judgement in Sri Lanka in which the duty of an Arbitrator to give reasons has been specifically recognized, Sri Lankan Courts have shown a willingness to recognize principles of Natural Justice in Arbitrations.[13]

Degree to which Reasons must be given

While Arbitrators are now under a duty to give reasons, it must be remembered that an Arbitrator may be considered to have failed to fulfill this duty by either not giving any reasons at all, or failing to give adequate, sufficient or relevant reasons. Therefore, a question arises as to the degree to which reasons must be given.

Certain jurisdictions have imposed a high standard on Arbitrators when determining the degree to which reasons should be given. Most notably in the Australian case of *Oil Basins Ltd v Bhp Billiton Ltd & Ors,*[14] the Supreme Court of Victoria held *inter alia* that an Arbitrator is subject to similar obligations as a judge. The Court stated;

"In arbitration, the requirement is that parties not be left in doubt as to the basis on which an award has

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[4] Arbitration Act No. 11 of 1995 (SL Arbitration Act), s 25(2)

[5] Peter Gillies and Niloufer Selvadurai, 'Reasoned Awards: How Extensive Must the Reasoning Be?' (2008) 72 ARBITRATION 125

[6] UNCITRAL Model Law on Commercial Arbitration 1985 (Model Law), art 31(2)

[7] Arbitration and Conciliation Act, 1996 (India), s 31(3)

[8] Commercial Arbitration Act 2010 (NSW), s 31(3); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT), s 31(3); Commercial Arbitration Act 2013 (QLD), s 31(3); Commercial Arbitration Act 2011 in (SA), s 31(3); Commercial Arbitration Act 2011 (TAS), s 31(3); Commercial Arbitration Act 2011 (VIC), s 31(3); Commercial Arbitration Act 2012 (WA), s 31(3); Commercial Arbitration Act 2017 (ACT), s 31(3)

[9] Arbitration Act (Singapore), s 38(2)

[10] Arbitration Act 1996 (UK), s 52

[11] John Saunders, 'The Obligation of an Arbitrator to Give Reasons for a Decision' (June 2012) <http://www.hkiarb.org.hk/PDF/Seminar_12_June_2012> accessed on 05 October 2019

[12] *Westport Insurance Corporation & Ors v Gordian Runoff Limited* [2011] HCA 37; *Gora Lal v Union of India* (2003) 12 SCC 459

[13] *Kristley (Private) Limited v The State Timber Corporation* (2002) 1 SLR 227

[14] (2007) 18 VR 346

been given. To that extent, the scope of an arbitrator's obligation to give reasons is logically the same as that of a judge."[15]

However, it appears that the general practice is to adopt a lower threshold. Russell on Arbitration states that;

> "*No particular form is required for a reasoned award…When giving a reasoned award the tribunal need only set out what, on its view of the evidence, did or did not happen, and explain succinctly why, in the light of what happened, the tribunal has reached its decision, and state what that decision is*." [16]

This view has been shared in the courts of New South Wales in *Imperial Leatherware v Macri & Marcellino*[17] where Rogers CJ stated;

> "*Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the Court should not construe his reasons in an overly critical way. However, it is necessary that the arbitrator deal with the issues raised…and make all necessary findings of fact…. The reasons must not be so economical that a party is deprived of having an issue of law dealt with by the Court*."

Similarly, a court in Egypt held that the reasoning must not be contradictory and that it must allow whoever reviews the award to determine the logic followed by the Arbitrator in fact or at law.[18] In evaluating the sufficiency of the reasons expressed, a Canadian court considered that the fact that an arbitral award did not expressly disclose any legal reasoning did not make the reasoning insufficient where the Arbitrators were commercial persons.[19]

Presently, there is no reported jurisprudence in Sri Lanka in which the Sri Lankan Courts have specifically and authoritatively answered the question as to the degree to which an Arbitrator has to give reasons. However, the views of the Supreme Court in the case of *Light Weight Body Armour Ltd. v Sri Lanka Army,*[20] may be indicative of the approach the Court may take in the event the question of degree is placed before it. While the case did not specifically deal with the issues of giving reasons and the degree to which reasons must be given, the Court was *inter alia* required to look into issues in relation to the existence of errors of law on the face of the award. In the *Light Weight Body Armour* case Shiranee Tilakawardane J. states the following;

> *"…the Court cannot sit in appeal over the conclusions of the Arbitral Tribunal by re-scrutinizing and re-appraising the evidence considered by the Arbitral Tribunal…The Court cannot re-examine the mental process of the Arbitral Tribunal and contemplate its findings even where slim reasons are given by the Arbitral Tribunal for its findings, nor can it revisit the "reasonableness" of the deductions given by the arbitrator, since the Arbitral Tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties."* [21]

It is clear from the above that the Courts are reluctant to interfere in the arbitral process. Further, Courts have clearly articulated its

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[15] (2007) 18 VR 367 [56]
[16] David St John Sutton, Judith Gill, Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet and Maxwell 2007), 6-032
[17] (1991) 22 NSWLR 657
[18] Cairo Court of Appeal, Egypt, 5 May 2009, case No. 112/124
[19] CLOUT case No. 10 [*Navigation Sonamar Inc. v Algoma Steamships Limited and others*, Superior Court of Quebec, Canada, 16 April 1987], 1987 WL 719339 (C.S. Que.), [1987] R.J.Q. 1346, ,
[20] [2007] 1 SLR 411
[21] ibid 418

intention of refraining from stepping into the shoes of the Arbitrator and evaluating the merits of an award. In this regard, it stands to reason that Courts in Sri Lanka would adopt an approach similar to that which has been put forward in Russell on Arbitration.

Consequences of not giving reasons

Whilst various jurisdictions, as illustrated above, impose a duty to give reasons by legislative enactments, several enactments go further to specify the consequences of failing to give reasons.

In the United Kingdom, a party may challenge an award on the ground of serious irregularity if the party can satisfy Court that the failure to comply with the requirements of the form of the award has caused, or will cause, substantial injustice to the applicant.[22] Further, on an application or appeal, if it appears that the award does not contain the tribunal's reasons, or set out the reasons in sufficient detail as to allow the court to properly consider the application or appeal, the courts are vested with the power to order the tribunal to state the reasons for its award in sufficient detail for the purpose required by Court.[23] **The Singaporean Arbitration Act** vests similar powers in its courts to order the Arbitral tribunal to state reasons for its award to Court.[24]

Although, **Section 25(2) of the Sri Lankan Arbitration Act** imposes a specific duty to give reasons, similar to the UNCITRAL Model Law the said Act does not specify the consequences of failing to give such reasons. In countries where the Model Law has been adopted, the alleged failure of the Arbitral tribunal to give sufficient reasons in the award has been used by applicants, under different provisions of their respective acts, as a ground for setting aside or for seeking an order refusing enforcement of the award.[25]

Under the Sri Lankan Arbitration Act, the grounds on which an Arbitral award may be set aside are set out in **Section 32** of the Act. However, the question of whether an Arbitral award may be set aside on the basis of failure to give reasons and, if so, under which heading it may be set aside has not been conclusively determined by Sri Lankan Courts.

Of the grounds that have been specified, it stands to reason that it may be possible for a party to challenge the award on the basis that; (1) the alleged failure to provide reasons is not in accordance with the arbitral procedure agreed by the parties or the provisions of this act (in this absence of such agreement);[26] or (2) that such arbitral award is in conflict with the public policy of Sri Lanka.[27]

The concept of party autonomy extends to the freedom for parties to adopt the procedure of their choosing. Apart from mandatory provisions of the law governing the Arbitration agreement and the *lex arbitri*, and subject to "unacceptable" amendments to institutional rules, the parties enjoy very broad freedom in selecting the Arbitration regime they desire and in prescribing the procedure to be followed.[28] Therefore, in the circumstances in which the parties to the Arbitration have agreed that reasons are to be given in the award, or alternatively have not agreed to an award without reasons being given, if an Arbitral award is made without reasons, it may be considered that

[22] Arbitration Act 1996 (UK), ss 68(1) and 68 (2)(h)
[23] ibid, s 70 (4)
[24] Arbitration Act (Singapore), s 50 (4)
[25] UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, para 116
[26] Arbitration Act SL, s 32(1)(a)(iv)
[27] ibid s 32(1)(b)(ii)

[28] Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) *Journal of Intl Arb* 4 <https://www.arbitration-icca.org/media/4/48108242525153/media012223895489410limits_to_party_autonomy_in_international_commercial_arbitration.pdf> accessed 05 October 2019

such award is not in accordance with the procedure agreed upon by the parties.
A party seeking to set aside an Arbitral award on the basis that it is contrary to public policy may face certain difficulties. Although it may be argued that the duty to give reasons is a matter of public policy and failing to give reasons would amount to a breach of public policy, the Sri Lankan Courts have displayed a reluctance to give broad interpretations to the term 'public policy'. Courts have repeatedly voiced their displeasure with parties seeking to set aside Arbitral awards for various reasons on the ground of public policy, most famously in the *Light Weight Body Armour* case.[29] Public policy was generally understood in the case to include instances such as corruption, bribery and fraud and similar serious cases. Therefore, it is unlikely the courts would consider the failure to give reasons as being contrary to public policy.

While courts may set aside an Arbitral award due to the failure of the Arbitrator to give reasons, it is also important to examine the possibility of remission to the Arbitral tribunal in terms of **Section 36** of the Act. The courts are empowered to set aside an Arbitral award for such period as it may consider necessary to enable the Arbitral tribunal to resume Arbitral proceedings or take such measures as may be necessary to eliminate the grounds for invalidating the award. Similar provisions have been made use of by courts internationally, such as by the High Court New Plymouth, New Zealand where an Arbitrator obtained a surveyor's report but failed to provide a copy to the parties. However, the court remitted the case to the Arbitrator (instead of setting aside the award) on the ground that the party waived its right to rely on the breach of Natural Justice as it was aware that a surveyor had been engaged, and instead of demanding a copy of the report, only complained after receipt of the award.[30]

Where an Arbitral tribunal has issued a final award, globally courts have not found it appropriate to remit the case to the Arbitral tribunal for the purpose of enabling the Arbitral tribunal to recall or revise its decision on the merits of the case or to take fresh evidence on the merits of the case.[31] Similarly, where an Arbitrator has failed to give reasons for the award, it is unlikely that courts would remit the case to the Arbitral tribunal to give such reasons as it would raise issues as to the authenticity and impartiality of the reasons provided at such time.

Conclusion

The duty of an Arbitrator to give reasons for his/her awards under the Arbitration Act is sometimes veiled with ambiguity. In this article, I have shown that the degree to which an Arbitrator must give reasons has not been authoritatively defined in Sri Lankan jurisprudence. While this study does not offer a conclusive answer to the question of "to what degree should reasons be given?", it stands to reason, keeping in mind the reluctance of Courts to interfere in the arbitral process, that the Courts would adopt a low threshold with regard to the degree to which reasons are to be given. In the absence of **Section 32** clearly defining the failure to give reasons as a ground to set aside an award, it is likely that Courts would entertain the idea of setting aside such an award on the ground that it is not in accordance with the procedure agreed between the parties.

[29] *Light Weight* (n 20) 419
[30] *Alexander Property Developments v Clarke,* High Court New Plymouth, New Zealand, 10 June 2004, CIV. 2004-443-89
[31] CLOUT case No. 12 [*D. Frampton & Co. Ltd. v Sylvio Thibeault and Navigation Harvey & Frères Inc*., Federal Court, Trial Division, Canada, 7 April 1988];

In the aforesaid circumstances, I propose that it would be prudent to introduce an amendment to the **Arbitration Act No. 11 of 1995** of Sri Lanka to clear the lacuna that is found in it with regard to the duty of an Arbitrator to give reasons for his/her award. The inclusion of an additional ground under **Section 32(1)(a)** in this regard is therefore recommended.

WORKING WOMEN AND TIGHT ROPE WALKING: AN AGENDA TO REFORM WORKPLACE FLEXIBILITY LAWS

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Abstract

Substantial variations in labour force demographics and the necessity of work life balance have highlighted the importance of welcoming labour flexibility favourable to women workers to the modern workplaces. Conscious of the growing needs for viable labour flexibility, the research appraises the efficacy of international and national labour framework in facilitating labour flexibility for women employees. This qualitative research is primarily rooted in International Labour Organization (ILO) instruments and labour legislation in Sri Lanka. Secondary sources such as commission reports, texts of authority and research studies have been used in finding answers to the research problem. The paper offers a critical examination on key ILO conventions on working time and work life balance and argues that most of them are designed to meet the needs of traditional male bread winner household. The research proceeds to prove that Sri Lanka labour statutes do not expressly deal with labour flexibility and are reluctant to diverge from traditional working concept also due to gender and cultural ideological factors. Grounded on this line of argumentation, the paper aims to highlight the necessity of reframing the international and national labour law frameworks in facilitating labour flexibility for working women.

Keywords: Labour flexibility, working women, workplaces

Introduction

Despite decades of increased educational participation and attainment in education among women, female employment still lags behind that of men.[1] According to the 2018 Global Gender gap index, the economic participation and opportunity gap is the second-largest gender disparity which maintains at 41.9%.[2] Sri Lanka is ranked 125 with a score of 0.549 under the sub index of economic participation and opportunity gender gap.[3] This low integration of women indicates a significant missed opportunity in professional domain for women leading to the development of many fields without diverse talent limiting its innovative and inclusive capacity. On the other hand, this tendency has also resulted women working below their 'qualification grade' and female underemployment in terms of hours. It is also worth noting that predominantly women are affected by the tensions rising due to the conflicting responsibilities of work and life because of the rise of ageing population, dual-earners, female breadwinners and increasing care and domestic responsibilities.

Flexible working options can play a significant role in addressing these adverse

[1] Amna Silim, Alfie Stirling, *Women and Flexible working* (Institute of Public Policy Research 2014)2

[2] Global Gender Gap Report (World Economic Forum 2018)

[3] Ibid 254

labour market outcomes and effectively reconciling commitments in their work and domestic lives. These arrangements can be defined as any type of working arrangement that allows work to be carried out outside the spatial and temporal limitations of a standard working day.[4] With the advancement of technology, there is spectrum of unstructured, structured, autonomous work structures that alters the time and/or place that work gets done on a regular basis such as flextime, extended leave, part time work, compressed work week, telecommuting, work from home and job share.

Despite the vital necessity flexible working to work life balance in the modern context the guidance provided by the International Labour framework in designing sustainable and flexible working arrangements assuring the necessities of rising female labour force participation are very limited. Most of the ILO conventions on working time are too restrictive to meet the modern realities of flexible working and failed in garnering broad ratifications by ILO member states including substantial number of third world countries. With this impact and the prevailing cultural, gender ideologies in the contexts, Asian third world countries including Sri Lanka still follow an outdated legal framework on working hours unfavorable to flexible working and work life balance on the side of the female employees. This paper intends to explore the effectiveness of ILO responses in facilitating flexible work arrangements and attempts to examine the effectiveness of the national legal framework of Sri Lanka in adopting of international legal standards and international legal trends on flexible working.

ILO and Flexible arrangements

Tracing the history of the international standards of working time it can be observed a downward trend in hours of work which moved in tandem with increases in wages and productivity.[5] The first international labour standard, the **ILO Hours of Work (Industry) Convention, 1919 (No. 1)**[6] accomplished a long-sought trade union objective, the eight-hour workday, into international law, alongside a 48-hour weekly limit on working time[7], a radical notion at a time when 60-plus hour work weeks were still common everywhere. However, it allows working 56 hours in cases of processes which are required by reason of their nature to be carried on continuously by a succession of shifts and offers the opportunity of averaging hours of work over a period of time.[8] The convention also provides leeway for few permanent and temporary exceptions to the general standard to be made after consultation with the organization of employers and workers concerned, special regard being paid to collective agreements, if any, existing between such workers' and employers' organizations.

Similar rules were established by the **Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)**.[9] The objective of Convention No. 30 is to extend the hours of work standards prescribed by Convention No. 1 to all those persons not covered by Convention No. 1, except for those employed in agriculture, maritime or inland navigation, fisheries and domestic service. Similar permanent and temporary

[4] Georgetown University Law Center, 'Flexible working arrangements: A definition and examples<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1009&context=legal> accessed 24th April 2019

[5]Lee Adams, 'The Family Responsibilities Convention Reconsidered: The Work-Family Intersection in International Law Thirty Years On' (2014) 22 Cardozo Journal of International and Comparative Law 201. 232

[6] ILO Hours of Work (Industry) Convention, 1919 (No. 1)

[7]Article 2 of ILO Hours of Work (Industry) Convention, 1919 (No. 1)

[8] Article 4 of the Convention ILO Hours of Work (Industry) Convention, 1919 (No. 1)

[9] ILO Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)

exceptions[10] were provided by the convention which would be applicable after consultation with the workers' and employers' organizations.[11]

It can be observed that the definitions of the exceptions to the normal scheme of working hours authorized by these Conventions are very restricted.[12] Some of these exceptions are directly connoted to the form of work organization. For instance, Shift work is acceptable subject to the condition that the average number of working hours over a period of three weeks or less does not exceed eight per day and forty-eight per week. In addition, if shift work is rendered necessary by the continuous operation of an industrial plant, hours of work can reach fifty-six hours per week on average, without prejudice to the compensatory rest that may be provided for in national legislation.[13]

Same applies to many innovative flexible working arrangements agreed upon between employers and employees and adopted by industrial, individual enterprise level which eased the tight ropewalking of female employees such as staggered working time arrangements, variable daily shifts lengths, annualized working hours, on-call work, flexi time system. The rigid working hours in the aforesaid ILO instruments were designed to meet the needs of traditional male bread winner household. Thus, these stringent limits on working hours are no longer sufficient to accommodate the diversity of modern living and working arrangements. The necessity of relaxing the working hours in order to meet the modern realities of working arrangements was also pinpointed by the committee of Experts on the Application of Conventions and Recommendations. Further the relatively light number of ratifications for both the conventions by developed economies buttress the archaic nature of the conventions.

In this backdrop, with the wave of work life balance started in the end of twentieth century, **Workers with Family Responsibilities Convention, 1981 (No. 156)**[14] was designed by ILO highlighting the necessity of enabling the workers to engage in employment without conflicting employment with family responsibilities. The debate on the text of Convention 156 makes clear that the Committee envisioned designing measures to enable workers with family responsibilities to combine employment and family obligations without conflicting both work and social services.[15] Reasonable flexibility in work is needed for workers with family responsibilities as perhaps the single most effective way to allow them to meet their dual responsibilities concurrently. Though facilitation of flexible working was not directly indicated in the convention, the view of creating effective equality of opportunity and treatment for male and female workers can indirectly support the acceleration of flexible working arrangements in the national policy frameworks.

ILO convention No.156 was supplemented by **the Workers with Family Responsibilities Recommendation, 1981 (No. 165)**.[16] It recommended that particular attention should be given to general measures for improving working conditions and the quality of working life, including measures aiming at the progressive reduction of daily hours of work and the reduction of overtime, and more flexible arrangements

[10] Article 6 and 7 of ILO Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)

[11] Article 8 of ILO Hours of Work (Commerce and Offices) Convention, 1930 (No. 30

[12] ILO, *Working time in the twenty-first century: Discussion report for the Tripartite Meeting of Experts on Working-time Arrangements* (International Labour Office, Geneva, ILO 2011) 4

[13] ibid

[14] Workers with Family Responsibilities Convention, 1981 (No. 156)

[15] Supra(n2) 34

[16] The Workers with Family Responsibilities Recommendation, 1981 (No. 165)

as regards working schedules, rest periods and holidays, account being taken of the stage of development and the particular needs of the country and of different sectors of activity.[17]

ILO convention No 156 strengthened with the **Workers with Family Responsibilities Recommendation, 1981 (No. 165)** is an innovative effort in augmenting 'growing consciousness on work life balance'. But the adequacy of the direction provided for reforming the regulation of work and family for the twenty first century is a moot point. Further the open-endedness of the instrument likely reflected a desire to permit the widest flexibility possible for member states, was criticized at the time as too vague.[18] So this ambitious yet fuzzy attempt did not succeed in garnering broad ratifications by ILO member states including most South Asian third world countries including Sri Lanka and India and remains largely hortatory.

The relatively light number of ratifications to **ILO 156** also suggest that specifying particular substantive outcomes or mandating expenditures for workers with family responsibilities is not likely to result in wider acceptance of this convention.[19] It can be proposed that labour standards in the form of required procedures rather than specified outcomes would be more appropriate and practical in meeting the real work world requests.[20]

Adding process- oriented rights such as right to request flexible working and a right to convert back to earlier terms and conditions if such a job is available as adopted in United Kingdom would be more realistic in achieving work- life balance of women rather than setting arbitrary and unrealistic objectives.

Developed economies v Asian third world countries

Despite the failure of ILO in providing adequate guidance and incentive to facilitate flexible time arrangements, the legal structures of industrialized countries have designed legislative interventions to flexible work for women in employment by mainly providing the right to request reduced hours. For instance, United Kingdom introduced a right to request flexible working through **section 47 of the Employment Act 2002** to limited categories of employees with parental or caring responsibilities.[21] Later this right was expanded to all employees with 26 weeks' continuous employment by the **Children and Families Act 2014**.[22] Since the new legislation came into force, around 36% of female employees with dependent children under the age of six have requested more flexible hours.[23] In Sweden, parents have a legal entitlement to reduce their working hours up to 25% until the child's eighth birthday, with a return to full hours guaranteed thereafter. In Sweden part-time employment rates are above the European Union average, with workers able to move between part- and full-time work with little difficulty.[24] Although these new legislative interventions needs improvements, interestingly they have shifted from enabling flexibility conditional to specified activities to extending access to reduced or part-time employment not only to women but to all or most of the working age population.

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[17] Article 18 of the Workers with Family Responsibilities Recommendation, 1981 (No. 165).

[18]Supra(n2)39

[19] Supra(n2) 47

[20] Richard B. Freeman, *a hard-headed look at labor standards in International Labour standards and economic interdependence* (Werner Segenberger and Duncan Campbell eds. 1994) 79, 89

[21] Doug Pyper, 'Flexible working' (2018) Briefing paper Number 01086, <https:// researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01086 >accessed 29th May 2019

[22]The Flexible Working Regulations 2014 of United Kingdom

[23] P Moss, *International Review of Leave Policies and Research* (Leave Network,2014)29

[24] Ibid

Unlike the western industrialized economies, the concept of flexible working is not much developed and abundant in Asian third world jurisdictions.[25] Culture and gender Ideological factors distinctive to this context play a pivotal role in this regard. Traditional views of gender are still widely held and fathers are still not expected to help with household chores, but rather occupy the role of privileged person in the family.[26] Childcare is often carried out by women sometimes with the help of grandparents and more affluent employees hire domestic helpers.[27] Work and family are viewed as independent and compartmentalized.

Further the mindset that one needs to be in office seems more customary in Asian third world countries. Ideal workers are defined as employees who demonstrate profound dedication to their jobs in terms of long hours, unlimited availability and visibility within the workplace.[28] Individuals who are unwilling or unable to be seen within the organization at all times are often classified as 'unprofessional' and/or uncommitted.[29] Flexible working arrangements are seen as 'favours' than entitlements. This leads to the lack of demand from female employees for flexible working arrangements. On the other hand, the lack of female representation in the Labour unions, gender discrimination experienced by women at workplaces often lead to demands of female employees for flexible working arrangements left unheard. In this backdrop, the legal responses reassuring flexible working arrangements are inadequate or mostly non- existent in the Asian third world countries.

Flexible working in Sri Lankan legal context

In Sri Lanka, the labour legislations do not have any provision that expressly deals with flexible working arrangements. **Wages Board Ordinance of 1941**[30], **Shop and Office Employees Act of 1954**[31], **Factories Ordinance of 1942**[32] adhering to the outdated international standards of restrictive- protective approach contain rigid working hours, rest intervals and different types of holidays. The normal period during which any person may be employed in or about the business of any shop or office should not exceed eight hours and in any one week must not exceed forty five hours under the **Shop and Office Employees Act of 1954**.[33] The Act does not provide for minimum hours of work in a day or week. Therefore, it could be construed that the Act applies to the part – time workers as well.[34] The total hours worked, exclusive of intervals for meals and rest should not exceed nine hours in any day and not exceed 48 hours in any week under the Factories ordinance.[35]

It is also evinced that the masculine norms and gendered structural assumptions still haunting in labour legislations are hindering women from engaging in modern flexi time arrangements. For instance, female workers cannot be employed for more than ten days on night

[25] work life balance policies and practices <http://shodhganga.inflibnet.ac.in/bitstream/10603/30836/9/09_chapter4.pdf> accessed 16th April 2019

[26] Boston College Global work force round table, 'Flexible working arrangements in Asia' <https://www.bc.edu/content/.../Flexible%20Work%20Arrangements%20in%20Asia> accessed 24th May 2019

[27] ibid

[28] Dulini Fernando, The rhetoric and reality of the work life balance agenda < http://www.ft.lk/columns/The-rhetoric-and-reality-of-the-work-life-balance-agenda/4-652172> accessed 1st May 2019

[29] ibid

[30] Wages Board Ordinance of Sri Lanka No 24 of 1941

[31] Shop and Office Employees Act (Regulation of Employment and Remuneration) Act of Sri Lanka No 19 of 1954

[32] Factories Ordinance of Sri Lanka No 45 of 1942

[33] Section 3(1) (a) &(b) of the Shop and Office Employees Act (Regulation of Employment and Remuneration) Act of Sri Lanka No 19 of 1954

[34] A.Sarveswaran,'A Reflection on Ratification of ILO Conventions to Promote Family Friendly Employment in Sri Lanka' SL Labour gazette (2019) 70 (1) 1,9

[35] Section 67 of the Factories Ordinance No 45 of 1942

work, during any one month.[36] Similar limitations and prohibitions in night work are imposed by **section 67(A) 2 of the Factories Ordinance**[37]and the **Shop and Office Employees' Act**.[38]

However, the **2018 amendments** to the Shop and Employees' Act and Maternity benefits ordinance provided more opportunity for mothers to spend considerable time with the babies. The amended shops and office act provides maternity leave for eighty-four days for any number of children[39] and allows working mothers to take two nursing intervals at such times as she may require.[40] The maternity benefits ordinance as amended in 2018 provides maternity leave for twelve weeks for any number children.[41] Though these new amendments are comforting efforts for working mothers they make rights to flexible working conditional to a specified activity namely caring for young children. Sri Lanka needs to rethink in providing access to flexibility as a part of protection against discrimination based on broader family care-giving responsibilities. Country needs to further broaden this concept by incorporating paternity leave or parental leave for the legal framework.

The common employer-oriented flexible working arrangements are often used in the Sri Lankan informal economic structure such as part time, seasonal employment, shift work. But non regulation of these arrangements by the prevalent labour law structure provides leeway for the exploitation of the female employees in the informal economies and jeopardizes the decent work norms of the workers of above categories. Further the flexible working arrangements being more concentrated on elementary, informal occupations and less focused on professional and managerial roles can tend high- skilled mothers to shift to informal economy pushing themselves to take up work of a lower level than what they are capable of. This is a suboptimal outcome for both employees and employers as it represents a significant opportunity cost and a loss of potential output.

Conclusion and Final remarks

Flexible work practices can result in higher rates if employment and batter matches between qualifications and job skilled level for women and mothers while enabling them to balance the work and life.

Thus, the ILO needs to consider in framing a modern legal framework balancing the needs of female workers and enterprises. Relatively light number of ratifications including substantive number of third world countries to the discussed conventions suggests that prevalent 'specifying particular substantive outcomes model' is not likely to result in a wider acceptance of these conventions. Structuring the international regulations in the form of procedures rather than specified outcomes would be more beneficial leading them to be considered as "fundamental social rights".[42] Sri Lanka same as many Asian third world countries, lack a legal framework that support flexible working arrangements. Cultural, gender ideologies, masculine norms embedded in law often devalue the importance of flexible working arrangements. Modifications of the prevalent outdated labour laws to cater flexible working thereby promoting a family friendly employment policy is imperative in reducing the weak

[36] The Employment of Women, Young Persons and Children Act No.47 of 1956

[37] Section 67(A) ()2 of the Factories Ordinance of Sri Lanka No 45 of 1942

[38] Section 10 of Shop and Office Employees Act (Regulation of Employment and Remuneration) Act of Sri Lanka No 19 of 1954

[39]Section 2 of Shop and Office Employees (Regulation of Employment & Remuneration) (Amendment) Act, No.14 of 2018

[40] Section 2 of Shop and Office Employees (Regulation of Employment & Remuneration) (Amendment) Act, No.14 of 2018

[41] Section 2 of the Maternity Benefits (Amendment) Act, No.15 of 2018

[42] Supra(n18)

employment outcomes towards women and to utilize the full potential of women workers. However, the efficacy of the modifications without an attitudinal change in the society in flexible working is a moot point.

LORDS SAVE THE CONSTITUTION!

INTERPRETING THE SRI LANKAN CONSTITUTION: ITS DIMENSIONS AND FACETS

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Abraham Lincoln, while commending the sacrifices of those who fought for their liberties, rightfully said; *"that these dead shall not have died in vain that this nation, under God, shall have a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth"*[1].

Preceded by a long struggle for independence, the architects of the Constitution of the Democratic Socialist Republic of Sri Lanka have embarked on a long journey passing several milestones from the **First Republican Constitution in 1972** to the **Second Republican Constitution in 1978**. Sri Lanka is a country where sovereignty is vested in people and is inalienable[2]. Therefore, the numerous amendments[3] made to the Constitution over the years, could be regarded as attempts made to reflect the mandate of the people.

Manifestly, it is critical to facilitate a harmonious interpretation of the provisions of the Constitution to ensure the sovereignty of the people and accountability to the people, and to undermine the unfettered exercise of State power. Therefore, being one of the three organs of the State, the judiciary is vested with an immense responsibility to interpret the constitutional provisions confined to the lines drawn by architects of the Constitution. The Judiciary is thus duty bound to interpret these provisions to ensure that any executive or administrative action do not infringe the fundamental rights guaranteed under the Constitution.

The author ascertains Their Lordships' efforts in facilitating a harmonious interpretation of the Constitution while safeguarding the intention behind the texts of the Constitution and its structure. However, the scope of this article is limited to the fundamental rights jurisdiction of the Supreme Court[4].

There is a robust arrangement of case law developed over time in the fundamental rights jurisdiction. In observing recent jurisprudence, especially the following, the author believes that it aptly shows the attempts of Their Lordships of the Supreme Court to broaden horizons of the fundamental rights jurisdiction. The pragmatic approach taken by Their Lordships to facilitate a harmonious interpretation in par with the international standards[5] is remarkable.

The author seeks to begin this journey with a remarkable judgment delivered by a Bench of nine Judges of the Supreme Court in terms of **Article 12(1)**. In terms of the scope of **Article 12(1)**, it is stated that [it] *"(…) perhaps has the most dynamic jurisprudence in our Constitutional law, offers all persons a protection against arbitrary and mala fide exercise of power and*

[1] (White & Ronald, 2008)

[2] Article 3 of the Constitution of Democratic Socialist Republic of Sri Lanka states that *"In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise"*.

[3] The First Amendment to the Nineteenth Amendment to the Constitution of the Democratic Socialist of Sri Lanka

[4] With regard to the applications made under and in terms of Articles 17 and 126 of the Constitution.

[5] (Moeckli, Shah, & Sivakumaran, 2014)

guarantees natural justice and legitimate expectations"[6].

Sampanthan and others vs Attorney General (2018)[7]

On 9th November 2018, the news of His Excellency the President[8] dissolving the Parliament[9], broke the internet as well as the national and international confidence on political stability. Several cases were filed to invoke the fundamental rights jurisdiction of the Supreme Court to maintain the sanctity of the Constitution.

It was a ground-breaking moment in the Sri Lankan history, when a Bench of nine Judges in the Supreme Court unanimously held that the said Proclamation violated the petitioners' rights guaranteed under **Article 12(1)**. The Court, thus, made an order quashing the said Proclamation and declaring the said Proclamation null, *void ab initio* and without force or effect in law. Thereby, the Supreme Court upheld that it is the inalienable right of every citizen of Sri Lanka to invoke the fundamental rights jurisdiction of the Supreme Court. Such right is a cornerstone of the sovereignty of the people, which is the 'Grundnorm' of the Constitution.

Lord Chief Justice H.N.J. Perera, emphasised the fact that *"The Constitution governs the nation. Disregarding the Constitution will cast our country into great peril and mortal danger. The Court has a duty to uphold and enforce the Constitution"*. His Lordship thereby reiterated the Court 's declaration that *"In Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary"*[10].

In the author's opinion, it was a well-articulated judgement armed with profound reasoning and conclusions[11] and a situation it is right to say that the penmanship has done justice to the ink. A few significant standpoints of this judgment as identified by the author are as follows;

- The mere existence of the procedure described in Article 38(2)[12], which the Respondents claimed as being solely a power

[6] (Sampanthan and others v. Attorney General and others (2018), SCFR 351-361/2018, SCM 13-12-2018.)

[7] (Sampanthan and others v. Attorney General and others (2018), SCFR 351-361/2018, SCM 13-12-2018.)

[8] His Excellency Maithripala Sirisena, The President of the Democratic Socialist Republic of Sri Lanka

[9] The Proclamation, which was published in the Extraordinary Gazette No. 2096/70 dated 9th November 2018 stated that such proclamation was issued by virtue of the powers vested in His Excellency the President by paragraph (5) of Article 70 of the Constitution of the Democratic Socialist Republic of Sri Lanka to be read with paragraph (2) (c), of Article 33 of the Constitution of the Democratic Socialist Republic of Sri Lanka and paragraph (2) of Article 62 of the Constitution of the Democratic Socialist Republic of Sri Lanka and in pursuance of the provisions of section 10 of the Parliamentary Elections Act, No. 01 of 1981.

[10] (Premachandra vs. Major Montague Jayawickrema (1994) 2SLR 90)

[11] His Lordship the Chief Justice emphasised the basis for the judgment as "*To my mind, the reasoning and conclusions set out above gives effect to the first principle of statutory interpretation that the words of a statute must be given their plain and ordinary meaning and that the clear and unequivocal language of a statute must be enforced. The rule that provisions in the Constitution must be harmoniously read and applied so that the scheme of the Constitution can be made effective without rendering any provision superfluous or redundant, is complied with. Further, the reasoning and conclusions set out above ensures that the words in the relevant provisions are not strained or twisted in an attempt to reach a conclusion which is not justified by the provisions themselves. To my mind, the effect of this interpretation also accords with the duty cast on this Court to read and give effect to the provisions in the Constitution so as to uphold democracy, the Rule of Law and the separation of powers and ensure that no unqualified and unfettered powers are vested in any public authority*".

[12] Article 38(2) of the Constitution states, *inter alia*, that any Member of Parliament may give the Hon. Speaker written notice of a resolution alleging that the President then in office is incapable of discharging the functions of his office by reason of physical or mental infirmity because the President then in office is guilty of intentional violation of the Constitution and/or misconduct or corruption involving the abuse of the powers of his office and/or three other grounds and seeking an inquiry and report thereon by the Supreme Court.

vested in Legislature, cannot deprive those Petitioners, who are Members of Parliament, of the inalienable right of every citizen of our country to invoke the fundamental rights jurisdiction;

- *"Since the proviso to Article 35 (1)[13] grants the right to challenge acts or omission by the President "in his official capacity" only by way of the specific procedure of making a fundamental rights application under Article 126 of the Constitution, it follows that "executive or administrative action" by the President "in his official capacity" may be challenged in terms of the proviso to Article 35 (1)[14]"*;
- The exercise of the power of dissolution of Parliament which is listed as one of the powers of the President in Article 33, which is within CHAPTER-VII[15], is one manner in which the President exercises executive power;
- The Court, while clarifying the position taken in several other judgments[16], held that *"our Law does not recognise that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power"*;
- While reiterating the basic principle, nothing valid can result from the illegality, the Court emphasized the fundamental premise that any exercise of the franchise, must be at a duly and lawfully held election, which satisfies the Rule of Law[17]. *"A departure from that rule will result in the negation of the requirement of the Rule of Law that an election must be lawfully called and be lawfully held and, thereby, adversely affect the results of an ensuing election"[18]*.
- *"The suggestion that Article 33(2)(c) vests in the President an unfettered discretion to summon, prorogue and dissolve Parliament at his sole wish and without reference to the clear and specific provisions of Article 70 is anathema to that fundamental rule and therefore must be rejected. Article 62(2) does not vest any separate or independent power in the President to dissolve Parliament outside the mechanism specified in Article 70(1)[19]"*.
- While emphasising the evolution jurisprudence under Article 12(1) since the doctrine of classification, the Court held that *"In a Constitutional democracy where three organs of the State exercise their power in trust of the People, it*

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[13] The proviso to Article 35 (1) of the Constitution was introduced by the 19th Amendment to the Constitution introduced a very significant change. It reads that "Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity."

[14] With the exclusion of the power to declare War and Peace under Article 33 (2) (g) from the ambit of the Proviso to Article 35(1) of the Constitution.

[15] CHAPTER-VII of the Constitution titled *"THE EXECUTIVE the President of the Republic*

[16] Visuvalingam vs. Liyanage (1983) 1 SLR 203, p.222: Singarasa vs. The AG (2013) 1 SLR 245; Maithripala Senanayake vs. Mahindasoma (1998) 2 SLR 333

[17] Article 105 of the Constitution places a duty on the Supreme Court to protect, vindicate and enforce the rights of the people which include the right of franchise and the Court acknowledged that it is obliged to act to uphold the Rule of Law.

[18] *"The Court further held that decision to issue the said proclamation may have been a political decision, the power to dissolve Parliament is specified in the Constitution, and, therefore, this Court has both the power and the duty to examine whether the issue of the said Proclamation was in accordance with the Constitution".*

[19] Therefore, the Court held that *"any dissolution of Parliament referred to in Article 33 (2) (c) and Article 62 (2) can only be effected by way of a Proclamation issued under Article 70 (1) which, in turn, can be issued only subject to the limitations specified in the second paragraph of Article 70 (1)".*

is a misnomer to equate Equal protection' with reasonable classification'. It would clothe with immunity a vast majority of executive and administrative acts that are otherwise reviewable under the jurisdiction of Article 126. More pertinently, if this Court were to deny relief merely on the basis that the Petitioners have failed to establish unequal treatment', we would in fact be inviting the State to equally violate the law.' It is blasphemous and would strike at the very heart of Article 4(d) which mandates every organ of the State to respect, secure and advance the fundamental rights recognized by the Constitution‖. Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal. It does not require positive discrimination or unequal treatment. An act that is prohibited by the law receives no legitimacy merely because it does not discriminate between people".

In contrast, the recent judgment of the Supreme Court of the United Kingdom in ***R v The Prime Minister (2019)***[20]refers to a prorogation of the Parliament in a country clothed with an Unwritten Constitution, as opposed to a dissolution of the Parliament in a country with a Written Constitution. Admittedly, there is a difference as to the consequence of the prorogation as opposed to the dissolution. However, the subject matter in question is relatively similar, because in the said judgment of ***R v The Prime Minister (2019)***[21], it was held that the said propagation was null and void for being founded on an unlawful advice, which was outside the scope of the powers of the Prime Minister.

Thus, the author observes a pattern reflecting the willingness of the judiciary in a Democratic setup to cut down the wings of plenary powers and unfettered discretion and to uphold the Rule of Law.

Wickramanayake and Kumarasinghe vs Mahinda Balasooriya, Inspector General of Police (2019)[22]**,**

This case invoked the fundamental rights jurisdiction in terms of **Article 12(1)** infringement of two Police officers. They were given transfers to other stations as a result of alleged insubordination occurred when discharging their duties impartially. This alleged insubordination occurred when they refused to follow unlawful Orders of Senior Officers during the Presidential Election held in the year 2010. In following a plethora of jurisprudence in similar matters[23], His Lordship, Justice Padman Surasena, while declaring the said transfers null and void, held that;

"This Court thinks this is a fit occasion to commend the forthrightness displayed by the Petitioners even in the face of the aforementioned adversary circumstances. There is no doubt that they had undergone a difficult time for mere upholding the rule of law in the country. Therefore, this Court decides to award a compensation in a sum of Rs. 1,000,000/= to each of the Petitioners payable by the 1st Respondent and the 3rd Respondent in equal shares."

The author verily believes that the Court has considered the effect of this application on future implications of similar nature and to has taken this as an opportunity to empower the Public Officers not to ponder on unwarranted

[20] (R (on the application of Miller) (Appellant) v The. Prime Minister (Respondent). Cherry and others (Respondents) v Advocate [2019] UKSC 41)

[21] (R (on the application of Miller) (Appellant) v The. Prime Minister (Respondent). Cherry and others (Respondents) v Advocate [2019] UKSC 41)

[22] (Wickramanayake and 1 other vs Mahinda Balasooriya, Inspector General of Police and others, SCFR81/2010, SCM 27-08-2019)

[23] Wijesuriya and another v. State 77 NLR 25; Deshapriya v. Rukmani, Divisional Secretary, Dodangoda and Others 1999 2 SLR 412

consequences, before resisting an illegal Order, in defending the Rule of Law.

Christopher Mariyadas Nevis for Mariyadas Nevis Delrokson (Deceased) v. Superintendent of Vavuniya Prison (2019)[24],

This case involves a fundamental rights application filed by the father of a deceased, who was arrested under Prevention of Terrorism Act[25] and had been later involved in a hunger strike when he was detained at *Vavuniya* prison. In the majority judgment, the Court held that in the circumstances of the case that it was not a violation. However, in the dissenting judgment of His Lordship Justice E.A.G.R. Amarasekara in *Christopher Mariyadas Nevis for Mariyadas Nevis Delrokson (Deceased) v. Superintendent of Vavuniya Prison(2019)[26]*, whereby his Lordship held that denial of timely medical care amounts to a violation of the deceased's fundamental rights.

The author observes that the international law is of persuasive value to the Supreme Court. The Supreme Court has expressly absorbed decision in *Linton v. Jamaica[27]* where denial of medical care for injuries suffered even in an escape attempt was considered cruel and inhuman, and thus, held as such would be violative of **Article 11 of the Constitution**. Similarly, *Thomas v Jamaica[28]* and *Bailey v Jamaica[29]* took the same view on the denial of medical care. The author also observes that the decision in *Thomas v Jamaica[30]* was also cited *in Somawardena v. Superintendent of Prisons & Others[31]* for the proposition that the failure to provide medical treatment to a person whose shoulder had been dislocated by an assault by the police was "cruel".

Anjali (Minor) vs Bogahawatte, Matara Police Station(2019)[32]

In this case, His Lordship Justice Buvaneka Aluvihare held that conduct of the respondent Woman Police Officer amount to a violation of minor child's fundamental rights guaranteed under **Articles 11, 12(1), 13(1) and 13(2) of the Constitution**. Such conduct included initiating the investigation of an alleged sexual abuse in public, failing to appreciate the dignity of the child, failing to consider the child's education and other social concerns, preventing the child to be associated with a parent or guardian, detaining the victimized child with another adult female inmate, and performing a medical examination without consent.

In view of the circumstance of this case, the Supreme Court recognized that *"what amounts to a 'high degree of maltreatment' in relation to an adult does not always resonate with the mental constitution of a minor. Therefore, when a minor complains of degrading treatment, the Court as the upper guardian must not be quick to dismiss the claims for failing to meet the same high threshold of maltreatment. Instead, it must carefully consider the impact the alleged treatment may have had on the mentality and the growth of the child".*

[24] (Christopher Mariyadas Nevis for Mariyadas Nevis Delrokson (Deceased) v. Superintendent of Vavuniya Prison, SCFR 660/2012, SCM 23-05-2019)

[25] Prevention of Terrorism Act No. 48 of 1979

[26] (Christopher Mariyadas Nevis for Mariyadas Nevis Delrokson (Deceased) v. Superintendent of Vavuniya Prison, SCFR 660/2012, SCM 23-05-2019)

[27] (Linton v. Jamaica, Communication No. 255/1987, U.N. Doc. CCPR/C/46/D/255/1987 (1992))

[28] (Thomas v Jamaica Communication No. 321/1988, Views of the U.N. Human Rights Committee, 19 October 1993)

[29] (Bailey v Jamaica Communication No. 334/1988, Adoption of Views by the UNHRC 31 March 1993)

[30] (Thomas v Jamaica Communication No. 321/1988, Views of the U.N. Human Rights Committee, 19 October 1993)

[31] (Somawardena v. Superintendent of Prisons & Others Sc App 494/93 SPL SCM 22 March 1995)

[32] (Anjali (Minor) and 1 other vs Bogahawatte, Matara Police Station and others, SCFR 677/12 SCM 12.06.2019)

His Lordship, thus, laid down several guidelines to be followed by the law enforcement officials, in securing and advancing the fundamental rights of the public. The author further observes that the said decision of the Supreme Court has considered international instruments such as *United Nations Convention on the Rights of the Child* and *United Nations Rules for the Juvenile Deprived of their Liberty*. Additionally, the author deems that the Apex Court of Sri Lanka is sensitive to the questions as to how do this girl and her family feel? If it happened to one of our daughters, as parents, we would realise the suffering experienced by the child and her family. The author verily believes that every law enforcement official shall be aware of these guidelines and duly take cognisance of it in discharging their duties.

Conclusion

Evidently, *"the judge's role when interpreting the Constitution is like that of an artist drawing a picture: the frame of the picture and the artist's tools must always be drawn from the texts of the Constitution, its structure and the country's history, but there must also be some measure of the artist's own vision and understanding"*[33].

The author verily believes that as the society advances with culture and mannerism, and the laws shall be progressive to enable demands of a disciplined society. Therefore, there shall only be room for improvement in safeguarding the fundamental rights of the people, who hold sovereignty. Manifestly, Their Lordships in the Supreme Court are cloaked with an immense responsibility to ensure that the Constitutional guarantees are harmoniously interpreted through case law to protect these constitutional safeguards available to people[34] and to uphold the Rule of Law.

In the author's opinion, the liberal attitude of the Honourable Judges in discharging Their Lordships' duty to ensure of the sovereignty of the people exercised in terms of the **Article 4(d) of the Constitution** is plausible. Indeed, the Lords save the Constitution

[33] (Nariman, 2018)

[34] (Karim, 2016 and 2018)

AN ANALYSIS OF THE MEDICO-LEGAL PRINCIPLES, INVESTIGATIONS, PROCEDURES AND PRACTICES RELATING TO THE DEATHS OF VICTIMS OF THE EASTER SUNDAY TERRORIST ATTACK AT THE KOCHCHIKADE CHURCH

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Introduction

On 21st April 2019 (Easter Sunday), three churches in Sri Lanka and three luxury hotels in the capital of Sri Lanka, Colombo were targeted in a series of coordinated terrorist suicide bombings. These church bombings were carried out during Easter morning church services in Kochchikade, Negombo, and Batticaloa. The hotels that were bombed were the Shangri-la, Cinnamon Grand and Kingsbury. Later that day, there were smaller explosions at a house in Dematagoda and a guest house in Dehiwala.

The clock on the top front right-hand side of the St. Anthony's church stopped at 8.45am on the 21st of April 2019, marking the time of one of the most devastating terrorist explosions that has occurred in Sri Lanka. Subsequent detailed criminal investigations conducted by specialized agencies of the Sri Lankan Police headed by the Criminal Investigations Department has transpired that all these terrorist attacks had been carried out by an extremist Islamic terrorist group named akin to the ideology of the so-called Islamic State (IS). The attacks were perpetrated using a human suicide bomber per each site.

A disaster is a sudden calamitous event bringing great damage, loss or destruction[1]. The World Health Organization (WHO) has defined a disaster as "an event; natural or man-made, sudden or progressive, which impacts with such severity that the affected community has to respond by taking exceptional measures". Based on the cause of mass disasters, they can be broadly categorized into three forms. They are, (i) natural mass disasters, (ii) accidental mass disasters, and (iii) man-made (intentional) mass disasters. As opposed to natural and accidental mass disasters, 'man-made mass disasters' can be defined as events that are caused intentionally and purposefully by human beings, to bring about the consequences of sever destruction. Acts of violence such as 'terrorism', which results in the death of a large number of people and extensive damage being to property, can certainly be considered as a main type of man-made mass disaster. The terrorist attack at the Kochchikade St. Anthony's church resulted in the deaths of 52 persons and bodily injury to another 81. There was vast damage to the church. Thus, this incident can be categorized as a man-made mass disaster.

One of the most important tasks in the immediate aftermath of such a mass disaster, which has resulted in the death of a large number of victims, is to establish to a certainty the identity of the victims and the manner and cause of their deaths. This is a human, social and legal necessity. The Government of Sri Lanka has taken important steps towards strengthening legislative, institutional and organizational arrangements with regard to the management of disasters. As a result of which, in May 2005, the **Disaster**

[1] Oxford Dictionary

Management Act, No. 13 of 2005 was enacted. The primary objective of the new law is to prepare disaster management plans, to declare a state of disaster, mitigate harm, manage the aftermath of disasters and provide relief to victims including the award of compensation. However, this law does not contain specific provisions for the management of human remains of deceased disaster victims, including the identification of the deceased and the determination of the manner and cause of their deaths. However, **Chapter XXX of the Code of Criminal Procedure Act (CCPA) No. 15 of 1979**, provides for legal provisions for the conduct of Inquest into deaths. Unfortunately, these provisions also do not specifically relate to Inquests into Deaths of disaster victims, and the management of their remains.

In Sri Lanka, when a death occurs ostensibly in an unnatural manner, investigations and inquiries are conducted, primarily by State agencies, with the view to ascertaining the cause for the death, resulting in the ascertainment of and pronouncing the reason for the death and taking necessary action, including enforcement of the law against persons responsible for causing the death (in the event of a culpable homicide). One such process is referred to as 'Inquest of Death', and is generally considered as being a part of the Criminal Justice System of Sri Lanka.

The first inquest proceedings relating to the accidental deaths of a large number of persons had taken place in 15th November, 1978. This had been in relation to the deaths of 183 (79 survivors) airline passengers and crew members of an Icelandic Airlines flight 001 which crash landed on a coconut estate in Minuangoda very close to the Bandaranayake International Airport. While documentation relating to those proceedings is presently inaccessible, according to reliable anecdotal evidence postmortem examinations into the bodies of all victims had been carried out in situ inside a makeshift hut. Scientific DVI processes had not been followed, due to lack of resources and the status of forensic sciences at that time. Since then, forensic pathological services of Sri Lanka had advance considerably. Inquests into mass deaths have been conducted in numerous occasions particularly associated with the era of the armed conflict cum terrorism which ended in may 2009. A high-water mark seems to be the 1999/2000 inquests into 15 human skeletal remains found in multiple graves in Chemmani, Jaffna. During these Inquests for the purpose of ascertaining of identifying the deceased victims, mitochondrial DNA analysis had been conducted. These professional standards of forensic pathological services seem to be rising significantly.

Inquest of Deaths

In terms of the prevailing Sri Lankan law, Inquirers who are also known as 'Coroners' should conduct Inquests into deaths. Further, a Magistrate too has the jurisdiction to conduct Inquests into deaths with regard to deaths that occurred suddenly[2]. When one reads **section 9(b)(iii) with section 370(1) of the CCPA**, it becomes evident that both Magistrates and Inquirers shall have concurrent legal authority to conduct Inquest of Deaths into the following types of deaths:

(i) Deaths due to accidents,
(ii) Sudden deaths,
(iii) Where the body of the dead person is found without the case of the death being known.

It is apparent that mass disasters (natural as well as man-made) occur suddenly. Therefore, in the aftermath of a mass disaster, Inquirers as well as Magistrates may conduct Inquests with regard to victims of such disaster. Both Magistrates and Inquires have been conferred with territorial jurisdiction. Thus, which

[2] Code of Criminal Procedure Act, Section 9(b)(iii), Chapter II

Inquirers or Magistrates should conduct the Inquest can be determined based on the location where the dead person's body is found. For the purpose of conducting an Inquest in terms of **chapter XXX of the CCPA**, Magistrates and Inquirers have been conferred with several powers. In terms of such powers, they are entitled to call upon the government medical officer of the district (DMO) or any other medical practitioner, to hold a Post Mortem Examination (PME) into the death of the deceased and to report to the Magistrate or Inquirer as the case may be, regarding the cause of the death[3]. It is pertinent to note that the present law regarding Inquests into deaths envisages an Inquest being conducted into one death, being conducted by one Magistrate or an Inquirer and supported by a postmortem examination into that single body being conducted by one medical officer. The Easter Sunday bombings at the Kochchikade church would show that in the aftermath of that mass disaster, **there was a need to deviate from that "one body, one Inquest, one magistrate, one medical officer" model and implement a "macro" model, which had a "team" approach, with sub-teams conducting different aspects of the Inquest into the death of multiple victims.**

Immediate aftermath of the terrorist attack[4]

"A big sound was heard and all the glass windows of the police station started to vibrate."

Chief Inspector of Police (CI), Mr. Nuwan P. Danthanarayana designated as the Officer-in-Charge (OIC) of the Offshore Police Station explained[5]. Having received the first information, the OIC proceeded towards the scene in less than five minutes. When the OIC entered the church premises, there had been a thick black smoke inside the church and people inside had been screaming and crying in pain. As an initial measure, the OIC had taken steps to inform all appropriate higher officials. On instructions of the OIC, the injured were rushed to the Accident Service of the National Hospital of Sri Lanka with the assistance of the first responders and lay people who abundantly came forward to assist. Having concluded this process, the OIC informed the Chief Magistrate of Colombo (CMC) with regard to the explosion via a telephone call[6]. It is that telephone call that triggered off the subsequent Magisterial Inquests into the deaths of the deceased victims.

Commencement of the Inquest proceedings

As per the information provided by the OIC, the Chief Magistrate of Colombo (CMC) Hon. Lanka Jayaratne had arrived at the scene at 11.10am to conduct the Magisterial Inquest into the deaths of the victims. Many first Responders had been present at the scene at that time, including police officers, officers of the Special Task Force, armed force personnel Ambulance personnel and the Bomb Disposal Units of the armed forces. Initially, in keeping with the recognized protocol, scene safety measures had been taken in order to prevent any further and sympathetic explosions[7]. In order to prevent forensic evidence at the scene being destroyed, the CMC had informed the Colombo Judicial Medical Officers (JMOs) to commence the conduct of the forensic pathological investigations at the scene itself. This was following her having selected Consultant Chief Forensic Pathologist and the Head of the Institute of Forensic Medicine and Toxicology (IFMT) of the National Hospital of Sri Lanka (NHSL) Dr. Ajith

[3] Code of Criminal Procedure Act, Chapter XXX, Section 373(1)

[4] A terrorist attack may be defined as the use of organized or premeditated, intentionally indiscriminate violence as a means to create terror among masses and is generally associated with an intention to achieve a religious or a political aim.

[5] In an interview given to the Author on 29th August, 2019

[6] Code of Criminal Procedure Act, Section 22, Chapter III

[7] College of Forensic Pathologists' Manual, Management of the Dead in Disasters and Catastrophes (2016)

Tennakoon to be the Head of the team of Forensic Pathologists to conduct the post mortem examinations into the bodies of the deceased victims. Accordingly, the Consultant JMO Colombo Dr. Channa Perera (deputy of Dr. Ajith Tennakoon) and his team arrived at the scene at 11.45am. The CMC had also directed the Government Analyst to arrive at the scene to commence the conduct of other forensic investigations.

Before the initial scene inspection, CMC had taken steps to divide the scene into several geographical parts, in order to facilitate investigational purposes. Accordingly, St. Anthony's church was divided into 5 parts, and named A, B, C, D and E. Further, different areas in each part had been sub-divided into several sub-parts and numbered as A-1, A-2 etc. The CMC and her team, Consultant JMO and his team and the Police officers had simultaneously conducted the crime scene inspection. Later, Scene of Crime Officers (SOCO) of the Police had also conducted their crime scene investigations.

The location, collection and tagging of human bodies and body parts were conducted during the initial phase. This process resulted in human remains being classified and tagged at the scene itself. Complete bodies were tagged as 'CB' and Body parts tagged as 'BP'. Initial tagging at the crime scene was conducted in the following manner; a complete body found in part B as mentioned above was tagged as B-CB/1 and a body part found in part B was tagged as B-BP/1.

As per the provisions of the CCPA, an Inquest of death should be held at an open place. However, on special grounds of public policy and due to expediency, the Magistrate (MC) or an Inquirer may use his discretion in excluding the public at any stage of the Inquiry from the place in which the Inquest is being held[8]. Thus, the CMC had initially made arrangements for the public to identify the dead at the scene itself. However, due to the trauma and other circumstances, which prevailed at that moment, it had been difficult for the public and the officials to participate in the relevant procedures relating to the identification of the dead. Therefore, the CMC had informed the public that the identification of the deceased would take place at the Institute of Forensic Medicine and Toxicology (IFMT). Afterwards, all dead bodies were transported immediately in body bags to the IFMT located at No. 111, Francis Road, Colombo 10.

Management of the remains of the deceased victims

The management of the dead is described under six procedural aspects[9]. It is as follows:

I. Recovery of bodies/body parts (human remains) at the scene
II. Management of bodies pronounced dead at the hospital.
III. Initial management of bodies/body parts brought to the body holding area/mortuary.
IV. Identification of the dead.
V. Determination of the manner and cause of death.
VI. Release of bodies/body parts and handing over of personal effects.
VII. Debriefing and counseling.

The bodies that were transported to the IFMT were managed as per the procedural aspects mentioned above. The disaster victim identification process of the Easter Sunday attack had been conducted in two parts at the IFMT[10]. A primary identification had been initially done outside the IFMT. Photographs of the deceased were taken and displayed digitally on a screen with a new tag number. The particular relative who identifies the deceased were told to go inside the office and participate in a secondary, more intimate identification process. During this second stage of the

[8] Code of Criminal Procedure Act, Section 372(2), Chapter XXX
[9] *Supra.,5*
[10] In an Interview to the Author by Dr. Ajith Tennakoon, Consultant Judicial Medical Officer, Head, IFMT, Colombo

identification process, the relative was given the opportunity to look at the deceased from the naked eye and attempt to identify. In most instances, identification of the dead through their external appearance had been difficult to even the immediate family members due to torn, burnt and absent clothing and existence of serious injuries particularly on the face. Where identification of the deceased was not possible by the external appearances, or was doubtful and in instances where only a body part was found, establishing the identity of the deceased was sought through DNA testing and Forensic Odontology.

As per the provisions of the CCPA, the Magistrate or Inquirer holding an Inquest shall record the evidence and his findings thereon[11]. Accordingly, having identified the deceased, the relative was informed to make a statement to one of the Magistrates who were present (6 Magistrates presiding in Colombo had assisted the CMC in the conduct of these Inquests). Having taken down the statement given by the relative who identified the deceased, the Magistrate made an order to a JMO to conduct a postmortem examination (PME) into the body of the identified deceased in order to ascertain scientifically the manner and cause of death[12]. Accordingly, the JMO had conducted the PME and had given an initial report to the Magistrate in a document captioned 'Cause of Death Form'. That enabled the Magistrate to primarily arrive at his finding on the 'apparent cause of death', which is the finding the Magistrate is required to arrive at in terms of the CCPA. The CMC had made provision for the Registrar Deaths of the relevant areas to be present at the IFMT in order to register the death and issue the 'death certificate'. This is a legal requirement pertaining to every death, in terms the Births and Deaths Registration Act 1954. Having concluded this process, the human remains had been released to the families or the next of kin. The bodies of foreign nationals, whose family members were not available, were released to their government's diplomatic representatives.

Following the conduct of detailed forensic medical examinations, proper 'Post Mortem Reports' (PMR) have been issued to replace the previous 'Cause of Death Forms'. The scientific manner and cause of death of all the deceased victims had been documented in various forms. Such as, multiple explosive injuries, shrapnel injuries, Hemorrhage due to shrapnel injuries etc.

The Suicide Bomber

On the day of the explosion, while the relevant authorities were tagging dead bodies and body parts at the scene, they found a human 'head' on the floor inside the church. At that time, considering the surrounding circumstances and the evidence available, it was assumed that the head was that of the suicide bomber. However, later that day, another head was located stuck in a chimney on the roof of the church. This human remain was located right on top of the epicenter of the blast. Subsequently, the officials correctly identified this second head to be the correct human remain of the suicide bomber, and the earlier 'head' as that of another victim. This (the head of the suicide bomber) was tagged as T-200 and was transported to the IFMT by the CID. These human remains were visually identified and was further subjected to DNA identification on 08/05/2019. And accordingly, the suicide bomber of the Easter Sunday attack at the St. Anthony's church was identified as one Alwudeen Ahmed Muath. It is to be noted that an Inquest had been held into the death of the suicide bomber as well. The CMC made an order on 14/5/2019 to the Chief Consultant Judicial Medial Officer to

[11] Code of Criminal Procedure Act, Chapter XXX, Section 372(1)

[12] Code of Criminal Procedure Act, Chapter XXX, Section 373(1), pg II/161

conduct a PME on the identified human remain, of the suspected suicide bomber. The report of that post mortem examination is due to be received by court on the next day of the hearing of the Magistrates Inquest, which is on the 24th of October 2019[13].

Conclusion

Deviating from the "one" model of Inquests into deaths referred to above (which is provided for in the CCPA), the Inquests into the deaths of 53 deceased victims of the Kotchchikade church terrorist attack had been conducted jointly by 6 Magistrates headed by the CMC and 21 Forensic Pathologists headed by the CJMO Colombo. This is a significant departure from the provisions of Chapter XXX of the CCPA. This had been understandably due to valid and compelling reasons. Thus, what had in fact taken place was a single and comprehensive Inquest into 52 deaths by two teams of Magistrates and Judicial Medical Officers, supported by the Police and a host of other officials. The procedures adopted and followed by all personnel who participated in different aspects of the Inquest had been compatible with internationally recognized standards relating to Disaster Victim Identification and conduct of Inquests.

When considering the sequence of events that occurred after the Easter Sunday terrorist attacks, it is evident that the mass disaster management process had been mainly governed by Inquest proceedings regulated by the CCPA and associated general practices, as opposed to management of the human remains of the disaster under the Disaster Management Act. When contrasting with the provisions of the CCPA and the sequence of events that had actually taken place, it is commendable as to how the learned Magistrate and officials involved in the process of the Inquests had adhered to due process of the law to the best possible extent, while ensuring compliance with requisite professional standards[14].

[13] Case Record B/10193/01/19

[14] This study focused only on the conduct of Inquests and associated procedures and not on the conduct of criminal investigations.

COPYRIGHT AND FACILITATING THE WORK OF MUSEUMS: THE CARROT OR THE STICK?

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"Copyright protection is above all one of the means of promoting, enriching and disseminating the national cultural heritage. A country's development depends to a very great extent on the creativity of its people, and encouragement of individual creativity and its dissemination as a sine qua non for progress".[1]

1. Introduction

The journey of heritage and history has immensely been stepped over the creations of human mind. With the development of society and law, creative works have economically been recognized and awarded under the roof of copyright. Being fundamentally an economic right, copyright presents an essential legal chapter which grants legal protection for literary and artistic works including works acquired or possessed by museums.

Museums are defined as non-profit, permanent institutions in the service of society and its development, open to the public, which acquire, conserve, research, communicate and exhibit the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment,[2] although the International Council of Museums has currently recognized the need of a new museum definition.

This paper examines the importance of copyright in the context of museums evaluating the current state of copyright law and exceptions and limitations regarding the use of copyright protected works by museums and their patrons, with special reference to Sri Lanka. The second part of this paper proposes possible ways to facilitate the provision of museum services in compliance with the norms of copyright law.

2. Mission of the Museum and Sri Lankan Context

A. Museums

Museums customarily have two different roles as a user and a creator pertaining to the relevance of copyright law. In performing these two roles, copyrighted works, non-copyrighted works and public domain works[3] are the works that can be acquired or possessed by Museums. In this backdrop, acquisition of copyright owned by third parties is significant for museums as similar as management of their own intellectual property, including copyright.

According to the definition of 'museum' adapted by the International Council of Museums, Acquisition, preservation, communication and exhibition of cultural heritage and works can be identified as the core mission of museums.[4] In cultural heritage tourism, the museum as a story teller opens its doors to experience the story of a new specific region while giving visitors enlightenment and entertainment.[5]

B. Museums and Copyright Restrictions

[1] World Intellectual Property Organization, WIPO Intellectual Property Handbook: Policy, Law and Use (WIPO Publication 2004) 41

[2] The International Council of Museums (ICOM)' Statute 2007, Article 3

[3] No interpretation for public domain works is provided in the Intellectual Property Act 2003

[4] Ibid 2

[5] Shubha Banerji, ''The Evolution of the Species' in Anura Manatunga (ed), Abstract Volume: Intenational Conference on Asian Art, Culture and Heritage (Centre for Asian Studies, University of Kelaniya 2013)

In South Asian region, museums are linked with history, culture and heritage of the country. For instance, majority of museums existing in Sri Lanka are linked with history, culture and heritage of the country.

Copyright is considered as the main obstruction in preserving cultural heritage.[6] However, in general, museums reproduce the copyrighted materials including works at risk, works in obsolete works and works which are rare and fragile for the purpose of preservation. Currently, digitization is being utilized by museums to preserve tangible and intangible cultural heritage.[7] Intangible cultural heritage[8] consists of art expressions, drama, acting, literature, language, martial arts, livelihood cultures, food habits, traditional practices, folktale, folksong, folklore, folkdance, oral records, etc[9]

Sri Lankan museums use scanning, photographing and other types of digitizing to reproduce works for preservation purposes.

In general, museums should focus on the question 'what to preserve: and what not to preserve' before preservation of copyrighted works. To decide such matters, specific provisions should be contained in the law. For instance, legislation may direct museums for preventive preservation. Online preservation is a challenge in this context. However, there is a possibility to lose the value of ancient artefacts in digital formats.[10]

Further, as a user of copyrighted works, museums have to consider copyright when they produce and distribute exhibition catalogues. However, South Asian Countries including Sri Lanka, have no specific internal guidelines or specific legal provisions for allowing such reproduced works for distribution of exhibition catalogues. This situation is similar to public display of media works in its collection. However, out of South Asian Countries, Nepal has specific legal provisions enacted for publicly displayed media works.[11]

Using a mobile application, Sri Lankan Museums allow the user online access to collections in the form of virtual visits.[12] Also, collections available on the website of museums can be accessed by users. However, no legal provisions have been introduced to make certain the legality of copyright in making digitized collections accessible to visitors on terminals onsite or allowing online access outside the premises of the museums.

Sri Lankan museums allow visitors to take photographs and the National Museum of Sri Lanka grants permits for this purpose.[13] Nevertheless, they have no mechanism to review photos uploaded on social media by visitors. The Sri Lankan law on copyright is silent on taking photographs in

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[6] Chennupati K Ramaiah and Somipam R Shimray, 'Issues in Preservation of Digital Cultural Heritage' (2017) Re-Envisioning Role of Libraries: Transforming Scholarly Communication, 146, 154

[7] For the definition of cultural property, see the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, Article 01 and Convention concerning the Protection of the World Cultural and Natural Heritage, Article 01

[8] For the definition of intangible cultural property, see the Convention for the Safeguarding of the Intangible Cultural Heritage, Article 02

[9] Chennupati K Ramaiah and Somipam R Shimray, 'Issues in Preservation of Digital Cultural Heritage' (2017) Re-Envisioning Role of Libraries: Transforming Scholarly Communication, 146, 147

[10] Discussed in the "Regional Seminar for the Asia Pacific Group on Libraries, Archives, Museums and Educational and Research Institutions in the Field of Copyright", held on April 29 and 30, 2019, in Singapore. Author was a Chair of one of four working groups in this regional seminar.

[11] The Copyright Act, 2059 (2002) of Nepal, s 23 According to the Section 23 of the Nepal Copyright Act, public exhibition is allowed. However, such public. display has to be made without the help of film, slide, television image or otherwise using the screen or device of other kind.

[12] For instances; 'Virtual Tour' (Ancient technology Museum - Department of National Museums)<http://ancienttechnologymuseum.gov.lk> accessed 03 October 2019; 'Virtual Tour' (National Telecommunication Museum) <http://slt.lk/museum/virtual_tour> accessed 03 October 2019

[13] 'Video/camera permit' (Department of National Museums)<www.museum.gov.lk/web/index.php?option=com_content&view=article&id=48&Itemid=103&lang=en> accessed 02 October 2019

museums and uploading photos on social media by visitors. On the other hand, no law has been enacted to limit the museum's liability regarding such uses.
Sri Lanka does not allow cross-border lending for exhibitions. In addition to the above context, Sri Lankan Law on copyright has not identified cross border issues for museums. As reported, Sri Lanka does not have prior experience of cross-border lending for exhibitions. However, this situation does not thwart the legislative changes which can be made for future use.

Although museums are supposed to be non-profit organizations, the question of future sustainability arises here. In this context, museums need to question themselves on the continuity of government funds and long-term support for daily activities. Against this backdrop, commercialization of some of the activities such as opening museum cafeteria and souvenir shops, replica production can be considered for self-sustenance of the museum. In this context, it is significant making the legal certainty regarding the copyright of works when they engage with commercial activities.
For education and research purposes, Sri Lankan Museums permit reproducing a part of a copyrighted work. For instance, some museums issue a one third of a copyrighted book for this purpose. Further, they issue photographs, scanned copies and photocopies for the same purpose.

3. Legal framework

A. Domestic Law Regime

The Law of Copyright crossed the Sri Lankan domestic legal system by regulating the **Copyright Ordinance No. 12 of 1908** which dates back nearly 111 years. The present copyright law has been encompassed in the Intellectual Property **Act No. 36 of 2003**. It consists of the provisions which can be applied to protect the original intellectual creations in the literary, artistic and scientific domain. **Sections 6(1) and 7(1) of the Intellectual Property Act No. 36 of 2003** recognize the works which attract the copyright protection in particular.
In terms of Intellectual Property Act, the owner of copyright of a work has economic rights for works that receive the copyright protection.[14] Economic rights have been defined as the rights referred in Section 09 of the Act, namely, exclusive right to carry out or to authorize the reproduction of the work; translations of the work; adaptation, arrangement or other transformation of the work; the public distribution of the original and each copy of the work by sale, rental, export or otherwise; rental of the original or a copy of an audiovisual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned; importation of copies of the work, (even where the imported copies were made authorization of the owner of the copyright); public display of the original or a copy of the work; public performance of the work; broadcasting of the work; other communication to the public of the work. Quite apart from the ownership of the economic rights referred in **Section 9** of the Act, the author of a work receives moral rights regarding his work.[15]

B. Recognition of the doctrine of fair use under Sri Lankan IP law

The doctrine of fair use can be recognized as the major restriction on copyright.[16] **Section 11(1)** of the Act presents the fair use doctrine as follows.

> *Notwithstanding the provisions of subsection (1) of section 9, the fair use of a work, including such use by reproduction in copies or*

[14] Intellectual Property Act 2003, s 09
[15] Ibid, s 10

[16] D.M. Karunaratna, An Introduction to the Law relating to Literary and Artistic Creations (Sarasavi Publishers 2019) 178

by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, shall not be an infringement of copyright.

However, it has been recognized that the purposes of fair use referred in section 11(1) does not constitute an exhaustive list of purposes. In words of D.M. Karunaratne, *'they are consequently open-ended covering any act of use performed to achieve a fair purpose'.*[17] Section 11(2) provides the factors that will be considered in determining whether the use of a work is a fair use;

a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

b) The nature of the copyrighted work;

c) The amount of substantiality of the portion used in relation to the copyrighted work as a whole; and

d) The effect of the use upon the potential market for, or value of, the copyrighted work.

In addition to above legal provisions, **section 12 of the Act** provides circumstances which can be located under the fair use concept. However, it does not present any instance with regard to museums. In this context, it can be argued that fair use of a copyright protected work acquired and possessed by museums for the purposes of preservation, can be considered under the fair use concept.

Although the Intellectual Property Act recognizes separate provisions and circumstances with regard to libraries, archives and educational institutions[18], it does not consist of specific provisions with regard to museums. Thus, this absence of separate legal provisions in the Intellectual Property Act creates a legal uncertainty on the subject. However, it can be argued that some legal provisions which are applicable to libraries and archives[19] might be applicable to museums.

C. International Legal Framework and Emerging Trends

Berne Convention for the Protection of Literary and Artistic Works provides provisions regarding exceptions and free uses of works.[20] It incorporates the three-step test which allows exceptions to the right of reproduction. **Article 9(2)** of the Berne Convention allows exceptions with respect to the right of reproduction;

(1) in certain special cases
(2) that do not conflict with a normal exploitation of the work
(3) that do not unreasonably prejudice the legitimate interests of the author.

The Agreement on **Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)** also encompasses fair use doctrine as follows;

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[21]

Article 13 of the TRIPS Agreement has extended the three-step test of the Berne Convention to cover any type of copyright.[22] Further, the WIPO Copyright Treaty also incorporates the three-step test to determine limitations and exceptions[23].

[17] Ibid 15
[18] Intellectual Property Act 2003, s 11-12
[19] Intellectual Property Act 2003, s 12(5)
[20] Berne Convention for the Protection of Literary and Artistic Works 1886, Article 9, 10
[21] TRIPS Agreement 1995, Article 13
[22] Daniel J. Gervais, '*Towards a New Core International Copyright Norm: The Reverse Three-Step Test*' (2005) 9:1 Intellectual Property Law Review 1, 14
[23] WIPO Copyright Treaty (WCT) 1996, Article 10

Sri Lanka is a party to the above discussed international instruments.[24] However, international legal framework in intellectual property does not specifically cater provisions for the field of museums.

Among 192 WIPO Member States, 50 countries provide specific limitations and exceptions for museums while 141 member states provide general limitations and exceptions and/or licensing solutions.[25] As per the study commissioned for the SCCR from Yaniv Benhamou (SCCR/38/5), exceptions regarding reproduction of works for preservation and archiving purposes, use of works in exhibition in exhibition catalogues, exhibition right, communication to the public (displaying and making available online to the public), use of non-attributed works have been discussed in terms of specific exceptions for the museums. In addition to the specific exceptions, exceptions regarding reproduction of works for private purposes, reprographic reproduction, and use for educational and scientific research have been considered as general exceptions which may be relevant for some museum's activities. [26]

According to the Resolution No. 03 adopted by ICOM's 22nd general assembly held in Vienna, Austria in 2007, the ICOM General Assembly resolved '*to support the efforts of WIPO and other relevant organizations to develop and implement a new WIPO Convention and other Conventions aiming to ensure the protection of the collective moral rights of the originators, inheritors, transmitters and performers of the world's traditional cultural expressions, and traditional knowledge'*.

As a recent discourse, WIPO has conducted an International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational and Research Institutions in October, 2019 in accordance with the Action Plan on Limitations and Exceptions approved by Member States during the 36th session of the Standing Committee on Copyright and Related Rights (SCCR) held in June 2018.[27] 39th session of the Standing Committee on Copyright and Related Rights, held from October 21 to October 25, 2019 also mainly focused on copyright exceptions and limitations.[28]

Conclusion

When analyzing the Sri Lankan IP law, a direct reference to museums cannot be found in **the Intellectual Property Act No. 36 of 2003**. Similarly, no specific legal provisions have been enacted to facilitate the provision of museum services in compliance with the norms of copyright law. This situation deliberately makes a legal uncertainty of copyright, copyright management and the applicability of fair use doctrine.

In this context, copyright law should be amended with an aim of facilitating the provision of museum services in compliance with domestic law regime. On the other hand, these legal amendments should be focused on insertion of provisions for the copyright protection of copyrighted works in museums and applicability of the fair use doctrine for the missions of museums. However, '*there is little doubt that IP laws necessitate additional administrative functions on the part of the museum'*.[29] In this context, the nature of

[24] ' Sri Lanka (6 texts)' (WIPOLex) <https://wipolex.wipo.int/en/legislation/profile/LK> accessed 04 October 2019

[25] Yaniv Benhamou, Revised Report on Copyright Practices and Challenges of Museums (WIPO 2019) 15

[26] Yaniv Benhamou, Revised Report on Copyright Practices and Challenges of Museums (WIPO 2019) 16 - 21

[27] WIPO, 'International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational & Research Institutions' (WIPO) <https://www.wipo.int/meetings/en/2019/international_conference_copyright.html?fbclid=IwAR3sNZyHB-gt2NyBGvD60OO_-PLVC1PJuCU_0UoZ9MVmM5IvoyNkU7LzMXk> accessed 04 October 2019

[28] WIPO, 'Standing Committee on Copyright and Related Rights, thirty ninth session' (WIPO) < https://www.wipo.int/meetings/en/details.jsp?meeting_id=50425> accessed 04 October 2019

[29] Rina Elster Pantalony, Guide - Managing Intellectual Property for Museums (2013 edition, WIPO 2013) 8

museums and its mission should scrupulously be studied and examined to recognize the integral necessity of IP rights in the field and introduce a set of comprehensive legal provisions and guidelines for IP rights which are applicable to museums.

The other significant factor is that, it will be remarkably easy for professionals and users to understand and implement relevant laws when separate legal provisions are available for separate fields. Building awareness is also essential for due implementation of exceptions and limitations to copyright.

Thus, introduction of a new WIPO Convention for exceptions and limitations of copyright and regional instruments can be considered as important for removing legal uncertainty of law. Using regional and international instruments, there is a possibility that issues including cross border issues in museum field can be solved. As a part of above changes, collective management of copyright and related rights should be strengthened in the region.

AN EVALUATION OF THE LEGAL FRAMEWORK OF CYBER-CRIMES IN SRI LANKA

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Technical infrastructure of today's world highly depends on internet. Social, political, business, education, health, leisure and entertainment, media practices of people are highly influenced with the rapid development of Information technology. Internet has become the basic tool which facilitates the global communication and all are provided with increased opportunities in the global cyber arena.[1] With the development of Information technology to cater human needs using virtual dimension, ordinary services have converted into electronic forms and the E-Banking, E-Business, Communication, Education and E-Governance fields are highly utilised. Despite the all advantages of IT developments number of crimes relating to IT have been increasing and more people become vulnerable each day.

With the rapid development in technology and the internet, new types of crimes and new means of committing traditional crimes have been discovered.

> "*The computer is rapidly increasing society's dependence upon it, with the result that society becomes progressively more vulnerable to computer malfunction, whether accidental or deliberately induced, and to computer manipulation and white-color law-breaking*".[2]

With the emerging use of information technology and computers related crimes have become a global concern. Gradually almost all the electronic devices including smartphones, tablets, watches, health related devices would have a distinct Internet Protocol (IP) address and with the facility to connected to the internet and as a result of that vulnerability of users get increased and attacks on these devises could damage the core functions of the society.[3] As a result of storage of confidential information, privacy and data protection has become a major concern as computers are not only targeted for crime but are also important instruments used in the commission of other offences.

Enhancing cyber security and protecting critical information infrastructures are essential to each nation's security and economic well-being. Making the Internet safer (and protecting Internet users) has become integral to the development of new services as well as government policy.[4] **The Evidence(Special Provisions) Act**[5], the

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[1] KennedyD Gunawardana , 'Current Status of Information Technology And Its Issues in Sri Lanka ' [September - December, 2007] Vol 15(No3)International Journal of The Computer, the Internet and Management <https://pdfs.semanticscholar.org/d735/e0199919d65bd3785c28da449cc6f3f33e43.pdf> accessed 4 August 2019

[2] C. G. Weeramantry, Justice Without Frontiers: Furthering Human Rights, (First published 1997, Published online by Cambridge University Press: 27 February 2017) 259

[3] Jayantha Fernando, 'THE IMPACT OF THE BUDAPEST CYBERCRIME CONVENTION ON SRI LANKAN LEGAL SYSTEM'[2016]

[4] Gade, Nikhita Reddy & Reddy, A Study Of Cyber Security Challenges And Its Emerging Trends On Latest Technologies. Ugander. (2014).

[5] The Evidence(Special Provisions) Act No.14 of 1995

Information and Communication Technology[6], the **Payment and Settlement Systems Act**[7], the **Electronic Transactions Act**[8], the **Payment Devices Frauds Act**[9] and the **Computer Crime Act**[10] are the main pieces of legislations which governs the legal regime in the area of Information Technology in Sri Lanka. The term "cyber-crime" is used to cover a wide variety of criminal conduct and include a broad range of different offences. One approach can be found in the Convention on Cybercrime, which distinguishes between four different types of offences: offences against the confidentiality, integrity and availability of computer data and systems, computer-related offences, content-related offences and copyright-related offences.[11]

In Sri Lanka, **Computer Crimes Act No. 24 of 2007** primarily addresses computer-related crimes and hacking offences. In this Act, computer crime is a term used to identify all crimes frauds that are connected with or related to computer and **Information and Communication Technology Act No.27 of 2003.** This Act covers a broad range of offences which are common offences identified and recognized internationally as well. Recognising the nature of computer crimes which are committed disregarding boundaries under the **Section 2 of the Computer Crime Act** courts have a wide jurisdiction to attend the matters irrespective of whether the person resides, the crime was committed or the damage was caused a person or corporation within or outside Sri Lanka.[12] In line with **Article 22 of the Budapest convention**, **Computer Crime Act** covers wide range of application without considering the geographical boarders and nationality.[13] **Section 27** enables the extradition of cyber criminals among the states.[14] However, above said provisions will not effectively function without the international cooperation among the states, one state can't solely fight against the computer crimes.[15]

In **Section 3 to Section 10**, the Act describes the key substantive offences under Computer Crime Act such as Hacking (illegal access)[16] , Cracking[17], unlawful modification[18], offences against national security[19], dealing with unlawfully obtained data[20], illegal interception of data[21], using illegal devices[22] and unauthorized disclosure of information[23] which are adequately consistence with the Budapest Convention under the heading of computer-integrity offences[24].

There are no laws or policies to ensure cyber security, privacy or data protection in Sri Lanka. Although hacking and some other activities are offences under the Computer Crime Act, a remedy can't be offered to a citizen if his or her sensitive data is withheld. This has a direct impact on our trade because some countries are reluctant to enter into transactions with us due to the lack of security in these on-line transactions.

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[6] Information and Communication Technology Act No.27 of 2003
[7] Payment and Settlement Systems Act No.28 of 2005
[8] Electronic Transactions Act No.19 of 2006
[9] Payment Devices Frauds Act No.30 of 2006
[10] Computer Crime Act No.24 of 2007
[11] Marco Gercke, Understanding cybercrime: phenomena, challenges and legal (ITU Telecommunication Development Bureau) < www.itu.int/ITU-D/cyb/cybersecurity/legislation.html> Accessed on 5th August
[12] Computer Crime Act No.24 of 2007 , Section 2,
[13] Computer Crime Act No.24 of 2007 Section 2,
[14] Computer Crime Act No.24 of 2007, Section 27.
[15] Jonathan Clough, A World Of Difference: The Budapest Convention On Cybercrime And The Challenges Of Harmonisation, Monash University Law Review2011 (Vol 40, No 3)
[16] Computer Crimes Act No. 24 of 2007 Section 3.
[17] Computer Crimes Act No. 24 of 2007 Section 4
[18] Computer Crimes Act No. 24 of 2007 Section 5
[19] Computer Crimes Act No. 24 of 2007 Section 6
[20] Computer Crimes Act No. 24 of 2007, Section 7
[21] Computer Crimes Act No. 24 of 2007, Section 8
[22] Computer Crimes Act No. 24 of 2007, Section 9
[23] Computer Crimes Act No. 24 of 2007, Section 10
[24] Convention on Cybercrime, Budapest, 23 November 2001

If a country wants to actually enter into international trade and commerce, then there must be directives and policies to protect data.

In Sri Lanka, there is a challenge in preventing cyber-crime. The growth of network-based crime has raised difficult issue in respect of appropriate balance between the needs of those investigating and prosecuting such crime, and the rights of users of such networks, so there is a need to empower the coordination process. Prosecutors, investigators, and Judges need to work in coordinating manner and experienced investigators need to be trained properly in order to deal with cyber-crime. Awareness in new media literacy and information technology is one way of minimizing cyber-crime. Further, Sri Lankan legal system needs to be reviewed in order to identify areas which need further modifications.

Computer Crime Act introduced new procedures in addition to the ordinary criminal procedures and every offences under this Act are cognizable offences[25]. Further a significant arrangement is that, government can appoint a panel of experts to assist police officers.[26] A panel of experts shall be appointed in order to assist the police officers in the investigation process. In the process of investigating the police officers and the experts are required to consider the protection of information and rights of the individuals.

Computer Crime Act complies with the **Budapest Convention (Art 16-21),** and provides special power to the investigation officers including the power of search and seizure which includes the laws for interception and real time collection of traffic data[27], and the request to preserve information[28].

Furthermore, for the purpose of effective enforcement Sri Lanka has established the computer crime division of police department and computer emergence response team (CERT). Moreover, the Computer Crime Act enables mutual assistance of states for investigation and prosecution of cybercrime through the **Criminal matters Act 2002.**[29] Furthermore, Sri Lanka's accession to the Budapest convention which leads to obtain mutual legal assistance from other member states, through that Sri Lanka can combat against the computer crime.[30]

In 2015, as the first country from South Asian region Sri Lanka acceded to the Budapest Convention. Though the Computer crime Act was enacted before the said accession, the majority of the provisions were in compliance with the Budapest Convention. Some provisions of the Convention were not covered by the Computer Crimes Act such as Child Pornography[31]. However the Sri Lankan Penal code has provisions to address this, however it may not adequate enough to prosecute these crimes when it is committed using Internet.[32]

A major challenge in the existing legal framework is that the Computer Crimes Act has failed to identify some of the most common cyber-crime offences, such as Illegal gambling, cyber-squatting, hate speech and statements promoting racism, cyber defamation, identity theft, cyber bullying and cyber stalking making it difficult take precautions against such offences.[33] The term computer was not

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[25] Computer Crimes Act No. 24 of 2007 Section 21
[26] Computer Crimes Act No. 24 of 2007 Section 17
[27] Computer Crimes Act No. 24 of 2007 Section 18
[28] Computer Crimes Act No. 24 of 2007 Section 19
[29] Computer Crimes Act No. 24 of 2007 Section 35.
[30] Convention on Cybercrime, NOVEMBER 13, 2018 The Lakshman Kadirgamar Institute (LKI) < https://www.lki.lk/publication/convention-on-cybercrime/> Accsesed on 5th August 2019
[31] Article 9 of the Budapest Convention
[32] Sri Lankan penal code section 286A
[33] Selvaras Janaha, 'Has Sri Lanka Worked Out Effective Ways of Fighting Computer Crime?' (Open University of Sri Lanka 2013) <

defined adequately in the Act and with the limited elements of the offences such as unauthorized access can be seen as inadequate areas of the Act.[34]

As a developing country Sri Lanka can always take lessons from other developed jurisdictions such as USA, UK, Australia and even from India as they have taken some different approaches in recognizing new types of cyber-crimes. Australia has recognised online illegal gambling as a criminal offence by the Interactive Gambling Act 2001. Further, USA in order to prevent cyber-squatting, abusive registration and use of the distinctive trademarks of others as internet domain names, with the intention of earning profits through the goodwill associated with those trademarks has introduced **Anti-cybersquatting Consumer Protection Act of 1999**.[35] In the UK, hate speech is recognised as an offence under many statutes and under the **Communications Act 2003**, many offenders have been convicted for the publication of statements promoting hatred in social media.[36] **Section 66A of the Information Technology Act 2008 of India**, provides the law governing a wide range of common cyber-crimes. It provides the punishment for sending offensive messages through communication services and the provision is so drafted to provide for the punishment of cyber-bullying, cyber-stalking offenders. The above examples from other jurisdictions effectively illustrates how those jurisdictions have stepped towards implementation of an effective legal framework by identification of common cyber-offences as criminal offences.

The "Access" is a commonly used term in ICT law, especially in relation to cyber-crimes. Yet, the term is not interpreted in the statutes. In this case, the Information Technology Act 2008 of India provides an interpretation to the term "access". Accordingly, "access" means; "gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network"[37] The element of "unauthorised access to commit an offence" is the given term as the *actus reus* for several offences in Sri Lankan **Computer Crime Act**. However, as there are various types of offences which come under cyber-crimes it may be difficult to take each and every offence under this element as in order to identify as a cyber-crime, as there are several offences which can be done with lawful access. **The 2008 amendment to the Information Technology Act 2000 of India** has introduced offences such as sending offensive messages, spam, identity theft, cheating by personation, and violation of privacy rather than placing them under the unauthorized access.[38] A further challenge which is faced by the law enforcement authorities is that the offences under the Computer Crime Act are entirely based on the principle of unlawful access. Accordingly, the Act fails to cover situations

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http://www.kdu.ac.lk/proceedings/irc2013/2013/l006.pdf>Acsessed on 5th August 2019

[34] Dr Thusitha ABEYSEKARA and Samindika ELKADUWE, 'A Game of Thrones': Law V Technology: A Critical Study on the Computer Crimes Legislation in Sri Lanka, Second International Conference on Interdisciplinary Legal Studies 2015(ISBN-978-0-9939889-3-6)page28

[35] Martin Samson, 'The Anti-cybersquatting Consumer Protection Act: Key Information - Internet Library Of Law And Court Decisions' (*Internetlibrary.com*, 2019) <http://www.internetlibrary.com/publications/anticybsquattSamson9-05_art.cfm> accessed 28 August 2019

[36] 'Everything You Need To Know About Cyberbullying And How To Stop It' <http://www.thebetterindia.com/71909/cyberbullying-it-act-2000-cyber-law-in-india/> accessed 28 August 2019

[37] Information Technology Act 2008, section 2(1)(a)

[38] Lionel Faleiro, IT Act 2000 – Penalties, Offences With Case Studies, June 24, 2014 < https://niiconsulting.com/checkmate/2014/06/it-act-2000-penalties-offences-with-case-studies/> Accessed on 10th August 2019

where information/data is obtained by lawful access, but are consequently misused for unauthorized purposes; for example, Cookies issues.

One of the major challenges faced by the Sri Lankan legal system is the lack of reporting of cyber-crimes. A main cause behind lack of reporting is that the victims fear that their data might get destroyed or they might lose the confidentiality of their private data.[39] Another one of the main drawbacks in the existing legal framework on cyber-crimes is that lack of case law. There are no reported case law on cyber-crimes and very limited numbers of cases are taken before the courts which make impossible to develop the legal framework relating to cyber-crimes.

Further, most of the individuals are not aware that they are victims of cyber-crimes and victims are not aware that there are legal remedies which they can seek out to mitigate the harm. Therefore, only a few numbers of cases are reported to the courts and the judges don't get an opportunity to administer law against the offenders.[40]

Sri Lanka is actually a pioneer in terms of ratifying international and regional conventions related to ICT Law. However, ironically, when it comes to adopting them and **implementing** them, we are lagging behind. There are special and simplified procedures provided by the law in relation to computer crimes where the police can even obtain the help of experts who hold proper qualifications. They can perform several tasks without even receiving a court order. However, none of this is implemented. It is necessary to research on how other countries have enforced their laws and integrated the culture of responsibly using the internet and digital devices and educate our society.

Although the Computer Crimes Act seems to be adequate in comparison to the Budapest convention, as it provides for identification of crimes, identifies a wide jurisdiction and provides an investigation procedure, the extent of implementation of the provisions of **Computer Crime Act** cannot be seen as a result of various reasons such as lack of reporting, lack of investigation officers who has adequate knowledge to deal with highly skilled cyber criminals and lack of investigation equipment. Further, social media flat forms such as Facebook are unwilling to provide information such as IP addresses of users and therefore it is necessary to take steps coordinating with those international corporations.

Sri Lanka needs to enact laws to streamline the existing legal framework on cyber-crimes with the international standards such as identifying new types of offences, introduce **Data Protection Act** and Reform defamation laws and introduce cyber defamation laws. In achieving these developments Sri Lanka can use International Conventions such as **Budapest Convention**, developments of other jurisdictions as guidelines and can seek assistant from them. Awareness about existing legal framework is much important since victims of cyber-crimes need to be encouraged to report such crimes which will eventually contribute towards the development of legal framework relating to cyber-cr

[39] Marco Gercke, Understanding cybercrime: phenomena, challenges and legal (ITU Telecommunication Development Bureau) < www.itu.int/ITU-D/cyb/cybersecurity/legislation.html> Accessed on 5th August

[40]Vishni Lakna Ganepola, Effectiveness Of The Existing Legal Framework Governing Cyber-Crimes In Sri Lanka

'*MY VOTE - MY CHOICE*'; VIABILITY OF INTRODUCING THE '*NONE OF THE ABOVE*' OPTION IN SRI LANKA

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Introduction

Sri Lanka is a constitutional democracy which often employs the representational democratic process as its decision-making method. Classical democratic theory has been used by many scholars as a normative standard that can be applicable to contemporary governing process. Three outstanding features of classical democracy are the centrality of the "common good" or "general will", maximum participation in government by the populace, and rational discussion and debate about politics.[1]**1978 Second Republican Constitution** (*hereinafter* Constitution) declares that sovereignty is in the People and is inalienable. Sovereignty includes the powers of the government, fundamental rights and the franchise.[2] Thus, it is essential to have free and fair elections to maintain and uplift the quality of democracy in which people exercise their participation in a healthy manner and to protect the sovereignty of people which has been guaranteed by the Constitution. Sri Lankan citizens enjoy the universal franchise since 1931 which enables them to participate in the governance of the country. Arguably, it is essential that the best candidates who have high moral and ethical values should be chosen as people's representatives in order to make this participation meaningful. However, the reality is that the candidates who are nominated by the parties to the elections are not always up to the expectation of the citizenry.

Thus, this article attempts to explore the possibility of introducing **None of The Above (*hereinafter* NOTA) option** to the ballot sheet of elections while placing its arguments on the right based approach. Thus, this paper argues that Right to reject or Right not to vote is a part and parcel of the freedom of expression enshrined in the Constitution and the presence of NOTA option in the ballot sheet in a representational democracy would expand the opportunity of exercising it in a meaningful manner while leaving an impact on the party politics of the country. In order to support the said argument this paper attempts to draw examples from the comparative jurisdictions including India and discusses the existing specific legal provisions of Sri Lanka pertaining to the options of ballot sheet. Finally, it suggests adoption of legislative or judicial methods to introduce NOTA option into Sri Lankan elections.

Why NOTA is Important?

NOTA is a choice of negative voting in certain electoral systems to help voters express their dissent for all the candidates competing in an election. It is based on the principle that the spirit of democracy is upheld by giving citizens a platform to voice their dissent while simultaneously participating in the electoral process.[3]

[1] Susan Herbst, 'Classical Democracy, Polls, And Public Opinion: Theoretical Frameworks for Studying the Development Of Public Sentiment' (1991) 1 Communication Theory <https://booksc.xyz/book/9653545/6df027> accessed 5 October 2019.

[2] Article 3 of 1978 Second Republican Constitution of Democratic Socialist Republic of Sri Lanka.

[3] V R Vachana, Maya Roy, NOTA and the Indian Voter,

The prime motivation behind introducing NOTA option in the ballot sheet at any election is to offer the voter with an option to manifest his dissatisfaction to the candidates who are nominated by the political parties. On the other hand this option provides a forum for the voter to engage in the political discourse in a silent and diplomatic but a stronger manner. It is expected in an ideal context, that the significant amount of protest votes could force political parties or the other independent candidates to rethink their political and governing strategy and push them towards adopting higher standards based on acceptable criteria in terms of selecting nominees.

In a system where the NOTA option is not available to its voters, the said protest vote does not attract any significance in the process of interpretation of the overall election results, as oppose to a system in which the NOTA is available. For an example, in Sri Lanka, the protest voter has to resort to an option such as abstention, nullification of the ballot or ironically vote for a non- establishment candidate even when the voter does not appreciate his proposed manifesto. Though these methods could be considered as grey signals of a protest, arguably they will not receive the due respect, which they would receive for a well thought of protest vote in a system where the NOTA option is available.

Many countries around the world opted to include NOTA option in their ballot papers at different levels of elections. The State of Nevada of USA is the pioneer state which introduced this option in the ballot sheet for the first time in 1976.[4] The option was brought to the ballot in the aftermath of the Watergate scandal to allow citizens to express their discontent.[5] In addition, an explicit 'blank vote' option is available on the ballot in Colombia, India, Ukraine[6] and Bangladesh[7] in order to facilitate the expression of dissent or rejection of the voter.

The outcome of the NOTA vote is different from country to country and election to election. In many countries the NOTA votes are treated separately for the purpose of reporting. They do not form a part of invalid votes because they are produced as a result of an unintentional mistake made by the voter while the NOTA votes are considered as a result of a deliberate action to express their dissent by the part of the voter. However, the NOTA votes do not affect the final outcome of the election. This category of NOTA option does not confer the voter to the right to reject but merely provides for demonstration of his dissatisfaction or disapproval of the candidates. However, some states such as Colombia, if the blank vote attracts the most votes, the election has to be repeated, sometimes excluding the previous candidates from the new ballot paper.[8]

Indian Experience

In India NOTA option was introduced in 2013 through a judicial pronouncement. India changed its election methods from ballot sheet to Electronic Voting Machines (*hereinafter EVM*) which has denied the voter the right to not to vote. Traditionally, when voting, the voter had the choice of not to vote any candidate and put the blank sheet to the ballot box instead. However, with the introduction of new EVM, voters were compelled to cast their vote to one of the candidates due to the absence of the NOTA option in the EVM. New evolution has violated right not to

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[4] Jyoti Hiremath, 'Analysis of the Introduction of NOTA in The Legislative Elections in India' (2017) 4 International Journal of Arts and Science research.

[5] Chiara Superti, 'The Blank And Null Vote: An Alternative Form Of Democratic Protest?' [2014] Midwest Political Science Association.

[6] Attila Ambrus, Ben Greiner and Anita Zednik, 'The Effects Of A 'None Of The Above' Ballot Paper Option On Voting Behavior And Election Outcomes' [2018] SSRN Electronic Journal.

[7] VR Vachana and Maya Roy, 'NOTA And The Indian Voter' (2018) LIII Economics and political Weekly.

[8] Chiara Superti, 'The Blank And Null Vote: An Alternative Form Of Democratic Protest?' [2014] Midwest Political Science Association.

vote and the quality of the secret ballet.[9] In this context, People's Union for Civil Liberties filed a Writ application in the Supreme Court of India.

People's Union for Civil Liberties v. Union of India.,[10] in this case, **Election Rules 41(2 and 3) and 49-O** were challenged by the Petitioners on the ground of constitutional inconsistency. Both parties agreed on the fact that the combined effect of these rules was that persons who did not vote in elections were recorded (by the presiding officer) as having not voted. The Petitioners argued that this was a violation of the right to secret balloting, protected by **Articles 19(1)(a) and 21 of the Constitution.** State argued that Right to vote is merely a statutory right which brought into existence by the Representation of Peoples Act[11] and it does not have any recognition as a fundamental right under **Article 32 of the Indian Constitution**. However, Court held that that the freedom to vote is not only a statutory right but a facet of the fundamental right to free speech and expression under **Article 19(1)(a) of the Constitution.** The Court took a step further from its own earlier rulings in two cases[12]. In *Kuldip Nayar v. Union of India*,[13] while interpreting an amendment to the **Representation of the People Act, 195**1, the court emphasized that the freedom to vote is a facet of **Article 19(1)(a).**

Provisions of the **Representation of the People Act, 1951** were up for challenge once again, this time, **Rules 41(2), (3) and 49(O)** which failed to ensure to a voter who chose not to vote for any of the candidates standing for election, the right to secrecy of his choice. While secrecy was assured to all those who voted in favour of the candidate of their choice, it wasn't extended to those who rejected all candidates. Where a voter decided not to record his vote, a remark to that effect was made under Form 17A by the Presiding Officer and his signature or thumb impression was obtained against it, violating the privacy of his choice.

The court held that the freedom of a citizen to vote or not to vote are both choices entrenched in the freedom of expression under **Article 19(1)(a)**. The freedom of expression captures not just a positive right but also the freedom not to express oneself or to express oneself through a negative vote or a non-vote. Just as the freedom of speech takes within its sweep the right not to speak or the right to silence, so is the freedom of expression broad enough to incorporate the right to express oneself by not voting for any candidate.

In addition, the Supreme Court noted that;

> *'Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. We are of the considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfil one of its objectives, namely, wide participation of people.'*[14] *[emphasis added]*.

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[9] See further: Jyoti Hiremath, 'Analysis of the Introduction of NOTA in The Legislative Elections in India' (2017) 4 International Journal of Arts and Science research

[10] (2013): Writ Petition(Civil)No.161 of 2004, Supreme Court judgment Dated 27th September 2013

[11] See: *Kuldip Nayar v. Union of India* (2006) 7 SCC 1

[12] PUCL v. Union of India, (2003) 4 SCC 399: The Supreme Court held that the voter exercises a statutory right by casting a vote but is entitled to information about the antecedents of an electoral candidate under her/his right to information under Article (19)(1)(a).

[13] *Kuldip Nayar v. Union of India* (2006) 7 SCC 1

[14] (2013): Writ Petition(Civil)No.161 of 2004, Supreme Court judgment Dated 27th September 2013

According to above statement, it can be argued that the presence of NOTA option in a ballot sheet not only make a real impact on the modern democracies through fostering the purity of the electoral process but also upgrade the democratic values by providing a voice to silent protesters to the rulers in a country.

Sri Lankan Legal Framework

Sri Lankan citizens enjoy universal franchise since 1931 and it has enabled millions of individuals to go to the poll and thus participate in the governance of the country. **1978 Constitution** provides for legal framework pertaining to the franchise and elections under **Chapter XIV**. Accordingly, every person shall, if his name is entered in the appropriate register of the electors, be qualified to be an elector at the presidential election and the general election or to vote in the referendum. [15] In addition, franchise is recognised as an element of popular sovereignty under the **Article 4(e) of the Constitution**. Though fundamental rights chapter of the constitution does not expressly recognise the Right to Vote as a Fundamental Right in Sri Lanka, Sri Lankan judiciary has utilized its creative role in constructing fundamental rights to include Right to Vote as a part and parcel of Freedom of Expression guaranteed under **Article 14(a).** In *Karunathilaka v. Dayananda Dissanayake*[16] the Petitioners claimed that **Article 14(a)** also protects the right to vote as one form of 'speech and expression'. State argued that there was a clear distinction between the franchise and fundamental rights as contained in Chapter III. However, Court held that **Article 14(1) (a)** entrenches the freedom of speech and expression, it guarantees all forms of speech and expression. Thus, Court noted that:

*'the silent and secret expression of a citizen's preference [*or dissent*] as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform. To hold otherwise is to undermine the very foundations of the Constitution.'*.

Accordingly, it can be argued that the Right to vote is recognized under the fundamental right jurisprudence in Sri Lanka. In addition, it should be noted that Sri Lanka is a state party to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which recognize the right to vote at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.[17] In light of the above international standards Sri Lanka has a positive and ethical responsibility to enhance the fair and free elections procedure to reflect genuine 'people's will' of the voters. Furthermore, Sri Lanka should undertake each and every measure that could enhance the legal infrastructure needed for the assurance of equal respect and recognition to the protest voters who wants to convey a message through their sovereign powers. This could be a positive step towards ensuring participation of the people who have different opinions in the governance.

Format of ballot sheet

The format of the ballot sheet is determined based on the different election statutes in Sri Lanka. Specification pertaining to ballot sheet of each election is set out in different legislations. **Section 29 (2) and Form B of the Presidential Election Act**[18] , **Section 32(1) and 32(2) and Form C**

[15] Article 88 of the 1978 Constitution.
[16] [1999]Sri LR 157
[17] Article 25(b) of the ICCPR and Article 21(3) of the UDHR

[18] Section 29(1) and 29 (2) of the Presidential Election Act No.15 of 1981 refers to the Form B of the Schedule of the Act and requires to adhere to the format stipulated in the said form B.

of the Parliamentary Act[19], **Section 30(1)and 30(2) of the Provincial Councils Elections Act**[20] **and Section 47 of the Local Authority Ordinance**[21] are the main enactments which set out the provisions for format of the ballot sheets to be used in different elections held in Sri Lanka to select public representatives to political organs of the governing mechanism of the country.

There are two possible legally legitimate ways to introduce NOTA option in Sri Lanka. First path is to amend the above-mentioned provisions and forms, included in each legislation, by way of an amendment brought by the Parliament for the purpose of introducing NOTA option to the ballot papers. Further, there should be a slight amendment to the Article 94[22] of the Constitution to clarify the availability of NOTA option for presidential election as well. Given the prevailing political circumstances of the country this option seems to be unfeasible unless there is a huge public pressure.

The second path is to get inspired by the Indian tradition of introducing NOTA in to the election procedure by way of judicial pronouncement. According to **Article 4(c) of the Constitution**, Judiciary also holds the sovereignty of people of Sri Lanka. Hence, arguably, it is empowered by the people to interpret existing legal provisions in light of judicial precedents in order to ensure the people's democratic right to reject any unsuitable candidate at the election. At present, there is a pending Writ application before the Court of Appeal praying for introduction of NOTA option to the ballot sheet. However, it is still premature to discuss the said case. When introducing NOTA option, it should be introduced as a powerful tool for the voters to hold it against unsuitable candidates rather than introducing it as a mere expression of dissent.

Conclusion

Sri Lanka has long tradition of constitutional governance based of democratic values. It has become a need of the hour that Sri Lanka introduces the NOTA option into its ballot sheets. It could protect the freedom of expression in a meaningful way and also sensitise the political parties to the need for putting up quality candidates who are capable of holding a responsible public office. However, it should be noted that this process would take substantial period of time to get rooted in to the political landscape of the country. Thus, it would be essential to educate people of the utility of the option and the overall impact that it could create on the representational politics of the country.

[19] Section 32(1) and 32 (2) of the Parliamentary Elections Act No.01 of 1981 refers to the Form C of the Schedule of the Act and requires to adhere to the format stipulated in the said form C.

[20] Section 30(1) and 30 (2) of the Provincial Councils Elections Act No.02 of 1987 refers to the Form C of the Schedule of the Act and requires to adhere to the format stipulated in the said form C.

[21] Section 47 of the Local Authorities Elections Ordinance (Ch262) refers to III Schedule of the Act and requires to adhere to the format stipulated in the same.

[22] Election of the President

IMPORTANCE OF FORENSIC PSYCHOLOGY IN ADJUDICATING JUSTICE

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What is Forensic Psychology?

Forensic Psychology is a discipline where psychology and legal system overlaps. American Psychological Association refers to Forensic Psychology as;

> *"a specialty in professional psychology characterized by activities primarily intended to provide professional psychological expertise within the judicial and legal systems."*[1]

It is also defined as the application of clinical specialties to legal institutions and people who come into contact with the law.

Role of Psychology in legal field

A forensic psychologist is a professional interviewing suspects or witnesses, work as expert witness in court cases particularly in relation to mental status of an alleged victim or perpetrator, work in the rehabilitation of offenders, piloting and implementing treatment programs for offenders, modifying offender behavior, responding to the changing needs of prison staff and prisoners, conducts Forensic Psychology Research work in academia.[2],[3]

Psychological service is very essential in both criminal and civil proceedings. The areas that need psychological intervention in legal system are of several folds. The most known and famous role of a forensic arriving at a judgement. Expert evidence is important in both criminal and civil procedures. At present, a written report from an expert in relation to mental illnesses would suffice the purpose in relation to the defense of insanity but if the reports are submitted many years ago, a testimony in courts may be necessary.[4] Expert witnesses are different from the other witnesses as their opinion is based on educated observations. In the case of forensic psychologists, the opinion is based on educated observations, training, experience, research, studies and scientific data.

The most discussed topics in forensic psychology include offender profiling and eye witness testimony.[5]

It is important to differentiate between Forensic Psychologist and a Forensic Psychiatrist; Forensic Psychologists are involved in understanding an accused person's mental/psychological status and Forensic Psychiatrists are involved in diagnosing and management of mental/psychological illnesses. Both disciplines are useful in justice system (specially in criminal justice system), yet different approaches are being incorporated. The most important responsibility of both disciplines is to determine the mental capacity of the person concerned in each case. This may involve measuring the intelligence level of a victim; for instance,

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[1] American Psychological Association, 'Forensic Psychology' <https://www.apa.org/ed/graduate/specialize/forensic> accessed 02 October 2019

[2] . Egyan Kosh, 'Roles and Functions of a Forensic Psychology- Unit 4' < http://egyankosh.ac.in /bitstream /123456789/24164/1/Unit-4.pdf> accessed 02 October 2019

[3] The British Psychological Society, 'The Psychologist' < https://thepsychologist.bps.org.uk/volume-22/edition-9/reality-work-forensic-psychologist> accessed on 02 October 2019

[4] Angelo de Alwis, Neil Fernando, 'The insanity defense and the assessment of criminal responsibility in Sri Lanka [2013] <file:///C:/Users/ASUS/Downloads/6313-22378-1-PB.pdf> accessed 02 October 2019

[5] Brian A Thomas Peter and Sarah Warren, 'Legal Responsibilities of Forensic Psychologists' < https://link.springer.com/article/10.1023/A:1008871314661> accessed 02 October 2019

ability to comprehend, ability to read etc. Assessment of the said mental capacities is done by carrying out psychological tests and/or through clinical interviews.[6] These tests are essential in identifying whether a person has intention/ knowledge at the moment of committing the crime and also to understand the whether a person is capable of being tried.

There are three primary ways in which psychology and law can relate to each other. They are referred to as "psychology and the law", "psychology in the law", and "psychology of the law."[7] Psychology and law refers to analyzing various components of legal system from a psychological perspective such as, "is eyewitness testimony accurate?", factors affecting jury decisions etc.

Psychology in law refers to specific applications of psychology into legal questions., for instance parental fitness/ capacity to obtain child custody, how to reduce the risk of an individual reoffending. Psychology of law focuses on abstract issues such as factors influencing people's attitudes towards different laws and different forms of punishment. Yet the famous argument is that forensic psychology should only be applied to psychology in law from the said categories as the purpose is to serve the legal system.[8]

The roots of forensic psychology run back to over a century and in 1985, Catell conducted a study by asking his own students a simple question; "What was the weather one week ago today?". This study can be considered as one of the first studies in relation to psychology of testimony. Even in 1985, it was established that courtroom eye witness testimony could be unreliable.[9] Yet this said study drew attention of several psychologists and the study was repeated and extended among psychologists in order to bring about new findings. By conducting number of studies, Alfred Binet; a famous French psychologist showed that the testimony provided by children was highly susceptible to suggestive questioning technique.[10]

William Stern is a German psychologist who put forward the concept that eye witness testimony often can be incorrect and also demonstrated that the observer's level of emotional arousal can have an impact on the accuracy of the said person's testimony.[11]

Albert von Schrenck- Notzing (1896) is considered to be the very first expert witness testified in Court on the effect of pretrial publicity on memory.[12] The case he testified of, took place in Munich, Germany and it involved a series of three sexual murders.

The court case drew a massive attraction from press/ media and Schrenck- Notzing testified that the press coverage could impact on the testimony of witnesses. This process was referred to by Schrenck-Notzing as "retroactive memory falsification".[13] "Retroactive memory falsification" is referred to as a process in which the witnesses confuse actual memories of events with the memories described or discussed by the media. Schrenck- Notzing supported this expert

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[6] Priyanjali de Zoysa, 'The Use of Psychology in the Administration of Justice in Sri Lanka- A point of view-' (2011) Sri Lanka Journal of Forensic Medicine, Science & Law-Vol 2 No 1

[7] Brian A Thomas Peter and Sarah Warren, 'Legal Responsibilities of Forensic Psychologists' < https://link.springer.com/article/10.1023/A:1008871314661> accessed 02 October 2019

[8] ibid

[9] ibid

[10] Pearson Higher Education, 'An Introduction to Forensic Psychology Chapter 1' < https://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_pearsonhighered/samplechapter/0205949932.pdf> accessed 02 October 2019

[11] ibid

[12] Irwing B Weiner and Allen K Hess, The Handbook of Forensic Psychology (Third Edition, John Wiley & Sons Inc, 2006)

[13] Irwing B Weiner and Allen K Hess, The Handbook of Forensic Psychology (Third Edition, John Wiley & Sons Inc, 2006)

evidence/ testimony with laboratory research. This said case is a classic example to show the credibility of testimony by witnesses in general.

Competency to stand a trial

There are several instances, where the psychological state of a party has to be taken into consideration in courts. It does not necessarily mean to be applied at the time of trial. Competence to stand a trial has to be considered or tested before starting the trial.[14]

Well renowned case in United States; *Dusky v. United States,*[15] depicts the concept of competency. Mr. Dusky drove two friends of his son and they encountered a girl the boys knew on their way. Then the two boys raped the girl. Even though Dusky attempted to rape the girl, he could not. But he could not remember the occurrence of events. Dusky was arrested. Two psychological assessments concluded that Mr. Dusky was mentally ill with schizophrenia and he was unable to properly understand proceedings against him and to adequately assist his counsel. Court of Appeals affirmed the conviction but the Supreme Court of United States held that,

> "*a federal court in which criminal proceedings are pending to make a finding regarding the mental competency of the accused to stand a trial, may not make a determination that an accused is mentally competent merely because he is oriented to time and place and has some recollection of events*; *the test must be whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him."*

A person can be considered to be incompetent to stand a trial due to poor cognitive functioning or mental illness. Competency to stand a trial refers to a person's situation not at the time of committing the offence but at the time of the trial. Furthermore, when a person is assessed to be incompetent to stand a trial, it does not amount for acquittal of the said person but a different process has to be employed such as referring that person to a psychiatrist facility.[16] In United Kingdom, prior to the commencement of the trial, competency is assessed. According to Grubin (1996)[17], the criteria used for the said purpose is as follows; ability to comprehend the details of the evidence, ability to follow court proceedings, ability to instruct lawyers effectively, ability to understand that jurors may be challenged, ability to understand the meaning and implications of the charges.[18] It is evident from the previously stated facts that if the said criteria are not met, the said person whether he/she is a perpetrator, victim or any other witness, that person lacks the ability to stand a trial.

Sri Lankan context

It can be considered that most frequent role of forensic psychologists is the psychological assessment of individuals who are involved with the legal system.[19] One of the most important requisites of a crime is "*mens rea*" which is also known as the intention of the offender/ suspect. In United States, a person cannot be held responsible for a crime if that

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[14] Dennis Howitt, 'Introduction to Forensic and Criminal Psychology 4th edition [2012] 401

[15] 362, US 402 [1960]

[16] Ibid 14

[17] . Egyan Kosh, 'Roles and Functions of a Forensic Psychology- Unit 4' < http://egyankosh.ac.in /bitstream /123456789/24164/1/Unit-4.pdf> accessed 02 October 2019

[18] Ibid 14

[19] Jane Tyler Ward, 'What is Forensic Psychology', American Psychological Association [2013] <https://www.apa.org/ed/precollege/psn/2013/09/forensic-psychology> accessed 02 October 2019

person was without the 'guilty mind' at the time of the criminal act was committed.[20]

In Sri Lanka, 'intention' is part of the definition in most offences that are stipulated in the **Penal Code, including culpable homicide (s.293), murder (s.294), voluntarily causing grievous hurt (s.312), assault (s.342), theft (s.366), extortion (s.372), cheating (s.398), mischief (s.408), criminal trespass (s.427), forgery (s.452)** etc.[21] In Sri Lanka, *mens rea* is characterized by the intention of causing a particular effect, or by the knowledge that the effect will be caused by the accused's act.[22]

It is noteworthy to refer to M'Naughten rule in relation to '*mens rea'* in legal matters. M'Naughten rule means that, if at the time of the committing of the act, the party accused was under such a defect of reason from disease of the mind, as not to know the nature and quality of the act, he was doing; or if he did know it, he did not know he was doing what was wrong.

M'Naughten rule with some modification is incorporated into Sri Lankan law, which reads as;

> "*Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*[23]

Insanity is an exception used by the defense counsels in criminal offences. However, exception of insanity in Sri Lanka is an exculpatory defense. **Penal Code** provides for the interpretation of the "unsoundness of mind" as the existence of mental illness and the presence of specific incapacities. Mental illness is not properly defined in any of the statue. In order to prove insanity, evidence should be provided to show that the person in question has a severe mental illness. The said severe mental illness is generally categorized by psychotic disorders such as schizophrenia or major effective disorders such as severe depression, bipolar disorder or an organic psychiatric illness such as delirium, dementia.[24]

In Sri Lanka, no laws are available for people with less serious mental illnesses/ disorders or personality disorders to be considered to have no intention at the time of committing an offence by invoking the defense of insanity.[25]

However, in the case of *Barnes Nimalaratne v The Republic of Sri Lanka,* the concept of 'irresistible impulses' was taken into consideration.[26] As per the said case, the defence of the irresistible impulses was denied as the evidence produced could not satisfy the jury. In light of the *Barnes Nimalaratne v The Republic of Sri Lanka* (supra), the concept of irresistible impulses can be taken up when insanity defence is invoked but strong expert evidence has to be produced to succeed the defence. Importance of forensic psychology becomes very useful at instances like this.

No forensic psychologist is found in our country and clinical psychologists have been called to furnish expert evidence also started only a decade ago.[27]

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[20] Jane Tyler Ward, 'What is Forensic Psychology', American Psychological Association [2013] <https://www.apa.org/ed/precollege/psn/2013/09/forensic-psychology> accessed 02 October 2019

[21] G.L.Peiris, General Principles of criminal liability in Ceylon, A Comparative Analysis (first published in 1972) 22

[22] ibid

[23] Ceylon Penal Code No.2 of 1883, s 77

[24] Angelo de Alwis, Neil Fernando, 'The insanity defense and the assessment of criminal responsibility in Sri Lanka [2013] <file:///C:/Users/ASUS/Downloads/6313-22378-1-PB.pdf> accessed 02 October 2019

[25] ibid

[26] 78 NLR 51

[27] Priyanjali de Zoysa, 'The Use of Psychology in the Administration of Justice in Sri Lanka- A point of view-' (2011) Sri Lanka Journal of Forensic Medicine, Science & Law-Vol 2 No 1

It is important to note that the role of forensic psychologist does not limit to engagement with the perpetrators or the offenders, they also get involved with victims.

In cases involving children and their custody issues, a forensic psychologist may serve either of the functions from the two below; to provide the court with information that assist court to understand the situation/issue or to provide court with an opinion.[28] In custody cases, the psychological status of the parents can be assessed and the most suitable parent can be chosen or the best custody arrangement can be picked up with the assistance of the forensic psychologist.

By reasoning out the psychology and the science behind the laws and regulations that need to be repealed, forensic psychologists can assist legislature which in turn help the people who are marginalized. Homosexuality is one example for the previously stated. Homosexuality is considered an offence in Sri Lanka and this legal position can be repealed/ revised with the assistance of psychologists. Homosexuality now considered as a sexual orientation not as a mental illness as it was referred to previously, yet it could not be legalized in our country until now. In instances like this, the psychologists can take the initiative and assist the legal system and/or the legislature to revise/repeal the law as they are equipped with knowledge. Another area where expert opinion of a psychologist is needed in Sri Lanka is to evaluate existence of a psychological condition of the victim, suspect or even a witness in alleged child abuse cases.[29]

The role a forensic psychologist can play in correctional system can be considered as a long-term solution in improving the status of the society. Assessment of the convicted offenders' psychological status, improving treatment areas, evaluation of treatment interventions such as sex offender therapy, and interventions targeting propensities for violence, emotional regulation, adaptive thinking, and the development of healthy beliefs which support offence-free life style are the areas that can be focused by forensic psychologists.[30] The concept of rehabilitation in criminal justice can be considered as highly essential feature.

Conclusion

Forensic Psychology is relatively a new discipline but when it is incorporated, the ultimate goal of a legal system which in fact bringing justice to every human being can be achieved. Punishment is one concept in legal system which comes under negative reinforcement technique. In order to keep the law and order intact in a country, correctional system has to be maintained and managed properly. For the above said purpose, it is mandatory that forensic psychologists take initiative. In Sri Lanka, exception of insanity cannot be invoked for mental disorders or psychological conditions which do not come under severe mental illness category as it is hard to prove. The defence of insanity is an exculpatory defense, yet needs an amendment as there can be cases where a person would undergo a different state of mind due to severe stress or as a result of other illness in nervous system or otherwise in which *mens rea* couldn't have been complied with. Custody cases, offender profiling, expert testimony, plaining and designing the prison system to minimize reoffending are fields that need psychological intervention. The main role of the Forensic Psychologist is to assist courts/ judicial system to adjudicate justice and also

[28] ibid

[29] Angelo de Alwis, Neil Fernando, 'The insanity defense and the assessment of criminal responsibility in Sri Lanka [2013] <file:///C:/Users/ASUS/Downloads/6313-22378-1-PB.pdf> accessed 02 October 2019

[30] ibid

to assist maintaining the psychological interest of the people that may contact legal system.

THE UNCITRAL MODEL LAW AND THE ARBITRATION ACT NO 11 OF 1995: CONFLICT OR CONVERGENCE?

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This article presents for consideration a basic interpretative model that arbitral tribunals and courts may look to adopt when faced with issues of interpretation concerning the provisions of the **Arbitration Act No. 11 of 1995**. It sets out the background and the problems that give rise to the need to consider such a model in Sections I-IV below. It then looks at how this model might be applied in practice and explores several issues that this process brings into focus in Sections V and VI.

I. Background

The UNCITRAL Model Law on International Commercial Arbitration[1] (**'Model Law'**) was born out of the need to establish a

unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. The rationale underlying its project was that, a common framework for international dispute resolution acceptable to States with different legal, social and economic systems, would contribute towards the development of harmonious international economic relations.[2] The Model Law sought to achieve this by addressing two specific problems that the **New York Convention**[3] had left unaddressed: first, the inadequacy of domestic laws that regulated international commercial arbitration and, second, the disparity between the national laws that dealt with this subject matter, which were already in place.[4]

The first of these issues arises in this way: national laws often were silent on many aspects of the arbitral process. Jurisdictions that had ratified the New York Convention were only obliged to adopt measures regulating the recognition and enforcement of arbitral awards and arbitration agreements, leaving virtually untouched, and to the absolute discretion of national legislators, the regulation of the entire process that lay in between these two procedural milestones. The result is crippling uncertainty for parties who wish to avail of international arbitration as the method to resolve their international commercial disputes. Secondly, having disparate national laws impacts the predictability of the arbitral process and its potential outcomes. International commercial parties looking to invest and trade in foreign, unfamiliar territories value the ability to predict and quantify the risk attached to their investments and therefore would in turn value a process that would enforce their respective bargains in a foreseeable and consistent way.

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[1] UNCITRAL, 'Model Law on International Commercial Arbitration' (1985) UN Doc A/40/17/ annex I and A/61/17/annex.

[2] See Resolution adopted by the UN General Assembly on 11th December 1985 at its 112th plenary meeting (Resolution 40/72 'Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law')

[3] 330 UNTS 3

[4] UNCITRAL, 'Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration' (2008) United Nations

II. Legislation 'based on' the Model Law

In this background, legislation based on the Model Law (which was amended on 7 July 2006, at the thirty-ninth session of the Commission) has been adopted in 80 States in a total of 111 jurisdictions.[5] The term 'adopted' here must be understood contextually. The UNCITRAL website provides a helpful disclaimer in this regard:

> *"A model law is created as a suggested pattern for lawmakers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text …"*

Therefore, jurisdictions seeking to adopt the Model Law have done so in a variety of ways. For example, Singapore, a popular 'pro-arbitration' seat, provides for the adoption of the Model Law under Section 3(1) of its International Arbitration Act 2002 which enacts that the Model Law (which is set out under the Act's Schedule 1), with the exception of Chapter VIII thereof, shall have the force of law in Singapore, subject to the Act. This legislation then goes on to effect specific additions or amendments to the Model Law with its own tailored provisions.

Taking a slightly different approach, the Hong Kong Arbitration Ordinance 2011, provides that,

> *"The provisions of the UNCITRAL Model Law that are expressly stated in this Ordinance as having effect have the force of law in Hong Kong subject to the modifications and supplements as expressly provided for in this Ordinance."*

Other jurisdictions that are considered to be major 'arbitration hubs', such as England and Wales (together with Northern Ireland), have not sought to adopt the Model Law at all. Rather, the **English Arbitration Act of 1996**, seeks to be a statement in statutory form of *"… the more important principles of English law of arbitration, statutory and (to the extent practicable) common law*".[6] Whilst consideration was given to having the same structure and language as the Model Law so as to enhance its accessibility to those who are familiar with the Model Law, the drafters of the English Act were mindful that its provisions were not limited to the content of the Model Law. The reasons for enacting the 1996 Act was provided by Saville LJ as being an exercise in consolidating and codifying the various English statutes on arbitration passed since 1698 as well as incorporating well-settled principles on arbitration as developed by the English common Law.[7]

III. The Arbitration Act No 11 of 1995

The UNCITRAL Secretariat records that Sri Lanka's Arbitration Act (**'the Act'**) is based on and/or adopts the Model Law.[8] However, our Act cannot said to be Model Law-compliant in the same way the Singapore and **Hong Kong arbitration laws** are. This is mainly because our Act has also 'drawn inspiration' from the **draft Swedish Arbitration Act of 1994**.[9] Therefore, the provisions of the Act, whilst meant to secure Sri Lanka's compliance with its international obligations under the New York Convention, contains several important deviations from the scheme of the Model Law[10].

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[5] UNCITRAL <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 30 September 2019

[6] Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill*, February 1996.

[7] A Tweedale and Keren Tweedale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, OUP 2010)

[8] See n.6 above.

[9] Claes Lindahl, Gustaf Moller and Sundeep Waslekar, 'Support to Building an Institutional Capacity for Arbitration in Sri Lanka' (1998) SIDA Evaluation 98/34, Swedish International Corporation Agency

[10] Our Act makes no mention of the Model Law in its preamble.

Several of these deviations occur due to the use of language in our Act that is different from the Model Law. Others are based on substantive rules that are not contained in the Model Law (or, indeed, the draft Swedish Arbitration Act of 1994) at all.

IV. Problems and Possible Solutions

Consequently, the following difficulties arise: first, where the language used in the Act is different to that in the Model Law, disputing parties may seek to exploit these differences to argue to their benefit that the Act envisages a scheme that is wholly separate and distinct from that contained in the Model Law, thereby invariably eroding the object and purpose of the Model Law and what the Act's adoption thereof, has sought to achieve. Second, where the Act deviates in its substantive content from the comparable provisions of the Model Law, arbitral tribunals and judges face difficulties in ascertaining applicable judicial precedent to interpret these provisions. This is because unlike in the case of the **English Arbitration Act of 1996**, our common law that predates the Act has not posited and developed principles relating to international commercial arbitration.

These are compounded by the fact that there is no identifiable *travaux préparatoires* available for the assistance of tribunals and courts in interpreting the Act.[11]. The sum outcome of the foregoing is the risk of decisions being rendered by courts and arbitral tribunals that are somewhat incongruent with international best practice, or amount to deviations from the object and purpose of the Model Law that are not justified on either principled or policy grounds.

Some argue that the obvious solution to these issues might be for the Act to be suitably modernized or repealed and replaced. However, until such time, courts and arbitral tribunals continue to be faced with these difficulties when called upon to address the following questions:

a) how must the unique provisions of our Act, i.e. those which are ostensibly not based on either the Model Law or the draft Swedish Arbitration Act of 1994, be interpreted? and

b) what aids may be used in interpreting these provisions?

The limited thesis of this article is therefore that courts and tribunals must in the interim, seek to construe the provisions of the Act in a manner that is 'pro-arbitration', unless a plain reading of the Act clearly excludes the possibility of such a construction. It is appreciated that this is an inherently difficult judgment call to make: what amounts to a 'pro-arbitration' interpretation of the Act? The answer would depend on the view one takes of the various conflicting values the Act seeks to reconcile and where one finds the right balance between these competing values to be situated. For example, would it be 'pro-arbitration' to construe the Act in a manner that grants parties an unfettered autonomy to shape certain aspects of the arbitral process? Or must this be tempered with controls imposed by the tribunal and court? If so, how, if at all, should the exercise of such controls be delineated?

In deciding on what the 'pro-arbitration' interpretation of a particular provision of our Act is, tribunals and courts may, in the absence of any directly applicable legal precedent, look to decisions of other Model Law-compliant common law jurisdictions whose judiciaries have historically been identified as being 'pro-arbitration'[12] and have interpreted the corresponding (and

[11] That the draft Swedish Arbitration Act of 1994 was not enacted by the Swedish legislature in its original form further aggravates these issues concerning the interpretation and application of our Act.

[12] Such as Singapore and Hong Kong (as contrasted with Russia, the PRC and certain older Indian judgments)

often similarly worded) provisions of their respective arbitration laws.

V. Illustration: Article 16 of the Model Law and Section 11 of the Act

Section 11 of our Act offers an illustration on how the approach under discussion might work in practice. It provides that:

> *"11. (1) An Arbitral tribunal may rule on its jurisdiction … but any party to the arbitral proceedings may apply to the High Court for a determination of any such question.*
>
> *(2) Where an application has been made to the High Court under subsection (1) the arbitral tribunal may continue the arbitral proceedings pending the determination of such question by the High Court."*

The comparable provision of the draft Swedish Arbitration Act of 1994[13] is set out below:

> *"The arbitrators may rule on their own jurisdiction to decide the dispute. This does not prevent a court from ruling on such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court …"*

In contrast, Article 16 of the Model Law reads:

> *"(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement …*
>
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.*
>
> *(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."*

A comparison of these provision raises several immediate questions on how Section 11 of our Act might be interpreted: (1) at what point in time may a party raise an objection to the tribunal's jurisdiction?; (2) at what point during the arbitration can the tribunal decide on a jurisdictional objection (whether as a preliminary issue or in an award on the merits)?; and (3) is the allocation of competence under our Act between the High Court and the arbitral tribunal to determine issues of jurisdiction concurrent, contingent or alternative?

Some of these questions were addressed by the High Court in the case of *Mahawaduge Priyanga Lakshitha Prasad Perera Vs. China National Technical Imports & Export Corporation*[14] where the issue before the court was whether a decision by the arbitral tribunal that it did not have jurisdiction was subject to review by the High Court under **Section 11** of our Act.

[13] Gillis Wetter "The Draft New Swedish Arbitration Act: The 'Presentation' of June 1994" (1994) Arbitration International, Vol. 10 No.4, 407

[14] HC/210/2014/ARB; Order dated 5 June 2017.

The Court, having considered the Model Law provisions (though not the similarly-worded provision in the draft Swedish Arbitration Act of 1994) rightly determined that like Article 16 of the Model Law, our Act does not provide parties a right to review before the High Court, a negative jurisdictional ruling by an arbitral tribunal. It further held that no such right existed under Section 11, even where the tribunal rules that it has jurisdiction (positive jurisdictional ruling). In deciding the above, the High Court observed that,

> *"... Section 11 of the Arbitration Act has provided two options to any party to challenge the jurisdiction of the tribunal, either to invite the tribunal to decide its jurisdiction as a preliminary question or apply to the High Court for a determination of any such question..."*[15]

Therefore, unlike the Model Law, our courts have taken the view that **Section 11** of our Act does not afford a right of review of an arbitral tribunal's positive jurisdictional ruling but an alternative right to obtain a jurisdictional ruling from the High Court. The 'pro-arbitration' ramification of this decision might be that once a positive ruling on jurisdiction is made by a tribunal, the losing party will have to continue with the arbitration until such time a final award is rendered, as the right to apply to the tribunal for a stay of proceedings pending court's review of the jurisdictional issue will not arise. The losing party may only raise the jurisdictional issue again during set-aside proceedings at the very end under **Section 32** of the Act.

On the other hand, a view can be taken that, particularly in complex and time-consuming arbitrations, the scheme of **Section 11** creates uncertainty and added risks for claimants who must wait till the very end of the arbitral process to know whether the tribunal in fact did have jurisdiction over their dispute. In contrast, the scheme set out under Article 16 of the Model Law, it might be argued, provides for a speedier resolution of jurisdictional issues by the court (with such decisions having preclusive effect) and is therefore more 'pro-arbitration'.

The scheme of concurrent/alternative court control over jurisdiction envisaged under **Section 11** may also lead to parties seeking the court's ruling on jurisdiction merely to delay and obstruct the arbitral proceedings.[16]

Whatever pros and cons one might assign to the foregoing interpretation of **Section 11**, the High Court in this case was faced with the unenviable and inescapable task of having to reconcile the object and purpose of Article 16 of the Model Law with the ostensibly different wording contained in **Section 11** of our Act.

If the issue before the High Court was based on different facts however, there might have been a more compelling argument for the court to look beyond the plain words of the statute and perhaps "read in" standards that would align better with the object and purpose of the Model Law.

For example, what approach to interpretation should the court adopt in a scenario where an Applicant to the High Court under **Section 11** objects to the tribunal's jurisdiction for the very first time, after substantial costs and resources have been incurred by the parties in long-running arbitration proceedings? Should the court allow such an application purely based on the plain textual interpretation of Section 11, or should it interpolate the requirements set out under **Article 16(2) of the Model Law** relating to the timing of jurisdictional objections when making its decision? And if the latter approach is permissible to do justice between the parties under certain factual scenarios, then are there good

[15] At paragraph 14.

[16] See the High Court's consideration of the Singaporean case of *Malini Ventura v. Knight Capital Pvt. Ltd and others* [2015] SGHC 225 at paragraph 50 on this point.

enough reasons for the court to not look to the object and purpose of the Model Law and international 'pro-arbitration' jurisprudence in every case where it is faced with interpreting such bespoke provisions of our Act?

VI. Conclusion

It is not denied that this approach remains open to several criticisms, including that looking to the object and purpose of the Model Law and 'pro-arbitration' jurisprudence in interpreting provisions in our Act that are plainly worded differently will undermine parliament's intention in enacting our legislation. However, notwithstanding these weaknesses, adopting an approach that has been sanctioned by a wider international community of stakeholders and 'pro-arbitration' jurisdictions will serve to promote uniformity and efficiency within the arbitral process whilst improving investor perceptions of Sri Lanka's landscape for commercial dispute resolution. The interpretative model that is proposed here therefore merits further consideration.

YOUR WALLET AND HAWK EYE; IMPACT OF MANIFOLD TAX REGIMES ON THE EMPLOYMENT GAINS IN SRI LANKA

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A. Introduction

The functions of a tax system involve several aspects. First, the primary function of a taxation system is to raise revenue for the government for its public expenditure as well as for local authorities and similar public bodies. Its efficiency is therefore primarily judged by whether this function is performed adequately and satisfactorily. The second function is to reduce inequalities through a policy of redistribution of income and wealth. The equity principle in taxation implies that taxes should be imposed in accordance with the ability to pay principle. This has two dimensions: (a) horizontal equity, i.e., similar treatment of persons placed in similar circumstances, and (b) vertical equity, i.e., different treatment of persons with different taxable capacity. Thirdly, the fiscal system is also employed for social purposes such as discouraging certain activities which are considered undesirable.[1]

Domestic tax system has the strings of control where the financial stability of a State is considered. The income and expenditure generated are the basic forces of an economy however the revenue generated would be the deeming factor creating the sustainability.

The **Inland Revenue Act No.24 of 2017** (hereinafter at times called as the 'Act') provides with the legal authority to charge, levy and collect income tax on the gains and profits of every person, on a year on year basis with effect from 1st of April, 2018 in relation to four main sources of income namely, employment income, business income, investment income and other income.

Engaging in an employment and receiving a salary is the most common method of generating income. Such employment income concerned, the involvement of diverse taxes could be identified in stages of Employment and Post-employment, specifically as to terminal benefits[2], compensation received directly from the Employer or through the Department of Labour, and compensation from the Labour Tribunal.

It is the author's understanding that the public lacks the knowledge as to how their salary and all the other gains from employment being taxed. Therefore the objective of this paper is to give a comprehensive overview on manifold tax regimes in consideration of employment gains.

[1]D.D.M Waidyasekera- former Commissioner of Inland Revenue, Secretary of 1990 Presidential Taxation Commission, present editor of the institute of policy studies of Sri Lanka/*Taxation in Sri Lanka: Current Trends and Perspectives- No.25 Working Paper of Institute of Policy Studies of Sri Lanka*/2016/page 1

[2]Employee's Provident Fund (EPF), Employee's Trust Fund (ETF), Gratuity

B. Stage of Employment

Under the charging provision section 2, income tax is payable by a person. A person is defined as an individual or an entity, and includes an executor, non-governmental organization and charitable institution.[3] An entity means a company, the charging provision is found in Chapter I of the Act,[4] and is the central provision from which the rest of the provisions considered as branches. Generally, income tax is payable on taxable income; and final withholding payments. Calculation of an individual's gains and profits from employment for a year of assessment will be described in Chapter III of the Act.

Generally, employment involves provision of labour for gain. The definition of "employment" in section 195 to the Act essentially refers to the general law concept of employment. This general law concept is extended to include past and prospective employment and so amounts received either before or after employment may be required to be included in income and an employee means any individual who earns remuneration in money or otherwise, for the present or past services performed by such individual.

It is important to properly classify a person as an employee or an independent contractor. The employee will derive income from employment from their activities whereas the contractor will derive income from business. The rules for calculating these types of income are different and, no deductions are permitted in calculating income from employment, section 10(1) (a) since, employees have few expenses, but an independent contractor providing services may have substantial expenses for which relief is granted.

Tax liability arises on total remuneration received by an employee, during the year of assessment[5] in money or otherwise from employer or others for services rendered, if not specifically exempted. The Remuneration liable to tax includes; [6]

i. Salary, wages, leave pay, overtime pay, fees, pensions, commissions, gratuities, bonuses, and other similar payments
ii. allowance, including any cost of living, subsistence, rent, entertainment or travel allowance
iii. Payments providing discharge or reimbursement of expenses incurred by an individual or an associate of the individual
iv. Payments for an individual's agreement to conditions of employment
v. Payments or transfers to another person for the benefit of an individual or an associate person of the individual
vi. The fair market value of benefits received or derived by virtue of the employment by an individual or an associate person of the individual

The excluded gains and profits are demonstrated under section 5 (3) to the Act.

In Wimalasundera J. Kanaga sabapathy vs. CGIR[7] it was clearly observed what amounts to employment gains.

> *"……. the kinds of receipts with the item wages and going down to perquisite are receipts in respect of a person's service as employee. The statute requires that these receipts must be payments "which an*

[3]S. 195(1) of the Act
[4] S. 2(1) of the Act
[5] Year of assessment is a period of 12 months from 1st April to 31st March of every year
[6]S. 5(2) of the Act
[7] 4 SLTC 140

employee receives in the course of his employment"

Having ascertained the component of remuneration liable, it is notable that imposing taxes varies sector-wise.

Public Sector Employees

The public sector is a portion of an economic system that is governed by national, state or provincial, and local governments. It is stated to be the largest sector of any economy, whereby one can argue that it consists of national economy providing basic goods or services that are either not, or cannot be provided by the private sector. Every employer is required to deduct income tax from the gross remuneration for every pay period of every employee who is liable to income tax, at the time such remuneration is paid or credited.[8] The pay period can be a month, week or such other period in respect of which remuneration is calculated and paid by an employer to an employee, and accordingly, the tax should be deducted and remitted monthly to the Department of Inland Revenue. This is known as ***PAYE scheme.***[9]The Commissioner General of Inland Revenue specifies Tax Tables which are to be used in making such tax deductions.

Section 83 to the Act empowers the Commissioner General to specify circumstances where the employers should withhold tax from an amount included in taxable income.

The section being linked with Section 10 of the first schedule to the Act it is mentioned that with regard to both resident and non-resident employees such sums would be taxed at the rates Commissioner General publishes in Gazette.

Withholding by Employers Regulations by the Gazette No. 2064/60 dated 01st April 2018, came into operation at the same time as the Act, No. 24 of 2017 specifies tax rates of the following.[10]

a. *Tax Table 01* for regular profits from the employment of an employee who is having one employment or any employee who has furnished a primary employment declaration[11],
b. *Tax Table 02* for payment constitutes a Lump-sum payment[12]
c. *Tax Table 03* for once-and-for-all payment (Terminal Benefits)[13]
d. *Tax Table 04* for payment received by the non-citizens in Sri Lanka
e. *Tax Table 05* for monthly regular profits of an employee from a primary employments is less than Rupees 100,000 but the cumulative profits from the primary employment up to any month in the year of assessment exceeds Rupees 1,200,000 due to payment of higher remuneration in certain months[14]Tax deduction should start from the month in which the cumulative profits up to that month exceed Rupees 1,200,000. Thereafter tax deduction should be made monthly till end of the year of assessment, using this table.
f. *Tax Table 06* for payment or reimbursement of the employee's tax liability on his

[8] S. 83 of the Act
[9] Pay as you earn (PAYE)
[10]The below mentioned tables can be found at link: <http://www.ird.gov.lk/en/publications/sitepages/PAYE%20Tax%20Tables.aspx?menuid=1502>
[11]In case of having two or more employment
[12] Bonus, Incentives etc.
[13] Will be specifically addressed in a later stage of this article
[14]Will be specifically addressed in a later stage of this article

income from employment by the employer

g. *Tax Table 07* for the remuneration of a chairman or a Director or a Non Execute Director of a Company who has not furnished a primary employment certificate, or in respect of remuneration of any employee employed under more than one employer, or from the remuneration of employee who are engaged in more than one employment where such remuneration is paid by any employer other than the employer of primary employment.

Employers are required to maintain PAYE Pay Sheets for the purpose of PAYE Tax deduction in the prescribed form, for each employee who is liable to tax. These pay Sheets should be maintained in addition to the normal pay sheets maintained by the employer for recording purpose. Annual Declaration of government sector should be furnished to PAYE Branch not later than the 30th of April every year.[15]

Primary and Secondary Employment

Paragraph 3 of 'Withholding by Employers Regulations by the Gazette No. 2064/60 dated 01st April 2018' resorts as to the requirements and how the tax liability is governed in accordance with the aforementioned tables where employee is employed under more than one employer.

An employee is obliged to furnish a declaration nominating the employment as the employee's primary employment to an employer, except any employee who is having one employment. Such an employment shall be considered as primary employment of an employee for a year of assessment. There can't be more than one primary employment throughout the respective year of assessment.[16]

If an employee has ceased the primary employment during a year of assessment and the employee has another employment after the primary employment has ceased, the employee must provide the employer of the other employment with a new declaration and the withholding tax certificate[17]issued with respect to the prior primary employment.[18]

Where an employee ceases two or more primary employments during a year of assessment, the employee may provide the new employer with multiple withholding tax certificate and the employers shall act accordingly with respect to those multiple withholding tax certificates.[19]

Secondary Employment refers to any employment that is not the primary employment of the employee.

Rates for the deduction of tax from the regular profits from employment of any employee who has not furnish the primary employment declaration, or in respect of regular profits from employment of any employee employed under more than one employer, where such regular profits from employment is paid by any employer other than the primary employer the tax liability shall be imposed as, on monthly remuneration less than or equal to Rupees 50,000 per month, at 10%; and Balance amount exceeding Rupees 50,000 per month, at 20%.[20]

Private Sector Employees

[15]Morefully explained by the latter part to this article
[16]Parah 3 (i) – (v)of Gazette No. 2064/60 dated 01st April 2018
[17]Certificate being issued under paragraph 7 of Gazette No. 2064/60 dated 01st April 2018
[18]Parah 4 (i) – (iii) of Gazette No. 2064/60 dated 01st April 2018
[19]Parah 4 (iii) of Gazette No. 2064/60 dated 01st April 2018
[20] Table 07 at <http://www.ird.gov.lk/en/publications/sitepages/PAYE%20Tax%20Tables.aspx?menuid=1502>

Resident individuals are subjected to ***income tax*** on their worldwide income while non-resident individuals are taxed only on their income generated in Sri Lanka.[21]

An individual is charged on such person's taxable income on progressive rates based on the level of income.

The rates currently applicable are: on the first Rupees 600,000, 4% of the taxable income; on the next Rupees 500,000, Rupees 24,000 plus 8% of the amount in excess of Rupees 600,000; on the next Rupees 600,000, Rupees 72,000 plus 12% of the excess of 1,200,0000; on the next Rupees 600,000, Rupees 144,,000 plus 16% of the amount in excess of 1,800,000; on the next Rupees 600,000, Rupees 240,000 plus 20% of of the amount in excess of 2,400,000; and Rupees 360,000 plus 24% of the amount in excess of Rupees 3,000,000 on any amount exceeding Rupees 3,000,000.[22]

A resident of Sri Lanka for income tax purposes will be entitled to claim a tax-free allowance of Rupees 500,000 for each year of assessment.

An individual who has profits from employment and is a resident or citizen of Sri Lanka is entitled to a further deduction of Rupees 250,000 as a qualifying payment.

Section 132 of the Act requires a taxpayer to assess the tax payable by himself and to file return[23]for the taxable period. Self-assessment taxpayer can file a return declaring a loss and be treated as he has assessed his income. A return which includes pre-filled information provided by Commissioner General of Inland Revenue (CGIR) and electronically computed payable amount of tax should be completed in writing or electronically as to be furnished.

As per **section 85 (1) (a)** to the Act coupled with **paragraph 10 (c) (i)** of the First Schedule service fees as to teaching, brokering, endorsement, supply of any article on contract basis, and any other prescribed by regulation rendered to resident individual shall be taxed at 5% on amounts exceeding Rupees 50,000 per month.

Section 85 (1) (b) with paragraph 10 (c) (ii) of the First Schedule the same services rendered to non-resident individual shall be taxed at 14%.

C. Post Employment (Terminal Benefits and Compensation)

> "*When an employee's employment terminates, either as a consequence of dismissal, redundancy or retirement, it is common that the employer will pay a lump sum payment to the employee. These payments may be referred to as a golden boot or a golden handshake*."[24]

According to the paragraph above an employee is entitled to receive retirement payments irrespective of the nature of cessation of such services.

In any event of unjustifiable and unlawful termination an aggrieved employee is entitled to go before the Labour Tribunal as per section 31B of the Industrial Disputes Act No. 43 of 1950 which has the jurisdiction to reinstate the employee with or without back-wages and in lieu to compensate.[25]

Terminal benefits are subjected to ***income tax*** as per **Section 1 (2) and (3)** of the Act.

a. Any sum paid in commutation of pension,

[21] S. 4 (a) & (b) of the Act

[22] First Schedule 1 (1) of the Act

[23]Can be a **NIL return** where no taxable income generated but the obligation lies on the taxpayer to declare the amount he has earned. (Will be treated as having made an assessment)

[24]ACCA Qualification Paper F6/*Taxation on Termination Payments*<https://www.accaglobal.com/content/dam/acca/global/PDFstudents/2012s/sa_mar11_f6irl_2.pdf>

[25] Discussed below in detail

b. Retiring Gratuity(Payable as per the Payment of **Gratuity Act No. 12 of 1983)**

c. Compensation for loss of office or employment under a uniformly applicable scheme recognized by the Commissioner- General,

d. Any sum paid at/after the retirement from a provident fund approved by the Commissioner-General which does not represent employee's contributions to the fund.

e. Any sum paid from a regulated provident fund which does not represent employer's contributions to the fund before 01.04. 1958, where the interest has been accrued if the tax paid by the employer at 15% and interest accruing thereon.

f. Any sum paid from Employee's Trust Fund (ETF) established by **Employee's Trust Fund Act No. 46 of 1980** at/after the cessation of employment.[26]

In consideration of the above income identified, where the period of service is *twenty years or less*, such sum would be taxed as, no liability upto Rupees 2,000,000, between Rupees 2,000,000 and 3,000,000, the excess amount of Rupees 2,000,000 at 5%, and tax payable for any sum exceeding Rupees 3,000,000 is Rupees 50,000 plus 10% on the amount in excess of Rupees 3,000,000.

Where the period of service is *more than twenty years* there is no liability upto Rupees 5,000,000. Between Rupees 5,000,000 and Rupees 6,000,000, the excess amount of Rupees 5,000,000 at 5%, and tax payable for any sum exceeding Rupees 6,000,000 is Rupees 50,000 plus 10% on the amount in excess of Rupees 6,000,000.

However, any income shall not be taxed if such sums have already been subjected to final withholding payments.[27]

As it was mentioned earlier section 83 to the Act the Commissioner General has authority to specify circumstances where the employers should ***withhold tax*** from an amount included in taxable income. Section 10 of the first schedule it is mentioned that such rates shall be gazetted.

Withholding by Employers Regulations by the Gazette No. 2064/60 dated 01st April 2018 refers to the *Tax Table 03* for once-and-for-all payments which are Terminal Benefits.[28]

Tax is stated to be withheld at 10% from pension, retiring gratuity, compensation for loss of office or employment under a scheme which is uniformly applicable to all employees and approved by the Commissioner General of Inland Revenue.

A scheme is uniformly applicable, where the Commissioner General is of the opinion that it is uniformly applicable to all the employees.

Where the payment made by the employer is in accordance with a scheme which is uniformly applicable to all the employees, or where the payment is made out of a Fund to which the employer has made contribution in accordance with a scheme which is uniformly applicable

[26]As per section 8 under Schedule I taxable income of an employee's trust fund, an approved provident or pension fund or an approved termination fund shall be taxed at rate of 14%

[27] S. 5 (3) (a) of the Act

[28]Parah2 (c) to the regulation *ibid*

to all the employees, then such a scheme would be a uniform scheme.

However, 24%, would be the rate for tax deductions in the circumstances referred to in compensation for loss of office or employment under non uniform scheme.

In the case of uniform scheme once–and-for–all payments, deduction should not be made in the situations where aggregate amount is Rs. 1,000,000 where the period of service or contribution is less than 20 years and/or Rs. 1,500,000 where the period of service (or contribution) is equal to or more than 20 years.

D. Conclusion

> *"Every worker and employer is directly affected by taxes on wages. Taxation is one of the principal ways we finance public services. It also helps us achieve important social objectives, such as redistributing wealth to address inequalities."*[29]

In light of the above it is to be understood the significance of sufficient knowledge on the imposition of manifold tax regimes under the Inland Revenue Act. To be responsible and vigilant citizens such knowledge is mandatory.

[29]Paturot Dominique, OECD Centre for Tax Policy and Administration/*Taxing wages: how taxes affect the disposable income of workers and wage costs of employers in OECD countries*<http://oecdobserver.org/news/fullstory.php/aid/5916/Taxing_wages:_how_taxes_affect_the_disposable_income_of_workers_and_wage_costs_of_employers_in_OECD_countries.html>

ABORTION: RIGHT OR INTENTIONAL KILLING? A COMPARATIVE ANALYSIS OF ABORTION LAW IN TWO COMMONWEALTH NATIONS: SRI LANKA & NEW ZEALAND

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Introduction

Abortion is rather a sensitive topic, the legalisation of which is still debated in some countries. Cultural barriers along with ethical and moral grounds across the different countries, make it a rather tedious task to implement a common treaty. Certain countries view the act of abortion as one of 'right', that is, exercising one's discretion as to whether or not to continue with the pregnancy. In other countries on the contrast, abortion is regarded as an act of 'killing', considering the foetus as a human being from the time of conception.

This divided perspective raises questions such as, after how many weeks of conception is the foetus considered as a human being? Is it morally correct to end the life of an unborn child? Since it is the female who bears a greater degree of responsibility than her male counterpart, should she not be given the discretion to decide whether to continue with the pregnancy? Responding to these in one way or the other would undoubtedly trigger public uproar - anti and/or pro.

In the medical context the abortion is described as the "termination of pregnancy"[1]. The definition encompasses two types of abortion: induced and spontaneous abortion.[2] An induced abortion is one which is induced by the pregnant woman either through surgical method or by consuming prohibited food items (eg: papaya, pineapple) or by engaging in prohibited activities (eg: climbing stair case, lifting heavy items).[3] The second type, spontaneous abortion terminates the pregnancy without any interference from the expectant mother.[4] This is more commonly referred to as miscarriage. Unintentionally on the part of the pregnant mother, the pregnancy is terminated prior to 20 weeks.[5]

As surprising as it may sound, pregnancies were terminated in ancient times as well. Research indicates that the act of abortion was in practice in the medieval era. In fact, women in primitive Greece and Rome chose to terminate pregnancy[6], using the herb known as silphium.[7] With the passage of time and technological advancement in the medical industry more awareness of the term 'abortion' was created and women in the developing countries were educated on the safe and legal modes of terminating a pregnancy if desired. Nonetheless, this was

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[1] British Pregnancy Advisory Service, 'What is abortion?'<https://www.bpas.org/abortion-care/considering-abortion/what-is-abortion/> accessed 24 September 2019

[2] Merriam-Webster, 'Abortion' <https://www.merriam-webster.com/dictionary/abortion> accessed 30 September 2019

[3] Science Direct, 'Induced Abortion' <https://www.sciencedirect.com/topics/medicine-and-dentistry/induced-abortion> accessed 30 September 2019

[4] Science Direct, 'Spontaneous Abortion' <https://www.sciencedirect.com/topics/medicine-and-dentistry/spontaneous-abortion> accessed 30 September 2019

[5] Southern Cross, 'Miscarriage – symptoms and causes' (May 2018) <https://www.southerncross.co.nz/group/medical-library/miscarriage-symptoms-and-causes> accessed 30 September 2019

[6] BBC, 'Abortion in ancient history' <http://www.bbc.co.uk/ethics/abortion/legal/history_1.shtml> accessed 23 September 2019

[7] History Daily, 'Things You Didn't Know About Ancient Birth Control' (28 June 2018) <https://historydaily.org/ancient-birth-control-plant-was-harvested-into-extinction> accessed 30 September 2019

and regrettably is still not the case in many developing countries.[8]

Though there is currently no single treaty that can be applied to all nations, the matter has been the subject of discussion on various occasions, including the time when the government of Peru was ordered by the United Nations Human Rights Committee to reimburse the complainant for the loss sustained by her for refusing to authorise her abortion (*KL v. Peru*)[9]. The decision in this case "marked the first time that a UN human rights body held a government accountable for failing to ensure access to legal abortion services."[10]

The argument that access to safe and legal abortion services is a fundamental human right and the denial of which is a violation of this right has been emphasised by the UN on numerous occasions.[11] This view is strongly supported by pro-abortion organisation such as reproductive rights which emphasise on the need to safe and legal access to abortion and, that it is at the woman's discretion to decide whether or not she wishes to continue with a pregnancy. The grounds sighted in support of their argument is the 'limitation' that will be placed on the girl / woman if she is compelled to give birth at an unexpected stage in her life, such include inability to complete (or pursue further) education, or not being able to commit to a career of her desire.[12]

In fact, there is sufficient statistics to proof that "legal restrictions on abortion do not result in fewer abortions, instead they compel women to risk their lives and health by seeking out unsafe abortion care."[13]

The report titled 'Abortion Policies and Reproductive Health around the World' published by the United Nations, provides that most countries permit abortion with the view to save the life of the woman.[14] Other grounds that permit abortion include, "to preserve a woman's physical or mental health, foetal impairment, in instances of rape or incest, economic or social reasons or on request by the pregnant woman". [15]

Given these imperative and grounds highlighted by international bodies, one is compelled to wonder: what is the substantial rationale that truly restrains the government from legalising abortion in their respective country? Religious or Political?

Sri Lanka

Currently the only legislation in Sri Lanka that makes reference to 'abortion' is the **Penal Code 1883**. As will be revealed from the wording of the relevant section, the legislation criminalises the intentional causing of miscarriage to a woman and does not specifically mention the term 'abortion'.

Section 303 of the Penal Code provides:

> *"Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman,…; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*[16]

In strictly interpreting this section, the following ambiguities can be highlighted:

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[8] Guttmacher Institute, 'Abortion in Asia' (March 2018) <https://www.guttmacher.org/fact-sheet/abortion-asia> accessed 30 September 2019

[9] CCPR/C/85/D/1153/2003

[10] UN News, 'UN announces that Peru will compensate woman in historic human rights abortion case' (18 January 2016) <https://news.un.org/en/story/2016/01/520272-un-announces-peru-will-compensate-woman-historic-human-rights-abortion-case> accessed 26 September 2019, paragraph 3

[11] Center for Reproductive Rights, 'A Global View:Mapping Abortion Rights Worldwide' <https://reproductiverights.org/sites/default/files/documents/World-Abortion-Map-GlobalView.pdf> accessed 26 September 2019

[12] Ibid

[13] Center for Reproductive Rights, 'The World's Abortion Laws' <https://reproductiverights.org/worldabortionlaws> accessed 26 September 2019, paragraph 7

[14] United Nations, 'Abortion Policies and Reproductive Health around the World' (2014) <https://www.un.org/en/development/desa/population/publications/pdf/policy/AbortionPoliciesReproductiveHealth.pdf> accessed 26 September 2019

[15] United Nations, 'Abortion Policies and Reproductive Health around the World' (2014) <https://www.un.org/en/development/desa/population/publications/pdf/policy/AbortionPoliciesReproductiveHealth.pdf> accessed 26 September 2019

[16] Penal Code 1883, s 303.

(1) Miscarriage is also described as spontaneous abortion, in other words termination of pregnancy due to natural causes without any intervention on that the part of the pregnant woman or a medical practitioner (as explained above under spontaneous abortion). However, by inserting the word 'voluntarily' it can be assumed that the legislators intended to refer to induced abortion. However, strictly speaking, a miscarriage is rarely caused voluntarily. It is a spontaneous occurrence.
(2) In accordance with this section the only ground on which 'a voluntary miscarriage' can be permitted is when the life of the woman is endangered. Therefore, the act of causing miscarriage in all other circumstances results in a criminal offence including foetal impairment, mental health of the woman, social or economic reasons.
Thus, the initial query that requires clarification at this stage is: does the current legislation in Sri Lanka encompass the act of abortion in its entirety?
The lack of a relevant legislation and proper guidance and education on abortion are sufficient grounds for women in Sri Lanka to seek access to illegal and unsafe modes to terminate their pregnancies.[17] The cost factor is also another vital reason for the majority of women to access unhealthy clinics and possibly inexperienced staff that agree to terminate the pregnancy at an affordable cost.[18]
Though, there are no apparent steps taken to legalise abortion in the country, the need to implement a legislation and the vitality of it has been emphasised by different actors on several occasions, including by professionals in the country.
In a 2018 Article, the importance and the need to legalise abortion in Sri Lanka was highlighted by the Past President of the Sri Lanka College of Obstetricians & Gynecologists and Past President, Sri Lanka Medical Association.[19] The writer emphasised sufficiently valid grounds for legalising abortion, sighting examples of abortion rate pre and post legalising abortion in some European countries such as France and Italy.[20] His argument focused on mental and physical health of the expectant woman, post abortion care needs and most importantly the consideration of basic human rights.[21]
In another article published in 2015, the author, a Consultant judicial Medical Officer at the District General Hospital highlighted the consequences of and the impact on the live of the woman if compelled to continue with the pregnancy. To quote: "The social impact on women and the new born children in cases involving sexual assault is often horrible. The woman with the child will be condemned by the family and society. The ultimate result would be the shattering of the family. The woman will live as a single mother or end up as a sex worker. In the case of teenage pregnancy, her education will also crash. The new-born may be ill-treated by the mother, left in a toilet pit, thrown into a canal or buried alive."[22]
Notably, the interpreters of the legislation in the country, too, do not appear to have provided clarity to the current and only legislation that governs 'abortion' in the country. Though there are reported case laws where the accused was charged for the breach of **section 303**, the questions that were raised in the appellate courts either focus on the applicability of certain sections in the Evidence Ordinance or the decision of the jury as will be evident below.
In the case of *Sheela Sinharage v The Attorney General*[23] it was contented that due to the act of the accused that terminated the second pregnancy of the victim was the underlying ground that caused her death. Though the act of the accused did in fact cause the

[17] The Island, ' A comparison of abortion law in Sri Lanka and the UK' (2 June 2012) <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=53449> accessed 24 September 2019
[18] Ibid
[19] The Sunday Times, 'A case for legalising abortion in Sri Lanka' (4 March 2018) <http://www.sundaytimes.lk/180304/sunday-times-2/a-case-for-legalising-abortion-in-sri-lanka-284253.html> accessed 24 September 2019
[20] Ibid
[21] Ibid
[22] Dr. K.M. Mahasen, 'Abortion: Reform the obsolete laws now' *The Sunday Times* (31 May 2015) <http://www.sundaytimes.lk/150531/sunday-times-2/abortion-reform-the-obsolete-laws-now-151388.html> accessed 24 September 2019
[23] [1985] 1 Sri L.R.

abortion of the foetus, the accused was charged for the breach of **section 305** of the Penal Code amongst other vital sections in the Penal Code. **Section 305** of the Penal Code provides: 'Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine'.[24] It should be noted that the accused was not charged for the breach of section 303, as her act of voluntary miscarriage of the foetus was not done with a view to save the life of the mother.

In another case of *Fernando v The Republic of Sri Lanka*[25], the accused in this case was charged for the breach of **section 303**. However, the leave to proceed to the Court of Appeal related to the evidence submitted by the victim. The Court of Appeal ruled out the conviction and acquitted the accused due the failure on the part of the prosecution to corroborate the victim's evidence and the failure on the part of the learned Magistrate to direct the jury accordingly.[26]

The case of *Regina v D. D. W. Waidyasekera* [27]is not different in context as the above-mentioned case laws. The case was filed in the primary court for the breach of **section 303**. However, the leading questions which the Court of Criminal Appeal focused on, revolved around the evidence that were produced by the accused's Counsel and whether a constant reminder about the benefit of the reasonable doubt to given to the accused should be directed to the jury by the learned judge.

In an interview conducted in February of this year, the Director of Advocacy at the Family Planning Association of Sri Lanka, hinted to the possibility that our lawmakers are considering to permit the termination of pregnancy in circumstances other than that of saving the life of the mother.[28] She believes more awareness and education on this topic may give the necessary push to amend the current law on abortion in Sri Lanka.[29]

Saira Meyler in her article also emphasised the need to legalise abortion in Sri Lanka. Sighting vital reasons such as high rate of maternal death and increased number of illegal abortions recorded annually.[30] In 2016 alone 658 abortions were recorded.[31] Though there were few efforts to legalise abortion, none of them were fruitful, to quote:

> *"There have been several attempts to reform these archaic laws in Sri Lanka, but opposition groups have continuously rejected all proposals. In 1995 an amendment was proposed to allow abortions in cases of rape and foetal impairments. In 2011 the National Action Plan for Human Rights included a goal to decriminalise abortion for rape and major congenital abnormalities, in 2013 the Law Commission proposals called for legalisation in cases of rape and foetal impairments, and more recently in 2017 recommendations were made by the Justice Aluvihare Special Committee to allow abortions in cases of rape and incest, pregnancy in a girl below 16 and with serious foetal impairments."*[32] *However, such recommendations never progressed beyond the draft stage and were put on hold due to opposition by different actors including religious leaders."*[33]

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[24] Penal Code s 305.
[25] (1980) 2 S.L.R.
[26] (1980) 2 S.L.R.
[27] (1955) 57 NLR 202
[28] International Planned Parenthood Federation, 'Fighting for safe abortion access in Sri Lanka' (27 February 2019) <https://www.ippf.org/blogs/fighting-safe-abortion-access-sri-lanka> accessed 29 September 2019
[29] Ibid
[30] Saira Meyler, 'Abortion – Where is Sri Lanka On The Spectrum?' (9 February 2018) <https://groundviews.org/2018/09/02/abortion-where-is-sri-lanka-on-the-spectrum/> accessed 29 September 2019
[31] Ibid
[32] Saira Meyler, 'Abortion – Where is Sri Lanka On The Spectrum?' (9 February 2018) <https://groundviews.org/2018/09/02/abortion-where-is-sri-lanka-on-the-spectrum/> accessed 29 September 2019, paragraph 7
[33] Ibid

Having discussed the stance of abortion in Sri Lanka and the relevant law that governs it, let us now analyse the position in another commonwealth country: New Zealand.

New Zealand

Prior to the enactment of the current legislation that governs abortion, the act was considered to be a crime unless performed with the intention to save the life of the mother or if her mental health was endangered,[34] somewhat similar to Sri Lanka.

In 1977, following the legalisation of abortion in United Kingdom, New Zealand parliament followed suit and enacted the Contraception, Sterilisation and **Abortion Act 1977**. The statute permits the performance of abortion provided two doctors consent to and authorise the procedure.[35] The grounds on which abortion can be permitted is determined in accordance **with section 187A of the Crimes Act 1961**:

"(1) For the purposes of sections 183 and 186, any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of not more than 20 weeks' gestation, the person doing the act believes—

(a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl; or

(aa) that there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped; or

(b) that the pregnancy is the result of sexual intercourse between—

(i) a parent and child; or

(ii) a brother and sister, whether of the whole blood or of the half blood; or

(iii) a grandparent and grandchild; or…"

Care of Children Act 2004 also governs abortion in instances of minors under the age of 16. As per **section 38** of the Act:

"(1) If given by a female child (of whatever age), the following have the same effect as if she were of full age:

(a) a consent to the carrying out on her of any medical or surgical procedure for the purpose of terminating her pregnancy by a person professionally qualified to carry it out; and

(b) a refusal to consent to the carrying out on her of any procedure of that kind."[36]

Pro- and Anti-Abortion Groups in New Zealand

In comparison to Sri Lanka, there are quite a number of organisations that are against and pro-abortion, including, Family First New Zealand, Family Life International New Zealand, Right to Life New Zealand and Voice for Life. In New Zealand groups that are in favour of abortion are more commonly referred to as pro-choice groups.[37] One example is The Abortion Law Reform Association of New Zealand.[38] The focus of pro-choice groups is on the rights of women as opposed to mistaken believes that such groups encourage the death of unborn children.[39] Access to safe and legal modes of abortion are considered by pro-choice groups of crucial importance, the denial of which has been the ground for number of maternal deaths recorded in the past.[40]

A well-known case law in this context is *Right to Life New Zealand Inc v Abortion*

[34] Megan Cook, 'Abortion - Illegal but possible: 1840 to 1950s' (5 May 2011) <http://www.TeAra.govt.nz/en/abortion/page-1> accessed on 29 September 2019

[35] New Zealand Family Planning, 'The Law around abortion' <https://www.familyplanning.org.nz/advice/abortion/the-law-around-abortion> accessed 29 September 2019

[36] Care of Children Act 2004 s 38

[37] Lynley Tulloch, 'The abortion debate: Her uterus, her decision - just give her compassion and respect' *Stuff* (3 June 2019) <https://www.stuff.co.nz/life-style/parenting/113199326/the-abortion-debate-her-uterus-her-decision--just-give-her-compassion-and-respect> accessed 4 October 2019

[38] The Abortion Law Reform Association of New Zealand, 'About Us' <http://alranz.org/about-us/> accessed 4 October 2019

[39] Lynley Tulloch, 'The abortion debate: Her uterus, her decision - just give her compassion and respect' *Stuff* (3 June 2019) <https://www.stuff.co.nz/life-style/parenting/113199326/the-abortion-debate-her-uterus-her-decision--just-give-her-compassion-and-respect> accessed 4 October 2019

[40] Ibid

Supervisory Committee.[41] The case was filed by the Right to Life New Zealand contending the arbitrary use its statutory powers granted to the Abortion Supervisory Committee by the Contraception, Sterilisation, and **Abortion Act 1977**. The appeal to the Supreme Court was based on the question of the Committee's authorisation to inquire about individual abortion cases.[42] After considering the submission from both counsels, the court ruled in favour of the Committee and held:

> *"…we conclude that investigation into individual cases, when reasonably necessary in the view of the Supervisory Committee, is contemplated and permitted under the Act, in addition to generalised inquiries into the operation of the abortion law. …. The Supervisory Committee is statutorily entrusted with the supervision of the provisions of abortion law, particularly decision-making under ss 32 and 33, and its role in this respect should not be read down.*"[43]

In *Wall v Livingston*[44], a paediatrician filed the case against the decision of two consultants who authorised an abortion.[45] His application was rejected on the basis that since he was not involved in the abortion process, as a consultant, his case is of no avail.[46] This case is also known for the decision of the court that an unborn child does not have right to which he or she is entitled to.[47]

Another notable incident is that of Graeme White's tunnelling case where he was found guilty for having attempted to explode an abortion clinic attached to a hospital in Christchurch by placing "firelighters, matches, candles and kerosene-soaked string".[48] The accused was a well-known "anti-abortionist"[49] who had protested several days in front of the hospital, but without success. Hence, his attempt to burn down the entire clinic.[50]

Since 1977, the above-mentioned legislation in New Zealand governing the act of abortion was subject to several criticisms and proposed amendments, including an amendment to the **Care of Children Act** that should include consent from parents for girls under the age of 16 wanting to terminate their pregnancy.[51] But this proposal was rejected. However, the more recent proposal includes notable changes - the removal of abortion from the **Crimes Act 1961** and the discretion to terminate a pregnancy if under 20 weeks without having the authorisation from two consultants.[52] In the event the pregnancy is beyond the above period, the pregnant woman is still entitled to terminate the pregnancy provided

> *"….. the health practitioner reasonably believing that an abortion is appropriate in the circumstances. The health practitioner must have regard to the woman's physical health, mental health, and well-being when considering whether an abortion is appropriate." (as per* ***section 11 of the proposed Abortion Act****)"*[53]

As may or not have been anticipated, the public expressed mixed views on this proposal. The pro-choice groups defending their stance on the basis of human rights, including the entitlement of women to choose whether or not to continue with a

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[41] [2012] NZSC 68
[42] [2012] NZSC 68
[43] [2012] NZSC 68 p 41-42
[44] [1982] 1 NZLR 734
[45] Hugo Farmer, 'An analysis of New Zealand's abortion law system and a guide to reform' [2013] 19 Public Interest Law Journal of New Zealand <http://www.nzlii.org/nz/journals/NZPubIntLawJl/2013/9.html> accessed 4 October 2019
[46] Ibid
[47] Ibid
[48] NZ Herald, 'Mystery hole revealed 'sinister' plot' (30 June 2000) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=138379> accessed 28 September 2019
[49] Ibid
[50] Ibid
[51] The Abortion Law Reform Association of New Zealand, 'Parental Notification' <http://alranz.org/change-the-law/parental-notification/> accessed 4 October 2019
[52] Sarah Robson, 'Abortion law reform: What you need to know' *Radio New Zealand* (8 August 2019) <https://www.rnz.co.nz/news/national/396248/abortion-law-reform-what-you-need-to-know> accessed 29 September 2019
[53] Abortion Legislation Bill s 11

pregnancy.[54] The ant-abortionist on the other hand focused on saving a life, regardless of 'age' and term which may be attributed.[55]

Protests by public does not appear to be novel, the New Zealand parliament has in spite of all the protests proceeded with the enactment of the bill which has passed the first reading in the Parliament on 8 August and is presently with the select committee for consideration.[56]

Conclusion

In conclusion, abortion is a sensitive, personal and a vital topic that should not be treated lightly. In particularly, when considering in the context of health and human rights this topic deserves the attention of the legislators and places them under an obligation (as the representatives of the members of public) to enact a legislation that takes into consideration the above-mentioned factors.

Undoubtedly, a proposal to any degree will receive mixed reviews, especially in Asian countries where religious and cultural values play a vital role. However, as mentioned considering the mortality rate which impacts the overall population and the GDP of the country, legalising abortion could result in positive outcomes in the long run.

[54] Alice Peacock, 'Clash of abortion rallies: Pro-choice protesters' rally meets pro-life rally in Auckland's Aotea square' *NZ Herald* (25 May 2019) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12234329 accessed 4 October 2019

[55] Ibid

[56] New Zealand Parliament, 'Abortion Legislations Bill, <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_89814/abortion-legislation-bill> accessed 4 October 2019

CLIPPING THE WINGS OF AN UNTRAMMELED EXECUTIVE: A COMMENT ON *R. SAMPANTHAN & OTHERS VS. HON. ATTORNEY GENERAL & OTHERS* ["THE DISSOLUTION OF PARLIAMENT JUDGMENT"]

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On9th November 2018, His Excellency the President issued a Proclamation[1] ostensibly under **Article 70(5) of the Constitution** read with **Article 33(2)(c)** thereof inter alia dissolving the Parliament of the Republic and calling for a general election. The ensuing events led to a seminal moment in the legal history of Sri Lanka.

Several individuals and organizations including the Leader of the Opposition at the time, Mr. R Sampanthan preferred Fundamental Rights Applications[2] under and in terms of Articles 17, 35 and 126 of the Constitution[3] to the Supreme Court. Upon Leave to proceed being granted the said cases were heard together before a

bench comprising of 07 Justices of the Supreme Court. On 13th December 2018 the Supreme Court delivered a landmark judgment inter alia quashing the said Proclamation[4]. The judgment was delivered by *H. N. J Perera CJ* with 5 other Justices concurring with him. Whilst concurring with the Judgment, *Sisira J De Abrew J* delivered a separate judgment[5].

The present analysis is not *per se* a comment on how the Court addressed the issue of the constitutionality of the Proclamation. Instead, this is an attempt to examine how the Supreme Court has delineated the limits of the powers wielded by the Executive Branch of the State including His Excellency the President, in the context of the jurisdiction conferred on the Supreme Court to review the actions of the President in terms of the 19th Amendment to the Constitution[6].

Pre 19th Amendment- blanket immunity to the president?

Article 35(1) of the Constitution as it stood prior to the 19th Amendment inter alia stated that no proceedings can be instituted against an incumbent President in respect of anything done or omitted to be done by him/her either in his/her official or private capacity.

At first glance the said provision appears to confer a blanket immunity from suit to an incumbent President. This may lead to the impression that prior to the 19th Amendment an incumbent President could exercise his discretion without any fetter by means of judicial review. However, as discussed below, there is a body of

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[1] Gazette Extraordinary bearing No. 2096/70 dated 9th November 218 ("Proclamation")
[2] SC/FR/351/2018 to SC/FR/361/2018
[3] The Second Republican Constitution of 1978 (as amended) ("Constitution")
[4] SC/FR/351/2018, SC/FR/352/2018, SC/FR/353/2018, SC/FR/354/2018, SC/FR/355/2018, SC/FR/356/2018, SC/FR/358/2018, SC/FR/359/2018, SC/FR/360/2018 & SC/FR/361/2018 (SC Minutes 13/12/2018) ("**Sampanthan vs. AG**"/ "the Judgment")
<http://www.supremecourt.lk/images/documents/sc_fr_351_2018.pdf> accessed 4/10/ 2019
[5] SC/FR/351/2018 (SC Minutes 13/12/2018) ("**De Abrew J's Judgment**")
<http://www.supremecourt.lk/images/documents/sc_fr_351_2018_contd.pdf> accessed 04/10/ 2019 > accessed 4/10/2019
[6] The 19th Amendment to the Constitution ("19th Amendment").

jurisprudence that goes back several decades wherein the Supreme Court has intervened to sanction various unconstitutional actions done or sought to be done by or on behalf of the Presidents of the Republic.

In Maithripala Senanayake & another vs. Mahindasoma & others[7], the Governors of the North Central and Sabaragamuwa Provinces acting under the direction of the President proceeded to dissolve the Provincial Councils of the said provinces. Upon upholding a decision of the Court of Appeal to quash the said decisions, the Supreme Court held that;

[…] the Governor had no discretion in the circumstances of the case in the matter of the dissolution of the Provincial Council. Article 154 F (2) which requires the exercise of the Governor's discretionary powers on the directions of the President has no applicability in this matter. Parliament …. expressly conferred the power of dissolution on the Governor, and not on the President, and specifically and unambiguously in apt words provided the manner and circumstances in which the Governor should exercise his power of dissolution.[8]

On the question of the President's Immunity from suit the Court held that;

It was suggested by the appellants that, since the Governor was a delegate, his action in dissolving the Provincial Council could not be questioned because of the immunity from suit conferred on the President by Article 35 of the Constitution. …. The Governor has no immunity from suit. He is not beyond the reach of the law, and it is not appropriate to invent new official immunities.[9]

In **Karunathilaka & another vs. Dayananda Dissanayaka (Case No. 1)**[10], the Petitioners sought to challenge the President's issuance of an emergency regulation by proclamation under the Public Security Ordinance[11] which had the effect of cancelling several Provincial Council elections. The Supreme Court whilst quashing the said regulation opined on the applicability of Article 35 as follows;

> *[…] Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. ….. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct. ….. It is the respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 ….*[12]

In *Senasinghe vs. Karunatilake, SSP Nugegoda & others*[13] the Supreme Court (*per Fernando J*) opined that;

> *this Court has reviewed the acts of the entire Cabinet of Ministers inclusive of the President……and of the President ……. despite Article 35 which only provides a shield of personal immunity from proceedings in courts and tribunals, leaving the impugned acts themselves open to judicial review.*[14]

In *Sugathapala Mendis & another vs. Chandrika Kumarantunga & others (The Water's Edge case)*[15] the Supreme Court in a far-reaching judgment impugned certain acts of the President at the time and held that;

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[7] [1998] 2 Sri. LR 333
[8] Ibid, 370
[9] Ibid, 372
[10] [1999] 1 Sri. LR 157
[11] Public Security Ordinance No.25 of 1947 (as amended)
[12] Ibid, 177
[13] [2003] 1 Sri. LR 172
[14] (n12), 186
[15] [2008] 2 Sri LR 339

> *[…] all facets of the country - its land, economic opportunities or other assets - are to be handled and administered under the stringent limitations of the trusteeship posed by the Public Trust Doctrine and must be used in a manner for economic growth and always for the benefit of the entirety of the citizenry of the country and we repeat, not for the benefit of granting gracious favours to a privileged few, their family and/or friends. Furthermore, being a creature of the Constitution, the President's powers in effecting action of the Government or of state officers is also necessarily limited to effecting action by them that accords with the Constitution.* ***In other words, the President does not have the power to shield, protect or coerce the action of state officials or agencies, when such action is against the tenets of the Constitution or the Public Trust****….*[16]

With regard to the President's immunity from suit, the Court citing the aforementioned dicta in **Karunathilaka & another vs. Dayananda Dissanayaka** held that;

> *Such a conclusion is unequivocal. To hold otherwise would suggest that the President is, in essence, above the law and beyond the reach of its restrictions. Such a monarchical/dictatorial position is at variance with (i) the Democratic Socialist Republic that the preamble of the Constitution defines Sri Lanka to be, and (ii) the spirit implicit in the Constitution that sovereignty reposes in the People and not in any single person*[17]*…*

In *Singarasa vs. Attorney General*[18] the Petitioner sought to set aside a conviction against him on the basis of the findings of the Human Rights Committee – Geneva established under the International Covenant on Civil and Political Rights, under the Optional Protocol to the Covenant. The President, exercising powers under **Article 33(f) of the Constitution** (as it existed prior to the 19th Amendment) had acceded to the covenant. Whilst holding that the Accession to the Optional Protocol 1997 by the President at the time, is inconsistent with the Constitution and is in excess of the power of the President as contained in **Article 33(f)**, the Supreme Court held that;

> *The President is not the repository of plenary executive power as in the case of the Crown in the U.K. As it is specifically laid down in the basic Article 3 cited above the plenary power in all spheres including the powers of Government constitutes the inalienable Sovereignty of the People. The President exercises the executive power of the People and is empowered to act for the Republic under Customary International law and enter into treaties and accede to international covenants. …… such act cannot be inconsistent with the provisions of the Constitution or written law*[19]*….*

From the aforementioned precedents it is clear that the Supreme Court even prior to the **19th Amendment**, did not consider the immunity conferred under **Article 35(1)** to grant the President an absolute and unfettered right to act in a manner that is contrary to the Constitution. It is submitted that the underlying rationale that emerges from the said precedents is that the sovereignty of the Republic is ultimately vested with the people and that the President and/or their agents cannot exercise their executive power in contravention of the Constitution and that the President does not possess any 'plenary' power which accords him/her an unfettered degree of discretion.

The 19th Amendment

The framers of the 19th Amendment *inter alia* sought to bring in provisions to the Constitution designed to act as checks and balances on the executive and the administrative state as a whole.

One such measure was the repealing and replacing of Article 35(1) of the

[16] Ibid, 374
[17] Ibid, 381- 382
[18] [2013] 1 Sri LR 245
[19] (n17), 260

Constitution with a new provision which contained two important provisos[20].

The first proviso is that the immunity conferred to the President by Article 35(1) should not be read and construed as restricting the right of any person to prefer a Fundamental Rights Application, in respect of anything done or omitted to be done by the President, in his official capacity.

The second proviso provides that that such jurisdiction now vested in the Supreme Court does not apply to the President's power to declare war and peace.

In, *In Re the Nineteenth Amendment to the Constitution Bill*[21] their Lordships of the Supreme Court opined that;

> *[…] the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance.*[22]

It is submitted that the aforementioned dicta succinctly encapsulate the spirit and ambit of the 19th Amendment.

Sampanthan vs. AG

At the outset it must be noted that the decision of the Supreme Court in *Sampanthan vs. AG* must be considered in the light of the body of jurisprudence discussed above and the amendments brought forth by the 19th Amendment.

A major portion of The Judgment deals with the various jurisdictional objections raised by the Respondents[23]. It is submitted that most of the dicta relevant for the present analysis is contained in these portions.

One of the objections raised by the Respondents' was that a specific mechanism is available in terms of **Article 38(2)** of the Constitution to impeach an incumbent President and that in view of the availability of the said mechanism the Supreme Court does not have jurisdiction to inquire into the Proclamation under an application made in terms of **Article 126**[24]. Their Lordships rejected the said contention as a "*non-sequitur*"[25] since a Member of a dissolved Parliament cannot impeach the President via that Parliament.

Their Lordships', further held that;

> *[…] the inalienable right of every citizen of our country to invoke the fundamental rights jurisdiction of the Supreme Court is a cornerstone of the sovereignty of the people which is the Grundnorm of our Constitution.*[26]
>
> *[…] mere existence of the procedure described in Article 38 (2) cannot deprive those Petitioners …of the inalienable right of every citizen of our country to invoke the fundamental rights jurisdiction of the Supreme Court. ….. the fundamental rights jurisdiction of the Supreme Court can be immediately invoked by any Member of Parliament in his capacity as a citizen …. His right to do so is not dependent on cobbling together the required majority of Members of Parliament. Thus, there is no valid comparison between the procedure specified in Article 38 (2) …… and the inalienable right of a Member of Parliament…. to invoke the jurisdiction of this Court for the protection of fundamental rights.*[27]

Another objection raised by the Respondents was that in issuing the Proclamation, the President was exercising "plenary executive powers" as the "head of state" and was not engaged in any executive or administrative action[28]. Whilst rejecting this contention the Supreme Court held that;

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[20] *While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity:*

Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity:

Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under Article 33(2)(g).

[21] Decisions of the Supreme Court on Parliamentary Bills for the years 2014 & 2015, 26

[22] Ibid, 31

[23] Vide: (n4), 27 to 45

[24] Ibid, 28 and 29

[25] Ibid, 30

[26] Ibid, 30

[27] Ibid, 33

[28] Ibid, 35 and 36

> *Thus, the suggestion inherent in the submission …. that the President, in his capacity as the Head of State, has a species of inherent unrestricted omnipotent power which is akin to royal prerogative power held by a monarch, has to be emphatically rejected. Since 1972, this country has known no monarch and this Court must reject any submission that carries with it a suggestion to the contrary.*[29]

With regard to the submission of the Respondents that the powers vested in the President in terms of **Articles 33(2)** of the Constitution are not executive or administrative actions but are actions done qua head of state, the Court with reference to the maxim of statutory interpretation *expressio unius est exclusio alterius* (the explicit mention of one is the exclusion of another) held that;

> *Applying the rationale expounded by this Court in the several decisions referred to earlier, I see no reason why the powers vested in the President under Article 33(2) of the constitution should be regarded as anything other than executive action by the President. While the president may when exercising those powers be doing so qua Head of State in a historical sense, any such flavour of acting as Head of State does not detract from the core feature that the President is exercising executive powers.*
>
> *This conclusion is fortified by the specific exemption from this Court's jurisdiction of the President's power to declare War and Peace under Article 33 (2) (g) of the Constitution. The maxim expressio unius est exclusio alterius enunciates the principle of interpretation that the specific mention of only one item in a list implies the exclusion of other items.*[30]

As evident from the following dicta, the Court also asserted its jurisdiction to review any action by the President save and except for exercise of the President's power to declare war and peace.

> *[…] the exclusion of the power to declare War and Peace under Article 33 (2) (g) from the ambit of the Proviso to Article 35(1) of the Constitution denotes that all the other powers of the President which are listed in Article 33 (2) are, subject to review by way of an application under Article 126 in appropriate circumstances which demand the Court's review of those powers.*[31]

The Respondents also contended that the Proclamation cannot be impugned since it gives the people the right to exercise their franchise. Whilst rejecting this contention the Court held that;

> *[…] this Court is obliged to act to uphold the Rule of Law. …. submission overlooks the fundamental premise that any exercise of franchise, must be at an election which is duly and lawfully held and which satisfies the Rule of Law. A departure from that rule will result in the negation of the requirement of the Rule of Law that an election must be lawfully called and be lawfully held and, thereby, adversely affect the results of an ensuing election. The basic principle is that nothing valid can result from an illegality. Therefore, I am of the view that the Court has ample jurisdiction and in fact a duty to examine whether "P1" was issued in accordance with the provisions of the Constitution.*[32]

Overarching principles laid-down by *Sampanthan vs. AG*

It is submitted that the following overarching principles can be gleaned from the Judgment;

(a) Every citizen has an inalienable right to invoke the fundamental rights jurisdiction of the Supreme Court.
(b) The sovereignty of the Republic is ultimately reposed in the people.

[29] Ibid, 38
[30] (n4) 41
[31] Ibid, 42
[32] Ibid, 44

(c) The discretion of the executive including any exercise of discretion by the President is not unfettered and the President does not have any inherent unrestricted power.
(d) Any action and/or inaction of the executive including those by the President done or sought to be done in his/her official capacity are amenable for juridical review in a Fundamental Rights application save and except for the President's powers to declare war and peace.
(e) The Supreme Court is obliged to uphold the Rule of Law.
(f) Nothing legal can ensue from an illegality.

Conclusion

Sampanthan vs. AG is perhaps the most significant judgment delivered in the Sri Lankan legal history. By this Judgment the Supreme Court emphatically asserted its independence and demonstrated that no one, including the highest authority in the land is above and beyond the Law and the Constitution. The legal community as a whole has a duty to ensure the legacy of this decision by striving and engaging themselves to protect and uphold Fundamental Right, the Rule of Law and principles of Constitutionalism.

INTRICACIES OF FAULT BASED LIABILITY IN MEDICAL NEGLIGENCE LITIGATION IN THE 21ST CENTURY CONCERNING SRI LANKA

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Introduction

The adversarial system has remained to be a controversial yet, a preferred system for the administration of justice since centuries. Nevertheless, there is a growing perception concerning its continued viability to advocate medical negligence litigation due to its arbitrary nature and the cost of suit outweighing justice to parties. Whilst through the adversarial system victims could obtain compensation, it is often unpredictable as success may not entirely depend on the merits of the claims. Stagnation and uncertainty of justice in adversarial system have resulted in further victimization of victims especially, in medical negligence litigation. Thus, for years, strong proponents of wiping out the conventional adversarial system of justice, which corresponds with the fault-based liability, has been a concern of many countries. To remedy this vexation, among various alternatives, no fault compensation system which would permit compensation to be provided without having to prove the fault had triggered much discussion as an efficient mechanism to compensate for medical injuries.

II. Complexities of the Adversarial System

Medical disputes in Sri Lanka are resolved through the "Fault based" system. Consequentially, establishing the fault is fundamental to a successful claim of negligence. Nevertheless, inherent complexities of the adversarial system leave many victims of medical negligence litigation uncompensated for their injuries. The fault- based system is formed on "all or nothing" approach leaving no room for compromises if the victim fails to successfully establish the fault element. In fact, majority of victims endure immense tribulation in procuring an unequivocal medical report from a medical professional against a fellow practitioner. J. Fleming observed that:

> *"the most controversial aspect of the negligence system is that it discriminates between different accident victims not according to their deserts but according to the culpability of the defendant: a claimant's success is dependent on his ability to pin responsibility for his injury on an identifiable agent whose fault he can prove. Put differently, negligence deems as deserving only those who can trace their harm to someone's wrongdoing."*[1]

Adding fuel to the fire, "Causation" as one of the decisive elements of an Aquilian action further aggravates the unpredictability of success in medical negligence litigation, as the pathogenesis of diseases and thereby injuries may initiate naturally as opposed to a negligent conduct by the medical practitioner. This view was endorsed by Lord Bridge, in *Hotson v East Berkshire Health Authority*[2], where he upheld that:

> *"in some cases, perhaps particularly medical negligence cases, causation*

[1] J. Fleming, "Is there a future for tort?" Louisiana Law Review, vol. 44, pp. 1193 - 1212, 1984, p. 1198

[2] (1987) 2 All ER at p. 913

may be shrouded in mystery that the court can only measure statistical chances".[3]

In the aftermath of such intricacies, judges tend to heavily rely upon intuitive judgements in lieu of logical reasoning. This inevitably culminates to the detriment of the parties in litigation. Furthermore, prevalent awarding of lump sum amount in tort litigation is often unwarranted as it is vital that an estimation of the costs that the Plaintiff expects to incur in the future due to the defendant's conduct be crucial in awarding of compensation. This entails legal ramifications for parties for two main reasons. One is the inaccuracy of estimation due to unpredictability of future upshots, and the other results from the first, in over-compensating victims in certain occasions and under-compensating in others. Hence, ultimately the award inhibits in serving the very purpose of paying compensation.

Regrettably, the hostile approach towards doctors in litigation, which is a vehement attack on their credibility and integrity, would invariably tarnish the healthy balance of doctor-patient relationship. Moreover, the attack being against the credibility of medical doctors inevitably results in belligerent retractions of admitting mistakes. This confrontation leads doctors with the option of diverging from general practices *nolens volens* and avail from "defensive medicine" for the sake of avoiding medical negligence litigation. As Lawton J in *Whitehouse v Jordan*[4] defines, "defensive medicine" is:

"adopting procedures which are not for the benefit of the patients but safeguards against the possibility of the patient making a claim of negligence".

On a positive note, this practice could be beneficial for patients as it provides supplemental care by way of additional testing and/or treatment. Nonetheless, this practice would inexorably serve more harm than benefits since increasing cost of health care would eventually impede the quality of the healthcare system as a whole. Irrefutably, the likelihood of mishaps and thereby sufferings are higher as more medications are prescribed. Thus, this unhealthy trend resulting in distorted medical practice is quite evidently inevitable. Practical difficulties inherent to the adversarial system have revitalized for potential alternative methods of compensation such as no-fault compensation.

However, proponents of the corrective justice theory have overemphasized the importance of the concept of wrongdoing and thus, negligence liability. Nevertheless, a conception of justice which places less consideration on corrective justice and more consideration towards distributive justice could assist to make coherence of strict liability and to place negligence in its proper place.[5] Hereby, the author takes an initiative to sketch a system of justice, that in general, is to be concerned with sharing of burdens and benefits of social life fairly.

III. Corrective Justice v. Distributive Justice

Different scholars have argued on the premise that there is a social responsibility to compensate all victims regardless of establishing the fault but, also to hold liable those who have committed a wrong by preserving theoretical concept of corrective justice. However, the plausible issue is whether corrective justice in its theoretical terms is adequately able to serve its inherent purpose of correcting the wrongdoer's wrongful action, since the fault -based liability is confined to rigid tests, such as duty of care, proximity and foreseeability. Hence, the author takes due consideration to determine whether and to what extent our current practices pertaining to medical negligence corresponding with the corrective justice approach be

[3] ibid 2 at p. 913
[4] [1981] 1 W.L.R. 246 at 659

[5] Gregory . Keating, "Distributive and Corrective Justice in the Tort Law of Accidents", Southern California Law Review, Vol. 74:193, at p. 195

comprehended as expressing an idea of justice.

Aristotalian principal of corrective justice is concerned with personal responsibility and relationship between individuals.[6] Unlike the adversarial system of justice, no fault compensation system is propelled by the principle of distributive justice which emphasizes the role of society and community responsibility. E.J. Weinrib[7] delineating the distinction between the two principles states that, "*distributive and corrective justices are the structures of ordering implicit in two different conceptions of interaction. In corrective justice, the interaction of the parties is immediate; in distributive justice it is mediated through a distributive arrangement,…which…activates a compensation scheme that shifts resources among members of a pool of contributors and recipients in accordance with a distributive criterion*".[8] Although E.J. Weinrib's exposition of corrective justice connects the entitlement of one party to the liability of another, and expounding on correlativity of harm done and harm suffered[9], Modak-Truran's[10] exposition of corrective justice refers to the mean between the two excesses of unjust gain and loss which provides a standard for judges to evaluate unjust gains and losses through judicial practical wisdom.[11] However, despite such egalitarian opinions on corrective justice, there is an iota of doubt as to what extent it serves justice to parties; especially victims of medical negligence litigation, due to the intricacies that prevail over the adversarial system. Hence, no fault compensation, which bears the imprint of distributive justice proposes that, the community or a part of the community should be accountable for harms or injuries accompanied by a conduct if, it is against the interest of the society. Lawton L.J in *Whitehouse vs Jordan*[12] reiterated that,

> *"as long as liability… case rests on proof of fault, judges will have to go on making decisions, which they would prefer not to make. The victims of medical mishaps of this kind should … be cared for by the community, not by the hazards of litigation.*"[13]

Therefore, implementing a no fault compensation scheme would undoubtedly assert a sense of accountability to the public including medical professionals, to be collectively responsible for misfortunes suffered by the community.

IV. Viability of No-Fault Compensation as an Alternative to the Advesarial System

It is vital to note that, the fault becomes irrelevant in no fault compensation scheme, since a social insurance mechanism dispenses compensation for injuries arising out of accidents, including medical negligence situations. Englard[14] expounds that:

> *"extent of the damage is easier to calculate…[and] therefore, [would] be better handled by collective insurance".*[15]

Furthermore, M. Woodrow,[16] Scottish Secretary to the British Medical Association stated:

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[6] H.E. Menyawi, "Public tort liability: An alternative to tort liability and no-fault compensation," Murdoch University Electronic Journal of Law, vol. 9, no. 4, pp. 1-21, Dec. 2002.

[7] E.J. Weinrib, "Corrective Justice," Iowa Law Review, vol. 77, pp. 403-425, 1992.

[8] ibid

[9] Weinreb, "The Insurance Justification and Private Law" (1985) 14 J. Leg. Stud. 681 at 683

[10] M.C. Modak-Truran, "Corrective Justice and the Revival of Judicial Virtue" Yale Journal of Law & the Humanities", Vol.12, issue.02, article 02, January 2002

[11] ibid at p. 252

[12] ibid 4

[13] ibid at p. 658

[14] Englard, "Alternative Compensation Systems", The Philosophy of Tort Law, Brookfield, Vermont: Darmouth Publishing Company, 1993

[15] ibid at p. 110

[16] BMA Scotland, "No fault compensation will end the blame culture within the NHS, says BMA Scotland," BMA Website, 2011. Retrieved from: http://web.bma.org.uk/pressrel.nsf/wlu/GGRT8E7LU8?OpenDocument.

> *"……..no-fault compensation offers a less adversarial system of resolving the process for compensating patients for clinical errors. A system of no-fault compensation with maximum financial limits would benefit both doctors and patients, speeding up the process and reducing the legal expenses incurred by the current system. More importantly, however, it would address the blame culture……..which discourages doctors from reporting accidents and would end the practice of defensive medicine"*[17]

D.E. Seubert[18] provides a pragmatic explanation to no fault system and explains that:

> "*a no-fault system encourages health care professionals to identify the system malfunction and take a proactive approach to fixing it….at the same time, where a patient has suffered harm, the no-fault system must assure appropriate compensation. Such an approach accomplishes two goals: first the patient is compensated for the injury, and, secondly, society's health care is upgraded and enhanced by fixing an error in the system. Such an error may in fact be a physician with a deficit. The no-fault process can identify this deficit and allow for physician retraining and rehabilitation"*[19]

Hence, espousing a no-fault system of compensation would deter the inherent intricacies and legal ramifications of the adversarial system such as stagnation and uncertainty of justice. Besides, establishing fault and causation which encumbers redressing the victims of medical negligence would no longer be relevant. Instead, a system that elevates the standards of health care would be an inexorable corollary in the no fault system.

Despite the egalitarian approach towards victims and medical doctors expounded under the no fault system, its viability in Sri Lanka as a developing nation remains an unresolved dimension. The foremost obstacle in manoeuvring a no-fault compensation system is convolutions in funding and the unpredictability of the number of cases that would arise yearly. New Zealand has successfully manoeuvred an Accident Compensation Scheme which is funded through taxes of employers, self-employed people, motor vehicles, drivers of motor vehicles and general revenue. However, the viability of such a system would be highly contentious if, taxes are increased in a country that is already overburdened with such. Furthermore, critics of the no fault system have opined on the cumbersomeness of the no fault system as it tends to compensate a wide array of victims. Thus, the no fault system is costly compared to maintaining an orthodox adversarial system.

V. Conclusion

Manoeuvring a no-fault system in Sri Lanka requires a great deal of consideration in terms of its social standing, population, financial standing and political ideology. Despite the convolutions of the no fault compensation system, the author wishes to note that such a system is not explicitly impossible in Sri Lanka. Constructing a viable system of no-fault compensation which suits the local traditions of Sri Lanka is an onerous task as it essentially depends on burdens and priorities inherent to a society. In addition, legal luminaries have further enlightened on the right of parties to sue, as the adversarial system has been a preferred measure of deterrence against general irresponsibility and a positive encouragement to a sense of individual responsibility towards one's fellows.[20]

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[17] ibid

[18] D.E. Seubert, L.T. Cohen, and J.M. LaFlam, "Is 'no-fault' the cure for the medical liability crisis?" American Medical Association Journal of Ethics, Vol. 9, No. 4, pp. 315-321, April 2007.

[19] ibid at p. 316

[20] The Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Report), at p. 363

Nevertheless, given the inherent obstacles posed by the adversarial system, it is dubious as to whether it can achieve its purported objectives i.e: affording a fair compensation to victims in assuring justice and thereby their right to sue. Hence, the extent to which our tort practice pertaining to medical negligence be comprehended, as expressing an idea of justice and the viability of implementing a no-fault compensation scheme in Sri Lanka, are shrouded in controversy.

THE CLIMATE STRUGGLE: A REVIEW OF LAW AND POLICY EFFORTS TO ADDRESS CLIMATE CHANGE IN SRI LANKA, AND ITS FUTURE PROSPECTS

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Climate change has become an existential threat that has entangled all forms of life on earth in an inescapable danger. Whilst carbon dioxide and other key greenhouse gases have been found to be the primary cause of global temperature rise[1], there is an abundance of scientific evidence identifying human activities as a significant contributor to global warming.

Although climate change knows no territorial boundaries, South Asia has particularly been one of the most vulnerable regions to climate catastrophes. The geographical placement of the region, presence of large populations living in poverty, and the lack of climate resilient infrastructure, are among the principal causes behind this vulnerability.[2] Sri Lanka, being a South Asian country has been no exception.

Extreme heat, floods and droughts caused by extreme precipitation and sea level rise, are some of the most common disasters attributed to climate change in Sri Lanka. Statistical data predict that approximately 19 million people in Sri Lanka today live in locations named as "climate change hot spots", places that would become severely affected due to numerous natural disasters by 2050.[3] Floods and droughts have altogether impacted closer to 14 million people in Sri Lanka between 2010 and 2018.[4]

Yet, Sri Lanka lacks a comprehensive set of binding legislation that directly address climate change.

Even with the policies and laws currently in force, the severity of the damages caused due to climate disasters begs the question whether Sri Lanka has been effective in implementing the protections that it pledged under the international conventions. Accordingly, this article reviews the legislative and policy efforts made by Sri Lanka to address climate change, their effectiveness, the challenges and future prospects.

Salient laws and policies

Sri Lanka's accession to United Nations Framework Convention on Climate Change ("UNFCCC") in early 1990s is the inception of addressing climate change as a nation.[5] Sri Lanka became a signatory to the UNFCCC in 1992 which was ratified in 1993.[6] Post UNFCCC, Sri Lanka acceded to several international conventions. Accordingly, in 2002 Sri Lanka ratified the Kyoto Protocol and in **2016 the Paris Agreement was signed**.

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[1] Challenge, Global Climate. NASA. n.d. English. 25 09 2019.

[2] Rachel Fleishman, *Takeaways from Sri Lanka Event: Climate Security in South Asia,* THE CENTER FOR CLIMATE AND SECURITY (Sept 20,2019, 10.04 AM), https://climateandsecurity.org/2017/12/06/takeaways-from-sri-lanka-event-climate-security-in-south-asia/

[3] Muthukumara. S. Mani, *Building Sri Lanka's Resilience to Climate Change,* THE WORLD BANK, (Sept 15, 2019, 10.10 AM) *https*://www.worldbank.org/en/news/feature/2018/09/21/building-sri-lankas-resilience-to-climate-change

[4] The World Bank. Sri Lanka strengthens its Climate Resilience. 25 June 2019. English. 02 10 2019. https://www.worldbank.org/en/news/press-release/2019/06/25/sri-lanka-strengthens-its-climate-resilience

[5] United Nations Framework Convention on Climate Change 1992

[6] https://unfccc.int/tools_xml/country_LK.html

Under the Paris Agreement, Sri Lanka agreed to adopt comprehensive mitigation and adaptation strategies to reduce the impacts of climate change through its Nationally Determined Contributions ("NDCs"). Mitigation plans focused on reducing carbon emissions in five key sectors; energy (electricity generation), industrial sector, transportation, waste and forestry in Sri Lanka. Adaptation plans include, establishing climate resilient and healthy human settlements, increasing food security to minimize the impact from climate impacts, and safeguarding natural resources and biodiversity to ensure minimum impact from climate disasters.[7]

In addition to signing international agreements, as a member state to the UNFCCC, Sri Lanka has developed a number of policies including, the "*National Adaptation Plan", "National Climate Change Policy of Sri Lanka", "National Climate Change Adaptation Strategy for Sri Lanka"*.

In terms of legislation, Sri Lanka has also adopted a number of pieces of legislation that regulates different sectors of climate change, such as environment and forest conservation, sustainable development, and energy generation. Some of the main enactments that directly links with climate change are briefly discussed below.

National Environmental Act, No. 47 of 1980 ("NEA") is the principal enactment that primarily addresses environmental conservation. The Ambient Air Quality standards and other regulations on air emission gazetted under the NEA adds a significant impact on maintaining the air quality. These regulations have set permissible levels of carbon emission from stationary[8] sources (such as thermal power plants, standby generators and boilers) as well as non-stationary sources (such as vehicles).[9]

Breaking the long hiatus in environmental legislation, the **Sustainable Development Act, No. 19 of 2017** was enacted. This provides the development and implementation of a National Policy and Strategy on Sustainable Development.[10] Ensuring an ecologically efficient use of natural, social and economic resources, integration and maintaining the equipoise of environmental, economic and social factors in making all government decisions are its' salient objectives.[11]

While the aforementioned laws and policies, although not an exhaustive list, manages to succinctly convey the lack of binding legislation in Sri Lanka in terms of addressing climate change.

The depth of Sri Lanka's vulnerability to climate change

The above laws and policies are being implemented in a rapidly changing environment on the ground. Sri Lanka's vulnerability to climate change brings various economic, agricultural and social impacts which are briefly enumerated below.

Agriculture and economy: the impact on agricultural crops due to the changes in the weather patterns is grave and almost inescapable. For instance, rising temperatures, droughts and unpredictable levels of precipitation inhibit the productivity of the crops. This leads to

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[7] Intended Nationally Determined Contributions, MINISTRY OF MAHAWELI DEVELOPMENT AND ENVIRONMENT, SRI LANKA- APRIL 2016, (Sept 16, 2019, 10.35PM, http://www.climatechange.lk/Publications_2016/Readiness%20Plan%20For%20INDCS%20In%20Sri%20Lanka.pdf

[8] Gazette No. 2126/36 on 2019.06.05, National Environmental (Stationary Sources Emission Control) Regulations, No. 01 of 2019

[9] Gazette No. 1562/22 on 2008.08.15, amendment of the National Environmental (Ambient Air Quality) Regulations, 1994, No. 850/4 of December 1994 (as amended); Gazette No. 1295/11, on 3o.06.2003, National Environmental (Air, Fuel, and vehicle importation standards) Regulation No. 1 of 2003

[10] Sri Lanka Sustainable Development 1 Act, No. 19 of 2017

[11] Ibid, Section 2 (b), (c)

reduction in farmer's revenue and in most cases loss of livelihood. The overall impact on the economy goes further when reduced crop production compels an increase in food imports. On the other hand, reduced crop production also shrinks the export industry as agricultural crops production plunge, which in turn deteriorates the trade balance. Further, reduced rainfall compels farmers to enhance their dependence on energy intensive methods to pump underground water and to distribute water manually, with the rising evaporation of water ways.[12] Due to Sri Lanka's aquifers being small, they are particularly vulnerable to the rising pollution of water ways. Further, farmers in the higher reaches usually enjoy the larger portion of the aquifers.[13] These issues require the farmers and the government to unite in search for different methods of harvesting, develop less water consuming crops, and technologically advanced fertilizer, all of which are usually expensive.

Energy crisis: Low precipitation and high temperatures demand more energy. At the same time, reduced water levels decrease hydropower generation. Increased power demand during water crisis and high temperatures add more pressure on the existing power plants; independent hydro power producers then step in with higher prices.

Social and security impacts: Flash floods displace thousands of people and deprive them of basic living conditions. In 2016 and 2017 Sri Lanka demonstrated how climate change can wreak havoc on fragile nations. The death counts due to floods reached almost 213, displacing more than 3000 families.[14]

Migration: Coastal erosion is a significant factor that induces migration. Coastal areas are one of Sri Lanka's densely populated areas, and its erosion forces coastal communities to move inwards giving rise to property disputes and pressure on limited resources. Experts state that low lying wetlands of the Western and Southern provinces of the island are the most prone to erosion, if the sea level continues to rise.[15] Moreover, the migration of the labour force into urban areas is another consequence of unpredictable weather. The reduction of regular income and profits from agricultural sector induce young labour force to move from villages to urban industrial zones. This often leads to overcrowded cities.

Health issues: Warmer climates often increase the propagation of air-borne infectious diseases. Lack of access to clean water also leads to a number of health issues including diarrhea and sanitation issues.

Are the existing laws and policies adequate?

In view of the above, it is evident that Sri Lanka is in an extremely vulnerable state in the face of environmental changes. Unfortunately, the existing laws and policies have been proven ineffective in the pursuit addressing climate change.[16]The salient issue in this regard is the lack of binding legislation that directly address the issue of climate change. This has created a serious ignorance in the mind-sets of lawmakers about the gravity of climate change. Consequently, such unfamiliarity or absence of knowledge has created a compelling need

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[12] Werrell, C., F, *Implications of Climate Change on Energy and Security in the MENA Region,* MIDDLE EAST INSTITUTE (Apr 03,2019, 10.04AM) http://www.mei.edu/content/implications-climate-change-energy-and-security-mena-region

[13] *Planning Groundwater Use for Sustainable Rural Development, INTERNATIONAL WATER MANAGEMENT INSTITUTE,* (Apr 24, 2019, 8.15 PM) http://www.iwmi.cgiar.org/Publications/Water_Policy_Briefs/PDF/wpb14.pdf

[14] *Sri Lanka: Floods and Landslides - May 2017,* RELIEFWEB, (Feb 10, 2019, 11.05 PM) https://reliefweb.int/disaster/fl-2017-000057-lka

[15] Amantha Perera, *Climate change heightens coastal erosion risk in Sri Lanka,* THOMAS REUTERS (Apr 15, 2019) (http://news.trust.org//item/?map=change-climate-heightens-coastal-erosion-risk-in-sri-lanka

[16] Ibid.

to invoke climate change in forming national legislation.

In this regard, Sri Lanka can certainly draw examples from other countries such as the United States and the European Union (EU). Although the United States, does not have central legislation to address climate change, various ancillary legislation imposes regulatory requirements. For instance, in 1992, to revive the fledging renewable energy industry in the country, a tax credit system i.e. a tax incentive for investors, was introduced in the **Energy Policy Act 1992** [17]. This has been critical in their rapid expansion of the wind and solar energy industry.[18] In 2007, U.S. Environmental Protection Agency was empowered to establish a rule requiring public reporting of greenhouse gas emissions from large sources.[19]

Within the EU, there are a number of legislative changes issued to keep greenhouse gas emissions in check. Greenhouse Gas Monitoring and Reporting mechanism enables to monitor and report greenhouse gas emissions and other information at the national and Union level relevant to climate change.[20] Further, **Directive 2003/87/EC**[21] established a scheme for greenhouse gas emission allowance trading, and imposed emission limits by issuing emission permits.

Whilst it is true that the standards above mentioned are a much higher threshold for Sri Lanka to achieve, the time is ripe for Sri Lanka to adopt stringent and effective legislation given the gravity of the damages. The requirement of a unified set of legislations that place Sri Lanka in congruence with its' obligations under the Paris Agreement is of vital importance given that Sri Lanka's jurisprudence on environmental justice is yet at its' inception. The recent judgement on *Chunnakam power plant*[22] is a timely reminder of that need for effective legislation and one that sheds light on environmental justice. In this case, the petitioners sued a company operating a thermal power plant for contaminating the ground waters of the area. The Court recognized access to clean water as a necessity of life as embedded in **Article 27 (c) of the Constitution** which recognizes citizens' "*right to an adequate standard of living including food.., the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.*" More importantly, while referencing to **Principal 4 of the Rio Declaration**, the Court recognized the State's obligation to ensure a sustainable development and the protection of nature for future generations to come.[23]

Although this judgement strengthens the enforcement of environmental rights in Sri Lanka, it is doubtful whether Sri Lanka can continue to rely on judicial interpretation to address the overarching issues of climate change, even on the grounds of sustainable development, absent express legislative intent.

In this regard, an industry which is in dire need of such legislation directly addressing climate change is the power and energy sector. Firstly, it should be noted that Sri Lanka's NDCs submitted under the Paris Agreement in respect of the energy sector are primarily focused on emission reduction by decreasing the reliance on coal power plants and promoting the renewable energy

[17] Solutions, Center for Climate and Energy. Congress Climate History. n.d. English. 03 10 2019.
[18] ibid
[19] ibid
[20] Lex, EUR. EU Law on climate change- Regulation (EU) No. 525/2013. 21 May 2013. English.
[21] Directive 2003/87/EC of the European Parliament and of the Council
[22] Ravindra Gunawardena Kariyawasam v Central Environmental Authority and others, SC FR Application No. 141/2015
[23] Ravindra Gunawardena Kariyawasam v Central Environmental Authority and others, SC FR Application No. 141/2015, pg. 51

sector.[24] However, regardless of the NDCs, implementation has proven quite the contrary.

One example is the rift between Public Utilities Commission of Sri Lanka (PUCSL) and the Ceylon Electricity Board (CEB). Whilst PUCSL, as the primary regulator of the sector, appears to be pursuing generation of low-cost clean energy, CEB is reported to have made decisions purely based on the financial costs involved. In other words, approving projects regardless of their negative externalities such as environmental or health costs.

To add more fuel to the fire, the Minister in charge of the power sector has reportedly put forth several proposals that are alarmingly detrimental to the environment.[25] These include, setting up four coal power plants in the Trincomalee district and reduction of PUCSL's powers.[26]

Among many other negative externalities, the environmental and health costs of these coal plants would reach far with the amount of human and animal lives at stake in the area. For instance, the existing Lakvijaya coal power plant in Norochcholai which commenced in 2006 reportedly captures only a small amount of dust while the balance is released to the air (which can create numerous health problems) , and the bottom ash is reportedly stockpiled at the site left to be caught by the wind.[27] To make the situation worse, in late September 2019, the Cabinet of Ministers has approved the establishment of 300MW unit as an extension to the existing coal plant in Norochcholai.[28]

Moreover, it is also reported that proposals have been made to strip PUCSL of its powers as the principal regulator to oversee projects.[29] While this can thwart any positive endeavour to reduce GHG emissions, Sri Lanka's continuous efforts to embrace a coal culture can no doubt smear any efforts to bolster the renewable energy sector. From a technological perspective as well, experts have predicted that deep investments in fossil fuel have the potential of making them stranded assets over time. Therefore, Sri Lanka should carefully revisit their investment decisions on coal from a financial as well as environmental standpoint.

Taken together, the climate impacts already seen and predicted, Sri Lanka's commitments, and lacking regulatory framework are all compelling reasons to call for robust and unified legislation formulated in line with the NDCs. Unlike policy decisions, binding legislation can thwart any attempts to veer the laws back and forth with the change of governments. As such, this would discourage any attempts of legislators to defy the fundamental commitments under the Paris Agreement.

Recommendations

Whilst it is clear that Sri Lanka require comprehensive legislation to address climate change, there are several aspects such legislation should cover.

Introducing policies and legislative amendments directed at incentivizing the following areas are essential to overcome the challenges: -

Renewable energy: Sri Lanka pledged to achieve a complete transition to renewable energy by 2050[30] in 2017 Sri Lanka's use of renewable energy as a source of generating

[24] Authority, Ministry of Mahaweli Development. "Nationally Determined Contributions." 2016. English.
[25] DailyFT, July 9,2019, Wijenayake, Tudor, "*Will CEB and Ravi K direct country towards pollution?*"
[26] ibid
[27] Ibid.
[28] Decisions, Cabinet. 24 09 2019. English. 04 10 2019.
[29] DailyFT, July 9,2019, Wijenayake, Tudor, "*Will CEB and Ravi K direct country towards pollution?*"
[30] Climate Vulnerability Forum in COP 22nd in Morocco

power was only 7%.[31] The economic burden of fostering a fossil fuel-based power generation is the enormous import costs involved. As Sri Lanka does not have an abundant supply of indigenous fossil fuel, a large chunk of the energy is imported. Hence, the immediate advantage of relying on renewable energy is the reduced economic burden. As such, it is reported that a 100% renewable energy-based economy can potentially save US$18-19 billion spent on importing coal.[32]

The primary challenge, although, in terms of transition to renewable energy is energy security, or the reliability of renewable energy as a primary source of power. These challenges are compounded by high generation costs, technological difficulties to transfer power supply from fossil fuel to renewable energy, and power storage difficulties.[33] Nevertheless, these can be surmounted by introducing policies to fund research and development to create innovative ways of developing local capacity. Legislative support is also required to find sufficient investments to develop necessary infrastructure.

Building resilient infrastructure

Infrastructure needs are at the center of economic development. Power and energy, transportation, water, communication related infrastructure development have an astounding connection to raising the standard of living. As such, investments in building climate resilient infrastructure that can forbear and mitigate the damages are essential.

In this regard, it is important that Sri Lanka adopts legislation that promotes a risk management approach in developing infrastructure. Designing infrastructure for disaster risk reduction, i.e. taking the location, design, construction and operation into consideration in planning the infrastructure are some of the recommended approaches in this regard.[34]

It is however commendable that Sri Lanka has developed a National Adaptation Plan for Climate Change (NAP)[35], which has considered a number of sectors connected to the NDCs adaptation efforts, such as food security, water, irrigation, coastal and marine, urban city planning. Although NAP has been prepared as a guideline in various government agencies, it has a very little binding effect and falls short of delivering a precise implementation road map. Hence, regulatory obligations should be imposed across all stakeholders including, private sector, civil societies and local community-based organizations to comply with the suggestions made by the NAP. This will also ensure NAP suggestions flow across all levels of the stakeholder structures in the society.

Green finance: In relation to financing, Sri Lanka should develop policies and regulations incentivizing private investors to make cheap financing methods available. This would enable private capital to crowd in, such as credit enhancements and bond markets, paving the way to various infrastructural investments. Since the government has to carefully ration its limited funds, it is time that they broaden the policies and regulations to incentivize the private sector to fund small and medium enterprises which are in dire need of funds to deploy renewable energy.

Legislative body

[31] Ministry of Power and Renewable Energy, Performance 2017 and Programmes for 2018,

[32] *100% Electricity Generation Through Renewable Energy by 2050, Assessment of Sri Lanka's Power Sector,* Co-publication of the Asian Development Bank and the United Nations Development Programme Empowered.

[33] Ibid.

[34] Lu, Xianfu. "Climate Finance- Building Resilient Infrastructure for the Future: Background paper for the G20 Climate Sustainability Working Group." 31 07 2019. Asian Development Bank. English

[35] Lanka, Climate Change Secretariat Sri. "National Adaptation Plan." n.d. Mahaweli Development Authority. English. 24 09 2019.

The establishment of a central institution with sufficient authority to overlook issues relating to climate change and suggest necessary legislation and policies relating to climate change is essential. This entity should also be empowered to oversee energy and other development projects for their compliance with NDCs.

Conclusion

Sri Lanka, as a country already grappling with economic development and weak governance, it is unfortunate that climate change has posed a challenge that seems insurmountable. This economic battle is unwise to be overlooked in the pursuit of a sustainable future, as it's too challenging for developing countries to fight both development and climate change simultaneously. It is too important of a battle for developing countries to be asked to play fair, as factually, fossil fuel is still the cheapest and the most reliable resource available. However, given that Sri Lanka is now a part of the global efforts to address climate change, they can certainly benefit from new technologies and funding sourced from wealthier countries to afford a smooth energy transition and resilient infrastructure.

That said, a comprehensive set of legislation is essential in the implementation of the commitments under NDCs. In respect of regulatory reforms, existing regulations will have to be revisited in order to bolster the renewable energy sector. At a time where the world is witnessing a wave of retirements in the coal power investments across the United States, Asia and Europe, Sri Lanka's attempts to increase investments in coal power seem rather a folly than futuristic.

Nevertheless, the writer believes that Sri Lanka has made commendable efforts to comply with the international commitments in the past. That said, Sri Lanka has a long way ahead in their pursuit to a sustainable future. The time is ripe for legislators to comprehend the importance of making rational amendments to current legislation. Absent such meaningful legislative efforts to constrain emissions and build resilient infrastructure, the damage caused by climate change will be pervasive and catastrophic over time.

ARE CONSUMERS SAFE IN ONLINE? A CRITICAL ANALYSIS OF SRI LANKAN LEGAL REGIME ON ONLINE CONSUMER PROTECTION

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Introduction

E-commerce is a rapidly growing phenomenon which has highly influenced the day to day life of the people all over the world. It has been able to transform the traditional market into a digital market and as a result the consumer-supplier relationship has also been subjected to a significant change. Through e-commerce and internet technology, the consumers, as well as traders, enjoy great benefits such as efficiency, low cost, more choices offered, convenience etc[1]. However, it must be noted that, due to the complex nature of the internet, online consumers have to expose serious violations of their consumer rights other than offline consumers. In such a context, state intervention is very much important to safeguard consumer rights in the digital environment[2].

Therefore, at international level, it is recommended that the State should regulate e-commerce activities in order to safeguard the rights of online consumers[3]. Accordingly, it is evident that many countries including the European Union, South Africa, United Kingdom, India etc. have developed legal mechanisms to protect online consumers. However, in the Sri Lankan context, the issue of online consumer rights protection has been subjected to minimum attention and the main IT and consumer-related legislation in the country provide a poor contribution to safeguard consumer rights in electronic contracts. Accordingly, this paper investigates the problem of inadequate consumer rights protection in electronic contracts in Sri Lanka comparing with European Union (EU) South African and Indian jurisdictions.

Consumer Rights in E-commerce

In 1962, the former President of the United States (US), John F. Kennedy, declared a broad meaning for the term 'consumer' in a very progressive manner. According to his words;

> *Consumers by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision[4].*

Later, this idea was embodied in various international legal instruments. As mentioned in **Guideline 3 of the United Nations Guidelines on Consumer Protection** in 2016 (UNGCP) the term 'consumer' generally referred to as "natural person regardless of nationality, acting primarily for personal, family or household purposes". The concept of consumer rights was first highlighted by President Kennedy

[1] Yuthayotin, *Access to Justice in Transnational B2C E-Commerce* (Springer International Publishing, 2015)

[2] UNCTAD. 'Manual on Consumer Protection' (United Nations, 2017) http://unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf. accessed 12th October 2017

[3] See OECD Recommendation on Consumer protection in E-Commerce 2016 – Part 1 – General Protection

[4] Supra n 2

in his congressional speech. Accordingly, every consumer should have four basic rights and these rights include, right to safety, right to be informed, right to choose and right to be heard[5].

In addition to the aforementioned four basic rights, the UNGCP unanimously adopted additional four rights including the right to satisfaction of basic needs, right to redress, right to consumer education and right to the healthy and sustainable environment[6]. Most importantly, in 2015, the revised UNGCP enlarged the boundaries of consumer rights further[7]. As a result, the **Guideline 5 of the revised UNGCP** additionally adopted another two important legitimate needs which the Guidelines are intended to meet with regard to e-commerce and consumer privacy. Accordingly, Guideline 5 recognizes the parity of treatments for online consumers, as well as the offline consumers as follows;

> *A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce*[8].

This Guideline indicates a progressive sign about the protection of consumer rights in an online context. Likewise, the OECD has adopted separate recommendations for consumer protection in the electronic environment and accordingly, the revised OECD Recommendation on Consumer protection in E-Commerce 2016 (OECD Recommendations), also emphasizes same protection for online consumers[9].

Notably, all these international examples reveal that the concept of consumer rights is no longer limited to offline contracts. Therefore, it is evident that consumers who are engaging with electronic contracts are also entitled to the basic consumer rights protection afforded by the law. However, the complex nature of internet technology paves the way for more and more violations of consumer rights in an online environment.

Consumer Rights Violations in the Online Context

The UNCTAD identifies three stages of a consumer-business relationship in e-commerce, namely pre-purchasing stage, purchasing stage and post purchasing stage, where consumer rights violations and consumer protection issues could be raised[10].

The pre-purchase stage of an online transaction is the primary position where the consumer engages with the internet. As UNCTAD highlights, information asymmetry and misleading advertising are the major challenges faced by online consumers in this stage[11]. After consumers have decided to purchase the products or services offered online, they may have to expose serious issues with regard to the terms of the contracts, security of the payments and privacy of the data they have entered.

Lack of dispute resolution and redress mechanism are the major problems which online consumers can be subjected to during post purchasing. As many scholars argue,

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[5] G.Larsen, & R. Lawson, 'Consumer Rights: An Assessment of Justice' (2012) 112(3) Journal of Business Ethics 515,528. doi:10.1007/s10551-012-1275-9

[6] Guideline 3 of the UNGCP, 1985

[7] Yu Y and Galligan DJ, "Due Process of Consumer Protection: A Study of the United Nations Guidelines on Consumer Protection" [2015] FLJS <https://www.law.ox.ac.uk/sites/files/oxlaw/oxford_ungcp_due_process_w_fljs_logo.pdf. > accessed January 8, 2018

[8] Guideline 5 of the UNGCP, 2015

[9] See Part 1-General Principles, OECD).

[10] UNCTAD secretariat, "Consumer Protection in Electronic Commerce Note by the UNCTAD Secretariat "(United Nations Conference on Trade and Development 2017) <https://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf. > accessed October 14, 2018

[11] ibid

conventional court system or other dispute resolution mechanisms are not effective in resolving online consumer disputes[12]. Therefore, Liyanage emphasizes that Online Dispute Resolution (ODR) related regulatory approach is much more appropriate for protecting online consumer's rights[13]. However, most of the developing countries, including Sri Lanka are still having many obstacles to establishing proper ODR systems for online consumer dispute resolution[14].

The Guideline 64 of the UNGCP highlights the state responsibility for consumer protection in e-commerce and states that member states should review existing consumer protection policies to accommodate special features of e-commerce. Recently, many developed, as well as developing countries, have enacted separate legislation to accommodate e-commerce activities. However, in the Sri Lankan context, the main IT and consumer-related legislation provide a poor contribution to safeguard consumer rights in electronic contracts.

Analysis of the Sri Lankan Legal framework

When examine the existing Sri Lankan legal framework, it must be noted that both the Information Technology law and consumer law related legal frameworks are providing the legal basis for the online consumer protection. On the one hand, the IT law related legal framework primarily consists of Electronic Transaction Act No.19 of 2006 (the ETA), Computer Crime Act No.24 of 2007 (the CCA) and a few other legislation. On the other hand, the Consumer Affairs Authority Act No.9 of 2003 (the CAAA) is the main legislation which regulates the matters related to the consumer law legal framework in Sri Lanka. Thus, this paper mainly analyses whether the aforementioned legislation could be able to provide proper protection against the major consumer rights violations occur during an online transaction.

Electronic Transaction Act No.19 of 2006

The legislature of Sri Lanka introduced the ETA in order to eliminate legal barriers and establish legal certainty on electronic transactions and e-commerce sector[15]. **Section 3 of the ETA** recognizes the effect, validity or enforceability of data messages, electronic document, electronic records, and other communications[16]. Moreover, **Section 7 of the ETA** admits the legal recognition of electronic signature. As Kariyawasam opines, the legal recognition and acknowledgment of electronic signature enhance the public confidence and use of e-commerce[17].

Moreover, **Section 11 of the ETA** provides the legal validity for electronic contracts as same as the paper-based offline contracts[18].

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[12] Cortes P, "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers" (2010) 19 International Journal of Law and Information Technology 1.

[13] Liyanage KC, "The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines" (2013) 17 Deakin Law Review 251

[14] Weragoda T, "Gaps Exist in Digital Consumer and Data Protection Laws in Sri Lanka" Symposium conducted at Institute of Policy Studies of Sri Lanka (November 1, 2017)

[15] Marsoof S, "Electronic Transactions in the Modern World: An Analysis of Recent Sri Lankan Legislation" [2006] Law College Law Review 108

[16] Section 26 provides broad definitions for the terms 'data messages', 'electronic documents' and 'electronic records'. So, the electronic documents include documents, records, information, communications or transactions in electronic form. Electronic record means a written document, or other record created, stored, generated, received, or communicated by electronic means

[17] Kariyawasam K, "The Growth and Development of e-Commerce: an Analysis of the Electronic Signature Law of Sri Lanka" (2008) 17 Information & Communications Technology Law 51

[18] Goonetilleke S, "The Impact of Technological Advances on Contract Formation in Sri Lanka.,"

On the one hand, this provision enshrines the applicability of traditional contract law principles in electronic contracts. On the other hand, it attempts to make confidence and reliability on the consumer's mind that their transactions are recognizable and accepted by the law[19].

However, when examine the provisions of the ETA in general, any direct section, chapter or any provision in relating to online consumer protection is hardly found. Kariyawasam also highlights this lacuna in the ETA as follows;

> *The Act recognizes that online transactions are valid, but contains no specific provision dealing with consumer protection. The Act is silent about online consumer protection in relation to, for example, information disclosure, delivery, transaction confirmation, cancellation, and refund policy[20].*

As the above statement clearly points out, the ETA contains no direct provision to address consumer protection issues. Similarly, Goonetilleke denotes that presently, Sri Lankan electronic transaction legislation does not have any regulatory mechanism to protect consumers from entering into electronic contracts[21]. Therefore, it can be argued that the ETA provides a very poor contribution to develop consumer trust in e-commerce because consumers are anticipating clear and efficient protection before they engage with electronic contracts.

When comparing the ETA with the South African legal framework, the **Electronic Communication and Transaction Act No.25 of 2002 (ECTA)** of the South African law contains a separate chapter which entirely deals with consumer protection in electronic transactions. The **Chapter VII of the ECTA** enshrines many legislative mechanisms to safeguard online consumers such as information requirement[22], opportunity to review the transaction[23], supplier's liability on utilizing secure payment system[24] and withdrawal rights[25]. Accordingly, it is evident that, as the main IT law legislation of the country, lack of proper consumer protection mechanism is a major drawback of the ETA in Sri Lanka.

Furthermore, the ETA does not facilitate privacy or personal data protection in electronic transactions[26]. However, Chapter VII of the ECTA in South Africa has provided specific legal protection for personal data and privacy of online users. In the EU legal framework as well, there are several separate directives and mechanisms to safeguard consumer privacy in an electronic environment. Therefore, the lack of privacy and data protection provision in the ETA can be criticized as another disadvantage for consumer protection in electronic contracts.

Computer Crime Act No.24 of 2007

The CCA was enacted in 2007 to provide for identification of computer crèmes and to provide the procedures for the investigation and prevention of such crimes[27]. Even though the CCA does not provide separate protection for online consumers, some major provisions of the Act can be utilized to enhance consumer protection in electronic contracts.

Proceedings of the Open University Annual Academic Sessions. (The Open University of Sri Lanka 2013)

[19] Kariyawasam,Supra n 17

[20] ibid

[21] Goonetilleke, Supra n 28

[22] Section 43 (1) of the ECTA

[23] Section 43 (2) of the ECTA

[24] Section 43 (5) (6) of the ECTA

[25] Section 44 of the ECTA

[26] Madugalla KK, "Right to Privacy in Cyberspace: Comparative Perspectives from Sri Lanka and Other Jurisdictions," *Kelaniya International Conference on Information and Technology* (University of Kelaniya 2016); Marsoof A, "The Right to Privacy in the Information Era: A South Asian Perspective" (2008) 5 SCRIPT-ed 553

[27] See the Preamble of the CCA

Most importantly, **Section 10 of the CCA** recognizes the unauthorized disclosure of information as a computer crime[28]. In addition to **Section 10, Section 8 of the CCA** provides illegal interception of data as an offence. The illegal interception of data was first recognized as an offence in Sri Lanka under the Telecommunication Act in 1996.

So, it is apparent that the CCA make some attempts to safeguard privacy and personal data in the electronic environment. However, the contentious issue is whether the basic privacy protection provides by the CCA is adequate to address the overall privacy and data protection issues in the online transactions. Particularly, as scholars point out, this protection is not sufficient when dealing with some technological applications like cookies, net spies, web bugs and spams in cyberspace[29].

Consumer Affairs Authority Act No,9 of 2003

As mentioned earlier, the CAAA provides the main legal framework for consumer protection in Sri Lanka. The CAAA intends to afford general protection for consumers and traders by establishing consumer Affairs Authority (CAA).

Nevertheless, according to **Section 75,** the interpretation section of the CAAA, the term consumer defines as "any actual or potential user of any goods or services made available for consideration by any trader or manufacturer". When examining this definition, it is *prima facie* evidence that there is no specific reference to the consumers who are dealing with online traders[30].

Notably, the **Consumer Protection Act, 2019 of India** also provides a much similar definition for the consumer like "any person who buys any goods or hires or avail any services for a consideration not for resale of goods or any commercial purposes". This definition is general and does not have any reference for the online consumers. However, unlike the CAAA in Sri Lanka, the Indian Act provides an explanation to this general definition as follows;

> *The expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing[31].*

Thus, it is apparent that this explanation clears all the doubts and it directly includes online consumers into the purview of the general definition of the term 'consumer'. Therefore, it can be argued that, Sri Lankan law needs more clarification with regard to this definition in order to provide protection for the online consumers as same as the offline consumers.

In addition to aforementioned major drawback, the CAAA fail to provide proper online trade regulation mechanism. Even though, Part II of the CAAA extensively deals with the regulation of trade, it is hardly found any provision which confers any authority on CAA to regulate online trade. Moreover, the CAAA does not contain any provision regarding the information obligation[32] and cooling off period[33]. In

[28] Section 10 - Any person who, being entrusted with information which enables him to access any service provided by means of a computer, discloses such information without any express authority to do so or in breach of any contract expressed or implied, shall be guilty of an offence ..

[29] Marsoof A, "Privacy Related Computer Crimes;A Critical Review of the Computer Crimes Act of Sri Lanka" (2007) 5 Law College Law Review 1

[30] In contrast, based on the words 'any' user and 'any' trader, it can be argued that this definition can be applied for any kind of transaction online or offline.

[31] Explanation (b) of the Section 2 (8) , CCA 2019

[32] Information obligation means the obligation on sellers to provide necessary details before entering into the contract

[33] According to the withdrawal rights the consumer would get an opportunity to leave the contract without

contrast, the Consumer Rights Directive (CRD) in EU law and Consumer Protection provisions of the ECTA in South African law specifically require traders to provide relevant information like identity of the seller, geographical address, price, main characteristics of the goods or services, arrangement of payment, delivery performance, etc before entering into the contract[34]. Most importantly, the CRD provide 14 days cooling off period for online consumers to withdraw their contact without any penalty.

Similarly, novel concepts like contracts relating to digital contents are also not facilitated under the scope of the CAAA. As Perera argues Sri Lankan consumers are not in a secure place in respect of defective intangible goods purchased[35]. When comparing to EU legal framework under the CRD, it is revealed that the CRD provides specific protection for the consumers who are engaging with the contracts on digital contents.

Although the CAAA utilizes dispute resolution mechanism through Consumer Affairs Authority and Consumer Affairs Council, Weragoda criticized that ,"the CAAA is not adequate as a dispute resolution mechanism in the current digital era where transactions take place in online trading platforms"[36]. Conversely, the EU legal framework facilitates effective ADR and ODR mechanism in order to resolve the cross border consumer disputes in electronic contracts. These dispute resolution platforms are user-friendly out of court solutions which provide more efficient settlement options for both traders and consumers. Therefore, as Liyanage suggests, the CAAA in Sri Lanka also needs to be amended, ensuring the legal validity of online consumer arbitration clauses[37].

Conclusion

As one of the fast-developing economy of South Asia, it is obvious that Sri Lanka needs to move forward with the technological and commercial advancements. Consumer engagement in e-commerce is one of the turning factors which directly affect the growth of e-commerce in a country. Therefore, state intervention is very important to enhance the consumer confidence and safeguard the consumer rights in electronic contracts.

After analysing the main IT law and consumer law related legislations, sevaral drawbacks and lacunas have been identified in the Sri Lankan legal system. When comparing with the EU, South African and Indian legal approches, it can be highlighted that lack of direct legal provisions for online consumer protection, lack of proper definition for the term online consumer, lack of privacy and data protection mechanism, lack of information obligation on online traders, lack of proper dispute resolution mechanism etc. as major pitfalls in Sri Lankan law.

It is obvious that the absence of a proper legal framework will negatively impact on the development of the e-commerce sector in Sri Lanka. Therefore, in conclusion this paper emphasizes that Sri Lankan IT law and consumer law should be changed and expanded to address this emrging issues in order to safegurd consumer rights in online context.

paying any compensation within a certain time period. This particular time period is called as 'cooling off period'

[34] See CRD Article 6 of the EU law and Section 43 (1) of the ECTA in South African law for the information obligation

[35] Perera WC, "Beware If You Are a 'Digital Consumer'- Intangible Digital Goods and Consumer Protection in Sri Lanka," *11th International Research Conference* (General Sir John Kothalawala Defence University 2018)

[36] Weragoda, Supra n 14

[37] Liyanage Supra n 13

CONSTITUTIONALIZING A NATIONAL SEX OFFENDER REGISTRY - A CASE OF BALANCING THE INTERESTS OF PREVENTION WITH THE RIGHT TO PROTECTION

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"Ladies and gentlemen of the jury, the majority of sex offenders that hanker for some throbbing, sweet-moaning, physical but not necessarily coital, relation with a girl-child, are innocuous, inadequate, passive, timid strangers who merely ask the community to allow them to pursue their practically harmless, so-called aberrant behaviour, their little hot wet private acts of sexual deviation without the police and society cracking down upon them. We are not sex fiends! We do not rape as good soldiers do. We are unhappy, mild, dog-eyed gentlemen, sufficiently well integrated to control our urge in the presence of adults, but ready to give years and years of life for one chance to touch a nymphet. Emphatically, no killers are we. Poets never kill." — Vladimir Nabokov, *Lolita*

INTRODUCTION

July, 1994 – Seven-year-old Megan Kanka goes missing from her home in New Jersey, United States of America (USA). Megan's body was later found dumped in a nearby park. In May 1997, Jesse Timmendequas, Megan's neighbour, was convicted of kidnapping, raping and murdering Megan.[1] Megan's parents lamented that had known that their neighbour was a sex offender, they would have taken extra precaution and not allowed their daughter to play outside.

Megan's story is strikingly similar to that of the four-year-old girl in the Kotadeniyawa incident reported in 2015. The victim was abducted, raped and strangled to death by the offender Saman Jayalath who eventually confessed to the crime. The first Judicial Medical Officer to arrive at the scene 'inferred that the crime was a combination of paedophilia, sadism and possibly necrophilia, whose escalation in criminal confidence and motive showed the perpetrator likely to be or become a serial offender, who in the best interests of all, was a predator to be captured'.[2]

Could these crimes have been prevented if there was a sex offender registry (SOR)?

WHAT IS A SEX OFFENDER REGISTRY (SOR)?

A SOR is a system used by countries to keep track of sex offenders and their activities. SORs monitor the movement of sex offenders upon their release from prison and includes details of the offender such as their address and the offence for which they were convicted. In some jurisdictions, SORs are accessible to law enforcement personnel alone whereas in jurisdictions such as the USA it is accessible to the public.

SORs are the norm in many jurisdictions with neighbouring India establishing a National Database on Sexual Offenders in 2018. SORs were introduced as a mean to

[1] Olivia B. Waxman - The History Behind the Law That Created a Registry of Sex Offenders.

[2] Ruwan Laknath Jayakody - The Serpent in Eden's Garden and the Fallen Angels: Constitutionalizing a National Sex Offender Registry, Unpublished, 2019.

safeguard children from falling prey to offenders. The public are notified when a convicted sex offender takes up residence in the neighbourhood allowing parents to be vigilant concerning their children's movements.

In Sri Lanka although Non-Governmental Organizations (NGOs) have advocated for a SOR, to date a system has not been put into place. This article seeks to make a case for the need for a SOR in Sri Lanka and the particular model of SOR that needs to be introduced especially one that is 'rational, humane, and ultimately effective'.[3]

SITUATION IN SRI LANKA REGARDING SEX CRIMES

Statistics from the Sri Lanka Police Department[4] for the period of 2009 - 2018 show that although there is a slight decrease of cases of statutory rape and sexual exploitation of children, the number is by no means on a steady decline as they are still in the triple digit range and in the case of certain offences such as rape and incest even higher. Despite the fluctuations in the number of sexual crimes reported, one should be aware there are many crimes of this nature that go unreported every year.[5] Therefore, it is imperative to have a legally sanctioned mechanism which monitors sex offenders to ensure the protection of the most vulnerable in our society, our women and children.[6] The statistics merely state the obvious – a SOR is the need of the hour.

NGOs have noted the absence of a child sex offender registry to help prevent the sexual exploitation of children and repeat offences by preferential offenders or paedophiles. These organizations have called for a SOR that complies with international standards on confidentiality and privacy and therefore recommend that the Government of Sri Lanka introduce one that also cooperates in this regard with the International Criminal Police Organisation's Green Notices system and its planned international police clearance system.[7] Although in 2013, the draft National Child Protection Policy had mentioned the need for a SOR, by 2017 the draft policy did not carry the same recommendation.[8]

Also, the Sri Lankan criminal justice system, tends to focus its resources entirely on punitive measures as opposed to preventive measures which are vital in tackling habitual and serial offenders.[9]

Moreover, sex offenders have increasingly adopted cyberspace based technological advancements such as the dark web and

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[3] ibid.

[4] Sri Lanka Police Grave Crimes Abstract for the years 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018.

[5] The benefits and detriments of sex offender registries (the HAQ report) notes that because children are often victims of rape and sexual assault, 'sexual offences are frequently underreported and as such the total number of victims far exceeds the number of reported incidents'.
[The HAQ report was prepared on behalf of the HAQ: Centre for Child Rights ('HAQ'), an Indian NGO based in New Delhi that aims to recognize, promote and protect the rights of all children - http://haqcrc.org/wp-content/uploads/2018/09/sex-offenders-registry-a-study-by-haq-macquire-university-2018.pdf.]

[6] According to Human Rights Watch 'children are often the victims of rape and sexual assault'. - Human Rights Watch, 'No Easy Answers, Sex Offender Laws in the US' (Research Discussion Paper, 11 September 2007) - accessed through the HAQ Report.

[7] Protecting Environment and Children Everywhere (PEaCE)/End Child Prostitution in Asian Tourism (ECPAT) Sri Lanka and the End Child Prostitution And Trafficking (ECPAT) International, March 2017 Submission for the Universal Periodic Review of Sri Lanka at the 28th Session of the United Nations Human Rights Council in November 2017.

[8] PEaCE/ECPAT Sri Lanka and ECPAT International, Supplementary Report on the 'Sexual Exploitation of Children in Sri Lanka' submitted in June 2018 for the Committee on the Rights of the Child to consider at its 81st Pre-Session in October 2018.

[9] Ibid.

popular social media networks as their hunting grounds. It is therefore evident that law enforcement agencies must, in turn, adopt sophisticated methodologies in bringing these offenders to justice.

WHAT IS THE MOST SUITABLE SOR MODEL?

SORs can be risk based, offence based or a hybrid model incorporating features of both risks based and offence-based models. Most countries (including many states in the USA) incorporate an offence-based model. Under this model, anyone convicted of a sex crime is required to register as a sex offender. On the other hand, a few states have opted to categorize offenders based on the likelihood of their risk of reoffending (risk-based model). The problem with a risk-based model is that the implementation of such a model may incur a cost due to risk-based assessment for each offender and in training professionals to perform the assessment. The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) operating under the office of Justice Programs in its Sex Offender Management Assessment and Planning Initiative by Kevin Baldwin states that there is no agreed risk assessment model nor 'a universal means of either describing risk or communicating the findings of risk assessments'. He further notes that 'risk assessment serves many purposes throughout the adjudication process. It is often undertaken for dispositional purposes to help determine, for example, an appropriate sentence or custody level or the conditions of community supervision. In these situations, decisions are often predicated, at least in part, on the assessed likelihood of recidivism, with resources being allocated accordingly to promote community safety'.

From the above, it seems at the outset that a risk-based approach is more accurate. However, there are also schools of thought that state otherwise. For example, Baldwin referring to the risk-based model/risk assessment system acknowledges that 'while much progress has been made regarding the ability of professionals in the field to accurately estimate the likelihood of future sexual re-offense, no one is presently able to estimate either the timing or the severity of such future criminal conduct'. This system cannot accurately predict human nature.[10] Accordingly, considering the costs involved in implementing such a system (which one can assume will be time consuming as well), and its unpredictability in certain aspects, in a country which seeks to establish a SOR for the first time, it is better to start with an offence based model and thereafter progress to a risk based one.

DETAILS INCLUDED IN A SOR

SORs include the name, address, criminal history and physical appearance of sex offenders ranging from juvenile offenders, offenders who have been released from prison and offenders under suspended sentences, among others. The distinguishing factor, if not the most obvious one, is that the individual must be convicted of a sex offence.

An issue presents itself when a distinction is drawn between those who have committed a sex offence of a non-violent nature and those who have committed a sex offence of a violent nature. Should the offenders convicted for non-violent sex crimes (crimes

[10] A quote from the film Minority Report in the form of a conversation between the characters John Anderton and Danny Witwer:
John Anderton: 'There hasn't been a murder in six years. There's nothing wrong with this system, it is…'
Danny Witwer: 'Perfect I agree, but there's a flaw. It's human'.

such as public indecency, lewd conduct, voyeurism, exhibitionism, among others) be included in the registry? Take for example the case of Shawna,[11] a mother of two, whose name appears on the sex offender registry in the state in which she resides. Shawna's name appears on the registry for having sexual intercourse with a 14-year-old when she was 18 years and intoxicated. Today, Shawna is unable to take her own children to the public park because her name is on the registry. She cannot be categorized as a violent offender because the act which took place between herself and the victim was consensual but because of the statutory restriction on the age of consent Shawna was convicted.

Human rights activists have voiced their concerns that SORs must not include the details of juvenile offenders. However, due to the nature of the offence and the risk of reoffending, the names of juvenile offenders are inevitably kept on the SORs.[12] In certain jurisdictions however, juvenile sex offenders names are placed on the registry only after they attain the age of adulthood.

Another point of concern is the time period for which the SOR should contain the details of the offender. Individuals convicted of violent sex crimes and those who re-offend are listed on the SOR for life whereas for some non-violent sex offences, the time period can be relatively short. In some jurisdictions, the monitoring of sex offenders under a SOR can be for varying periods of time based on the nature of the offence and the age of the offender.

ACCESSIBILITY OF SORs

A major point of contention with regard to SORs is whether it must be made accessible to the public or not. While most jurisdictions limit the access of SORs to law enforcement personnel, countries like the USA have not only given public access to SORs but have now enabled a notification system whereby certain authorities are alerted when an offender updates his/her information in the registry or registers in the registry.[13] Public access to SORs may lead to vigilantism and social ostracising. Such vigilantism and ostracising will affect not only the offender but most importantly his family and their privacy.

PROS AND CONS OF SORs

SOR is a useful tool in the hand of law enforcement agencies. A SOR system, monitors the activity of registered sex offenders. Such important information allows law enforcement personnel to take preventive measures as opposed to apprehending the offender in the act. Furthermore, the local community may, if the SOR is publicly accessible, be vigilant to the movements of the offender and also take preventive measures themselves.

A SOR is based on an assumption amongst others that sex offenders are likely to reoffend, and that SORs effectively reduce recidivism.[14] This may not necessarily be true.[15] According to Geneva Adkins, David Huff and Paul Stageberg, 'The Iowa Sex Offender Registry and Recidivism' (Research Report, Iowa Department of Human Rights, December 2000) 'there is no

[11] Untouchables – a documentary.

[12] The United Kingdom operates a SOR under the head of Violent and Sex Offender Register which includes the names of those convicted of violent sex offences and have received a prison term of more than 12 months and those who are not convicted but are under the risk of offending. This register includes details of juveniles as well. The time period for which those below 18 years of age are kept on the register varies according to the offence and sentence received.

[13] See the 2006 - Adam Walsh Child Protection and Safety Act. Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act (SORNA).

[14] The HAQ report. See also Sex offender registry: More harm than good? by Tom Condon - Ct Mirror.

[15] Andrew Harris and R. Karl Hanson, 'Sex Offender Recidivism: A Simple Question' (2004) 3 Public Safety and Emergency Preparedness Canada, 1-23.

statistically significant difference between recidivism rates for sex offenders subject to registration, versus those not subject to registration.'[16] The HAQ report concludes that SORs have little to no impact on recidivism rates.

In her article titled Sex Offender Registries: Fear without Function? Amanda Y. Agan uses a regression model to determine the crime rates after the implementation of a sex offender registry or public access to same and concludes that 'the results do not support the hypothesis that sex offender registries are effective tools for increasing public safety'.

SORs and Sex Offender Registrations and Notifications (SORNs) were intended to safeguard communities and protect children who are for the most part unable to fend for themselves. However, SORs may lull a community into a false sense of security 'leading residents to conclude that they know about the sex offenders in their midst when in fact, a resident is more likely to be sexually abused by a parent, relative, or acquaintance than by a stranger'.[17]

The HAQ report also notes that the implementation cost of SORs are significant. It further notes that 'the quantitative difference achieved by SOR implementation is considered incommensurate when compared to the monetary investment required to adequately and successfully facilitate a SOR.'

SORs have enormous social impact. Research has shown that the impacts of SORs on the offenders flow as a 'collateral consequence' of SORs and result in 'harsh punishment' on the offenders. Offenders are often faced with 'unemployment, residency restrictions, and isolation and stigmatization'.[18] The HAQ report reviews the problem of balancing the offender's right to protection against the victim's interest of protection in the following manner, 'most research conducted into the social impacts of SORs focuses on broad social aspects of SORs – including the effect on offenders, communities and families, with very little research being conducted regarding the actual perceptions of offenders themselves. As a result, the needs of offenders are rarely considered when designing legal policies. This is largely because the protection that SORs provide to the community comes at the expense of offender freedoms. Arguably, this balance has become unjustifiably skewed in favour of victims and the community by overlooking the fundamental physical and emotional needs of offenders themselves. A better understanding of how sex offenders perceive and are affected by SORs would help to improve policies and achieve better outcomes.

RECOMMENDATIONS

Statistics and recent trends in the Island indicate that a SOR must be established in

[16] The HAQ report.

[17] Colorado Department of Public Safety Division of Criminal Justice, Office of Research and Statistics. According to Rape in America: Report to the Nation (Crime Victims Resource and Treatment Center, 1992), 22% of sexual assaults were committed by strangers, 46% were committed by relatives, and 29% were committed by acquaintances (3% refused to answer). 84% of these victims did not report the crime to the police.

[18] Richard Tewksbury and Matthew Lees, 'Perceptions of Punishment: How Registered Sex Offenders View Registries' (2007) 53(3) Crime and Delinquency 380; Danielle Tolson and Jennifer Klein, 'Registration, Residency Restrictions, and Community Notification: A Social Capital Perspective on the Isolation of Registered Sex Offenders in Our Communities' (2015) 25(5) Journal of Human Behaviour in the Social Environment 375, 380; Richard Tewksbury and Patrick Connor, 'Incarcerated Sex Offenders' Perceptions of Family Relationships: Previous Experiences and Future Expectations' (2012) 13(2) Western Criminology Review 25-35 - accessed from the HAQ report.

the country. However, the model of the SOR, details to be included in a SOR and accessibility to a SOR must be decided on prior to the operation of same. The monitoring of sex offenders must balance the interests of the offender and his/her family against those of the victim. In the alternative, Sri Lanka may follow the example set by initiatives such as Germany's Prevention Project Dunkelfeld. Now known as The Prevention Network "Kein Täter Werden" (Meaning: Don't offend) the project 'offers a free and confidential treatment… for people seeking therapeutic help with their sexual preference for children and/or early adolescents.' What is interesting to note is that this is a voluntary programme which also maintain the confidentiality of the individuals undergoing treatment. As there is no mandatory reporting law in Germany the chances that such individuals undergo therapy is high.[19]

Sri Lanka has a long way to go in understanding sex offenders and assisting them by means of therapy. At least, for the time being, a SOR would suffice as it establishes some mechanism to monitor sex offenders and reduce recidivism.

'At any rate these unfortunate beings (paedophiles) should always be looked upon as a common danger to the welfare of the community, and put under strict surveillance and medical treatment.[20] The proper place for such persons is a sanatorium[21] established for the purpose, not prison'.[22]

[19] https://www.dont-offend.org/

[20] pg. 374, Pathological Sexuality in Its Legal Aspects, Psychopathia Sexualis with Especial Reference to the Antipathic Sexual Instinct: A Medico-Forensic Study, Richard von Krafft-Ebing, 12th German Edition, Stein and Day, New York, 1965.

[21] pg. 11, Treatment of Anomalous Vita Sexualis in Men: With Special Consideration of the Suggestive Treatment, Alfred Fuchs.

[22] Krafft-Ebing.

THE CURIOUS CASE OF BRIGADIER PRIYANKA FERNANDO

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On the 5th of February 2018, newspapers around the globe were highlighting an incident which occurred at the Independence Day celebrations of Sri Lanka in front of the High Commission of Sri Lanka in the United Kingdom (UK).

The incident was where an officer of the Sri Lanka Army was alleged to have made death threats (throat slitting gesture) to a group of persons of British and Tamil citizens who were protesting opposite the High Commission waving LTTE Flags and allegedly stepping on the Sri Lankan flag.

The incident resulted in an action filed by the aggrieved party in the Westminster Magistrates Court citing breach of UK laws. The Learned Magistrate after having heard the submissions made by the aggrieved party, had issued an arrest warrant on the said officer Brigadier Priyanka Fernando.

The trial was held *in abstentia* and on the 21st of January 2019, Brigadier Fernando was convicted (in his absence) of threatening the protesters and an arrest warrant was issued. However, this warrant was later recalled on issues raised that the Brigadier was immune from prosecution owing to his diplomatic immunity.

The purpose of this article is simply to analyse whether the Brigadier can be arrested by the UK according to the main principles of Public International Law, and if not, the reasons as to why he cannot be so.

In order to do this, let us first begin to look at the source of diplomatic immunity which is sovereign immunity, and proceed as follows.

The Concept of Sovereign Immunity

The Concept of Sovereign Immunity in international law is a direct outcome of the following doctrines in international law which is the Doctrine of Sovereignty and the Doctrine of Sovereign Equality.

International Law seeks to primarily govern the international relations between Sovereign States and other institutional subjects of international law. It is also important to understand that international law operates alongside international diplomacy, politics and economics.

Therefore, as Sovereign States are the primary actors in the international arena, the Doctrine of Sovereignty imputes that each State has a right of control to the exclusion of all others the functions of a Sovereign[1].

What is Sovereignty?

There are many definitions to this type of question. Professor John Austin defined the Sovereign to be *'illimitable, indivisible and clearly identifiable'*, a source of authority where commands are backed by threats to a group of people who habitually obey them[2]. This is the very essence of a Sovereign. An absolute ego with absolute authority.

In the *Island of Palmas Arbitration*[3], Sovereignty was defined as follows;

[1] Island of Palmas Arbitration [1928] 2 RIAA 829
[2] The Providence of Jurisprudence Determined, 1832
[3] Ibid 1

"*Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State*."

However, in international law, since there are many Sovereign States, and as each State strives to dominate over each other either militarily, politically and/or economically, international law has introduced key doctrines to mitigate the general problems posed by the Doctrine of Sovereignty.

The Doctrine of Sovereign Equality

The Doctrine of Sovereign Equality is a legal principle in international law which imputes that all states are legally equal despite their physical and practical limitations.

Naturalist Writer Emir de Vattel[4] captured the essence of this doctrine by the following anecdote by saying '*A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.'*

This principle is now legally recognized and enshrined in **Article 2(1) of the UN Charter** which states as *follows; "The Organization is based on the principle of the sovereign equality of all its Members.[5]"*

Furthermore, the consequence of this Doctrine of Sovereign Equality is the Principle of Non-Interference in the Domestic Affairs of States, i.e. States by being legally equal to one another will no longer interfere in the domestic affairs of each other.

This principle is also legally enshrined as per **Article 2(7) of the UN Charter**[6].

The legal consequence of the above two doctrines is the Doctrine of Sovereign Immunity. This doctrine is encompassed in the maxim that symbolizes the essence of sovereign immunity which is '*in par in parem non habet imperium'* which is 'legal persons of equal standing cannot have their disputes settled in the courts of one of them. Otherwise, this would be an attack on the dignity of a foreign state'[7].

History of Sovereign Immunity

Initially, a State enjoyed **absolute immunity** from proceedings in municipal courts. This immunity was passed on to acts which were not necessarily of a public nature.

For e.g. even commercial activity fell under this immunity, therefore if any contract became frustrated or difficult to perform, parties would rely on sovereign immunity to escape any legal obligations.

In the case of *The Parlement Belge (1878)*, the defendant ship was owned by the King of the Belgians. It was a mail boat engaged in the channel crossings which had been involved in a collision.

The Court[8] initially held that as the mail ship was only involved in commercial enterprise and as such it was not entitled to immunity. However, this decision was overruled by the Court of Appeal[9] which held that it was entitled to immunity as it was of absolute immunity.

Qualified (Restrictive) Immunity

The overreliance of absolute immunity in areas such as commercial activity made this rule of absolute immunity increasingly difficult to justify. This was because people began to abuse this rule and this in turn led to an overall lack of trust between states.

However, in the landmark US case of *The Schooner Exchange*[10], the restrictive

[4] The Law of Nations 1759 London 1797 edition 75, <http://files.libertyfund.org/files/2246/Vattel_1519_LFeBk.pdf> accessed 04 October 2019

[5] United Nations Charter 1945, Article 2(1)

[6] United Nations Charter 1945, Article 2(7)

[7] De Haber V Queen of Portugal (1951) 17 QB 171

[8] (1879) 4 PD 129

[9] CA (1880) LR 5 PD 197

[10] 11 U.S. (7 Cranch) 116 (1812)

approach was applied where the case led to the categorisation of acts of which sovereign immunity was distinguished and recognised only for only certain acts.

Thus, state immunity would only apply to acts of ***public or official capacity of a state (jure imperii)*** and acts which immunity would no longer apply were those which were ***private or commercial acts (jure gestionis).***

As a result, a State could now only claim immunity in relation to acts jure imperii (sovereign or public acts).

Thus in the Privy Council case of *The Philippine Admiral*[11] the precedent regarding absolute immunity was broken.

This was followed in *Trendex v Central Bank of Nigeria*[12] where the plaintiff sued the Central Bank of Nigeria for refusing to honour a letter of credit in respect of a contract for the supply of cement. The defendant relied on the defence of its action being similar to a state and thus argued that it was protected by sovereign immunity.

The Court of Appeal held that the Central Bank of Nigeria was a separate entity from the Government of Nigeria and thus was not entitled to immunity.

Lord Denning in the case stated that international law now recognised the *doctrine of restrictive immunity* and that a distinction must be drawn between acts jure imperii and acts jure gestionis.

The case of Head of State and Diplomatic Immunity

Historically, the Head of a State (HOS) was closely associated with a State. Both entities enjoyed under customary international law, absolute immunity in all areas of their activities, ranging from civil to criminal action.

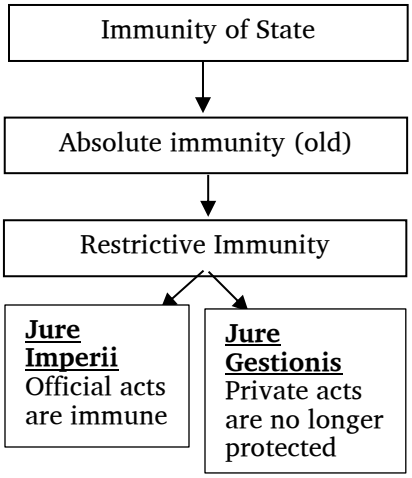
However today, under qualified immunity (restrictive immunity), a State and its agents enjoy immunity only in respect of government acts (acts jure imperii) and not in respect of private acts (jure gestionis).

This restriction of immunity (acts jure imperii) when applied to agents of State which includes Head of State, Diplomats and other high ranking officials come in the form of two applications which are;

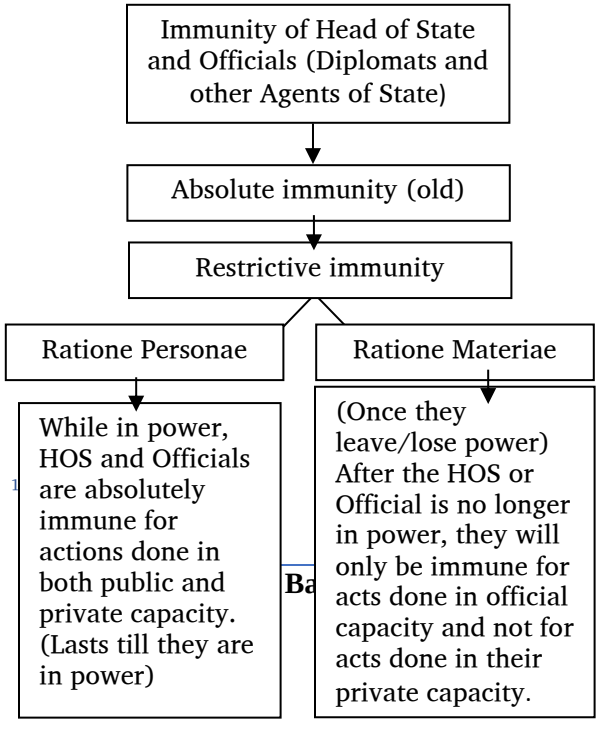
1) Ratione Materiae immunity &
2) Ratione Personae immunity.

This application of restriction of immunity on their power is better explained in the following diagram;

Immunity of State



Immunity of Head of State and State Officials



[11] [1976] 2 W.L.R. 214 (P.C.), aff'g [1975] 3 C.L. 32 (Hong Kong Sup. Ct.).

For e.g., the decision of a Head of State to declare war is an official act. Therefore, such a person can never be brought to a Court of Law even after leaving office as such an act is of an official nature.

However, if such a Head of State decides to engage in some illegally activity without following any procedure of law, no action may take place as such a person, while in power, will be protected from ratione personae immunity.

Legal action can be then taken against only when such a Head of State leaves or loses power. As such an act would fall beyond his executive function, he would not be able to protect himself under ratione materiae immunity and as such he can be brought to face justice.

Brigadier Priyanka Fernando

According to the diagram above, Brigadier Priyanka Fernando went to the UK with diplomat and/or consular authority from Sri Lanka.

As an agent of Sri Lanka, he is protected by immunity ratione personae, and his action even though one may argue goes outside the line of his duty is still protected as he is still an agent of the State.

The arrest warrant issued by the Learned Magistrate of the Westminster Magistrate Court was in fact wrong in law as it in fact violates the age-old maxim of sovereign immunity '*in par in parem non habet imperium*' as well as violates the inviolability of diplomatic agents guaranteed under the Vienna Convention on Diplomatic Relations 1961.

Such an act may lead to an equal reciprocal step by the Sending State as was seen in the landmark *US Diplomatic and Consular Staff in Iran (US V Iran)*[13], where the International Court of Justice stated that diplomatic immunity is '*essential for the maintenance of relations between states and is accepted throughout the world by nations of all creeds, cultures and political complexion'*.

Other Issues of Sovereign Immunity

This Doctrine of Sovereign Immunity has been further criticised and challenged on four grounds.

1) **Sovereign Immunity is incompatible with International Criminal Law**

   The Doctrine of Sovereign Immunity has been criticised to be incompatible with international criminal law as it aims to shield Heads of State and other high-ranking officials from being accountable for grave human right abuses.

2) **The Creation of the International Criminal Court**

   The International Criminal Court (ICC) is the first permanent, independent international criminal court of the world whose main task is to try individuals accused of committing the most serious crimes of genocide, crimes against humanity and war crimes.

   The ICC by virtue of **Article 27(2)**[14] **of the Rome Statute** has the power to summon and shall not be barred by the general immunities or special procedural rules which may attach to the official capacity of a person, and has the power to exercise its jurisdiction over any such person.

[13] International Court of Justice (ICJ), 12 May 1981

[14] The Rome Statute of the International Criminal Court 2002, Article 27(2)

In such a situation the Executive of such a country can be summoned by the ICC at any given time.

However, the power of ICC to issue such summons primarily depends on whether a State has signed and ratified its convention, i.e. any State who signs and ratifies the Rome Statute will lose any right to their traditional immunities. Only then will the ICC be able to wield such power.

As such any country that has not signed or ratified this convention shall not be bound by its' summons.

3) **The emergence of Jus Cogens Rules**

The recognition by the international community that some rules of international law are of a *jus cogens nature* has led to a challenge of sovereign immunity.

Jus Cogens are principles considered so fundamental that it overrides all other sources of law including even the Charter of the United Nations and accordingly, even the laws of immunity has been considerably challenged by this phenomena.

E.g., genocide, torture, etc.

4) **Human Rights**

Sovereign Immunity is further criticised as it has clashed with basic human rights such as the right to access to a court, the right to a remedy and/or the right to effective protection.

Ways in which Brigadier Priyanka Fernando could have been summoned.

It should be noted that there are ways in which the Brigadier could be summoned to face charges in the United Kingdom.

Given below are some ways the said Brigadier may be warranted;

1. If Sri Lanka had waived[15] the Officer's diplomatic and consular authority, while he was in the UK at the time of the order of the Magistrate, then he could have been charged and arrested.
2. If the officer after having serving his term and upon expiry of his authority visits the UK again as a private individual, he may be arrested.

However, given the sensitivity of the case, such an action would probably be highly unlikely.

Conclusion

Accordingly, it is clear that Brigadier Priyanka Fernando cannot be arrested in the UK as at the time of the incident he was an agent of the State who is also protected by sovereign immunity and also diplomatic immunity guaranteed by the Vienna Convention of Diplomatic Relations.

To deny this right would lead to negative international relations between Sri Lanka and the United Kingdom and a possible legal dispute in the International Court of Justice (ICJ) as has been seen in the previous cases like the ***US Diplomatic and Consular Staff in Iran (US V Iran)***[16] where the ICJ ordered Iran to pay reparations to the US

[15] Vienna Convention of Diplomatic Relations 1961, Article 32(1)

[16] Ibid 13

for violating the said Vienna Convention.

Thus, in conclusion, it is clear that the study of immunity as done with the case of Brigadier Priyanka Fernando is not a straight forward one as it involves an understanding and appreciation of several doctrines and principles of Public International Law

THE TIME IS NIGH FOR LEGISLATIVE RECOGNITION OF RESPONSIBILITY OF SUPERIORS IN THE POLICE FORCE FOR ACTS OF THEIR SUBORDINATES

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Introduction

Police brutality is a recurring phenomenon in Sri Lanka. Notwithstanding the existence of a long line of jurisprudence of the Supreme Court which has denounced police brutality and held that brutal force inflicted by police officers often amount to violation of fundamental rights of victims, there is recurring incidence of the same. The author extrapolates principles of responsibility of commanders and superiors as recognized in international criminal law, to propose the case for legislative/regulatory recognition of criminal responsibility of police superiors for illegal acts of their subordinates.

The author argues that the absence of a legislative/regulatory framework to attribute penal sanctions on superior police officers for illegal acts of subordinates, contributes to the recurrence of incidence of police brutality. This essay discusses the need and positive attributes of adopting legislation/regulations by which superiors of the police force may be held liable for illegal acts of their subordinates.

The concept of superior and command responsibility in international law

Responsibility of superiors and commanders for acts of their subordinates has been recognized in international criminal law. **Article 28 of the Statute of the International Criminal Court**[1] recognizes the responsibility of military and non-military leaders for criminal acts committed by their subordinates.

Responsibility of military commanders includes the failure to exercise control over forces under his effective command and control.[2] A commander is responsible if he knew or, owing to the circumstances, should have known that forces under his control were committing or about to commit crimes.[3] Failure to take necessary and reasonable measures, within his power, to prevent or repress criminal activities or submit subordinates to competent authorities for investigation and prosecution attracts liability.[4]

Responsibility of superiors has also been recognized by the ICC Statute. A superior is criminally responsible for crimes of subordinates under his effective control or authority, for failure to exercise proper control over subordinates.[5] If a superior had knowledge of the commission of crimes by subordinates, or that they were about to commit crimes, which concerned activities within the effective responsibility and control of the superior, and the superior consciously disregarded the same, he is held liable.[6] Failure to take necessary and reasonable measures, within a superior's power, to repress crimes or to report them to competent authorities for investigation

[1] Article 28 of the UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998 [hereinafter 'ICC Statute'].
[2] ICC Statute, Art.28(a).
[3] ICC Statute, Art.28(a)(i).
[4] ICC Statute, Art.28(a)(ii).
[5] ICC Statute, Art.28(b).
[6] ICC Statute, Art.28(b)(i)&(ii).

and prosecution also attracts liability.[7] In addition to the ICC Statute, responsibility of superiors has been recognized by several instruments of international criminal law.[8]

There exists a gamut of writing and jurisprudence relating to superior responsibility in international law. This article discusses the most salient aspects of the principle of superior responsibility to support the contentions of the author.

Attributing responsibility to a superior requires the relationship between the superior and subordinates to be established, along with the criminal acts of subordinates.[9] It must be established that the superior knew or had reason to know that the subordinates were committing or about to commit the alleged crimes and that the superior failed to take reasonable measures to prevent crimes or punish subordinates.[10]

The level of control that a superior must possess over a subordinate is characterized as effective control.

Effective control is the material ability of a superior to prevent or punish criminal conduct.[11] Control of a superior is the formal and actual position of authority over a subordinate.[12] 'Control' has been specifically used to attribute responsibility to civilian leaders[13] and the existence of a *de jure* or *de facto* superior-subordinate relationship has been accepted to meet the threshold of effective control.[14]

Failure to prevent, repress or punish subordinates attracts liability for the superior. If a superior had the material ability to prevent crimes of subordinates, he may be found liable.[15] Additionally, failure to take 'necessary' and 'reasonable' measures to prevent or repress crimes of subordinates attracts liability.[16] Necessary measures are those which are appropriate for a superior to discharge his functions while reasonable measures are those which fall within the material power of the superior.[17] Failure to exercise control properly, and failure to take measures to prevent[18] or punish crimes,[19] attracts responsibility.

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[7] ICC Statute, Art.28(b)(iii).

[8] International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 827, 25 May 1993, [hereinafter 'ICTY'] Art.7(3); International Criminal Tribunal for Rwanda, Security Council Resolution 955, 8 November 1994, [hereinafter 'ICTR'] Art.6(3); Special Panels in East Timor, UN Transitional Authority in East Timor Regulation No. 2000/15, 6 June 2000 (UNTAET Regulation No. 2000/15); Statute of the Special Court for Sierra Leone, 16 January 2002 [hereinafter 'SCSL'] Art.6(3); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, [hereinafter 'ECCC'] Art.29; Statute of the Iraqi Special Tribunal for Crimes against Humanity, Law No. 1 of 2003, as amended, 18 October 2005, Art.15(4); Statute of the Special Tribunal for Lebanon, 29 March 2006, [hereinafter 'STL'] Art.3(2).

[9] ICTR, *Ndindiliyimana et al*., Trial Chamber [hereinafter 'TC'] II, ICTR-00-56-T, 17 May 2011, ¶126. See also ¶1916.

[10] *ibid*.

[11] ICTR, *Nyiramasuhuko et al*., TC II, ICTR-98-42-T, 24 June 2011, ¶121. See also ICTR, *Bizimungu et al*., TC II, ICTR-99-50-T, 30 September 2011, ¶1872; ICTY, *Stakic*, TC II, IT-97-24-T, 31 July 2003, ¶459.

[12] ICTY, *Aleksovski*, TC, IT-95-14/1-T, 25 June 1999, ¶74.

[13] ICTY, *Mucic et al*., Appeal Chamber [hereinafter 'AC'] IT-96-21-A, 20 February 2001, ¶196.

[14] ICTY, *Kordic and Cerkez*, AC, IT-95-14/2-A, 17 December 2004, ¶839.

[15] ICTY, *Mucic et al*., TC, IT-96-21-T, 16 November 1998, ¶¶394-395. See also ICTY, *Krnojelac*, TC II, IT-97-25-T, 15 March 2002, ¶95;; ICTY, *Aleksovski*, AC, IT-95-14/1-A, 24 March 2000, ¶¶73-74, 81; SCSL, *Taylor*, TC II, SCSL-03-01-T, 18 May 2012, ¶501. ICC, *Bemba*, Pre-Trial Chamber [hereinafter 'PTC'] II, ICC-01/05-01/08-424, 15 June 2009, ¶495.

[16] ICTR, *Bagilishema*, TC I, ICTR-95-1A-T, 7 June 2001, ¶47. See also ICTY, *Halilovic*, TC I, IT-01-48-T, 16 November 2005, ¶74.

[17] ICTY, *Halilovic*, AC, IT-01-48-A, 16 October 2007, ¶63. See also ICTY, *Oric*, AC, IT-03-68-A, 3 July 2008, ¶177.

[18] Elies van Sliedregt, "*Command Responsibility at the ICTY-Three Generations of Case Law and Still Ambiguity*" in Bert Swart, Alexander Zahar, and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p.392.

[19] SCSL, *Fofana and Kondewa*, TC I, SCSL-04-14-T, 2 August 2007, ¶248. See also *Limaj et al*., TC II, IT-03-66-T, 30 November 2005, ¶528; ICTY, *Halilovic*, TC I, IT-01-48-T, 16 November 2005, ¶89.

The *mens rea* attributed to superiors arises from the failure of the superior to take measures to prevent or punish their crimes.[20] Jurists have stated that express evidence of knowledge or inferential proof of knowledge based on the widespread nature of offences may be used to attribute knowledge of crimes of subordinates to superiors.[21] International jurisprudence has held that in the absence of direct evidence of knowledge of the superior, it must be established with circumstantial evidence.[22] Circumstantial evidence *inter alia* the number of illegal acts, their type, scope, time of occurrence, logistics and *modus operandi* have been used to determine the *mens rea* or knowledge of a superior.[23]

Mens rea has been presumed in instances where a superior 'should have known' that a subordinate was committing or about to commit a crime or for failure to acquire such knowledge.[24] Additionally, actual knowledge, defined as the awareness that illegal acts were committed or about to be committed, has been used to attribute *mens rea* to a superior.[25] However, it has also been suggested that even in the absence of proof of actual knowledge, a superior may be found liable for failure to obtain information about the conduct of subordinates.[26] Therefore, varying degrees of *mens rea* have been utilized to attribute responsibility to superiors. Thus, international case law and writings of eminent jurists suggest that a subjective approach must be taken to ascertaining *mens rea* or knowledge of a superior.

Jurisprudence of Sri Lankan courts

The Sri Lankan judiciary has given recognition to the liability of superiors for acts of subordinates. The liability of a Commanding Officer of the Navy was recognized for failure to prevent the torture of a detainee.[27] The Commanding Officer was precluded from stating that he was unaware of the torture of the detained officer, since no complaint was made to him. Fernando J., held that:

> *"……..responsibility and liability is not restricted to participation, authorization, complicity and/or knowledge. His duties and responsibilities as the Commanding Officer were much more onerous. In the Forces, command is a sacred trust, and discipline is paramount. He was under a duty to take all reasonable steps to ensure that persons held in custody (like the petitioner) were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates, particularly those who had contact with detainees. The fact that the petitioner was being held in custody under his specific orders made his responsibility somewhat greater."*[28]

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[20] Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, pp.83-84.

[21] Jenny S. Martinez, "*Understanding Mens Rea in Command Responsibility From Yamashita to Blaskic and Beyond*", 5(3) *Journal of International Criminal Justice*, 2007, p.652. See also ICTR, *Karemera and Ngirumpatse*, TC III, ICTR-98-44-T, 2 February 2012, ¶1530.

[22] ICTY, *Mucic et al*., TC, IT-96-21-T, 16 November 1998, ¶386.

[23] *Ibid*. See also ICC, *Bemba*, PTC II, Decision on the Confirmation of Charges, ICC-01/05-01/08-424, 15 June 2009, ¶429-431; ICTY, *Blaskic*, TC, IT-95-14-T, 3 March 2000, ¶54-57, 308.

[24] ICTY, *Mucic et al*., TC, IT-96-21-T, 16 November 1998, ¶388, 393. See also ICTY, *Blaskic*, TC, IT-95-14-T, 3 March 2000, ¶322; *U.S.A. v Yamashita*, United States Military Commission, Vol. IV, Law Reports, p.82; *U.S.A. v. Soemu Toyoda*, Official Transcript of Record of Trial, 6 September 1949, p.5006.

[25] SCSL, *Taylor*, TC II, SCSL-O3-01-T, 18 May 2012, ¶497.

[26] Ibid p.652-3.

[27] *Deshapriya v. Captian Weerakoon, Commanding Officer, Sri Lanka Navy Ship "Gemunu" and Others* 2003 (2) Sri L.R.99.

[28] *Ibid* p.103.

Thus, the Commanding Officer was found liable for torture of a detainee by his subordinates. The said judgment pertains to the Navy. However, the principle elucidated in the judgment has been applied to superiors of the police force.

An Officer-in-Charge of a police station has been held liable for violation of Article 11 of the Constitution, since he had control and supervision over subordinates who violated the fundamental rights of a detainee.[29]

> *"As Officer-in-Charge he had overall responsibility to supervise and control the conduct of his subordinates, and it was he who had the power to release the Petitioner. He is therefore liable if the Petitioner's arrest and/or detention were unlawful, and for any torture that occurred at the Station."*[30]

Additionally, a superior has been held to incur liability for his acquiescence of illegal acts of subordinates.[31] Prolonged failure to give effect to the directions designed to prevent violation of Article 11 and failure to ensure that a proper investigation, followed by disciplinary or criminal proceedings, has been held to justify inference of acquiescence or condoning of illegal acts, if not also of approval and authorization.[32] Deliberate encouragement, tolerating and acquiescence of inflicting acts of torture and inhuman treatment of a detainee by superior police officers has been recognized as rendering superior officers to be personally liable for illegal acts of subordinates.[33] Kulatunga J., stated that:

> *"If the injuries to the petitioner were inflicted by subordinate police officers without the complicity of the 1st and 2nd respondents one would have expected these two respondents to have sent the petitioner for medical treatment. The failure to do so confirms the allegation that the petitioner was tortured on their orders or instigation…"*[34]

Responsibility of superior officers has received judicial recognition in respect of superior prison officers.[35] Failure to prevent ill treatment of a detainee leading to the violation of the law, Prison Rules and International Conventions, was held to violate the detainee's fundamental rights under **Article 11 and 13(4).** Court held that:

> *"…..Officer In Charge, the Chief Jailor and the Superintendent of the Negombo prison, respectively, were under a duty to take all reasonable steps to ensure that the persons kept in the Prison are treated with kindness and humanity.….On a consideration of the totality of the circumstances of this case, I declare that there had been dereliction of duties by the 3rd, 4th and 5th respondents for not being able to prevent the assault on the deceased by some of the Prison Officials and therefore they too are responsible for the infringement of the deceased's fundamental rights….."*[36]

It is patently clear that the jurisprudence of Sri Lanka has given recognition to the responsibility of superior officers for illegal acts of subordinates. Notwithstanding such recognition, police brutality is a continuous recurrence, often with the sanction of superiors and/or by their failure to prevent and/or punish such illegal acts. Therefore, the author argues that the time is nigh for legislative/regulatory recognition of

[29] *Sanjeewa Attorney-at-Law (on behalf of Gerald Perera) v. Suraweera, OIC Wattala and Others* 2003 (1) Sri L.R.317.
[30] *Ibid* p.322.
[31] *Ibid* p.328.
[32] *Ibid* p.329.
[33] *Ratnapala v Dharmasiri HQI Ratnapura* (1993) 2 Sri L.R.224.
[34] *Ibid* p.236.
[35] *Lama Hewage Lal (Deceased) and Others v. OIC, Seeduwa Police Station and Eight Others* 2005 (1) Sri L.R.40.
[36] *Ibid* p.54.

responsibility of superiors in the police force for illegal acts of subordinates.

Legislative or regulatory recognition of responsibility of superiors and commanders

In the absence specific laws to recognize responsibility of superiors for acts of subordinates, there exists no incentive for superiors to prevent and/or punish illegal acts of subordinates. This glaring lacuna has led to recurrence of incidence of police brutality of detainees.

In this context, the National Police Commission (NPC) can play a vital role in finding superiors responsible for acts of subordinates, through disciplinary control and dismissal of police officers.[37] The NPC is empowered to entertain and investigate public complaints against police officers[38] and Rules of Procedure for such public complaints have been adopted.[39] Therefore, legislation/regulations must be introduced to enable a detainee or any person to complain of police brutality, to the NPC. Legislation/regulations must be introduced to provide for a specific framework to conduct investigations to allegations of police brutality and institute disciplinary action against superiors for acts of subordinates.

There is a lacuna of specific provisions pertaining to complaints against police brutality and superior responsibility for acts of subordinates. In the absence of such specific provisions, disciplinary action taken against superiors may not be retributive or punitive. Therefore, legislation/regulations must make specific provision to recognize the responsibility of superiors for illegal acts of subordinates, combined with punitive sanctions being imposed on them, if found guilty.

Drawing from the recognition of superior responsibility in international criminal law, the legislative/regulatory framework must recognize liability of a superior for illegal acts of subordinates under his effective control or authority. The relationship of superior and subordinate must be clearly established to find a superior liable. If established, a superior may be responsible for failure to exercise proper control over subordinates. If a superior had knowledge of illegal activities of subordinates, or imminent commission of illegal activities, or if illegal activities came within the effective responsibility and control of the superior, and the superior consciously disregarded the same, he must be found liable for acts of subordinates. Failure to take necessary and reasonable measures within his power, to repress illegal activities or to report them to a competent authority such as the NPC for investigation and prosecution, must attract punitive sanctions against the superior.

Legislation/regulations must provide a yardstick to determine the illegality of acts of subordinates. Determining the illegality of acts of subordinates may not always be assessed objectively. In the absence of a definition of police brutality, torture or inhuman and degrading treatment of a detainee, a subjective approach may be taken towards ascertaining the illegality of acts of subordinates. Notwithstanding the lack of a definition of police brutality, torture or inhuman and degrading treatment, the NPC subjectively assess whether acts of subordinates were justified.

Legislation/regulations must therefore unambiguously draw the parameters for the element of *mens rea* or knowledge required of superiors when attributing responsibility for illegal acts of subordinates. Instances in which a superior has knowledge or the

[37]Constitution of the Democratic Socialist Republic of Sri Lanka [hereinafter Constitution], Art.155G(1)(a).
[38] Constitution, Art.155G(2).
[39] Rules of Procedure for Public Complaints Investigation Gazette Extraordinary 2047/22 dated 28.11.2017.

necessary *mens rea* to attract liability must be specified. The legislative/regulatory framework must also include guidelines or indicia to illustrate circumstantial evidence used to determining *mens rea*/knowledge. Failure to do so may result in superiors being averse to giving orders to subordinates causing grave affectation to services rendered by the police.

In instances requiring spontaneous action, subordinates may be compelled to take action without formal orders from superiors. Legislation/regulations must provide for such situations, enabling the NPC to evaluate the orders to conduct spontaneous operations and the degree of involvement of the superior.

The existence of such a legislative/regulatory framework which attracts penal sanctions for infractions of subordinates on superiors contributes to deter illegal activities of subordinates, as superiors would exercise greater vigilance over subordinates. The possibility of being attributed criminal responsibility must be coupled with punitive sanctions such as delay and/or suspension of promotions, causing serious detriment to the career progression of superior officers. Such measures may deter superiors from authorizing and/or failing to prevent and/or punish illegal acts of subordinates. This would contribute to reducing incidence of police brutality which is usually condoned and/or not punished by superiors.

Conclusion

Considering the deterrent created by introducing a legislative/regulatory framework to recognize responsibility of a superior for acts of subordinates, the author contends that the existence of a legislative/regulatory framework for finding superiors liable for failure to prevent and/or punish illegal acts of subordinates, may largely contribute to curtail incidence of police brutality. Such a framework must specify the scope of illegal acts provided for and make specific reference to the element of *mens rea* and knowledge required of a superior, to effectively be applied to the police force, to curtail recurrence of police brutality by subordinates of the police force.

FORMATION OF E-CONTRACTS AND E-CONSUMER PROTECTION IN SRI LANKA

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Introduction

Sri Lanka recorded a 29.3% of internet users of the total population and a 0.2% of involvement in the world in 2016[1]. The engagement of locals in the internet and in electronic transactions have rapidly grown surpassing geographical boundaries in obtaining unlimited access to information, goods and services which were formerly limited to physical stores. The evolution of Information and Communication Technology ("ICT") in recent years have outdone human expectations, specially, in electronic commerce ("e-commerce") which has become ubiquitous. The internet has evolved in great strides and has become the most successful mode of communication between business-to-business (B2B), business-to-consumer (B2C) and consumer-to-consumer (C2C) transactions.

Electronic contracts ("e-contracts") are advantageous mainly due to its instantaneous nature. It can however also be detrimental in terms of trust, reliability and security in contrast to traditional contracts. Consumer confidence is mainly based on 02 elements; the products meeting consumer expectations and if unmet, the availability of an expedited remedy[2]. In consideration of a B2C transaction a local consumer may be more confident over a paper transaction in comparison to an autonomous online transaction in a website. As the entire transaction is made through the use of technology it is distant and impersonal. Sensitive information has to be shared in an open network infrastructure to facilitate payments. Whether the browser is secure or whether it encrypts the sensitive personal and financial information provided by the e-consumers, is questionable. Another concern is whether the browser provides a comprehensive privacy policy to enable data protection. A risk of involvement of hackers, fraud, exploitation of privacy and data prevails in e-contracts. False and misleading representations of products in respect of standards, quality, grade and the fitness for the purpose, misrepresentations in warranties and guarantees, after sale services are in question until receipt of products. Return policies may not be in place, thus limiting the bargaining power of an electronic consumer ("e-consumer"), exploiting the right to all information relating to the transaction and thereby the freedom of contract. This paper examines the Sri Lankan context of protection of e-consumerism with respect to e-contracts formed on websites.

Background

Sri Lanka established legislative enactments to address e-commerce by utilizing the functional equivalence and technology neutrality to traditional contract law. Based on United Nations

[1] Internet Live Stats, 'Sri Lanka Internet Users' (2016) <http://www.internetlivestats.com/internet-users/sri-lanka/> accessed 4 October 2019

[2] Ashok R Patil and Pratima Narayan, 'E-CONSUMER PROTECTIONIN INDIA: TRENDSAND CHALLENGES', < https://webcache.googleusercontent.com/search?q=cache:OrkdKGEAQUYJ:https://revistas.unlp.edu.ar/ReDIP/article/download/6354/5418/+&cd=1&hl=en&ct=clnk&gl=lk> accessed 5 October 2019

Commission on International Trade Law ("UNCITRAL") model the **Electronic Transactions Act, No. 19 of 2006** ("ETA") was enacted. The subsequent amendment, the **Electronic Transactions (Amendment) Act, No. 25 of 2017** ("ETAA") further aligned the Sri Lankan e-commerce spectrum to the United Nations Convention of on the Use of Electronic Communications in International Contacts. **The Computer Crimes Act, No. 24 of 2007** addresses any violations committed in the cyberspace. With respect to consumer protection, the prevailing legislation is the **Consumer Affairs Authority Act No. 09 of 2003** ("CAAA")[3], which was created to address physical commercial trade. The functional equivalency and the absolute application of the CAAA to e-contracts on websites, is however, is arguable.

Formation of e-contracts

An e-contract contains the identical elements to a contract in the traditional sense[4]. There are 03 types of websites which can form e-contracts with consumers; non-interactive websites which provides only information and any contact with the vendor is through other modes of communication; interactive websites where an e-consumer can log onto a site, select items for purchase, and enter payment details and lastly automated interactive websites which are similar in operation to interactive sites with the exception of automated systems in place[5]; and based on each type of website the time of formation of an e-contract can differ. An e-contract offer is similar to a traditional offer[6]. In establishing an e-contract offer in websites, *Richards*[7] is of the view that depending on the content made available to the buyers, websites can constitute offers. In such circumstances, the objective intention of the vendor is looked employing the objective test of a reasonable man. In *Fisher v Bell*[8] an offer in a supermarket was held to be constituted when the buyer produced the goods at the cashier. Similarly, goods displayed in a website clicked 'into' a virtual shopping cart and proceeded to 'checkout' constitutes only to an offer. Another stance is that if order buttons are marked 'place order' instead of 'purchase' that there is likelihood of being considered an invitation to treat[9]. However, shedding light to the matter **section 11A[10] of the ETA**, provides that advertisements accessible unilaterally on websites amounts merely to invitations to offer, unless the advertisement clearly indicates the intention of the party proposing the transaction to be bound if accepted.

Notwithstanding that an offer in a website is generated from the buyer and accepted

[3] The Act repealed the Consumer Protection Act No.01 of 1979, Fair Trading Commission Act No.01 of 1987 and the Control of Prices Act (Cap 173) as published in Consumer Affairs Authority Act No. 09 of 2003, Rules & Regulations, Consumer Affairs Authority, Ministry of Industry and Commerce, <http://www.caa.gov.lk/web/index.php?option=com_content&view=article&id=111&Itemid=560&lang=en>, accessed 02 October 2019

[4] *'A legally binding agreement made between two or more persons, by which rights are acquired by one or more acts or forbearances on the part of the other on the part of the other or others*' as published in Jack Beatson, *Anson's Law of Contract*, (28th edn, OUP 2002)

[5] *Christensen, Sharon, 'Formation of Contracts by Email -Is it Just the Same as the Post?' [2001] QUTLawJJl 3; (2001) 1(1) Queensland University of Technology Law and Justice Journal 22*

[6] 'A*n expression of willingness to contract on certain terms made with the intention that a binding agreement will exist once the offer is accepted'* as published in Paul Richards, *Law of Contract,* (9th edn, Longman 2009)

[7] Paul Richards, *Law of Contract,* (9th edn, Longman 2009)

[8] *Fisher v Bell* [1961] 1 QB 394

[9] Julia Hörnle, 'The European Union Takes Initiative in the Field of E-Commerce', Journal of Information, Law and Technology, 31 October 2000, <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/hornle>, accessed 02 October 2019.

[10] Electronic Transactions (Amendment) Act, No. 25 of 2017, s8

by the vendor, web sites include click-wrap agreements which prior to acceptance of the buyers order form by the vendor, a dialogue box or a pop-up window will appear on screen to provide a series of set terms and conditions wherein the buyer has the opportunity to tick either 'OK', 'I Accept' or 'I Agree' to provide his assent or click the 'cancel' or close the window. Drawing a significant contrast between traditional contracts, the offeree dictates the terms and conditions and has the sole bargaining power in the transaction over the offeror. As the terms and conditions are curated solely by the vendor it refutes any bargaining powers with the offeror. Once cancelled or closed the window of the terms, the offeror is rendered incapable of using the said goods or services. Click-wrap agreements are created for the benefit of the vendor to easily manage e-customers collectively and the ICT industry have also made these agreements a threshold to save digital signatures by utilizing clauses which are not consumer friendly or covered under cyber laws[11]. This has created an unequal bargaining power between the parties, placing the vendor in a superior position compared to the purchaser, thereby creating a lack of freedom of contract.

Acceptance[12]; the final act of forming an e-contract, is similar to a traditional contract. Acceptance in a website is based upon the nature of a website. Upon an e-consumer placing an order on a non-interactive website, acceptance doesn't form until the owner communicates same through email or another mode. In an interactive website the owner is likely to communicate clearly what constitutes an offer or an invitation to treat which also applies to the moment a contract is formed. In automated interactive websites acceptance is instantaneous, and is effective upon receipt of confirmation by the e-consumer[13]. To avoid unnecessary liability, as Amazon.com utilizes acceptance of an order as a buffer and establishes acceptance only upon an e-consumer receiving a confirmation that the goods have been shipped[14]. The postal rule[15] which was created to remedy the time and distance delay in traditional contracts is applicable for interactive and non-interactive websites depending on their mode of communicating acceptance, excluding automated interactive websites, where acceptance occurs instantaneously.

Among the key significances of e-contracts is its instantaneous nature, which was initially addressed by Denning J where a demarcation was made against the postal rule, '**[T]he rule about instantaneous communications between parties is different from the rule about post. The contract is only complete when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received**'*[16]*. *Hill*[17] further provides that unlike in post the likelihood of the letter of acceptance

[11] Alison S. Brehm & Cathy D. Lee, 'From the Chair: "Click Here to Accept the Terms of Service"', American Bar Association (Jan 2015), Vol. 31 No. 1, <http://www.americanbar.org/publications/communications_lawyer/2015/january/click_here.html>, accessed 12 September 2019

[12] "'*[T]he final unqualified expression of assent to all the terms of an offer*'" as published in G. H Treitel, *The Law of Contract* (11th edn, Sweet & Maxwell 2003)

[13] Al Ibrahim M, Ababneh A & Tahat H, The Postal Acceptance Rule in the Digital Age, Journal of International Commercial Law and Technology, Vol. 2, Issue 1, 2007, <http://www.jiclt.com/index.php/JICLT/article/viewFile/33/20>

[14] Benjamin Groebner, 'OOPS! THE LEGAL CONSEQUENCES OF AND SOLUTIONS TO ONLINE PRICING ERRORS', 1 Shidler J. L. Com. & Tech. 2 (2004), < http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/354/vol1_no1_art2.pdf?sequence=1>, accessed 26 September 2019

[15] The postal rule provides that acceptance is effective when it is posted and a contract is considered to be formed even if the acceptance fails to reach the offeror.

[16] *Entores v Miles East Corporation* [1955] 2 QB 327

[17] Simone W. B Hill, 'Email Contracts - When is the Contract Formed?', [2001] JlLawInfoSci 4; (2001) 12(1) Journal of Law, Information and Science 46, <http://www.austlii.edu.au/au/journals/JlLawInfoSci/2001/4.html>, accessed 3 October 2019

being lost in the system in email communication is a rarity. Any error in the system would indicate to the sender as a 'delivery failure' notification or the email would 'bounce back', unlike in the postal system, where status of letter would remain unknown until received by the receiver. A similar stance can be taken with respect to websites where an automated message will appear with an error notice in the event of any default in the system. However, to ensure that instantaneity does not place the e-consumers in a disadvantageous position over e-mistakes as provided in **ETA section 14A (1) (a) and (b)**[18] has been enacted by which an input error made in an automated message system in forming or performing an e-contract can be rectified if the vendors' attention is immediately brought to the error and no material benefit has been gained from such transaction by the e-consumer.

In paper contracts revocation can be communicated any time prior acceptance[19]. In *Payne v Cave*[20] it was decided that until acceptance is communicated an offer can be revoked and no legal obligation exists. Any revocation subsequent to acceptance is *prima facie* a breach of contract. Revocation with respect to non-interactive websites and interactive websites can be made prior to the website owner communicating his acceptance. However, the stance is different in terms of an automated interactive website, if the confirmation of acceptance is instantaneous. In such instances the model utilized by Amazon.com can be considered e-consumer friendly in terms of revocation.

As mentioned previously, the vendor exercises an unlimited bargaining power over an e-consumer. E-consumer are easy prey to scrupulous vendors on e-commerce platforms, who misrepresent the nature of products and services and acts fraudulently by providing ambiguous information about the products instead of providing transparency to all pertinent information. In the Indian case of *Rediff.com India Ltd. v Urmil Munjal*[21] it was held that the online platform was liable for deficiency of service in not providing sufficient information for the e-consumer to return a deficient product to the supplier connected through the platform.

In traditional contracts, the terms and conditions cannot be amended without the express written agreement between the parties. Nonetheless, terms and conditions of e-contracts are updated at the sole discretion of the vendor and without any prior notice to the e-consumer. While in the traditional sense the contract would be rendered null and void it doesn't generally apply to e-contracts thereby placing e-consumers in an unfavorable position with lack of bargaining power and freedom of contract. In the US case of *Briceno v. Sprint Spectrum, L.P.*,[22] it was held that a customer who was informed of yet did not read the updated terms and conditions were bound to such updates. The judgment further provided that it was sufficient for the vendor to display in its invoices that the terms and conditions were subject to periodic updates and the mode of access to such. The principal feature in consumer protection is to ensure good business practices while protecting the interest of consumers. Due to the anonymity of e-contracts there is a greater need for an e-

[18] Electronic Transactions (Amendment) Act, No. 25 of 2017, s10

[19] Ibid

[20] *Payne v Cave*, (1789) 3 Term Rep 148

[21] *Rediff.com India Ltd. v/s Urmil Munjal* RPNo.4656 of 2012

[22] *Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176 (Fla. Ct. App. 2005), cited in Seth A Drucker, 'Online Terms and Conditions: Are They Enforceable, Can They Be Changed, and What Should You Look Out For in Your Contractual Relationships?', Foster Swift Business & Corporate Law Report, (2014), <http://www.fosterswift.com/communications-Online-Terms-Conditions-For-Contractual-Relationships.html>, accessed 11 September 2019

consumer to be well informed of the terms and conditions, technical steps for the conclusion of an e-contract of a transaction[23].

In comparison to a traditional contract where the parties physically meet prior contracting e-contracts can be entered in anonymity. In such circumstances a growing concern is the involvement of minors, who are in law incapacitated to enter into agreements due to lack of maturity and the inability to comprehend the depth of contractual duties and liabilities. With the popularity of smartphones, the engagement of minors in e-contracts are commonly seen. In the US case of *I.B. v. Facebook, Inc*[24] a minor unknown to his parents utilized their credit cards to purchase Facebook credit for gaming purposes. It was argued in court that the e-contract was voidable as the minor lacked capacity to enter into a legally enforceable contract. However, the case was dismissed due to the lack of derogatory claim sought. Having noted the significant number of minors involving in e-contracts without guardians, it was provided for in the **California Family Code s 6710** that minors are capable of entering into contracts which can however, be disaffirmed subsequently by minors or parents despite rendering a service in such respect, as per *Arias*[25]. The **Distance Selling Directive in Article 4(2)** provides for the protection of minors engaged in e-contracts[26]. The Sri Lankan laws are yet to address the protection of minors engaged in e-contracts.

In the event of dispute, the jurisdiction is referred to ascertain where the cause of action arose. The parties to a contract prefer to include their country of residence in a contract due the familiarity of laws and access to courts. Jurisdiction is however, a grey area in e-contracts as the parties to an e-contract prefer their own respective jurisdictions, to which the other maybe completely ignorant of. It has become a challenge in e-commerce to locate the exact geographical location of online vendors. E-mail domains, designation of websites, electronic addresses or home pages do not necessarily relate to the place of business of the vendor or supplier[27]. Even though, domain names may provide possible indications, there is no guarantee that the undertaking was established in such country. This aspect however, is rendered irregular due to the geographical disparities, languages and variations in jurisdictions. In the Indian case of *Rajinder Singh Chawla v. makemytrip.com*[28] the court rejected entertaining the matter due to lack of jurisdiction. However, in a subsequent instance in the Indian case of *National Commission in Marwar Engineering College and Research Centre v. Hanwant Singh*[29] it was held that the consumer's place of e-commerce transaction is the jurisdiction valid for filing a complaint.

Conclusion

The digital world is rapidly evolving and expanding and has becoming an essential mode of commercial transactions. In comparison to the previous decade, e-commerce plays a pivotal role in daily human lives, with the increase number of smart phones and internet penetration. The internet has made the globe a one digital market space and among other things, by giving opportunity for entrepreneurs to reach a wider market and consumers an unlimited affordable choice.

[23] Ibid (n2)

[24] I.*B. v. Facebook, Inc*, No. C-12-1894 CW (Northern Dist. Ct. of California 2012)

[25] Martha L. Arias, 'INTERNET LAW - Can Children Enter into Legally Binding Online Contracts Using their Parents' Credit Cards?', <https://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2548>, accessed 2 October 2019

[26] Distance Selling Directive, Article 4(2)

[27] Ibid (n2)

[28] *Rajinder Singh Chawla v. makemytrip. Com,* First Appeal 355/2013, SCDRC Chandigarh

[29] National Commission in Marwar Engineering College and Research Centre v. Hanwant Singh, IV (2014) CPJ 582 (NC)

However, the full potential of e-commerce can only be achieved by providing stability, trust, reliance and security for e-consumers to be comfortable and e-literate in cyberspace.

An informed consumer is an asset of the nation and considerably better equipped to look after his interests than is an uninformed consumer[30]. E-consumers should be afforded the opportunity of freedom of contract with access to comprehensive information of products and the technicalities in completing e-contracts. Transparency in information and transaction is pivotal in gaining e-consumer trust. Another aspect is to provide for a set of standard terms and conditions in e-contracts termed in simple language instead of legalese for the better understanding by e-consumers.

E-consumers require to be educated in e-commerce and e-contracts through multi-media to ensure trust is established. Most of all e-consumers require to be facilitated with remedies with respect to product defaults, delivery of wrong products, return of products etc. and ensure their grievances are heard and expeditiously remedied. E-commerce businesses must establish self-regulatory policies and procedures to gain consumer confidence. As an e-consumer lacks opportunity to physically examine a product purchased online an adequate grace period should be afforded to return products, if required. Digital platforms which facilitate market space for various suppliers should ensure the credibility of such suppliers. To avoid unauthorized data-harvesting, data protection laws must be enacted. Minors must be supervised and protected by their guardians and take necessary action to refrain minors from engaging in e-contracts.

As viewed, the existing consumer law in Sri Lanka is inefficient in providing adequate protection to e-consumers and requires reforms to address the growing legal and social concerns. The use the functional equivalent approach to CAAA in e-consumer protection and welfare within the domestic parameters is inefficient and at times, impractical. While the businesses have a significant role in providing due protection to the customers and thereby gaining trust and loyalty of consumers, the Sri Lankan government should play the crucial to update consumer laws to address the growing concerns of e-contracts and e-consumers. A common grievance of e-consumers in Sri Lanka is lack of regulatory authority with online presence to raise grievances or to provide online alternate-dispute-resolution platforms. With respect to digital platforms and vendors located in various jurisdictions, the State requires to co-operate with other jurisdictions to streamline procedures and to safeguard the interests of local e-consumers. As provided by Charles Clarke, "the answer to the machine is in the machine[31]"; the modern-day problems require modern day solutions.

Sri Lanka being a developing nation is yet to reach its full potential in e-commerce. While it is a universal fact that law cannot surpass the pace of technological innovations, in a world of 'haves' and 'have-nots' Sri Lankan consumers should not be placed with the 'have-nots', specially in providing cross-border dispute resolution mechanisms merely due to the lacuna of relevant laws. With the use of the new UN Guidelines on Consumer Protection of 2015[32] on e-contacts which

[30] Shashi Nath Mandal, 'E-Consumers' Protection in India', Global Journal of Management and Business Research: E Marketing Volume 16 Issue 5 Version 1.0 Year 2016, < file:///C:/Users/ASUS/Desktop/Law%20Journal%202019/India/2142-1-2121-1-10-20170301.pdf>, accessed 4 October 2019

[31] Charles, Clark, 'The Answer to the Machine is in the Machine', in: P. Bernt Hugenholtz (ed.), The Future of Copyright in a Digital Environment, The Hague: Kluwer Law International, p. 139

[32] United Nations, 'United Nations Guidelines for Consumer Protection', <

facilitates fair and equitable treatment, ethical commercial practices, transparency, disclosure, awareness and education, secure payment systems, fair affordable and speedy dispute resolution, consumer privacy and data security; Sri Lanka requires to take steps to prioritize e-consumer protection simultaneously with the development of e-commerce.

https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf>, accessed 5 October 2019

මරණ දඩුවම (නෛතික සහ අධිකරණ වෛද්‍ය විද්‍යාත්මක විග්‍රහය)

ඩන්කන් අබේනායක

Attorney-at-Law,
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"If you hang 100 guilty but one innocent, the system is a failure"

පුද්ගල ක්‍රියාවක් හෝ නොකර හැරීමක් හේතුවෙන් සමාජීය ප්‍රගමණයට බාධා ඇති කරන අනීතික හැසිරීම් අපරාධ වශයෙන් පොදුවේ අර්ථ නිරූපණය කළ හැකිය. කිසියම් ජනසමාජයක අපරාධ ක්‍රියා සිදු වීම සහ අපරාධ වර්ධනය වීම මගින් එම සමාජයෙහි මහජන සාමයට මෙන්ම ඉදිරි පැවැත්ම කෙරෙහිද ඍණාත්මක බලපෑම් ඇති කරන බව නොඅනුමානය. එම නිසා ලොව සෑම රාජ්‍යක්ම විසින් තම සමාජයට එරෙහිව සිදු කරනු ලබන අපරාධ වළක්වා ගැනීම සඳහාත්, නීතිය සහ යුක්තිය ආරක්ෂා කර ගැනීම සඳහාත්, පුද්ගල නිදහස පවත්වාගෙන යාම සඳහාත්, අපරාධ නීති පද්ධතියක් මෙන්ම දඩුවම් යාන්ත්‍රණයක්ද සකස් කොට ගෙන ඇත. එලෙස සකසා ගෙන ඇති නීති සහ දඩුවම් යාන්ත්‍රණයට අනුව සමාජයේ සාමකාමීව ජීවත් වන පුද්ගලන් හට ඉතා දරුණු වේදනාවක් සහ අප්‍රතිකාරී හානි සිදු කරන ලද අපරාධකරුවන්ට ලබා දෙන උපරිම දණ්ඩනය ලෙස මරණ දඩුවම බොහෝ රාජ්‍යයන් විසින් භාවිත කරනු ලබයි.

ඇසට ඇසක් සහ දතට දතක් (Eye for an eye, Tooth for a Tooth) යන මිලේච්ඡ සහ අමානුෂික දණ්ඩන සංකල්පය ලොව ඉපැරණි ශිෂ්ඨාචාරයන්හි දී පිළිගත් දඩුවම් විධියක් ලෙස සලකා භාවිත කළද, වර්තමානයේදී ලොව බොහෝ රාජ්‍යයන් විසින් එම දඩුවම් සංකල්පය භාවිතයෙන් ඉවත් කොට තහනම් කර ඇත. කෙසේ වුවද දැනට ලොව රටවල් 58ක් පමණ ක්‍රියාකාරීව මරණ දඩුවම ක්‍රියාත්මක කරන අතර මරණ දඩුවම තහනමට ලක් කර ඇති හෝ ක්‍රියාත්මක නොකරන රටවල් 142ක් පමණ හඳුනා ගත හැකි වේ. චීනය, ඉරාණය, සවුදි අරාබිය, වියට්නාමය සහ ඉරාකය වැනි රටවල් මරණ දඩුවම ක්‍රියාත්මක කරන ප්‍රධාන රටවල් වශයෙන් වාර්තා වන අතර චීනය වසරක් තුළ දහසකට අධික පිරිසකට මරණ දඩුවම ක්‍රියාත්මක කරනු ලැබේ. එල්ලා මැරීම (Judicial Hanging)" ශීර්ෂච්ඡේදනය (Beheading), වෙඩි තැබීම (Shooting) මාරක නික්ෂේපණය (Lethal Injection) විද්‍යුත් චිතක්පය (Electrocution) ගල්ලෑම (stoning) සහ විෂ වායු ආඝ්‍රාණය (Inert gas asphyxiation) වැනි විවිධ ක්‍රම මෙම රටවල් විසින් මරණ දණ්ඩණය ක්‍රියාත්මක කිරීම සඳහා උපයෝගී කොට ගනී. එම ක්‍රම අතුරින් එල්ලා මැරීමේ ක්‍රමවේදය මරණයට පත්වන පුද්ගලයා හට වේදනාව අවම ක්‍රමය වශයෙන් හඳුනාගෙන ඇත.

ශ්‍රී ලංකාව තුළදී ද දරුණු අපරාධ සඳහා ලබා දෙන දඩුවමක් වශයෙන් මරණ දඩුවම[1] හඳුන්වා දී ඇති අතර ඒ සඳහා එල්ලා මැරීමේ ක්‍රමවේදය පමණක් භාවිත කරනු ලැබේ. වර්ෂ 1802 දී එවකට ඉංග්‍රීසි ආණ්ඩුකාර ශ්‍රීමත් ෆෙඩ්රික් නෝර්ත් විසින් එතෙක් මෙරට ක්‍රියාත්මක වූ අමානුෂික දණ්ඩන විධි තහනම් කොට, මරණ දඩුවම ලබා දීම සඳහා එල්ලා මැරීමේ ක්‍රමය පමණක් භාවිත කළ යුතු බවට ප්‍රකාශයට පත් කරන ලදී. ඒ අනුව ඉංග්‍රීසි ආණ්ඩුවට එරෙහිව කැරලි ගැසීමේ වරදට වරදකරු කරමින් ඉංග්‍රීසීන් විසින් 1812 පෙබරවාරි 10 වන දිනයේදී පළමු වරට එල්ලා මැරීමේ දඩුවම සිංහලයෙකුට පණවා ඇත. වර්ෂ 1956 දී එවකට ශ්‍රී ලංකා රජයේ අගමැතිවරයා වූ S.W.R.D. බණ්ඩාරනායක මහතා විසින් මරණ දඩුවම ක්‍රියාත්මක කිරීම තහනම් කළද නැවතත් 1960 වර්ෂයේදී මරණ දඩුවම ක්‍රියාත්මක කිරීම ආරම්භ කරන ලදී. වර්ෂ 1976 ජූනි මස 23 වන දිනයේදී අවසන් වරට ශ්‍රී ලංකාව තුළදී මරණ දඩුවම ක්‍රියාත්මක කොට ඇත. වර්ෂ 1978 දී සම්මත කරගත් ශ්‍රී ලංකා ජනරජයේ නව

ආණ්ඩුක්‍රම ව්‍යවස්ථාවට අනුකූලව කිසියම් වරදකරුවකුට මරණ දඩුවම ක්‍රියාත්මක කිරීම සඳහා ජනාධිපතිවරයා විසින් අදාළ නඩුව විභාග කළ විනිසුරුවරයාගෙන් වාර්තාවක් ලබාගෙන. එම වාර්තාව නීතිපතිවරයා වෙත යොමු කොට එය අධිකරණ අමාත්‍යවරයාගේ නිර්දේශය සඳහා යොමු කළ යුතුය. අනතුරුව ජනාධිපතිවරයාගේ අනුමැතිය හිමි වුවහොත් පමණක් මරණ දඩුවම ක්‍රියාත්මක කළ හැකි වන ලෙසින් ව්‍යවස්ථාව ප්‍රතිසංවිධානය කොට ඇත[2]. එම ව්‍යවස්ථාව හේතු කොටගෙන මරණ දඩුවම නාමමාත්‍රික දඩුවමක් පමණක් බවට පත් වූයේ කිසිදු ජනාධිපතිවරයෙකු එම අනුමැතිය ලබා දීමට මේ දක්වා කටයුතු කොට නොමැති බැවිනි.

No judicial system in the world is infallible and there is a chance that a wrong person can be sent to gallows.[3] ලොව පවතින කිසිදු නීති පද්ධතියක් නොවරදින සුළු නොවන අතර නිර්දෝෂී පුද්ගලයෙකුට වුවද මරණ දඩුවම ලබා දී එල්ලුම් ගසට නියම කිරීම සිදු විය හැකිය.

අපරාධයකට චෝදනා ලත් තැනැත්තෙකු ඔහුට එරෙහිව පැවති චෝදනා අධිකරණය ඉදිරියේදී සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු වූ අවස්ථාවකදී අදාළ වරද සඳහා වරදකරුවකු බවට පත් වේ. එවැනි වරදකරුවකුට දඩුවම් නියම කරනු ලබන්නේ ප්‍රධාන අරමුණු හතරක් සාක්ෂාත් කර ගැනීම සඳහා වේ. එනම් වරදකරුට වරදෙහි **ඵලවිපාක/ ප්‍රතිවිපාක** (Retribution) ලබා දීම සඳහාත්. **අපරාධ නිවර්තනය/ අනාගතයේදී සිදු වීම වළක්වා ගැනීම** (Detterence) සඳහාත්. වරදකරු සිරගතකොට **අයෝග්‍යතාවයට පත් කිරීම** (Incapacitation) සඳහාත් සහ **වරදකරු පුරුත්තාපනය කිරීම** (Rehabilitation) සඳහාත් වේ. එහිදී අවධාරණය කළ යුතු ප්‍රධාන කරුණක් වන්නේ නීති සහ දඩුවම් කොතරම් දැඩි වුවද සමාජය තුළ සිදු වන අපරාධ ප්‍රමාණය සංඛ්‍යාත්මකව පහළ යාමක් හඳුනා ගත නොහැකි වීමය. මරණ දඩුවම ක්‍රියාත්මක වන රටවල පවා මෙම තත්වය එසේමය. ඇමරිකා එක්සත් ජනපදයේදී "give a gun to a American, he becomes a man" යන කියමන පවා ජනප්‍රිය වී පවතී. කිසිදු අපරාධකරුවකු අරාධයකට යොමු වන මොහොතේදී හෝ අපරාධය සිදු කරන අවස්ථාවේදී එම අපරාධය සඳහා තමා නීතියේ රැහැණට හසුවී දඩුවම් ලැබේ යැයි නොසිතීමද මෙයට හේතුවක් විය හැකිය. එමෙන්ම "Chaos Theory" එනම් දෙන ලද අවස්ථාවකදී මිනිසෙකුගේ හැසිරීම කෙසේ සිදු විය හැකි දැයි. කිසිවෙකුට උපකල්පනය කළ නොහැකි වීම නිසා ඕනෑම පුද්ගලයෙකු අවස්ථානුගත තත්වය අනුව අපරාධයක් හෙවත් වරදක් කිරීම සඳහා යොමු වීමේ සම්භාවිතාවයක් තිබිය හැකිය.

ශ්‍රී ලංකාවේ ක්‍රියාත්මක වන නීතිය අනුව මරණ දඩුවමින් දඩුවම් කළ හැකි වරදවල් කිහිපයක් හඳුනා ගත හැකිය. එනම්.

- මිනිමැරීම.[4]
- හෙරොයින් ග්‍රෑම් 02ක්. කොකේන් ග්‍රෑම් 02ක්. මෝපින් ග්‍රෑම් 03ක් හෝ ඕපියම් ග්‍රෑම් 500ක් ජාවාරම් කිරීම හෝ සන්තකයේ තබා ගැනීම.[5]

වර්ෂ 2018 දෙසැම්බර් මාසය වන විට උක්ත වැරදි සඳහා වරදකරුවන් වී මරණ දඩුවමට නියම වූවන් 1299 ක් පමණ ශ්‍රී ලංකාවේ සියලු බන්ධනාගාර තුළ රඳවා තබා සිටි අතර ඉන් 84 දෙනෙකු කාන්තාවන් වූන[6]. මරණ දඩුවමට නියම වුවද එම දඩුවම ක්‍රියාත්මක නොවීම නිසා දීර්ඝ කාලයක් බන්ධනාගාර ගතව සිටීමට සිදු වීම එක් අතකින් බලන විට ඔවුන්ගේ අයිතිවාසිකම් දැඩි ලෙස උල්ලංඝනය වීමක් මෙන්ම අනෙක් පසින් සලකා බලන විට රැඳවියන් විශාල ප්‍රමාණයක් සිටීම හේතුවෙන් ඔවුන්ගේ නඩත්තුව සහ අනෙකුත් සේවා සැපයීම සඳහා විශාල පිරිවැයක් දැරීමට සිදු වී තිබීම ශ්‍රී ලංකා බන්ධනාගාර අධිකාරිය සහ රජය මුහුණ දෙන ප්‍රධාන ගැටලුවක් බවටද පත් වී ඇත.

මරණ දණ්ඩණයට නියම වූ රැඳවියෙකු බන්ධනාගාරය තුළ ගත කරන ජීවිතය එතරම් සුවපහසු නොවන බව අවධාරණය කළ යුතු වේ. මරණ දණ්ඩනයට නියම වූ රැඳවියෙකු සෑම දිනයකදීම උදෑසන 06.00 ට අවදි වීමත් උදෑසන ව්‍යායාම කිරීමත් අනිවාර්ය වේ. ස්නානය කිරීම

[2] 1978 Y%S ,xld m%cd;dka;%sl iuscjdoS ckrc jHjia:dj 34 ∧1& jHjia:dj
[3] http://www.ft.lk/news, article by Chandani Kirinde,
[4] Y%S ,xld oKav kS;s ix.%yh 296 jk j.ka;sh
[5] Opium and Dangerous Drugs Ordinance, No.17 of 1929 and Poisons, Opium and Dangerous Drugs (Amendment) Act, No.13 of 1984
[6] Cornell Center on the Death Penalty Worldwide, https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Sri+Lanka

සඳහා නිශ්චිත වේලාවක් ඇත. සෑම රැඳවියෙකු හටම දිනකට පැයක කාලයක් දිවා සේවා නිලධාරියෙකු භාරයේ එළිමහන තුළ රැඳී සිටීමින් කාලය ගත කිරීමට අවස්ථාව සළසා දෙනු ලබයි. රාත්‍රී 10.00 ට සිර කුටි තුළ විදුලි පහන් නිවා දැමීම සිදු වේ. මසකට එක් දිනයක් පමණක් රැඳවියාගේ ඥාතීන් හට රැඳවියා මුණ ගැසීම සඳහා අවස්ථාව සළසා දෙනු ලැබේ. මෙම ක්‍රියාදාමය බ්‍රිතාන්‍ය සම්ප්‍රදාය අනුව යමින් ඒ ආකාරයෙන්ම සිදු කරන අතර එය බන්ධනාගාර පරිපාලනය නිසි ආකාරයෙන් විනයවත්ව පවත්වාගෙන යාමට මහත් සේ උපකාරී වී ඇත.

අධිකරණමය කාර්යපටිපාටියට අනුව චිත්තිකරුවකු, වරදකරුවෙකු බවට තීන්දු කොට මරණ දඩුවම ලබා දෙන ලෙසින් නියෝග කළද, එම දඩුවම ක්‍රියාත්මක කරනු ලබන්නේ බන්ධනාගාර අධිකාරිය විසින්ය. එය අතිශය භාරදූර කාර්යයක් වන අතර නිවැරදිව ක්‍රියාත්මක කිරමට බන්ධනාගාර පාලන අධිකාරිය වගබලා ගත යුතුය. මරණ දඩුවම ක්‍රියාත්මක කිරීමේදී ද බ්‍රිතාන්‍ය සම්ප්‍රදාය අනුව යමින් අනුගමනය කරනු ලබන රීතීන් රැසක් හඳුනා ගත හැකි වේ. බන්ධනාගාරය තුළ මරණ දඩුවම ක්‍රියාත්මක කරනු ලබන පෝරකය ආසන්නයේ ඊට යාබදව සිර කුටි 06ක් නිර්මාණය කොට ඇත. කිසියම් රැඳවියෙකු හට මරණ දඩුවම ක්‍රියාත්මක කිරීමේ නියෝගය සඳහා ජනාධිපතිවරයාගේ අනුමැතිය ලැබුණහොත් එම දණ්ඩණය ක්‍රියාත්මක කරන දිනයට දින 07කට පෙර පෝරකයේ සිට ඇති 06 වන කුටිය වෙත රැඳවියා ගෙන යනු ලබයි. දිනෙන් දින පොරකය වෙත සමීප වන ලෙස කුටියෙන් කුටියට රැඳවියා මාරු කරන අතර මරණ දඩුවම ක්‍රියාත්මක කරන දිනයට පෙර දිනයේදී පෝරකයට ආසන්නම කුටිය වෙත රැඳවියා ගෙන එනු ලැබේ. එම කාලය තුළදී ලේ ඥාතීන් මුණු ගැසීමටත්, නිවසෙන් ගෙන එනු ලබන ආහාර ලබා ගැනීමටත්, අවශ්‍ය නම් මත්වතුර පවා පානය කිරීමටත් අවකාශ ලබා දෙනු ලැබේ. එමෙන්ම තමා අදහන ආගමික කටයුතු වල නියැලීමටත්, ආගමික ශාස්තෘවරු සහ පූජකවරු මුණ ගැසීමටත් අවස්ථාව සළසා දීම සිදු කෙරේ.

ශ්‍රී ලංකාවේ අළුගෝසුවා (Hangman) රඳවා තබා සිටිනු ලබන්නේ වැලිකඩ බන්ධනාගාරය තුළය. අදාළ රැඳවියා එල්ලා මැරීමට නියමිත දිනයට දින 02 කට පෙර රැඳවියා සිටින බන්ධනාගාරය වෙත අදාළ නිලධාරියා ගෙන්වා ගැනීමට කටයුතු කළ යුතුය. එම නිලධාරියා විසින් පෝරකය නිසි පරිදි ක්‍රියාත්මක වන්නේද යන්න නිවැරදිව පරක්පා කරනු ලැබේ. එහිදී ලීවරය, කඹය සහ තොණ්ඩුව නිසි ප්‍රමිතියෙන් පවතිනවාද යන්න අදාළ නිලධාරියා විසින් පරීක්පා කෙරේ. විශේෂයෙන්ම දඩුවම් ලබන්නාගේ බරට සමාන වැලි කොට්ටයක් අධාරයෙන් පෙරනුරුවක් පවත්වා සියල්ල නිසි ආකාරයෙන් ක්‍රියාත්මක වන බවට සහතික කර ගැනීමද සිදු කරයි.

එල්ලා මැරීමේ දඩුවම ක්‍රියාත්මක කිරීම සඳහා දවසේ නිශ්චිත වෙලාවක් නියම කොට ඇත. ඒ උදෑසන 8.10 වේ. ඊටද විශේෂ හේතුවක් පවති. එනම් කිසියම්ම හෝ හේතුවක් මත ජනරජයේ ජනාධිපතිවරයා (එවකට ආණ්ඩුකාරවරයා) විසින් මරණ දඩුවම ක්‍රියාත්මක නොකිරීමට තීරණය කළහොත් අදාළ පණිවිඩය බන්ධනාගාරය වෙත රැගෙන ඒම සඳහා උදෑසන 8.00 සිට විනාඩි 10 ක කාලයක් වෙන් කොට ලබා දීම සඳහා වේ. බන්ධනාගාරයෙහි දොරවල් ආරුක්කු හැඩයෙන් නිමවා ඇත්තේ ද අදාළ පණිවිඩය රැගෙන එන අශ්වාරෝහකයාට කිසිදු බාධාවකින් තොරව අදාළ නියෝගය පෝරකය වෙත අසු පිටින්ම රැගෙන යාමට හැකි වන ලෙසය. වැලිකඩ බන්ධනාගාරයේ එලෙස පණිවිඩ රැගෙන එන අශ්වයන් බැඳ තැබීමට භාවිත කල ගල්කණු අදටත් එලෙසින්ම දැක ගත හැකිය. මරණ දඩුවම ක්‍රියාත්මක කරන දිනයේදී අනෙකුත් සියලුම රැඳවියන් සිර කුටි තුළට දමා අගුලු ලැම සිදු කරන ලැබේ. කෙසේ උවත් බන්ධනාගාරයේ ඇති අනෙකුත් සියලු ගේට්ටු සහ දොරවල් විවෘතව තබන අතර එලෙස සිදු කරන එකම දිනය වන්නේ ද මෙම දිනයම පමණි.

මරණ දඩුවම ලබන රැඳවියා විශේෂ කැන්වස් කබායක් අන්දවා පෝරකය වෙත කැදවාගෙන එනු ලබන අතර එහිදී ඔහුගේ උරහිස ප්‍රදේශය, උකුල් ප්‍රදේශය සහ දෙකකුල්a n| má ;=klska fj<d oud ysio wdjrKh කරනු ලැබේ. එම අවස්ථාවට බන්ධනාගාර අධිකාරවරයා, ජේලරවරුන් දෙදෙනකු, අලුගෝසු නිලධාරයා සහ අධිකරණ වෛද්‍ය නිලධාරිවරයෙකු අනිවාර්යෙන් සහභාගී විය යුතුය. එම සියලු නිලධාරන්ගේ නිවැරදි අධීක්පණය යටතේ අලුගෝසු නිලධාරයා විසින් උදෑසන 08.10 කනිසමට මරණ දඩුවම ක්‍රියාත්මක කිරීම සඳහා ලීවරය අදිනු ලැබේ. පුද්ගලයාගේ ප්‍රාණය නිරුද්ධ වූ පසු පෝරකයට පහළින් ඇති විශේෂ කුටියේදී අධිකරණ

වෛද්‍යවරයා විසින් දේහය පරීක්ෂා කොට මිය ගිය බව නිශ්චය කර ගනී. අනතුරුව මෘත දේහය බන්ධනාගාර මෘත ශරීරාගාරය වෙත රැගෙන යනු ලැබේ. (යම් හෙයකින් අදාළ පුද්ගලයා මිය ගොස් නොතිබුණහොත් අවශ්‍ය සියලු වෛද්‍ය ආධාර ලබා දී රෝගියා ජීවත් කරවීමට ප්‍රතිකාර සිදු කරන අතර නැවත කිසි දිනයකදී එම තැනැත්තාට මරණ දඬුවම ක්‍රියාත්මක කරනු නොලැබේ.) මෘත දේහය අවශ්‍ය නම් ඥාතීන් හට භාර ගැනීම සිදු කළ හැකි වුවද අවමංගල උත්සව පැවැත්වීම, මල්වඩම් භාවිත කිරීම, තොරණ් නිර්මාණය කිරීම සහ දේහය ආදාහනය කිරීම කිසිසේත් සිදු කළ නොහැකිය. දේහය තැබීම සඳහා මිනී පෙට්ටියක් භාවිත කළ හැකි අතර එය දණහිසට පහළින් තබා ගනිමින් සුසාන භූමිය වෙත රැගෙන යා යුතුය. දේහය භූමදාන කිරීමෙන් අනතුරුව අදාළ වළ පොළොවට මට්ටම් කිරීමද අනිවාර්ය වේ. මේ සියල්ල එලෙසින් සිදු කළ යුතු වන්නේ මරණ දඬුවමට ලක් වූවෙකුගේ ප්‍රජා අයිතීන් අහිමි වීම හේතුවෙනි. වරදකරුවන් එල්ලා මැරීම (Judicial Hanging) සඳහා ලොව විවිධ රටවල් ප්‍රධාන ක්‍රමවේද හතරක් භාවිත කරනු ලැබේ. එනම්.

Short Drop Hanging: වරදකරු අගල් කිහිපයක් පහළට එල්ලවීම සිදු කරවන අතර එහිදී ශරීර ස්කන්ධය සහ ජීවිත අරගලයට දරණ පරිශ්‍රමය හේතුවෙන් තොණ්ඩුවට ගෙල සිරවීමෙන් මරණය සිදු වේ.

Suspension Hanging: වරදකරුගේ ගෙලට තොණ්ඩුව දමා පොළොවෙන් ඉහළට යාන්ත්‍රිකව අගල් කිහිපයක් ඔසවනු ලැබේ. එහිදී ද ශරීර ස්කන්ධය සහ ජීවිත අරගලයට දරණ පරිශ්‍රමය හේතුවෙන් තොණ්ඩුවට ගෙල සිරවී මරණය සිදු වේ.

Standard Drop Hanging: වරදකරුගේ ගෙලට තොණ්ඩුව දමා අඩි 04-06 ක් දක්වා පහළට ඇද වැටීමට සැලැස්වීම සිදු කරයි.

Long Drop Hanging: වරදකරුගේ බර, උස සහ ශරීර ප්‍රමාණය අනුව එල්ලා වැටීම සිදු කරන උස තීරණය කරනු ලබයි.[7]

ශ්‍රී ලංකාවේ බන්ධනාගාර තුළ මරණ දඬුවම ක්‍රියාත්මක කිරීමේදී Standard Drop Hanging සහ Long Drop Hanging යන ක්‍රමවේද භාවිත කරන බව හඳුනා ගත හැකිය. බොහෝ විට Atypical Hanging සිදු කරන ආකාරයට එනම් ගෙළෙහි පැත්තකින් (sub mental position) තොණ්ඩු ගැටය පිහිටා තිබෙන ආකාරයට තොණ්ඩුව ගෙලට දමන අතර ඇතැම් විට Typical Hanging සිදු කරන ආකාරයට එනම් තොණ්ඩුවෙහි ගැටය ගෙළෙහි පිටුපසින් (Suboccipital) කශේරුකාව මත තිබෙන ආකාරයට තොණ්ඩුව ගෙලට දැමීම සිදු කෙරේ. එහිදී ප්‍රමාණවත් ශක්තියකින් සහ දිගකින් යුත් කඹයක් භාවිත කරමින් තොණ්ඩුව සකසා ගනී. පොරකයේ සිට අඩි 05 - 07 දක්වා පහළට එල්ලා වැටෙන සේ උස ගණනය කරන අතර රුධිරයාගේ උස, බර, වයස සහ ශරීර හැඩය යනාදිය පිළිබඳව සැලකිලිමත් විය යුතුමය. මන්ද, දේහය එල්ලා වැටීමේදී කිසි ලෙසකින්වත් ගෙල කඳින් වෙන් වීම සිදු නොවීමට වගබලා ගත යුතු හෙයිනි. ලීවරය ඇදීමත් සමග ලණුවේ දිගට සමාන ප්‍රමාණයකින් දේහය පහළට ඇද වැටීම සිදු වේ. පුද්ගලයාගේ මරණය සිදු වන්නේ ක්පණික ඇදවැටීමත්, තොණ්ඩුවෙහි ගෙළ ආශ්‍රිත ගැටයෙහි ස්වභාවයත් සහ සිරුරේ ස්කන්ධයත් හේතුවෙන් කශේරුකාවේ 02, 03 සහ 04 (C2, C3, C4) යන කශේරුකා පුරුක් ආශ්‍රිතව සිදුවන භග්න වීම හේතුවෙනි. බොහෝ විට ගෙල ආශ්‍රිත කශේරුකාවේ (Cervical Vertebrae) 02වන පුරුක (fracture of the axis - C2) භග්න වීම සිදු වන අතර එය අධිකරණ වෛද්‍ය විද්‍යාවේදී "Hangman's Fracture" වශයෙන් හඳුන්වයි. කශේරුකාවේ 02වන පුරුක භග්න වීම හේතුවෙන් Upper Cervical Vertebrae කොටස ඉරීමට සහ ඇදීමට ලක් වීමත් Pons සහ Medulla යන කොටස්වලට හානි වීමත් සිදු වේ. ක්පණිකව සිදු වන එල්ලා වැටීමේදී කශේරුකාව තුළින් ගමන් කරන සුසුම්නාවට (Spinal Code) සහ මොළ දණ්ඩට (Brain Stem) සිදු වන හානිය නිසා පුද්ගලයාගේ මරණය සුළු වේලාවක් තුළදී සිදු වේ. නමුත් සිරුරේ මාංශ පේශි වල චලනය සහ වෙව්ලීම මරණයෙන් පසුද සිදු විය හැකි අතර හෘද ස්පන්ධනය මිය ගොස් විනාඩි 15-20 දක්වා කාලයක් පමණ වුවද සිදු විය හැකිය.

[7] https://medical-dictionary.thefreedictionary.com/judicial+hanging

ගෙල වැළලාගෙන මිය යාමේදී හෙවත් එල්ලී මරණයට (Suicidal Hanging) පත්වීමේදී සහ ගෙල සිරකර මරණයට (Manual Strangulation) පත් කිරමකදී පුද්ගලයෙකුගේ මරණය සිදු වීමට බලපාන හේතුව. එල්ලා මැරීමේදී (Judicial Hanging) මරණය සිදු වීමට බලපාන හේතුවට (Cause of Death) වඩා වෙනස් බව පැහැදිලි කර ගත යුතු වේ. ගෙල සිර කිරීමකදී ගෙලෙහි ශ්වාසනාලය සිර වීම හේතුවෙන් වායුගෝලය (Atmosphere), පෙනහලු (Lungs) වල ගර්ත (Alveoli) සහ ශ්වාසනාලිකා (Bronchi) අතර සිදු වන වායු හුවමාරුව අඩපණ වීම. උත්තර මහා ශිරාව (Superior Vena Cava) හැකිලීම සහ ශීර්ෂපෝපී ධමනිය (Carotid Arteries) සිර වීම හේතුවෙන් පුද්ගලයාගේ මරණය සිදු වේ. ඊට අමතරව ගෙල සිර කිරීමකදී උගුරු දණ්ඩෙහි හයොයිඩ් අස්ථිය (Hyoid Bone) භග්න වීම ද සිදු විය හැකිය. විශේෂ ගෙල විච්ඡේදනය සිදු කිරීම මගින් ඉහත කරුණු අනාවරණය කර ගැනීමේ හැකියාව අධිකරණ වෛද්‍ය විද්‍යාව සතු වේ. ගෙල වැළලාගෙන සියදිවි නානි කරගැනීමේදී ශ්වසනයට සිදු වන බාධා සහ රුධිර නාලිකා වලට සිදු වන බාධා හේතුවෙන් මරණය සිදු වේ. ඒ අනුව එකිනෙකට වෙනස් හේතු මත ඉහත අවස්ථාවන් හිදී පුද්ගල මරණය සිදු වන බව හඳුනා ගත යුතුය.

අධිකරණයකදී අපරාධ නඩු විභාගයකින් අනතුරුව සාධාරණ සැකයෙන් ඔබ්බට වරදකරු බවට ඔප්පු වුවද. අංශුමාත්‍රයක හෝ සැකයක් නිවැරදිකරු වන්නේ ද යන්න සම්බන්ධයෙන්ද පැවතිය හැකිය යන්න තර්ක කළ යුතු කරුණකි. 1970 දශකය සහ ඉන් පෙරදී ශ්‍රී ලංකාවේ අපරාධ නඩු විභාග කිරීම සඳහා ජූරි සහා විභාග ක්‍රමය බහුලව භාවිත කළද වර්තමානයේදී බහුලවම තනි මහාධිකරණ විනිසුරුවරයෙකු ඉදිරියේදී බරපතල අපරාධ නඩු විභාග කිරීම සහ තීන්දු කිරීම සිදු කරනු ලැබේ. එහිදී පැන නගින ප්‍රධානම ගැටළුව වන්නේ තවත් පුද්ගලයෙකුගේ ජීවත් වීමේ අයිතිය තීරණය කිරීම සඳහා තනි පුද්ගලයෙකුට බලය ලබා දීම සහ තීරක අයිතිය ලබා දී තිබීමය. එය එක් අතකින් සළකා බලන විට විනිශ්චයකාරවරයාටද අනවශ්‍ය පීඩනයක් ගෙන දෙන්නක් විය හැකි වන්නේ මනුද හිත්පිත් ඇති සාමාන්‍ය මිනිසකු වනු නිසාමය. එමෙන්ම වර්තමානයේදී රජය වෙනුවෙන් නඩු මෙහෙයවන්නන් ද ඇතැම් විට සමාජය විසින් බරපතල අපරාධ වලට මරණ දඩුවම අනිවාර්යෙන්ම ලබා දිය යුතු යැයි අපේක්ෂා කරන බව උපකල්පනය කරමින් කටයුතු කරන බවටද විවේචන එල්ල වන අවස්ථාද නැතුවා නොවේ. කෙසේ උවද එහිදී රජයට පුද්ගලයෙකු වරදකරුවකු කිරීමේ යුතුකමක් නොව භාරයක් පමණක් පවතින බව අවධාරණය කළ යුතු වේ. විනිසුරුවරු විසින් ව්‍යවස්ථාපිත නීතියට අනුව යමින් අදාළ අපරාධ සඳහා වරදකරු බව තීරණය කරමින් මරණ දඩුවම ලබා දීම සඳහා නියෝග කළද. වර්තමානයේදී මරණ දඩුවම ක්‍රියාත්මක නොවීම ශිෂ්ඨ සමාජයක ප්‍රගතිගාමී ලක්ෂණයක්ම වන්නේ ය.

Bachan Singh v. State of Punjab[8]

"There can be no doubt that death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches" -Justice Bhagwati-

ඉහත පැහැදිලි කළ කරුණු වලට අමතරව වැරදි සහගත ලෙස අධිචෝදනාපත්‍ර ගොනු වීම,චිත්ති නීතිඥවරයා විසින් ප්‍රමාණාත්මක පරිදි චූදිත වෙනුවෙන් පෙනී නොසිටීම. නීතිඥ සහය චූදිත විසින් ලබා නොගැනීම. වෛද්‍ය විද්‍යාත්මක මතය පිළිබඳව දෙවැනි මත විමසුමකට විනිසුරුවරයා හෝ චිත්ති නීතිඥවරයා යොමු නොවීම. වරදකරු අදාළ අපරාධය සිදු කරන අවස්ථාවේදී පසුවූ මානසික තත්වය පිළිබඳව මානසික වෛද්‍ය වාර්තා සහ සාක්ෂි ලබා නොගැනීම සහ අධිකරණාත්මක දෝප යනාදියද චිත්තිකරුවකු වරදකරුවකු වීමට බලපාන සාධක විය හැකි බව අවධාරණය කළ යුතු වේ.

වර්තමානය වන විට මරණ දඩුවමට ලක් වූ බොහෝ රැඳවියන් එහි චින්දිතයන් බවට පත්ව ඇති බව හඳුනා ගත හැකිය. ඒ පිළිබඳව ඇමරිකා එක්සත් ජනපද අත්දැකීම් වලට අනුව 1992 සිට මේ දක්වා මරණ දඩුවමට නියම වූ පුද්ගලයින් 20කට අධික පිරිසක් පසුකාලීනව සිදු කරන ලද DNA පරීක්ෂණ අනුව නිර්දෝෂී පුද්ගලයින් බවට

[8] 1983 S.C.R (1) 145 at 366.

තහවුරු වීම හේතුවෙන් නිදහස් කොට ඇත. එමෙන්ම Death Penalty Information Centre නම් ආයතනය විසින් 2018 වර්ෂයේදී පළ කරන ලද ලිපියක් මගින් ඇමරිකා එක්සත් ජනපදය තුළදී වැරදි සහගත විමර්ශන සහ තින්දු මත මරණ දඩුවමට ලක් වූවා යැයි සැලකිය හැකි පුද්ගලයින් 10 දෙනෙකුගේ විස්තර අන්තරජාලයට මුදා හැරීමට කටයුතු කර ඇති බවද අවධාරණය කළ යුතුමය.[9]

1990 දී Amnesty International ආයතනය විසින් කෲර, අමානුෂික සහ නොගෞරවනීය (Cruel, Inhuman & Degrading) දඩුවමක් වශයෙන් මරණ දඩුවම ප්‍රකාශයට පත් කොට ඇත.

"Judging by past experience, a substantial number of death row inmates are indeed innocent, and there is a high risk that some of them will be executed."[10]

ඒ අනුව වර්තමානය වන විට මරණ දඩුවම වෙනුවට ආදේශක දඩුවම් වෙත වැඩි අවධානයක් යොමු වෙමින් බවතින බවත් හඳුනා ගත හැකිය. එහිදී.

01. ICCPR යටතේ මරණ දඩුවම අහෝසි කිරීම.

02. මරණ දඩුවම ජීවිතාන්තය දක්වා සිර දඩුවම් ලබා දීම වශයෙන් පරිවර්තනය කිරීම.

03. මරණ දඩුවමට ලක් වූවන් කඩිනමින් පුනුරුත්තාපනය කිරීම.

04. මරණ දඩුවම පිළිබඳව සමාජය තවදුරටත් දැනුවත් කිරීම.

05. අපරාධකරුවන් නිර්මාණය වීම වළක්වන ආකාරයේ නියමයන් පාසැල් විෂය නිර්දේශ තුළට ඇතුළත් කිරීම.

06. නව දඩුවම් පද්ධතියක් හඳුන්වා දීම.

07. ජීවත්වීමේ අයිතිය පිළිබඳව සමාජාවබෝධය ඇති කිරීම. වැදගත් වේ.

ඉහත පැහැදිලි කරන ලද තත්වයන් තුළදී මරණ දඩුවම ක්‍රියාත්මක කරවීම අතිශය ගැටළු සහගත වනු නොඅනුමානය. ඕනෑම පුද්ගලයෙකු දෙන ලද විශේෂිත අවස්ථාවකදී කෙසේ හැසිරේද යන්න කිසිවකුට කිව නොහැකි කරුණකි. එමෙන්ම එම වරදකරුවා ජීවිතයේ කරන ලද එකම වරද ද එයම විය හැකිය. වර්තමාන සමාජ, ආර්ථික, දේශපාලනික සහ සමාජීය සන්දර්භය තුළ හඳුනා ගත හැකි බොහෝ සාධක එවැනි අපරාධකරුවන් නිර්මාණය කොට ඇති බව පැහැදිලි කර ගත හැකි වේ. ඒ අනුව මිනිසෙකුගේ ජීවිතය නීත්‍යානුකූලව අවසන් කරමින් මරණ දඩුවම ලබා දීම සහ එවැනි දඩුවමක් ව්‍යවස්ථාපිත නීතිය තුළ හඳුනාගෙන පැවතීම ශිෂ්ඨ සමාජයකට කෙතරම් උචිත වන්නේදැයි විමසා බැලිය යුතු කරුණකි.

[9] https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent

[10] Amnesty International, Facts and Figures on the Death Penalty, AI Index: Act 50/02/99, London, April 1999 https://www.amnesty.org/download/Documents/164000/act500101996en.pdf

TAKE-OVERS AND MERGERS IN SRI LANKA; LEGAL PERSPECTIVES, DRAWBACKS AND THE WAY FORWARD

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1. Introduction

Significant changes in technology and globalisation that took place in and around the 1990s have transformed and continue to transform how we, as human beings live and work. These changes have not only had an impact on us, but

> *"they have forced firms to reshuffle the cards they hold and remix ownership of assets in the economy."*[1]

According to statistics, over five hundred thousand mergers and acquisition deals have taken place in the last eleven years, making it the highest number of deals in any period in recent history.[2]Whilst the 2018 global M&A market was resilient throughout the majority of the year, the 2019 M&A market sustained its robust volume and strong pace. [3]

When diverting one's attention from the global arena to Sri Lanka, a similar trend is evident - an increase in the number of take-over and merger transactions in recent years. This increase has been facilitated by changes in the domestic economy which have been taking place in the latter part of the 1900s, the most significant change being the opening of Sri Lanka's economy. The Central Bank of Sri Lanka states that *"far reaching policy reforms were introduced to free the economy from an array of controls"* in 1977,[4] thereby signifying to us the genesis of an economy conducive for take-over and merger transactions. However, with the civil war spanning for three decades and ending only in 2009, Sri Lanka's economy has been struggling while much of the benefits envisaged by the said policy did not materialise until now–almost a decade after the end of war. This is not to say all that was planned have come to fruition, but that significant progress has been achieved in comparison to having attained nothing at all. It is the growth of a healthy and dynamic economy which has paved the way not just for take-over and merger transactions, but also for an increased number of such transactions as

> *"companies morph to stay competitive. Some companies may be better off merging or closing, while others are born through spin-offs and entrepreneurship,"* [and] *"all these possibilities keep our economy moving forward."*[5]

[1]Benjamin Gomes Casseres, 'What the Big Mergers of 2017 Tell Us About 2018' (*Harvard Business Review*, 28 Dec. 2017) <https://hbr.org/2017/12/what-the-big-mergers-of-2017-tell-us-about-2018>accessed 15 Sep. 2019)

[2]*Ibid.*

[3]J.P Morgan, *2019 Global M&A Outlook* (first published 2019, J.P Morgan's M&A team 2019) 28

[4]The Central Bank of Sri Lanka, *Economic Progress of Independent Sri Lanka 1948-1998* (CBSL 1998)

[5]Emily Liner, 'What's Behind the All-Time High in M&A?'(*Harvard Law School Forum on Corporate Governance and Financial Regulation,* 16 March 2016) <https://corpgov.law.harvard.edu/2016/03/16/wha

While the above signify how take-overs and mergers are gaining ground in the world, and in Sri Lanka, we are able to see how crucial take-overs and mergers are to the growth of an economy, thereby contributing to the development of a country. The very fact that take-over and merger transactions could contribute both directly and indirectly to raising our country from a lower middle-income country to an upper-middle income country means that greater attention ought to be paid to this area without further ado. One crucial way in which this could be done is by having well thought out laws and/or rules and/or regulations framed specifically for the purpose of governing these transactions. In this light, this paper will examine the existing legal and regulatory regime on take-overs and mergers of companies in Sri Lanka, the drawbacks prevalent in the existing legal and regulatory regime on take-overs and mergers of companies in Sri Lanka and the way forward as a country to ensure their effectiveness and success.

2. The Existing Legal and Regulatory Regime on Take-overs and Mergers of Companies in Sri Lanka

An examination of the way in which Sri Lanka's legal system has facilitated take-overs and mergers calls for an analysis of the Companies Act No.07 of 2007 and the Securities and Exchange Commission Act No. 36 of 1986. Thus, the proceeding sections are dedicated to this task.

- The Companies Act No. 07 of 2007

The provisions pertaining to amalgamation in Sri Lanka's Companies Act No. 07 of 2007 draws its inspiration from Canadian legislation and the **New Zealand Companies Act.**[6]With no definition of the term in the Act, it ordinarily refers to

> *"the blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which will carry on the blended undertakings."*[7]

Dr. Aritttha Wickramanayake identifies amalgamation as "*a true merger*,"[8] and one of many ways in which a merger of separate entities could be accomplished based on their structure.[9]The provisions relevant to it are found in **part VIII of the Act in Sections 239 – 246**, and are applicable to any company[10] be it a listed public company[11]or otherwise. In the words of the learned K. Kanag-iswaran PC,

> *"amalgamation is a voluntary process and is done without the sanction of the court. It is a statutory method of company re-organisation where two or more companies combine and continue as one company. Shareholders in the amalgamating companies either take shares in the amalgamated company or receive other consideration in exchange for their shares. The assets and liabilities of the amalgamating companies become the assets and liabilities of the amalgamated company by operation of law. Amalgamations are generally used*

ts-behind-the-all-time-high-in-ma/>accessed 20 September 2009

[6]Dr. K. Kanag-Iswaran, 'Legal nature of amalgamation and the procedure to amalgamate'*Daily FT* (Sri Lanka, 24 June 2014)
[7]*Ibid.*
[8]AritthaWikramanayake, *Company Law in Sri Lanka* (first published 2007, Arittha Wikramanayake 2007)
[9]*Ibid.*
[10] See § 529of the Companies Act No. 07 of 2007 for the interpretation of 'a company' and § 5 of the Act.
[11]Rule 2 of the Company Take-overs and Mergers Code of 1995, as amended in 2003, states that the Code applies to"take-overs and mergers [only]where the offeree is a listed public company."

> *where, for commercial reasons, an internal group restructuring or merger of separate companies is deemed desirable. Amalgamations may also be used to "freeze out" minority shareholders, and consequently amalgamation attracts minority buyout rights. When upon an amalgamation two or more companies "continue as one company," the merged entity is the equivalent of each of the amalgamating companies. It is generally recognised that the amalgamating companies do not cease to exist but continue, and that the amalgamated company is not a new company. This metaphysical process has been explained by the analogy of streams coming together to form a river and strands of fibre intertwining to form a rope."*[12]

This being said, it is pertinent to note that Part X of the Companies Act entitled 'Approval of Arrangements, Amalgamations and Comprises by Court' caters to amalgamation as much as the aforementioned **Part VIII of the Act. Part X** empowers Court to declare that an amalgamation would be binding on the company and such other persons or classes of persons as the court may specify only in instances where it is satisfied that it is not reasonably feasible to do so under **Part VIII of the Companies Act**.[13]

The provisions on amalgamation found in the Companies Act alone do not signify the legal framework pertaining to take-overs and mergers in Sri Lanka in its entirety. This is because Sri Lanka has a code of rules made solely for the purpose of governing take-over and merger transactions under the purview of the Securities and Exchange Commission.

- Securities and Exchange Commission of Sri Lanka Act No. 36 of 1986

The Securities and Exchange Commission of Sri Lanka Act No. 36 of 1986 as amended by **Act No. 26 of 1991, Act No. 18 of 2003 and Act No. 47 of 2009** has been enacted to,

> *"provide for the establishment of the Securities and Exchange Commission of Sri Lanka, regulate the securities market of Sri Lanka, grant licenses to stock exchanges, managing companies in respect of each unit trust, stock brokers and stock dealers who engage in the business of trading in securities,register market intermediaries,set up a compensation fund and,deal with matters connected therewith or incidental thereto."*[14]

As per section 53 (1) (g) of the Act, the Commission has been endowed with the power to make rules. The Company Take-overs and Mergers Code of 1995 has come into being as a direct result of the Commission exercising this power as per the aforementioned section.

- The Company Take-overs and Mergers Code of 1995

The Company Take-overs and Mergers Code of 1995 as amended in 2003, acts as a body of rules having force of law in Sri Lanka. Following in the footsteps of Asian countries such as Malaysia and Singapore, Sri Lanka's Code has drawn much of its inspiration from the London City Code on Take-overs and Mergers,[15] which is deemed to be one of the very first regulatory systems, introduced in

[12] *Supra* note 6
[13] *Supra* note 6
[14] Preamble , Securities and Exchange Commission Act No. 36 of 1986

[15] Saleem Marsoof,'Take-over offers and their Ramifications'(*LawNet*)<https://www.lawnet.gov.lk/1960/12/31/takeover-offers-and-their-ramifications/> accessed 14 September 2019

1968. Both the London City Panel[16]and the Code on take-overs and mergers are said to have been created to curb public criticism of the strategies adopted by bidders and targets in a number of significant "*bid battles*."[17] Ever since, both the Panel and the London City Code have supervised a considerable number of announced bids, while also setting a precedent to countries around the world on how take-overs and mergers ought to be set in motion within a legal framework.

The British regulation of Take-overs has at its core two central tenets;

1. the shareholders alone should decide on the fate of the offer, and
2. the equality of treatment of shareholders.[18]

As Justice Saleem Marsoof who has written quite extensively on the Code very rightly points out, these two tenets ultimately boil down to the protection of shareholders of a target company in the course of a take-over or merger operation.[19]This proves to be the ultimate objective of the Sri Lankan Code albeit slightly different means[20] have been adopted by the two codes to achieve the said objective. Despite the different means, both Codes do so by;

- ensuring that all shareholders of a target company are treated equally and fairly;
- ensuring that such shareholders receive "adequate, accurate and timely" information so that they would be able to ascertain as to whether they should accept or reject a take-over offer;
- attempting to establish and maintain a fair and orderly securities market devoid of turbulence;
- doing its utmost to manage and curb defensive and detrimental action that the management of target companies may take to frustrate the take-over bid.[21]

It is in furtherance of the above that mandatory offers[22] and voluntary offers[23] are regulated by the Code.

Thus, is the legal framework within which take-overs and mergers are to take place. The provisions of the Companies Act and the Securities Exchange Commission Act are proof of how the legal system has facilitated take-over and merger transactions. However, whether these provisions and the results emanating from them are in keeping with the needs of this day and age is a question that remains to be answered, and this paper will briefly shed light on several drawbacks identified both at the inception of the Company Take-overs and Mergers Code of 1995 and in the course of working within the legal framework pertaining to take-overs and mergers.

3. Drawbacks and the Way Forward

[16]See Chapter 28 of *Principles of Modern Company Law*by Davies and Worthington for a detailed explanation on the history of the London City Code and the Panel

See *Pipe dreams and nightmares of the Sri Lanka Company Takeover Code* by SaleemMarsooffor an elaborate description on the composition and the powers of the Commission. . It is important to note that the Securities and Exchange Commission is in Sri Lanka what the Panel is in the United Kingdom.

[17]Prof. Blanaid Clarke, *Takeover Regulation –Through the Regulatory Looking Glass*[2007] Comparative Research in Law and Political Economy 2-39

[18]Paul Davies and Sarah Worthington*Principles of Modern Company Law*(Sweet and Maxwell 2014)

[19]Saleem Marsoof,'Pipe dreams and nightmares of the Sri Lanka Company Takeover Code'*(Academia)* <https://www.academia.edu/9415975/The_pipedreams_and_nightmares_of_the_Sri_Lanka_Company_Takeover_Code> accessed 5 September 2019

[20]*Ibid.*

[21]*Ibid.*

[22]*Ibid.*

[23]*Ibid.*

Over two decades have passed since the introduction of the Code in 1995 and the time is ripe for change. Both time and experiences of the past have afforded us, and most importantly the Securities and Exchange Commission a better vantage point from which the shortcomings prevalent in the said field could be seen. The most significant shortcomings appear to be the inherent flaws of the Code and its stagnation which could result in a great deal of inevitable litigation.

Several inherent flaws/ drawbacks were observed at the time of the Code's inception and concerns were raised. It would be remiss on the part of this paper if attention is not drawn to such detriments at least in brief. The said inherent flaws or drawbacks are as follows;

- the lack of any sort of procedure in the Code which could be followed by parties to approach the Commission for the purpose of consultation or approval. Parties are also not able to appeal against the decisions of the Commission to any court of law or an administrative body due to the very same reason – the lack of procedure.[24]
- The Sri Lankan Code ensues from authority delegated by the Parliament. Therefore, the Code is statute based and rigid instead of flexible.[25]
- Another problem that prevails is the lack of discretion on the part of the Securities and Exchange Commission and thus has prevented the Commission from amending the rules of the Code on a case by case basis. This is further aggravated by the lack of General Principles which plays a key role in enabling flexibility as well as in increasing the discretion of the Commission.[26]
- The omission of anti-frustration rules.[27]
- The inadequacy of sanctions to be applied internationally.[28]
- The absence of anti-fraud provisions.[29]
- The lack of stringent disclosure requirements in the Code unlike the London City Code.[30]

To the above list, the following too could be added.

In the recent past, it has been observed that the Code has facilitated unlisted companies which control listed companies to be acquired by investors, much to the detriment of small shareholders. The interests of the market have begun to supersede both the interests and protection of shareholders with the mandatory offer being disregarded thus resulting in the rights of minority shareholders being ignored. [31]

Further, although the Companies Act and the Company Take-overs and Mergers Code facilitate take-over and merger transactions, nowhere has what ought to be done in the event of an overlap of the two been specified, and this remains so to date.

Through all that has been set out above, the fact that the legal framework relating to take-overs and mergers is in need of reform is indisputable. Although the Securities and Exchange Commission is conferred with the power to bring about reform as called for, as and when needed by the Securities and

[24]*Ibid*. pages 35 and 36
[25]*Ibid*. pages 26 -28
[26]*Ibid*. page 30
[27]*Ibid*. page 24
[28]*Ibid*. pages 24- 26
[29]*Ibid*. pages 30-34
[30]*Ibid*.
[31]Duruthu Edirimuni, 'SEC Flaw in Take-over Code Hurts Small Shareholders'*Sunday Times* (Sri Lanka)

Exchange Commission Act, this very Act has tied down the hands of the commission. Hence, only one amendment has been made to the Code in the year 2003 since its inception in 1995, although a committee was appointed by the Securities and Exchange Commission that very same year to study the existing Code and make recommendations so that the Code could be revised. The working draft of the Sri Lanka Code on Take-overs and Mergers 2014 was its result, and it was to come into operation on a date appointed by the Securities and Exchange Commission of Sri Lanka by an Order published in the Gazette. However, the truth of the matter is that the working draft is yet to come into operation though it could be considered as both a commendable effort made to bring about reform and a progressive step forward from the existing legislation that is stagnant and far from satisfactory.

4. Conclusion

The adoption of the Company Take-overs and **Mergers Code in 1995** and the inclusion of **Parts VIII and X** into the **Companies Act No.07 of 2007** is a bold step forward for Sri Lanka in relation to take-overs and mergers. However, little to no progress has been seen or achieved ever since. At present, the legal framework within which take-overs and mergers are to take place are fraught with many a drawback. The present state of affairs is none other than an eye opener; a call for both the legal and commercial fraternity to be more sensitive and attentive to the issues prevalent in this area of law, so that they could be remedied to facilitate its progress. It is true that the progress of laws does not emerge from thin air, but from experiences gained through practice and discourse surrounding such laws. While Sri Lanka has much to learn from experiences gained over a period of two decades, it suffers from a deficiency of adequate legal discourse on take-overs and mergers and the courage it once had back in 1995- the courage to act, and the courage to set change in motion. Inaction would mean the weakening of take-over and merger transactions thus obscuring Sri Lanka's ability to see the promise it holds for our economy.

"Biotechnology & Patenting - Should Sri Lanka seek guidance from U.S. or E.U.?"

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INTRODUCTION

'Biotechnology' can be described as the utilization of any technique which encompasses living organisms to modify or manufacture products in order to enhance the desired characteristics of an animal or plants or to change the micro-organisms of the same. It is the utilization of biological processes for industrial, medical, agricultural or environmental purposes.

At present, biotechnology refers to a wide range of technologies ranging from industrial fermentation to animal breeding to genetic. These groundbreaking methods and the prospects offered by it have not been unanimously welcomed by everyone. Although some consider it to be a positive advance as it provides many benefits including the hope of curing or avoiding genetic disorders, nutritional enhancement of food, and opens doors to the possibility of many breakthroughs that will enable people to live longer, healthier lives and tackle environmental challenges, others are averse to genetic engineering and are apprehensive of such technology being the commercial property of a few companies in addition to being concerned on moral issues.[1]

Although Sri Lanka does not possess a significant presence of biotechnology and genetically modified crops or food at present, local scientists have not ruled out the existence of the same in the future. In fact, the common belief shared among scientists is that changing climatic and economic conditions could make genetically modified crops desirable in the domestic market, and the future lies with biotechnology and genetic engineering. In fact, a National Bio-safety Framework Project was launched by the Ministry of Mahaweli Development and Environment in 2018, in an attempt to ensure the safe introduction of genetically modified organisms in Sri Lanka.[2]

When laws pertaining to patents are being enacted in a State, the moral standards of the community of that State are a prime factor that affects the content of those laws pertaining to patents. Correspondingly, morality usually seeps into the process of interpretation encompassed in judicial decision making on patent law.

In Sri Lanka, *inter alia*, plants, animals micro-organisms other than transgenic micro-organisms, essentially biological process for the production of plants and animals (other than non-biological and microbiological processes) and any invention, the prevention within Sri Lanka of the commercial exploitation of which is necessary to protect the *public order, morality* including the protection of human, animal or plant life or health or the avoidance of serious prejudice to the environment, are considered to be non-patentable.[3]

There exist many ambiguous aspects; in particular, the absence of a clear-cut standard of morality or approach to ascertain whether issuance of a patent to

[1] K. Lee Lerner, *The Gale Encyclopedia of Science*, 5th ed., (Gale, 2014). pp.603-605

[2] 'A future for GMOs in Sri Lanka' Daily News (Colombo, 13 April 2018)

[3] Intellectual Property Act No 36 of 2003, s 62 (3)

an invention should be denied on moral grounds as well as an explicit benchmark on what constitutes an immoral invention.

APPROACH ADOPTED BY THE UNITED STATES ("U.S.")

The U.S. courts have not been restricted by specific statutory exclusions on patentability. A broad approach to patenting of biotechnological inventions has been adopted and there is no explicit statutory proscription in opposition to the patenting of subject matter which could be deemed 'immoral' per se. There, however, exists non-patent legislation which may restrict patentability on the footing of national security.

Thus, matters pertaining to the issuance of patents in the biotechnology field are determined in the U.S. under the same standards of patentability observed in all patent law systems; utilization, novelty, and non-obviousness.[4] [5]

For many years, a "moral utility" doctrine established by the judiciary, permitted both the United States Patent and Trademark Office ("USPTO") and courts to deny issuance of patents on subject matters which are deemed morally controversial on the premise that that the inventions cannot be deemed to be "useful".[6]

Justice Story instructed the jury *in Lowell v. Lewis*[7] that what is required by the law is for the invention to not be frivolous or harmful to the good policy, sound morals or the well-being of the society and that the term "useful" is "incorporated into the Act in contradistinction to mischievous or immoral."

Justice Story's direction set in motion the aforementioned "moral utility" doctrine where, for an invention to be deemed "useful" in terms of the patent statute and thereby qualify for patent protection, it had to satisfy the standards of morality identified by the judiciary.[8]

Courts later diverted from the aforementioned doctrine and, in lieu of an invention not being qualified for patent protection if it was deemed to be a morally controversial subject matter or could be used unlawfully, courts was of the view that an invention would satisfy the "moral utility" requirement if it possessed a single moral, legal purpose in the least.[9]

According to the USPTO Board of Patent Appeals and Interferences,

"*everything is useful within the meaning of the law, if it is used (or designed and adapted to be used) to accomplish a good result, though in fact it is oftener used (or is as well or even better adapted to be used) to accomplish a bad one*"[10]

Subsequently, U.S. Courts adopted a "patent first, ask questions later" approach with regard to patents as a result of judicial decisions which interpreted the extent of the standards of statutory utility and subject matter under the **Patent Act of 1952** in a manner which does not enable the imposition of the "moral utility" doctrine.

In *Diamond v. Chakrabarty*[11], the U.S. Supreme Court held that the U.S. Congress "intended statutory subject matter to include anything under the sun that is made by man" and held that courts are not competent to rule on ethical issues as it

[4] Title 35 of the United States Code, ss. 101-103

[5] Andrea D. Brashear, "Evolving Biotechnology Patent Laws in the United States and Europe: Are They Inhibiting Disease Research" (12 Ind. Int'l & Comp. L. Rev. 183, 2001) pp. 193-197

[6] Margo A. Bagley, "Patent first, ask questions later: morality and biotechnology in patent law" in *William and Mary Law Review.45.2* (2003) pp.1-2

[7] *Lowell v. Lewis* (C.C.D. Mass. 1817) (No. 8,568) 15 F. Cas. 1018

[8] Bagley, op.cit., p.4

[9] *Fuller v. Berger*, (7th Cir. 1903) 120 F. 274, 275

[10] *Ex parte Murphy* (Bd. App. 1977) 200 U.S.P.Q. (BNA) 801, 802

[11] *Diamond v. Chakrabarty* [1980] 447 U.S. 303

was for the political divisions of the government to confront such issues in lieu of the courts. Hence, by declaring itself to be sans of competence to deliberate high policy contentions involving morality, the court broadly restricted its propensity and capacity to impose any moral limits on the eligibility of the subject matter for patent protection.

The phrase "anything under the sun that is made by man" was used to expand the scope of patentable subject matter to interminable bounds and was repeated by the court in the case of *Diamond v. Diehr*[12]. This case involved the use of the Arrhenius equation in a manufacturing process and the phrase "anything under the sun" was adopted to extend patentability to software.

U.S. Courts have consistently held that U.S. Congress intended the definition of subject matter qualified for patent protection under the **Patent Act of 1952** to include any matter, as long as it is "made by man." These judgments, along with the judiciary's deference to U.S. Congress in intellectual property clause matters[13], manifest that no clear basis exists to deny the issuance of patents to morally controversial subject matters which would otherwise be deemed patentable.

In the case of *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, the court once again quoted the aforementioned phrase in support of its holding that utility patents may be issued for sexually and asexually reproducible plants.[14] [15]

Having interpreted the **Patent Act of 1952** to incorporate any invention "made by man", the court is sans competence to exclude morally controversial inventions from patent eligibility and makes way for morally controversial biotechnological inventions presented to the USPTO to be considered patentable. Hence, the interpretation adopted by U.S. courts as to patent eligibility does not impede the patenting of morally controversial biotechnological subject matter. Consequently, morality seldom seems to have played a role in the issuing of patents to biotechnological subject matter in the U.S.

Thus, the U.S. law pertaining to patents does not encompass any statutory basis for the courts or the USPTO to deny patent protection to a biotechnological invention which could be deemed to be a morally controversial subject matter. As per the Patent Act of 1952, a person is entitled to patent protection if their invention meets the statutory patentability requirements specified in the Act.[16]

The issue of moral standards with regard to biotechnological patenting arose again in the case of *Juicy Whip, Inc. v. Orange Bang, Inc.*[17] In the said case, the court attempted to render obsolete the "moral utility" requirement and pronounced that the threshold of utility is low and an invention is deemed to be "useful" in terms of **Section 101** if it is able to dispense some identifiable benefit.

There has been a tendency of both federal courts and the USPTO to not impose the "moral utility" doctrine with regard to patentability, subsequent to the

[12] *Diamond v. Diehr* [1981] 450 U.S. 175

[13] *Eldred v. Ashcroft* [2003] 537 U.S. 186

[14] *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.* [2001] 534 U.S. 124

[15] Christopher J. Asakiewicz, "Separation of church and state while promoting the progress of biotechnology and modern science: does morality have its place in United States patents?" in *Journal of International Commercial Law and Technology. 7.2* (2012). p.2

[16] Patent Act 1952, ss. 101-102

[17] *Juicy Whip, Inc. v. Orange Bang, Inc.* (Fed. Cir. 1999) 185 F.3d 1364

aforementioned judgment in *Juicy Whip*.[18] [19]

In *Geneva Pharms. Inc v. GlaxoSmithKline, PLC*, it was held that a patent will possess utility "if it will operate to perform the functions and secure the results intended, and its use is not contrary to law, moral principles, or public policy."[20]
Thus, it could be deduced that *Juicy Whip* judgment did not fully dispel considerations as to morality from the advancement of science. In the year 2009, the District Court for the Southern District of New York held in the judgment of *Association for Molecular Pathology v. U.S. Patent & Trademark Office*[21] that patents should not be issued to genes as they should be construed as "discoveries".
As the U. S. Patent Act lacks statutory morality inquiry, it could be said that there is no uniform and consistency guidance in relation to the patent "morality" conditions with regard to biotechnological inventions. Although, both the U.S. Court and the USPTO have disregarded the "moral utility" requirement in respect of the patentability of biotechnological inventions in most of the instances, contrary views have also been adopted by the same from time to time.

APPROACH ADOPTED BY THE EUROPEAN UNION ("EU") AND MEMBER STATES

The substantive requirements under the **European Patent Convention of 2000** ("EPC") are industrial application, inventive step and novelty. There exist certain exceptions to patentability under the EPC and the legal consideration with respect of morality of biotechnological patents in Europe pivot on an interpretation of **Article 53 (a) of the "EPC"** as it stipulates an exception for inventions which could be deemed to violate public policy or morality and is of paramount importance to the field of biotechnology.
Accordingly, the said Article stipulates that "European patents shall not be granted in respect of inventions the commercial exploitation of which would be contrary to '*ordre public* ' or morality;

"*such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States*."
This has permitted the expansion of the scope of interpretation of "morality", causing it to be interpreted vaguely and with immense uncertainty, thus, rendering the morality provision controversial.[22]
Case law pertaining to Article 53 is contradictory and has perhaps portended the need for European patent reform to respond to an increasingly technological world[23].
In the *Harvard/Onco-mouse* case[24], which involved the patentability of genetically modified mice used for cancer research, a utilitarian balancing test was adopted which assessed the potential benefits of a claimed invention against adverse aspects of it. Thus, the "unacceptability" standard was developed, which balanced the "acceptable suffering" and "unacceptable suffering." and the eventual decision weighed in favor of patentability of the

[18] *Chiron Corp. v. Genentech, Inc.* (E.D.Cal. 2002) 268 F.Supp.2d 1148

[19] *Diamond Heads, LLC v. Everingham* [2009] WL *1046067* (M.D.Fla. 2009)

[20] *Geneva Pharms. Inc v. GlaxoSmithKline, PLC* (E.D. Va. 2002) 213 F. Supp. 2d 597

[21] *Association for Molecular Pathology v. U.S. Patent & Trademark Office* (S.D.N.Y. 2009) 669 F. Supp. 2d. 365

[22] Yan Min, "Morality - an equivocal area in the patent system."

[23] Brashear, op.cit., p.205

[24] *Harvard/Onco-Mouse* (1990) EPOR 501

invention by reason of the invention's massive benefits.

The utilitarian approach to the morality issue was once again adopted in the *Upjohn case (Hairless Mouse case),* in which it was deemed that the invention was contrary to morality and not patentable as the harm caused to the mouse outweighed the benefits derived from it.[25]

In *Plant Genetic Systems v. Greenpeace*[26], a case concerning transgenic plants, the Opposition Division initially refused to utilize the balancing test adopted in the *Harvard/Onco-mouse* case and stated that the "unacceptability" standard is not the sole method of assessing patentability. The "abhorrence" standard was adopted in lieu of the "unacceptability" balancing test and it was held that patents should not be issued for inventions that are universally deemed to be outrageous.

In *Howard Florey/Relaxin*[27] which concerned the issuance of a patent on the hormone Relaxin, it was held that the invention cannot be deemed to be contrary to morality as the general public would not view the invention as too "abhorrent" for a patent to be granted.

The aforementioned cases evince that two competing standards, "unacceptability" and "abhorrence" may be adopted sans any clear direction and guidance as to which approach is suitable and appropriate to be followed in any particular case. The "abhorrence" standard demands the invention to be "so abhorrent that the issuance of patent rights would be inconceivable", and seems to be a more austere criterion than the "unacceptability" standard which simply necessitates the immoral aspect to outweigh the moral aspect.

As evinced by Justice Neuberger's statement in *Kirin-Amgen Inc. v. Roche Diagnostics GmbH* [28], although EPO verdicts do not possess any precedent value on the courts of the EPC contracting states, the case law is highly influential on national judges and is taken into consideration when defining the practice of issuing a patent in EU member states. In the above case, Justice Neuberger held

"I am reluctant not to follow the approach of the Board, particularly in light of the sheer number of consistent decisions on this point. However, I am not bound by decisions of the Board."

In the case of *Wisconsin Alumni Research Foundation/Stem cells (WARF)*[29], which involved a method for culturing primate-embryonic stem cells, the Enlarged Board of Appeal hinged on direction as to morality provided in r 28(c) of the EPC Regulation and held that it debarred the patenting of claims directed to products which, at the filing date, could be formulated solely by a method which necessitated the eradication of the human embryos from which those products were derived and were in violation of the EPC morality prohibitions.

Thus, it is apparent that two different moral standards have been adopted in the E.U. and its member states sans a unitary opinion being formed. Although the "unacceptability" standard was adopted in the *Harvard/Onco-Mouse* and *Upjohn* cases, the "abhorrence" standard was applied as the criterion in *Howard Florey/Relaxin*, and *WARF* cases and as such, there seems to be a dearth of sound reasons in applying different standards in different cases.

[25] Bently and Sherman, *Intellectual Property Law,* 3rd ed., (OUP Oxford, 2009), pp.455-456.

[26] *Plant Genetic Systems v. Greenpeace* (1995) EPOR 357

[27] *Howard Florey/Relaxin* (1995) EPOR 541

[28] *Kirin-Amgen Inc. v. Roche Diagnostics GmbH* (2002) RPC 1

[29] *Wisconsin Alumni Research Foundation/Stem cells (G 2/06)* (2008) OJ EPO 2009

CONCLUSION

As in the U.S., the **Sri Lankan Intellectual Property Act No 36 of 2003** lacks statutory morality inquiry, with no explicit, uniform and consistent guidance in relation to the patent "morality" conditions with regard to biotechnological inventions. Adopting the approach followed in the U.S. could be problematic as there is a dearth in explicit statutory provisions with respect to morality inquiry in the U.S., causing the application of the morality criterion by the U.S. Court and USPTO to be subjective.

In the E.U., there is no single, explicit and widely accepted morality standard. Case law has established contrasting and inconsistent standards and at present, there are two principal standards; the "unacceptability" standard and the "abhorrence" standard, sans any clear guidance as to which standard should be adopted in a particular instance.

The Author is of the opinion that explicit provisions should be inserted in the Sri Lankan **Intellectual Property Act No 36 of 2003** as to the morality doctrine, citing a **single** morality standard to be adopted; the "unacceptability" standard **OR** the more austere "abhorrence" standard adopted by E.U and its member states.

As Sri Lanka gears towards the use of biotechnology and genetically modified organisms, the non-existence of consistent guidance in relation to the patent morality condition could lead to uncertainty; similar to what has transpired in the U.S., curtailing the ability of Courts to successfully impede the patenting of morally controversial biotechnological and other subject matter.

JUDICIAL DISCRETION VS. MANDATORY SENTENCING IN RAPE CONVICTIONS AND VICTIMS' RIGHTS IN SRI LANKA; A CRITICAL ANALYSIS

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Abstract- Despite the race, religion and culture, Rape is a heinous crime committed by men destroying the bodily integrity of women and the girl child. Hence, justice should be meted out not only to the offenders but also, to all innocent victims proportionately.
Crime is viewed as an offense against the state. In criminal justice, Sentencing plays a vital role in order to send the message of deterrence to the perpetrators of such serious crimes.
In Sri Lanka though rape is a penal offence and provides mandatory sentencing, having the adversarial and offender-centric Court procedure, in adjudication process due to infinite judicial discretion, rape offenders are often sentenced with a suspended term of imprisonment.
While significant advances in victims' rights have been made universally, it is

predominantly vital to discuss how justice should be dispensed to victims within the criminal justice system. The ultimate goal of law is to deliver justice. If criminal jurisprudence grants all advantages towards rape offenders, that would be manifestly miscarriage of justice.
The objectives of this paper are to critically analyse the existing grey areas on rape verdicts in Sri Lanka and recommend positive approaches to the criminal justice system to protect the rights of the women and the girl child of Sri Lanka tomorrow.
Key words: Judicial Discretion, Mandatory Sentencing, Rape, Victims' Rights.

1.0 INTRODUCTION

"*Offences against women are not a women's issue alone, but Human Rights issue*,"[1]
Literature reveals that Punishment is an essential feature of civilization.[2] Crime is viewed as an offense against the state. Penalizing the accused is done by numerous ways like imprisonment, fine, and death sentence etc.
The transition of 'retribution' justice system to rehabilitation method of offenders, restorative justice is founded as an alternative theory to the traditional methods of justice.[3] Suspended sentencing is one of the methods in restorative practice. In Sri Lanka, **Section 303** of the **Code of Criminal Procedure Act (CCPA) No. 15 of 1979 as amended by CCPA (Amendment) Act No. 47 of 1999** provides the procedure of Suspended Sentencing.
Rape is defined as unlawful sexual intercourse committed by a man with a woman through force and against her will.[4] Over one in five women will be forced to perform some sexual act within her lifetime.[5] Most of the countries impose

[1]Mukesh & Anr v. State for NCT of Delhi & Ors Nirbhaya gang rape case [CRIMINAL APPEAL NOS. 607-608 OF [2017][428]
[2] Vidanapathirana M, Ruwanpura PR,'Correction methods available for the convicts in Sri Lanka compared with American methods of correction'. Medico-Legal Journal of Sri Lanka, [2018]; 6(2): 47-54.

DOI:<http://dx.doi.org/10.4038/mljsl.v6i2.7374>
[3]'Restorative justice' Wikipedia,<https://en.wikipedia.org/wiki/Restorative_justice>
[4] Black's Law Dictionary (8th ed. 2004) , 3952
[5] Reyes, Izabelle Barraquiel, 'The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy' [2003],UCLA Women's Law

deterrent punishment for the culprits of rape. The Supreme Court (SC) of Louisiana affirmed that, it is Constitutional to impose death penalty for rape.[6] In Sri Lanka (SL) **Section 363** read with **364 of the Penal Code**[7] (PC) describes rape as a penal offence and provides mandatory sentencing of Rigorous Imprisonment (RI). However, in practice, offenders are sentenced with a suspended term of imprisonment.[8]

Indeterminate sentencing cause detrimental effects on Victims. The right for a fair trial is not only a right of the accused but also an inherited right of the Victim. The ultimate goal of law is to deliver justice. If criminal jurisprudence grants all advantages towards rape offenders,[9] that would be manifestly miscarriage of justice.

In this article I wish to discuss these issues and recommend measures to eliminate the gaps in administering justice.

Primary and secondary resources are used in this paper. The information has been taken from many readings, articles, books, case laws and statutes.

2.0 DISCUSSION

2.1 JUDIAL TRENDS ON SENTENCING IN RAPE TRIALS IN SRI LANKA

In SL the PC lays down categories of offences and stipulates punishment.[10] The CCPA provides procedural rules for criminal trials.[11]

The **PC (Amendment) Act, No 22 of 1995** introduced the concept of minimum mandatory sentencing rule in respect of all sexual offences.[12] Statutory rape is punishable by a minimum mandatory sentence of ten years imprisonment.[13]

The discretion on sentencing finally lies upon the judiciary. Though Section **303** of the CCPA[14] provides the procedure for suspended sentences, Section **303 (2) (a)** of the Code clearly states that;

'*A court cannot impose a suspended sentence for an offence where the law requires a mandatory minimum sentence of imprisonment*'.

It is clear that by the above-mentioned provisions the Court cannot use its judicial discretion on suspending the sentence in rape verdicts since it is contrary with written law. Despite this, information collected by LHRD on 129 concluded sexual violence cases, from 2009 and 2010 reveal that in 114 of the cases the accused were given suspended sentences for rape.[15] Series of judgments by the SC also have created troubling confusion regarding the law on rape cases[16] by imposing suspended terms, manifestly disregarding the legislative intent of protecting women and children from sexual offences.

In *S.C. Reference No. 03/2008*[17], a case on Statutory Rape, the SC held that;

"*The High Court is not inhibited from imposing a sentence that it deems appropriate in* the *exercise of its judicial*

Journal, 12(2) <https://escholarship.org/uc/item/0fq160dv>

[6] Louisiana v. Kennedy, 957 So.2d 757 [La. 2007]

[7] Penal Code (Amendment) Act No 22 of 1995

[8] M A D S J S Niriella,'Protection of Children from Sexual Violation: Adequacy of the Contemporary Legal Framework in Sri Lanka.' Forensic Sci Add Res. 3(2). FSAR.000561.[2018.] DOI: <10.31031/FSAR.2018.03.000561,> [214]

[9] Flavia Agnes, 'Violence Against Women: Review of Recent Enactments' by. P.81116. In the Name of Justice: Women and Law in Society by SwapnaMukhopadhyay. New Delhi, Manohar Publishers and Distributors, New Delhi 2,(1998). <https://www.academia.edu/9221493/Violence_Against_Women_Review_of_Recent_Enactments>

[10] Ibid, 26

[11] Ibid.

[12] Supra n. 8, Rape-section 364, trafficking -section 360C, Incest- section 364A and Grave Sexual Abuse section 365 B.

[13] S. 364(2)(e) PC

[14] Criminal Procedure Act No. 15 of 1979. The principal Act has been amended several times from 1979 to date.

[15] 'Report of the leader of the opposition's commission on the prevention of violence against women and the girl child', (2014) December, 29

[16] Ramani Jayasundere, 'Trivialising Statutory Rape: The Dangers of Suspended Sentences' <https://www.academia.edu/29951065/Trivialising_Statutory_Rape_The_Dangers_of_Suspended_Sentences>

[17] Marmba Liyanage Rohana vs The Attorney General, SC Appeal No. 89 A /[2009], SC Spl LA 02/2009, High Court Anuradhapura Case No. 149/2003

discretion notwithstanding the minimum mandatory sentence."

Also the Apex Court stated that minimum mandatory sentence in Section **364(2) (e)** of statutory rape in the Penal Code is in conflict with **Articles 4(c), 11 and 12(1) of the Constitution.**

It was reiterated in *S.C. Appeal No. 17/2013*[18] ;

'That part of the law with the minimum mandatory sentence, acts as a bar to judicial powers in sentencing or punishing the wrong doer"

Both in the above-mentioned statutory rape cases the SC affirmed the High Courts' decisions on suspending the terms of imprisonment.

Considering the above judgments, it is important to discuss why the courts try to impose suspended sentence in rape trials. Is this appropriate? Generally, the intention of the Court about suspended sentencing is that,

'A suspended sentence is a means of re-educating and rehabilitating the offender'.[19]

But in series of judgments including *AG Vs. Janak Sri Uluwaduge*[20],[21] it was discussed in determining the proper sentence, **primarily** the Judge should consider the **gravity of the offence**, the **reformation of the criminal** should be taken into consideration **subsequently.**[22]

A.G vs. Ranasinghe[23] is a significant case which provided guidance in considering the appropriate punishment for rape. The CA held that abducting the prosecutrix from legal guardianship, the extreme youth of the victim, repeatedly committing the act of rape and preplanning the rape should be considered as the aggravating factors of the case, and (1) to mark the gravity of the offence (2) to emphasize public disapproval (3) to serve as a warning to others (4) to punish the offender and (5) to protect women are the reasons for an immediate custodial sentence for an offence of rape.

Further stated;

"In a contested case of rape, a figure of five years imprisonment should be taken as the starting point of the sentence subject to aggravating or mitigating features."

Also, in a *Revision Application came before the CA*[24] it was discussed the relevancy in imposing suspended sentence to a serious crime like rape. The Accused was indicted in the Colombo HC for committing statutory rape and sentenced RI and suspended for 10 years.

The Counsel for the Accused mentioned the above *S.C. Reference No. 03/2008* case and submitted that the HC is not inhibited in imposing suitable punishment. Also, in this case, the accused had pleaded guilty and it has to be considered as a mitigating factor in sentencing.[25]

CA held, regarding the facts of repeated commission of the crime, preplanning of rape and considering the gravity of the offence, it deserves a heavy custodial term.[26]

Further held, that mere pleading guilty is not adequate to consider as a mitigating factor under Section **303 (1) (k) of the CCPA** and the offender has to be truly and sincerely repentant of what he has done.[27]

In analysing the above cases on rape sentencing the most recent decisions appears to be more lenient on the offenders. The intention of the judiciary

[18] Ambagala Mudiyanselage Samantha Sampath vs The Attorney General SC Appeal No. 17/[2013], SC Spl LA No. 207/2012 CA No. 297/2008 HC. Kurunegala No. 259/2006.

[19] Kumara v. Attorney General [2003] 1 Sri L R 139

[20] [1995 (1) SLR 157]

[21] De Zoysa vs. Inspector of Police [74 NLR 425];A.G. vs. De Silva [57 NLR 138];Premarajh vs. Officer of In-Charge of Wattala Police [2 SLR 361].

[22] Jeeva Niriella, ' The Most Appropriate Degree of punishment: Underline Policies in Imposing Punishment in Criminal Cases with Special Reference to Sri Lanka' (2012), 2nd International Conference on Social Science and Humanity IPEDR vol.31,© (2012) IACSIT Press, Singapore, 122

[23] (1993) 2 SLR 81

[24] Court of Appeal Case No. CA (PHC) APN 147/12, High Court of Colombo Case No. 6020/12

[25] Ibid page 5

[26] Ibid pg. 7

[27] Ibid pg. 5

might be that mandatory sentencing prejudice the modern human rights response[28] in judiciary. But the earlier decisions were more particular on conveying the message of deterrence to the society.

2.2 ARE THE VICTIMS' RIGHTS AFFORDED IN RAPE TRIALS IN SRI LANKA?

Victims' rights are legal rights afforded to victims of crime. These may include the right to a victims' advocate, the right not to be excluded from criminal justice proceedings and the right to speak at criminal trials.[29]

SL has ratified a number of international instruments including **CEDAW**[30] which preserve the rights of women and children from sexual violence, but not incorporated in national legislation.[31]

The **Constitution** of Sri Lanka guarantees the Fundamental Rights[32] in **Article 11 and 12** the right to freedom from torture and equality before law. In this context free from sexual violence and equal treatment before law can be interpreted as fundamental rights of the women and the girl child in Sri Lanka.

The prime law to protect victims' rights in Sri Lanka is embodied in the **Assistance to and Protection of Victims of Crimes and Witnesses Act No. 04 of 2015**. Section **03** of the Act recognizes the rights of victims of crime and their entitlements.[33]

Section 364 of the **Penal Code**[34] provides compensation mandatory for sexual offences.

Though enactments are available to protect the rights of the victims of crimes However, a clear criterion for compensatory scheme/mechanism is not specified in these Acts.[35] Uniform treatment is not equal treatment.[36] Though the rights are conferred to the victims, if cannot be empowered by the judiciary is miscarriage of justice.

It is clearly stated by Justice Gratiaen in *De Mel Vs. Haniffa*[37] that;

"Our criminal justice system, based on principles of English Law, to a very great extent, ***does not recognize the rights of victims adequately****. It has sometimes been said that the criminal justice system of Sri Lanka is* ***unduly favourable to accused person".***

The criminal justice system of SL is adversarial. In this system, The State prosecutes the Case to punish the offender, the victim is forgotten and considers just as a witness.[38]

Though there are certain laws to protect victim's rights, it is completely a suspect-centred criminal justice system.[39] This is stated in the case *AG Vs. H.N. de Silva*[40] that;

"*Judges are too often prone to look at the question only from the angle of the offender"*

The argument that, most of the decisions are subjective in rape trials was apparent

[28] Supra n. 9

[29] For a description of typical U.S. victim's rights, see "About Victims' Rights". VictimLaw. Office for Victims of Crime Training and Technical Assistance Center. Retrieved 1 October (2017).

[30] UN Convention on the Elimination of All Forms of Discrimination against Women, 1981 and CRC in 1991.

[31] Japan International Cooperation Agency. (2010). 'Sri Lanka Country Gender Profile–Final Report'. <http://www.jica.go.jp/english/our_work/thematic_issues/gender/background/pdf/e10sri.pdf>

[32] Chapter III of the Constitution (Article 10-17 of the 1978 Constitution)

[33] Jayaruwan Dissanayaka , 'Balance The Rights Of The Suspect And The Victim; A Critical Analysis Of Fair Trial Rights Of Suspect And Victim In Criminal Justice System Of Sri Lanka', JSA Law Journal (2017), Volume V, Published By The Judicial Service Association Of Sri Lanka, ISSN 2357-2884, pg.158

[34] 1995 amendment

[35] Supra n. 8, 214

[36] Supra n. 5, 376

[37] (1952) 53 NLR 433

[38] Supra n. 33, pg. 160

[39] ibid

[40] [57 NLR 121] at page 124

in the case of *S.C. Appeal No. 17/2013* where the Court stated that;

*"Leave aside the **victim of rape** and the accused, there exists a child born into this world"*

The right not to be excluded from criminal justice proceedings is an inherent right of the victim. But the judiciary focused only on the rights of the child, is a crystal-clear example that the rights of the victim are violated. Judiciary is the guardian of the Fundamental Rights of the society. Though the best interest of a child should be a matter before Courts the rights of the women of a serious crime like rape should also be preserved.

2.3 ISSUES IN LENIENT SENTENCING

Health Issues: Indian Supreme Court held in *State of Karnataka vs. Krishnappa*[41] that,

"A rapist inevitably causes serious psychological as well as physical harm in the process"

In 2013, in the USA a 54-year-old convicted of statutory rape of a 14-year-old girl was held to serve only 31 days in prison. The child committed suicide subsequent to the judgment.[42]

Faithfulness upon the Law and judiciary:

In *S.C. Reference No. 03/2008 and S.C. Appeal No. 17/2013* discouraged the women and young girls who seek redress in rape cases. The decisions of the cases would give a message to society that when an adult man has sexual intercourse with a girl child under 16 years, the act alone does not call for serious punishment[43] and the penal laws in SL do not safeguard the victims of a brutal crime like rape.

Also, the SC mentioned that the minimum mandatory sentencing of the PC is in conflict with the fundamental rights of the Constitution. The legislative intent is to safeguard the women in SL by imposing deterrent punishment for rape. If judges are the protectors of the law and they themselves reason the written law to be unjust,[44] what is the trust the society would have upon the justice system?

Ambiguity: 2008 and 2013 SC cases paved the path to ambiguous and discriminatory reasoning[45] to statutory rape and also in most of the cases defence counsels tend to use "pleading guilty" as a mitigating factor to consider suspended sentence. This is also a playground for lawyers when the Courts always tend to impose leniency towards rape offenders.

3.0 RECOMMENDATIONS

i. **Uniform Sentencing policy**

Sentencing guidelines make sentencing fairer[46]. In above-mentioned cases the appropriate sentence to impose on a particular accused[47] was difficult to sentencing judges. As previously discussed, sentencing policy in Sri Lanka being not monotonous in punishment is another area where the victim has to suffer.[48] Even though minimum mandatory sentencing prevails finally, it depends on the discretion of the Judge.[49] Hence, a uniform sentencing policy is a must. In order to address the issue of determining the most appropriate degree of punishment the Judiciary should provide discretion with certain guidelines in considering the factors which help to come to a better conclusion.[50]

ii. **The role of the sentencing Judges**

[41] [2000] A.I.R. 1470] at page 1475
[42] Supra n. 16
[43] ibid
[44] ibid
[45] ibid
[46] Supra n. 33, Mahie Wijeweera, 'Sentencing Guidelines From Decided Cases On Sentencing' pg. 67
[47] I.R.M. Perera, 'New Sentencing Structure and Policy in the RepUblic of Sri Lanka' <https://www.ncjrs.gov/pdffiles1/Digitization/45385NCJRS.pdf>
[48] Supra n. 33, pg. 163
[49] Ibid.
[50] Supra n. 22, pg. 123.

Judicial decisions and their implementation to be coloured by patriarchal values[51] is not appropriate when addressing issues in rape trials. Hence, as Dias[52] mentioned, the discretion a trial judge possess should be exercised lawfully. In Karnataka case it was observed that;

"A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women.[53]

Proportionality is also a vital concept in delivering criminal justice. In *The Attorney General v. Mahapatunage Sujeewa Samanmali*[54] it was stated that;

"*A trial Judge must be mindful to impose a sentence which is proportionate to the crime committed*."

And also concerning Public Interest Specially in sentencing rape trials was discussed in *Rex v. Boyd*[55] and held;

"*Where the public interest or the welfare of the State outweighs the previous good character, antecedents and age of the offender,* ***public interest must prevail."***

iii. The Role of the Legislature

It is apparent that amendment of rape laws only has focused on sentencing. Though statutes avail to protect the Victims of sexual violence, absence of a clear criterion of compensating the Victim is an issue. Hence, steps to reform the existing victim protection framework to ensure victims' Rights in rape trials is vital.

iv. Victims' Rights based Justice System

The rights of the victim are not addressed in most of the rape cases in Sri Lanka due to the offenders rights-based system. However; the concept of fair trial is not a concept solely for the accused.[56] So, the vulnerable situation of the victim and the damage or loss caused by the offence to victim should be considered within the factors relating to the victim. Hence, a **victim compensatory** and **offender punishment system**[57] has to be established. In that system to impose a fine which would be given to the woman as compensation[58] is suggested in order to empower women.

CONCLUSION

Maneka Gandhi Case[59] opened the doors for women to get her status and position safeguarded in society through Judiciary.[60] Since rape is a brutal crime, in preserving the rights of women the Courts shoulder a greater responsibility while trying an accused on charges of rape.[61]

Sentencing Judges, must deal with such cases with utmost sensitivity[62]. It is apparent that the clash between the theories of Judicial Discretion and Mandatory Sentencing prevail. Judicial reasoning should be exercised in a value-added manner, not in a subjective or personal point of view. Minimum mandatory sentencing in a Criminal Justice System is effective as a partial remedy[63] in addressing this issue. It is true that judicial response to human rights cannot be blunted by legal bigotry.[64] But Justice should be dispensed not only to the offender but also to the victim and the society proportionately. As Lord Hewart CJ said *"Justice should not only be done, but should manifestly and undoubtedly be seen to be done"*.[65]

[51] Supra n. 9, pg. 34
[52] Supra n. 16
[53] Supra n. 41
[54] [CA 204/2017 decided on 08.08.2019]
[55] (1908) 1 Cr. App. Rep. 64.]
[56] Supra n. 33, pg. 152
[57] Supra n. 33, pg. 163
[58] Supra n. 9, pg. 16
[59] Maneka Gandhi v. Union of India, AIR [1978] SC 597]
[60] 'Gender Sensitization and Rehabilitation of Rape Victims', <http://www.legalservicesindia.com/article/1913/Gender-Sensitization-and-Rehabilitation-of-Rape-Victims.html>
[61] Supra n. 41
[62] Ibid.
[63] Supra n. 5, pg. 359
[64] Supra n. 9, pg. 17
[65] R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233)

"Bail", A Critical Analysis of Recent Development in Law of Bail

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"To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the Court To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, which security is called "bail," because the party arrested or imprisoned is delivered into the hands of those who bind themselves for his forthcoming, (that is, become bail for his due appearance when required,) in order that he may be safely protected from prison."- Wharton. Stafford v. State, 10 Tex. App. 49.

Introduction

Bail is not intended as a punishment in itself. It is rather a way of securing an accused agreement to abide by certain conditions and return to Court. In that sense, Bail is like collateral left with the Court to ensure that, after the accused release from remand, he or she will appear in courts for the remaining parts of their case. If the accused fails to appear or violates the conditions of the release, he or she might forfeit the amount paid. There is no statutory definition to define "Bail" in Sri Lankan law.

However, according to the Black's Law dictionary "Bail" defines as "procuring release of one charged with an offence by ensuring his future attendance in Court and compelling him to remain within the jurisdiction of that Court"[1]. Bail has been defined by Court of Sri Lanka as the "release or setting at liberty of a person arrested or imprisoned either on his own recognizance or upon others becoming sureties for his appearance on a future date"[2].Nowadays law concerning bail has much more preference than any other matter in Sri Lankan Judicial System.

Bail Act No.30 0f 1997

The introduction of the **Bail Act No.30 of 1997** made a huge difference in the Criminal law. The Objective of the new Act and the intention of the legislature is given in the preamble of the Act. It states as follows "An Act to provide for release on bail of persons suspected or accused of being concerned in committing or having committed an offence; to provide for the granting of anticipatory bail and for matters connected therewith or incidental thereto.[3]" It is clear that the main intention of introducing this Act is to consolidate the law relating to bail, to introduce the concept of anticipatory bail and to make provisions for matters connected to it.[4]

Before the enactment of the Bail Act it was the Code of Criminal Procedure **Act No.15 of 1979** which provides all the legal provisions related to bail. This Act provides

[1] Blacks law Dictionary
[2] ***Kanapathy V Jayasinghe***(1964) NLR 549 at p.551, per Alles J
[3] Bail Act No.30 of 1997, Preamble
[4] Kalinga Indatissa, *Law Relating to Bail in Sri Lanka and A Commentary on the Bail Act* (1st edi,Lassana Press Pvt Ltd,2005) 5-8

provisions of bail for any person surrenders himself or is produced on arrest on allegation that has committed or has been concerned in, committing, or is suspected to have committed or to have been concerned in committing an offence until the conclusion of the trial.

However, this **Bail Act No.30 of 1997** has exceptions, according to the provisions of this Act it does not apply in respect of offences committed under certain laws. According to **Section 3(1) of the Act** Nothing in this Act shall apply to any person accused or suspected of having committed, or convicted of an offence under, the **Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979**, Regulations made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed or convicted of offences under such other written law[5].

According to this section it is clear that a provision of the Bail Act does not apply to a person who is arrested under one of the three categories listed below. First for the persons who are arrested under the **Terrorism Act No.48 of 1979**. Secondly under the Regulations of the Public Security Ordinance and thirdly under any other law which contains express provisions relating to granting of bail to suspects and convicts who are convicted for an offence under any such law. There was a slight confusion regarding the Sinhala interpretation of the **Section 3(1)** as it conveyed a different meaning. According to the Sinhala text it showed that only Prevention of Terrorism Act and the Public Security Ordinance is excluded from the terms. But however from the third part of the **Section 3(1)** it states that any other written law which expressly states about bail which means it also excludes **Immigrants and Emigrants Act No.20 of 1948 amended by No.16 of 1955**, **Offensive Weapons Act No.18 of 1966** and **Poisons, Opium and Dangerous Drugs Ordinance, Customs Ordinance, Fire Arm Ordinance , Bribery Act and Victims and Witness Protection Act No.4 of 2015**. In the case of *Thilanga Sumathipla V Inspector General of Police*[6], **Abeyratne J** stated that this in effect excludes, application of the Bail Act to the three categories of offenders cited in the earlier three instances who come within the purview of the three Acts in contemplation. Section 3 states thus: The Acts referred to are: Firstly, the Prevention of Terrorism Act, No.48 of 1979 (Temporary Provisions Act) and secondly, Regulations made under the Public Security Ordinance. Four categories of offenders are in Contemplation-Having committed an offence, convicted of an offence, accused of an offence, suspected of an offence. The Sinhala Act refers to these four stages of offenders, as being regulated by written law, (who are excluded from the purview of the Bail Act No.30 of 1997. All others are encompassed under the provisions of the Bail Act with wide ranging effect.

Accordingly, the judgment given in the above-mentioned case was that provisions of the Bail Act only exclude the Prevention of Terrorism act and the Public Security Ordinance. Therefore, Thilanga Sumathipala who was charged under the Immigrants and Emigrants Act fell under the provisions of the Bail Act and was entitled to get bail under the Bail Act No.30 of 1997.

However, in the case of *Shiyam V Officer-in-charge Narcotics Bureau and another*[7], Shirani Bandaranayake J held that the *eusdem generis* rule had no application and **Section 3(1)** permitted the prohibition under the Section 83 of the Poisons, Opium and

[5] Bail Act No 30 of 1997, Section 3(1)
[6](2004) 1 SriLR p. 210
[7](2006) 2 SriLR 156, (2006) BLR 52 SC

Dangerous Drug Act against bail. As such, the **Section 83** restriction against bail was operating despite **Section 3(1)** of the **Bail Act.** It was also held that in case of doubt, it is competent to look at parliamentary debates on Acts to ascertain the intention of the law. According to recent judgments, the debates in parliament on the Bail Act shows that bail under that Act was not available to a person accused of an offence underwritten law in the nature of **Section 83 of the Poisons, Opium and Dangerous Drugs Ordinance** restricting bail and not necessarily limited to written laws dealing with public order. The important decision given by Justice Shirani Bandaranayake provides a clear picture as to the persons who fall under the purview of the Bail Act and the people who does not. If a person has committed or has been concerned in committing, or is suspected to have committed or to have been concerned in committing an offence under any written law which expressly states the provisions of bail, **Bail Act No.30 of 1997** has no applicability for such person.

According to the **Section 16 of the Bail Act**, subject to the provisions of **Section 17**, unless a person has been convicted and sentenced by a Court, no person shall be detained in custody for a period exceeding twelve months from the date of his arrest. According to the **Section 17**, period of detention can be extended on application made in that behalf by the Attorney General at the High Court Holden in any zone or a High Court established under Article 154P of the Constitution may, for good and sufficient reasons that shall be recorded, order that a person who has not been convicted and sentenced by a Court, be detained in custody for a period in excess of twelve months: Provided that the period of detention ordered under this section, shall not in any case exceed three months at a time and twelve months in the aggregate.

In the case ***Hettiarachchige Jayawathi V Attorney General***[8] it has stated that this extension of the period is subjected to the provisions in the Section 14 which states that whenever a person suspected or accused of being concerned in committing or having committed a bailable or a non-bailable offence, appears, is brought before or surrenders to the Court having jurisdiction, the Court may refuse to release any such person on bail or upon an application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a subsisting order releasing such person on bail if the Court has reasons to believe that the person would not appear to stand his inquiry or trial or interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice or commits an offence while on bail or that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

However this judgment was overruled by the case ***Wickramasinghe V Attorney General and another*** [9]**.**In this case Sisira de Abrew J held that the purpose of remanding an accused is to ensure his appearance in Court on each and every day that the case is called in Court, if the Court feels that, he would appear in Court after his release on bail Court should enlarge him on bail. Court should not remand an accused in order to punish him. Section 14, section 16, Section 17 of the Bail Act do not state that 'Notwithstanding anything contrary in the provisions of the Act-but section 16 states 'subject to the provisions of section 17, and it does not state subject to the provisions of section 14. Therefore, section 16 and section

[8] CA 189/2004 CAM 274/2006

[9] 2010SLR1V141

17 are not subjected to section 14. When one considers Section 3 and section 16 it is clear that the accused to whom the Bail Act does not apply can be kept on remand for a period exceeding two years but not the suspects to whom the Bail Act applies.

Sisira de Abrew J further held that the maximum period that a suspect to whom the Bail Act applies can be kept on remand is 2 years, the period of 2 years is considered only if the Attorney General acts under Section 17. If there is no application under Section 17 the maximum period that an accused to whom the Bail Act applies can be kept on remand is one year.

The considerations which induce a judge to refuse to order the release of an accused on bail before trial will often render it inexpedient to release the same accused after conviction. Indeed, there are all the more reasons for keeping him in the custody after the charge has been proved, for the temptation to abscond is all the stronger. Moreover, there is a greater likelihood, in some cases, of the offence being repeated[10]. Under the previous law, an accused who had been convicted by a Magistrate or District Judge was entitled as of right to be released on bail if he was in custody. Even habitual criminals enjoy this right. It was certainly anomalous that an accused who, it was thought, should be kept in custody until his case is decided could demand as of a right that he should be released upon his conviction. Many instances have come to our notice of convicted persons, released on bail pending appeal, taking the opportunity to commit further offences in the interval"[11].

Section 19 and Section 20 of the Bail Act provides the current provisions related to bail pending appeal. According to the Section 19, it provides provisions of bail in respect of a person convicted by a Magistrate Court and Section 20 provides provisions for granting bail relating to suspects convicted by High Court. According to the Section 19, Magistrates has power to release a convict on bail after the trial who is convicted until the appeal is pending. Furthermore, it is the same for the High Court under the Section 20 of the Act. When the bail is rejected at the preliminary stages of the case it is of the normal procedure to go for a revision or submitting a fresh bail application to the Court of Appeal under the Section 404 of the Criminal Procedure Code.

However, the Bail Act does not specify the circumstances under which the High Court should grant bail for a person found guilty until the appeal is over. It is said that a person can be released on bail in High Court only if there are exceptional circumstance. The concept of exceptional circumstances has never been a statutory requirement. We only can get a clear picture about the concept of the exceptional circumstances by referring to the case law. Moreover, according to the **Section 10 of the Assistance to and Protection of Victims of Crime and Witnesses Protection Act No.4 of 2015**, an offence under Section 8 or 9 shall be cognizable and non-bailable and no person suspected, accused or convicted of such and offence shall be enlarged on bail, unless under exceptional circumstances by the Court of Appeal. In the case of *Ramu Thamotharanpillai V Attorney –General*[12] it was decided that the bail should only be granted if there are exceptional circumstances. With the development of **Bail Act No.30 of 1997** it was said that the concept of exceptional circumstance has been abolished by the appeal Courts. It was decided in the case of *Attorney General's V Ediriweera*[13] that the norm is that bail after conviction is not a matter of right but would

[10]G.L.Peiris, *Criminal Procedure in Sri Lanka* (2ndedi, Stamford Lake Pvt Ltd) 142- 164

[11] Final Report,pp 41-42, paras 142-144,

[12] (2004) 3 SriLR 180

[13]BLR 2006

be granted only under exceptional circumstances: in an application for bail after conviction, the appellate Court should not pre-empt the hearing of the substantive appeal and pronounced upon merits of the appeal. It is further decided that exceptional circumstances only exist when the facts and circumstances of the case are such that they constrain or impel the Court to conclusion that justice can only be done by the granting of bail, only then should be bail granted after the conviction. Sri Lankan law has given a broad interpretation for the term exceptional circumstances in bail in several decided cases and it should be decided as per the facts and circumstances of the case.

The next major area in law relating to bail is the concept of Anticipatory bail. This concept was alien to the Sri Lankan law until it was introduced by the Bail Act No.30 of 1997. The concept of 'anticipatory bail' means that a person who has reason to believe that the authorities require him for the purpose of an offence and that where there is a material to believe that he may be arrested immediately, any such person could make an application to the relevant Court to obtain bail prior to his arrest. According to Section 21 When any person has reason to believe that he may be arrested on account of him being suspected of having committed, or been concerned in committing, a non-bailable offence he may with notice to the officer in-charge of the police station of the area in which the offence is alleged to have been committed, apply to the Magistrate having jurisdiction over the area in which such offence is alleged to have been committed, for a direction that in the event of his arrest on the allegation that he is suspected of having committed, or been concerned in the commission of, such offence he shall be released on bail. This application should be in the form of an affidavit. Upon receiving the application, the Court should fix a date for inquiry, the date shall not be later than seven days from the date of the application, and shall issue notice of such date to the applicant and the officer in charge of the police station. After hearing the applicant personally or by his Attorney-at-Law, and the officer-in charge of police station, if he is present, order is given on the application after giving reasons for that.

In the case of *Gunasekara V Ravi Karunanayake*[14] the concept of Anticipatory bail was examined carefully by the Court of Appeal. The two main questions that arose in this case is whether suspect who is facing charges under the Public Property Act is entitled to make an anticipatory bail application and whether the provisions of Section 3 of the Bail Act has ousted the offences against Public Property Act, from application of the provisions of the Bail Act. By considering the intentions of the parliament through the Hansard, the Magistrate Court granted bail. However, this is considered to be a landmark judgment as it not only cleared the doubts regarding the Bail Act, but has also widened up the scope of the Bail Act.

When considering the Antiquities Ordinance which is amended by the **Act No.24 of 1998** there is no any provision which empowers a specific Court to grant bail. This is a unique situation as in all the other statutes there are express provisions to release a person on bail. In the case of *Pannipitiya V Attorney General*[15]three accused were taken into the custody on an allegation that they have committed offences under the Antiquities Ordinance. They made a bail application under Section 7 of the Bail Act. It was held that the **Section 15(C) of the Antiquities Ordinance** makes express provisions in respect of the release on bail of persons

[14](2005) 2 Sri LR pg 180,

[15] 2011SLR1V267

charged with or accused of offences under the said ordinance. The person charged with or accused of offences under the Antiquities Ordinance are covered under the 3rd category in Section 3 of the Bail Act do not therefore apply to a person charged with or accused of offences under the Antiquities Ordinance.

Conclusion

The guiding principle in the implementation of the provisions of the Bail Act shall be that the grant of bail shall be regarded as a rule and the refusal to grant bail as the exception. The rule, therefore upholds the values anchored in human freedom. The exception is refusal of bail, and it is only in special circumstances that the bail should be refuse. The decision of granting bail is the most crucial decision from the point of view of the suspect or accused and also from the point of view of the liberty of the individual and by the provisions of this Act and recent development of it through case law it promotes and correct bail decisions, thereby reducing the sufferings of the people and upholding the human liberty.

FAILURE TO DISCLOSE A CAUSE OF ACTION - A FAILED ACTION?
A PRAGMATIC REVIEW OF THE LEGAL PROCEDURE

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INTRODUCTION

Following the introduction of the Pre-Trial Process to the Civil Procedure Code by the **Civil Procedure Code (Amendment) Act, No. 8 of 2017** ("Amending Act"), the question of how and when a purely legal objection such as the failure to disclose a cause of action *inter alia*, should be raised has proved to produce two competing views. This paper seeks to analyse the procedure adopted by courts prior to the amendment in 2017 *vis-à-vis* the Amending Act, to understand if the intention of the Act was to depart from the inveterate practice adopted by court prior to it.

This paper will first explore the procedure adopted by courts in dealing with defective plaints, namely the failure to disclose a cause of action prior to 2017, and thereafter deliberate on the Amendment introduced to the **Civil Procedure Code** ("Code") in 2017. The relevant provisions of the amendment will also be analyzed to understand whether a departure from the established procedure was intended by the Act, culminating in a discussion as to how the Amending Act ought to be reconciled with the basic scheme of the Code with relation to addressing pure legal objections.

FAILURE TO DISCLOSE A CAUSE OF ACTION PRIOR TO 2017

Section 46(2)(d) of the Code states that the Court may reject a plaint if no cause of action has been disclosed.[1]

The Court in *Lowe vs. Fernando*[2] explained,

> *The expression 'cause of action' generally imparts two things, viz, a right in the plaintiff and a violation of it by the defendant…*

Hence the plaintiff **must** adequately set out the basis of the action, namely the right (whether positive or any other) that has been violated including the manner in which such party has wronged the plaintiff.[3] If the plaintiff fails to state the involvement of the defendant in the alleged violation or infringement of the purported right, it would be that a cause of action has not been disclosed against the relevant defendant, culminating in the rejection of the plaint.

When and how does one invoke the jurisdiction of the court to exercise the power to reject a plaint in terms of **section 46(2)(d) of the Code**?

The earliest case on record relating to this matter is *Mudali Appuhamy vs. Tikarala*, which held that;

[1] Section 46(2)(d), Civil Procedure Code.
[2] [1913] 16 N.L.R. 398 at p 404. See also, K. D. P. Wickremesinghe, Civil Procedure in Ceylon, (1st edn, 1971) 32.
[3] As per the interpretation in Section 5, Civil Procedure Code, the wrong may include; (a) denial of a right, (b) a refusal to fulfill an obligation, (c) the neglect to perform a duty a duty, and (d) the infliction of an affirmative injury.

> *[A]n objection for want of particulars is not a matter to be set up by plea. If defendants desired to require more particulars, they should at once instead of answering to the merits, have moved to have the plaint taken off the file for want of particulars, such motion being made in the manner required by section 91.*[4]

This position was followed in *Actalina Fonseka vs. Dharshani Fonseka*, which clearly stated that if the defendant is of the opinion that no cause of action is disclosed or sufficient particulars relating thereto have not been furnished;

> *…the defendants should,* ***before pleading to the merits****, move to have the plaint taken off the file for want of particulars - Mudali Appuhamy v. Tikarala. Under Section 46(2) of the Civil Procedure Code this is the correct procedure even in a case where it is alleged that the plaint does not disclose a cause of action.*[5]

The Supreme Court in *Seetha Luxmie Arsakulasooriya vs. Avanthi Sudharshanee Tissera nee Wadugodapitiya*[6] reinforced this procedure, stating as follows in the context of a failure to disclose a cause of action;

> ***it is trite law that the correct procedure is for the defendant, before filing answer, to move court as contemplated by Section 46(2) of the Code to return the plaint to the plaintiff for amendment****.*

In view of the aforesaid authorities, where a plaint does not disclose a cause of action the correct or proper procedure is to file a motion, and have the matter temporarily removed off the trial roll, even before an answer is filed. Thus, an objection of this nature must be taken at the very inception, quite independently of other objections that may be raised in the answer.

Anil Gooneratne J., in *Alvitigalage Padmasiri vs. K.L. Anulawathie*[7] states;

> *I am convinced that parties could not have proceeded to trial on the plaint filed of record. Court on its own motion could have rejected the plaint at the earliest available opportunity. If that was the case Plaintiff would have been able to present a fresh plaint without difficulty or even at an earlier stage (may be prior to issue of summons) it could have been rejected if the Defendant by way of motion objected to the plaint. Section 46(2) of the Civil Procedure Code is designed to cure such defects by giving an opportunity to remedy the situation and permit filing of a fresh plaint.*

When a motion to dismiss an action has been filed on the basis of a failure to disclose a cause of action, the court is statutorily vested with discretion to determine whether the plaint ought to be returned for correction or not. If the plaint is returned without adequate change the court is vested with the power to reject the plaint. More importantly, the defendant is free to move for a rejection/refusal of the plaint on that ground at the earliest opportunity.

PROCEDURE CONSEQUENT TO THE 2017 AMENDMENT

The Amending Act introduced a significant change to the litigation process, viz., the 'pre-trial hearing'.[8] The pre-trial hearing chiefly involved the settling of written issues and admissions.

Consequent to the introduction of the pre-trial process, a school of thought has developed that jurisdictional issues can only be raised at the pre-trial hearing and not before that, in view of section 142D, which empowers the Judge to ascertain jurisdictional issues at the pre-trial. If

[4] [1892] 2 Ceylon Law Recorder 35 at p 36.
[5] [1989] 1 Sri L.R. 95 at 100.
[6] S.C. Appeal No. 54/2008, SC Minutes dated 09.09.2010 at p 5.
[7] CA 323/1997(F), CA Minutes 06.10.2011 at p.6.
[8] Sections 142A-142I, Civil Procedure Code (Amendment) Act, 8 of 2017.

jurisdictional issues may only be raised at the pre-trial stage, the argument is made that all other applications including infirmities relating to the plaint are *a fortiori* prevented from being raised prior to the pre-trial.

However, this line of thinking is not reconcilable with the entire framework of the civil procedure. As the Code provides for the refusal of a plaint, where a *prima facie* cause of action is not disclosed,[9] it ought not be taken up in the answer, instead, an objection as to nonconformity under section 46(2)(d) of the Code must be raised by way of a motion before the pre-trial commences. The Amending Act does not amend Section 46. Thus, there is no basis to deviate from the procedure adopted prior to the amendment.

Courts have consistently held that where a plaint is *ex facie* defective, it must be rejected or returned **at the earliest opportunity**. Bonser C.J., in *Read vs. Samsudin*[10] held;

> *If the plaint is defective in some material point and that appears on the face of the plaint, but by some oversight the court has omitted to notice the defect, then the defendant on discovering the defect, may properly call the attention of the court to the point, and then it will be the duty of the court to act as it ought to have done in the first instance, either to reject the plaint or to return it to the plaintiff for amendment*.

A failure to satisfy the criteria stipulated in the Code relating to a plaint does not involve evidential proof. Insofar as an evidential burden is not required to determine such an objection, a party should be at liberty to draw judicial attention to the matter.[11]

This position is logically and legally supported by the fact that the provisions which empower court to reject/return of a plaint for want of jurisdiction are left untrammeled by the amendment.[12] This is consistent with the scheme and structure of the Code, which clearly envisages the power of court to reject/return a plaint (which is *ex facie* defective) at the first available opportunity.[13]

It is pertinent to note that although section 142D provides for jurisdictional issues to be ascertained at pre-trial, it does not preclude such objections from prior consideration. The fact that sections 47 and 48 dealing with jurisdictional issues have not been amended reinforces this position.

Therefore, where a plaint is not *ex facie* defective, all objections to the merits of the matter must be taken up in the answer.

Moreover, one must keep in mind that the pre-trial procedure comes after the filing of an answer. Therefore, if the contention of the defendant is based on the fact that no cause of action has been disclosed, the only 'issue' to be determined would be whether a cause of action has been disclosed or not. In order to determine that sole legal issue, one need not file an answer and prolong the litigation process. Moreover, where the court is of the view that sufficient particulars have not been furnished with respect to the cause of action, the court cannot return the plaint to be amended consequent to the pre-trial process unless *grave and irremediable injustice* would be caused.[14] It is not reasonable to construe that the pre-trial process disposed of the practice adopted over the ages, to file a motion to reject a plaint for want of a cause of action, especially in the absence of provisions precluding the same.

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[9] Section 46(2)(d), Civil Procedure Code.

[10] [1895] 1 N.L.R. 292 at 295. See also K. D. P. Wickremesinghe, Civil Procedure in Ceylon, (1st edn, 1971) 71-76,

[11] [1913] *Soysa v. Soysa* 17 N.L.R. 118; [1922] *Avva Ummah v. Casinader* 24 N.L.R. 199.

[12] Section 40, 41, 46(2), 47 and 48, Civil Procedure Code.

[13] [2007] *Piragalathan v. Shanmugam* 1 Sri L.R. 320 at 328.

[14] Section 93(1)-(2) as amended by the Civil Procedure Code (Amendment) Act, No. 8 of 2017.

Further, Section 39 of the Judicature Act provides that once a defendant has pleaded in any action, the defendant is no longer entitled to object to the jurisdiction of such court.[15] Practically, to 'answer' the plaint, would mean to acknowledge the existence of a cause of action. Therefore, once the defendant files the answer, the defendant loses the right to take up a purely legal objection as to maintainability of the plaint.[16]

Therefore, by this reasoning, such legal objections should be raised before an answer is filed i.e., well before the pre-trial.

The next issue to be addressed is the procedure by which such objections should be raised. Section 91 of the Code states;

> *Every application made to the count in the course of an action, incidental thereto, and not a step in the regular procedure shall be made by motion…and a memorandum in writing of such motion shall be at the same time delivered to the court.*

The Amending Act did not amend the aforesaid section relating to motions. Although, the pre-trial provides for the ascertaining of jurisdictional issues, a motion may be filed before the pre-trial hearing to move for a dismissal of an action where there is a fundamental and material defect in the plaint. The need to draw the attention of Court to this fact, which is *not a step in the regular procedure,* ought to be done by way of a motion.

The authority to act on motions not in step with the ordinary procedure form part of the inherent powers of the Court as observed by Wigneswaran J., in *Muthucumaran vs. Wimalaratne and Another*[17] that;

> *There is nothing in the Civil Procedure Code which prohibits a party to an action filing a motion at any stage and claiming an appropriate relief. A motion is a document which moves Court to act. Filing of a motion may not be a step in the regular procedure, which procedure lays down the type of pleadings that should be filed. But it is nevertheless an application to Court made in the course of an action incidental to the procedure adopted by Court either Regular or Summary, calling upon the Court for its intervention.*
>
> *Section 46 (2) of the Civil Procedure Code gives right to the Court to refuse to entertain a plaint or reject a plaint. This right can be used by Court ex mero motu though generally due to the large number of cases filed in a Court of Law in present times, the Court does not have the time to look initially into the matters set out in section 46 or 47 of the Civil Procedure Code until the Court's attention is drawn either by the Registrar of the Court or subsequently by a party to the action. Suppose a Court has patent lack of jurisdiction to entertain a plaint in its Court, the Registrar of the Court has the right to bring this matter to the notice of Court not by motion but by an endorsement made on the journal. Similarly, a party to an action could bring any matter incidental to the action which needs the attention and intervention of Court to the notice of the latter by motion. (vide section 91 of the Civil Procedure Code). A Court's right to entertain such application by motion and act upon them derives sanction apart from specific provisions in law, from also the inherent authority granted to it by law to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the*

[15] Section 39, Judicature Act 1979.

[16] Naturally, this does not include instances where there is a patent lack of jurisdiction *vide*, section 636, Civil Procedure Code. See also, [1974] *P. Beatrice Perera v. The Commissioner of National Housing* 77 N.L.R. 361 at 366.

[17] [1999] 1 Sri L.R. 139 at 142-143.

Court (vide section 839 of the Civil Procedure Code)

Thus, the power to file motions *at any stage* of the action has not been derogated by the Amending Act since it contains no positive rule prohibiting the same. This is congruent with the procedure adopted by the Indian Civil Procedure Code which expressly states that if a plaint does not disclose a cause of action against defendant, it may be rejected on an application filed by the defendant at any stage before trial.[18] This position has been considered by the Supreme Court in *Ram Sukh vs. Dinesh Aggarwal*[19] where it was emphasized that the purpose of **Order VII Rule 11** is to ensure that litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of Court.

It is manifestly clear that the Civil Procedure Code of Sri Lanka echoes the same position even after the Amending Act. Had the Amendment sought to alter this position, it would have done so expressly. Therefore, an interpretation of the Amendment contrary to this position is not cohesive with a holistic reading of civil procedure.

Whilst a significant change in procedure was introduced by way of the Amending Act, the discretion of the Court to refuse to entertain a plaint under Section 46(2) remained untrammeled. The Amendment does not seek to suggest that such issues should only be raised during the said hearing. If the legislative intent was to overturn what judicial authority referred to as 'trite law' in rejecting a plaint at the earliest opportunity, it would have done so expressly without leaving it to the imagination of the judiciary.

CONCLUSION

The need to disclose a cause of action in a plaint is vital to the tenability of the action. Failure to do so would warrant a rejection of the plaint.

A comparative analysis between the pre 2017 and the alleged post 2017 procedure reveals that the Amending Act, which introduced the pre-trial process also provided for jurisdictional matters to be ascertained. Nevertheless, nothing contained in the Amendment precludes Court from considering a legal objection which renders the plaint defective/nugatory prior to the pre-trial.

The power of the Court to reject a plaint has not been subject to amendment. This therefore leads to the logical conclusion that it was **not** the intention of the legislature to alter the existing practice of drawing the attention of Court (by way of motion) to a defect in the plaint that renders it void for further consideration.

The scheme of the Code seeks to draw an intentional distinction between matters involving an evidential determination and matters involving a legal determination. While the former would have to be addressed in the answer, the latter ought to be addressed before pleading to the action. Upon the pleading to the action, the party relinquishes his right to canvas the same.

Therefore, the power of the Court to reject a plaint *in limine* may be understood both logically and legally in the context that where a plaint is intrinsically defective for want of disclosing a cause of action, there can be no further action taken upon it; to do so, would only result in futile litigation.

[18] Order VII, Rule 11 (a); *S.M.P. Shipping Services Pvt. Ltd. v. World Tanker Carrier Corporation* [2000] AIR Bom 34; *K. Roja v. U. S. Rayu* [2016] 14 SCC 275.

[19] [2009] 10 SCC 541. See also, *Colonel Shrawan Kumar Jaipuriyar v. Krishna Nandan Singh and Another*, Civil Appeal No.6760/2019 decided on 02-09-2019.

RIGHT TO STRIKE: A CRITICAL APPRAISAL OF THE SRI LANKAN LAW

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Introduction

Industrial relations are a dynamic field of study as it encompasses an everlasting conflict between the employees and their employers over their respective claims. While employers are more conscience about their profits, employees are at a constant war for better wages, working hours, working conditions, terms of employment, retirement benefits etc. The law relating to industrial relations have tried to intervene and ease out this tension by trying to manage and facilitate for the smooth functioning of these relationships while understanding the inherent disparity of the bargaining powers between the employers and the employees. Industrial law has therefore empowered the employees to use certain measures which are portrayed at balancing out this inequality of bargaining powers.

Trade unions are formed in order to strengthen the employees who, in isolation, would not have any bargaining power. They act as the medium in which employees can get together and form an association with a common objective(s) in order to further their respective claims. Members belonging to such trade union are given the opportunity of collective bargaining, where by with their collective power they can come to acceptable terms and conditions of labor with their respective employers. They can wield their powers through the strength in numbers. These unions can take trade union actions regarding the rights and interest of their respective members and one of the most commonly and widely used actions are strikes. The ability or the right to 'strike' is a very powerful tool of economic coercion, which the employees can utilize to make claims and demands for their rights and interests.[1] While being a very powerful mechanism of erasing out the bargaining differences between the employers and employees, the abuse of this supposed right would and could have very serious repercussions on the country. The frequency of strikes in Sri Lanka has brought about public fury as employees, mostly in the public sector, have resorted to this method for making claims and demanding for their rights and interest. The public outraged is so immense that there have been many instances where people actively engaged in strikes have come under threats and violence from the general public at large. While strikes have become the most powerful tool available for trade unions, it has also become one of the most hated actions by the public at large. In this backdrop, it becomes important to investigate upon the right to strike by the employees.

Historical Developments

As late as 1921, the prevalent view was that action of strikers was prima facie actionable and therefore, required justification, which is to be secured by the standard of public policy. The use of the strike grew and developed along with the union movement.[2] It is generally

[1] S.C. Srivastava, *Industrial Laws and Labour Relations* (6th Edn Vikas Publishing 2012)

[2] Sidney J Watts, 'The Right to Strike' (1948) 9 U Pitt L Rev 243

recognized that the strike has been and still is labour's most significant and powerful industrial weapon or device to materialize its objectives or to effectuate union-management policies. The workers usually strike if their collective bargaining activities fail to result in adequate or satisfactory wages, hours and conditions of employment. They do not quit their jobs permanently but cease to work until their demands are satisfied or until circumstances force them to return to their jobs.[3] Trade union leaders have sought (with uneven success) to incorporate strikes into their strategies, and democratic lawmakers have sought (again, with uneven results) to incorporate them into laws and public policies. Historically strikes have expressed an irritation, a refusal to work, a spontaneous revolt against what are deemed to be unacceptable employment conditions.[4] Employees' right to strike is an essential component of their right to freedom of association, and one of the weapons wielded by trade unions when collective bargaining fails. Strike action is the most visible form of collective action during labour disputes and is often seen as the last resort of workers' organisations in pursuit of their demands.[5] The right to strike can be considered from several points of view. From a socio-economic point of view, the strike action can be justified on principles of equilibrium, autonomy or freedom to work.[6]

The International Labour Organization is a United Nations agency which is devoted to promote social justice and internationally recognized human and labour rights, pursuing its founding mission that social justice is essential to universal and lasting peace[7]. It may be surprising to find that the right to strike is not set out explicitly in ILO Conventions and Recommendations. It has been discussed on several occasions in the International Labour Conference during preparatory work on instruments dealing with related topics, but for various reasons this has never given rise to international standards (Conventions or Recommendations) directly governing the right to strike. A review of the actions of the International Labour Conference (ILC), the Governing Body, the Committee on Freedom of Association and the Committee of Experts does not produce one explicit statement proclaiming that workers have a right to strike. Nor is there an express statement in the two Conventions dealing with Freedom of Association, Convention No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). While the lack of an explicit, declarative statement is not conclusive regarding the existence of such a right, it does necessitate an inquiry to determine whether a right to strike exists and if so, to identify its origins.[8]

Constitutional Framework of Trade Unionism

Form a Sri Lankan perspective, the **1978 Constitution**[9] recognizes the right to form and join trade unions under **Article 14 (1) (d) of the Constitution**. This right is associated with the freedom of association which is enshrined under **Article 14 (1) (C)** of the Constitution and both rights are inseparable from one another.[10] It is worth

[3] Walter L Daykin, 'The Right to Strike' (1955) 6 Lab LJ 361

[4] Jean-Michel Servais, 'ILO Law and the Right to Strike' (2009) 15 Canadian Lab & Emp LJ 147

[5] Ernest Manamela and Mpfari Budeli, 'Employees' Right to Strike and Violence in South Africa' (2013) 46 Comp & Int'l LJ S Afr 308

[6] J. Y Claasen, 'The So-Called Right to Strike' (1983) 46 THRHR 32

[7] International Labour Organization, 'Mission and impact of the ILO' <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> accessed on 10.11.2019

[8] Janice R Bellace, 'The ILO and the Right to Strike' (2014) 153 Int'l Lab Rev 29

[9] Constitution of the Democratic Socialist Republic of Sri Lanka

[10] J. Wickramaratne, *Fundamental Rights in Sri Lanka* (2nd Edn Stamford Lake 2013)

recalling exactly why we ask about the connection between the right to strike and the fundamental right to freedom of association. If there is no such link, it does not of course pull the rug from under the right to strike. It does mean, however, that without this or another equally robust connection to a constitution or other source of basic rights, the entitlement to strike will be on a short leash.[11] However, from the wording of the Constitution we can neither directly assert nor deny whether there is a right to strike *per se* guaranteed by the Constitution. A liberal interpretation of the Constitution[12] should mean that, if there is a right to form and join trade unions, those who belong to such an association should also be granted with the rights, duties and responsibilities which are by law and customs would be attached to such associations. The law governing trade unions are to be found in the **Trade Unions Ordinance No. 14 of 1935. The Industrial Dispute Act No. 43 of 1950** has also made some provisions which are relevant to trade unions and it has some provisions regarding strikes as well.

S. R. De Silva[13] opines that, the right to strike is one of the most fundamental rights enjoyed by the employees and their unions, and it is an integral part of their right to defend their collective economic and social interest. Employees used to stop work when their claims and demands were not met by their employers. The cession of work was used to coerce the employer to accept the claims and demands of the employees. The employers in the days gone by vehemently rejected this attitude and method of the employees in trying to win their claims and demands, and therefore, employers often repudiated the employment contracts which were drawn with these striking employees as a counter measure to stop them from carrying any further. However, that was later stopped and trade unions managed to stop this practice of repudiating employment contracts.[14]

What is a Strike

A strike is defined as 'the cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been so employed, to continue to work or to accept employment' under the Section 2 of the Trade Union Ordinance. However, it is to be mentioned that, a mere cessation of work does not constitute a strike and this was emphasized in the case of *Tata Iron and Steel Co. v Its Workmen*[15].

The above definition recognizes that it shall be an act done in combination and the use of the word concerted indicates that the act must be planned, arranged, adjusted or agreed on and settle between the parties acting together pursuant to some design or scheme.[16] In addition to this, the judicial decisions has clearly pointed out that, the time duration of a strike is immaterial in deciding whether there was a strike or not[17] and refusing additional work which an employer cannot legally require an employee to do[18], has not been considered as a strike.

In Western nations, a worker's power to strike has been interpreted in two ways: the right to strike or the freedom to strike.

[11] Sheldon Leader, 'Can You Derive a Right to Strike from the Right to Freedom of Association' (2009) 15 Canadian Lab & Emp LJ 271

[12] See, ***Visuavalingam and Others v Liyanage and Others*** [1984] 2 Sri L R 123, where the Supreme Court held that, a meaningful interpretation of freedom of expression should also include a right to receive information as well.

[13] S. R. De Silva, *The Legal Framework of Industrial Relations in Ceylon* (1st End H.W. Cave Publishers 1973)

[14] S, Egalahewa, *A General Guide to Sri Lanka Labour law* (1st Edn Stamford Lake 2018)

[15] [1967] 1 LLJ 381

[16] R. Sen, *Industrial Relations: Text and Cases* (2nd Edn McMillan 2010)

[17] ***Buckingham and Carnatic Co. Ltd v. Their Workers***, [1953] 1 LLJ 181

[18] ***North Brooke Jute Co Ltd v Their Workmen***, [1960] 1 LLJ 17

For example, Article 57 of the Uruguayan Constitution stipulates that, "the strike is declared to be a right of trade unions." According to Article 59(2) of the Constitution of the Republic of Poland, "trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute". These are instances in which a right to strike has been specifically recognized. On the other hand, when we speak of a freedom to strike, it is about a negative right in the form of non-prosecution for conducting a strike as we find with the Sri Lankan legal system where there is no right to strike *per se*.

The difference between the two interpretations is more than a superficial matter of semantics; each interpretation has vastly different implications in terms of how protections for strikers are translated into law. The first interpretation regards striking as a fundamental human right which must be protected by law.. The second interpretation treats the power to strike as an exemption from criminal or civil sanctions; the protection of strikers is expressed in immunities, in the withholding of state intervention.[19]

Strike as a Trade Union Action

The Sri Lankan legal framework pertaining to strikes takes the latter view in which persons who are taking part in strikes are given immunity from suite under **Trade Unions Ordinance**, where under **Section 26**, they are afforded immunity from suite for civil matters and **Section 27** provides for immunity from suite for tortuous acts. However, the above acts must be committed by or on behalf of the trade union in contemplation or in furtherance of a trade dispute. If the acts are not covered under the provision, both provisions will become inapplicable and hence the immunity will be lost. In addition to this, to be afforded with the immunity, the strike must be carried out thorough a registered trade union. If the association in question has failed to register as a trade union Section 25 declares that, such a 'trade' union shall not enjoy any of the rights, immunities or privileges of a registered trade union until it is registered'. Therefore, it could be argued that, since it is the trade unions, their officials and members who are given immunity from suite for carrying out or on with a strike, an association or a group of individuals who are not a part of a trade union would not be able to strike and be protected from such immunities granted in favour of trade unions. This can also be seen from the fact that certain individuals engaged in certain professions such as; judicial officers, members of the armed forces, police officers, prison officers and members of any corps established under the Agricultural Corps Ordinance are barred from forming trade unions and therefore, are also denied the right to strike.

The Industrial Dispute Act also refers to the term 'strike' where it declares that it shall have the same meaning as provided in the Trade Unions Ordinance. **Section 32(2) of the Industrial Disputes Act** requires that at least 21 days written notice be given, in the prescribed manner before the commencement of a strike in any essential industry. Any workman who contravenes the provisions of **Section 32(2)** and any person who incites a workman to commence, continue or participate in or do any act in furtherance of a strike in contravention of **Section 32(2)**, is guilty of offences as specified in **section 40(1) (d) and (n)** respectively. **Section 40(1) (f)** prohibits a workman who is bound by a collective agreement, a settlement under the Act or by an award of an arbitrator of an Industrial Court or of a Labour Tribunal from taking part in a strike with a view of procuring any

[19] Mayoung Nham, 'The Right to Strike or the Freedom to Strike: Can Either Interpretation Improve Working Conditions in China' (2007) 39 Geo Wash Int'l L Rev 919

alteration of the terms and conditions of that agreement, settlement or award. Similarly, it would be an offence in terms of Section 40(1) (fff) to take part in a strike with a view to procure any alteration of an order made by a labour tribunal in an application under section 31 B. Section 40(1) (m) prohibits a strike after a dispute has been referred for settlement, by arbitration to an arbitrator to an industrial court or by adjudication to a labour tribunal.

A Right to Strike

While a general right to strike has not been recognized under the existing laws, Courts have on many instances have recognized a general right to strike. In the case of Rubber *Company Ltd v Labour Officer Colombo*[20] the Court held that, the Industrial Disputes Act recognizes a basic right of workman to commence and to participate in a strike to express their grievances and to win their demands subject to restrictions and prohibitions specifically laid down. In the case of *Abbosally, Former Minister of Labour v Vocational Training and Others*[21] it was held that, the workers had a right conferred on them to launch a legitimate strike. The right to strike has been recognized by necessary implication in the industrial legislation in Sri Lanka and there are numerous express statutory provisions providing for the regulation of strikes. It is, thus a recognised weapon for the workmen to resort to in asserting their bargaining power and for promoting their collective demands upon an unwilling employee. In addition to this, it was made clear that, even a probationary employee has a right to strike and this was made clear in the case of *Ceylon Mercantile Union v Ceylon Cold Stores Ltd and Another*[22] where the court held that, a probationer has as much a right to strike as a confirmed workman and the proper exercise of that right cannot place the probationer in jeopardy insofar as the employer's right to terminate his services during the period of probation is concerned.

Conclusion

From the above it is evident that, in Sri Lanka, there is freedom of strike rather than right to strike which is not directly recognized as a right *per se*. However, the governing legal framework is enough to afford protection for those who do get engaged in strikes through a combination of statutory provisions and decided case law.

[20] [1990] 2 Sri L R 42
[21] [1997] 2 Sri L R 137
[22] [1995] 1 Sri L R 261

LAW OF CONFISCATION: A COMPARATIVE ANALYSIS WITH REGARD TO RECENT JUDICIAL DECISIONS AND THE CODE OF CRIMINAL PROCEDURE OF SRI LANKA

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Right to property is enshrined in **Article 17 of the "Universal Declaration of Human Rights (UDHR)**". It enshrines it as follows:

1. "Everyone has the right to own property alone as well as in association with others."[1]
2. "No one shall be arbitrarily deprived of his property."[2]

Therefore, it must be noted that one can possess, use and enjoy of his property until such is used to commit offences which lead to confiscation or forfeiture of his property.
This article is intended to be written to discuss the development of the recent pronouncements of Appellate Courts of Sri Lanka with regard to concept of confiscation and to assess the current trend of the Courts of Sri Lanka.

Confiscation of property

The term "Confiscation or forfeiture" is derived from the Latin term '*Confiscaio' "*joining to the *fiscus*, i.e. transfer to the treasury*"*. It's a legal seizure by a government authority.
In a case[3] it was stated as "Forfeiture is a punishment"[4]. In the case of Police *Sergeant v. Kandasamy*[5], MacDonell, CJ observed that forfeiture or confiscation is penal provision and the power to confiscate should be clearly be given by law."[6]
Therefore, it must be noted that use of a property is a right which cannot be taken away unless there is a specific statutory provision.
In Sri Lanka, substantial provisions regarding confiscations are found in some specific statutes and procedures of the same are found in **Code of Criminal Procedure Act No.15 of 1979** amended subsequently.

Procedure to conduct the inquiry

Inquiry in connection with disposal of property is conducted in terms of **chapter XXXVIII of Code of Criminal Procedure**.
Through inquiry, Magistrate is to be satisfied whether the property used in commission of the offence should be forfeited, subject to the substantial provisions of the specific statutes which provide provisions for confiscation.
Section 425(1) of the Code Criminal Procedure Act No.15 of 1979 stipulates as follows:
"When an inquiry or trial in any criminal court is concluded the court may make such orders as it thinks fit for **the disposal of any document or other property** produced before it regarding which any offence

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[1] Universal Declaration of Human rights 1948, Article 17(1)
[2] Ibid.,Article 17(2)
[3] 28 N.L.R.348
[4] 28 N.L.R.348 (349)
[5] 3 C.L.W 45
[6] Police Sergeant v. Kandasamy, 3 CLW 45

appears to have been committed or which has been used for the commission of any offence."[7] (Emphasis added).

It has to be borne in mind that the term "disposal" does not mean or include "confiscation".[8] So, the Magistrate is bound to peruse the relevant statutes under which charges may be framed to confiscate a property, before confiscating a property.

At the confiscation inquiry, the owner of the property is heard from his side to explain the use of his property at the time of committing the offence.

In the case of *Manawadu v. Attorney General*[9], Sharvananda J held that the term "Forfieted" used in section 40(1) of the Forest Ordinance must be given a meaning as "Liable to be forfeited".

In the case of *Orient Financial Corp. Ltd v. Range Forest Officer and 1 Other*[10], Priyasath Dep PC.J pronounced as follows:

"*According to the plain reading of this section, it appears that upon conviction, the confiscation is automatic*"[11].

Therefore, there is no doubt that 3rd parties who are the owners of such properties, are prejudiced. Thus, the rule of "*audi alteram partem*" came into existence. On that basis, it was understood that 3rd parties who are the owners of such properties, should be heard.

This view puts a burden on the Magistrates to conduct a confiscation inquiry and to take evidence, subject to specific statutes without making immediate orders to confiscate once the offence is committed.

At the confiscation inquiry, registration book should be marked as part of evidence in order to prove the "ownership" of such property.[12] "The claimant, in the first instance before claiming the production, must establish ownership."[13] Non-tender of the document will create an impression that "petitioner knew that the vehicle was not under the petitioner's name and cannot claim it."[14]

Proofs and standard of proof

When it comes to the purview of confiscation, the owner, who is heard, is expected to establish and satisfy the Court on two elements at the confiscation inquiry. Namely,

1. The accused committed the offence without his knowledge.
2. The accused committed the offence without his participation.

The first is the knowledge test. Here, what standard which the Court expects is a question of law. The latter is a question of fact which is precautionary measures that should have been taken. There are numbers of judgments which discuss these two elements deeply.

In the case of *The Finance Company PLC v.Priyantha Chanadana and 5 Others*[15], Dr. Shirani Bandaranayake J held that it would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence, had been so used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such offence. The owner has to establish the above said matters on a "balance of probability".

In the case of *Abuthalibu Mujeeba v. A.G. and Others*[16], it was held that the petitioner has no "locus standi" to maintain the case since

[7] Code of Criminal procedure Act, No.15 of 1979
[8] 28 N.L.R.348
[9] 1987 3 SLR 30
[10] SC Appeal No.120/2011 decided on 10.12.2013
[11] Ibid. (3)
[12] Abuthalibu Mujeeba v. A.G and Others, CA (PHC) APN No:122/15
[13] Ibid. (12)
[14] Ibid. (12)
[15] 2010 2 SLR 220
[16] Abuthalibu (n12)

the property was not in her possession at the time of commission of the offence. In this case, it must be noted that petitioner (subsequent owner) was not the original owner at time of commission of the offence. Therefore, she cannot prove any one of these two elements even though she was noticed to be heard.

In the case of *Mary Matilda Silva V. P.H. De Silva*[17], it was held that giving "mere instructions" is not sufficient to discharge the said burden. Owner must establish that "genuine instructions" were in fact given.

In the case of *Kottasha Arachchige Ubhayaweera v. Range Forest Officer and Others*[18] ", it was held as follows:

"*Accordingly, it is amply clear that simply telling the driver is insufficient to discharge the burden cast on the vehicle owner by law*."[19]

In the case of *Peoples Leasing Co. ltd v. The Forest Officer and Others*[20], the order reported to be given by the Magistrate, is reproduced as follows:

"*රාත්‍රී කාලයේ කරන දේවල් සම්බන්ධයෙන් සොයා බැලීමේ හැකියාවක් නොමෙති බව ද සාක්ෂිකරු පිළිගෙන ඇත.*[21] *and further .ලොරි රථයේ සන්තකය ලයා පදිංචි අයිතිකරු භාරයේ නොතිබී ඇති බව පෙනී යයි*"[22]

The judgment reported to be given by the Judge of the High court, is reproduced as follows:

"*fuu idlaIslre m%ldI lr we;af;a" jdykh iïnkaOfhka fidhd ne,Su wh lsrSfï ks<Odrshd úiska isÿ lrk njh' tfia jQj o tu fidhd neÿfõ hehs lshk wh lsrSfï ks<Odrsfhl+ idlaIshg le|jd ke;*"[23]

Therefore, it was held by the Court of Appeal that views of both the Magistrate and the Judge of the High Court are correct, in finding that the absolute owner has failed to establish the two elements.

Then, it is clear that the owner has a full-time task to look after his property and the property must be under his effectual possession.

In the case *of Ceylinco Leasing Corp. Ltd v. M.H. Harison and Others*[24], the court pronounced as follows:

"*by merely having a clause in small print in the (lease) agreement that the registered owner of the vehicle is required to comply with and confirm to all rules, Regulations and Laws, in my view is not adequate to prevent the commission of offences*."[25]

In the case of *K.W.P.G. Samarathunga v. Range Forest Officer and 1 Other*[26], The term used in the judgment with regard to precautions, is "necessary precautions". In the later part of this judgment, his Lordship Chitrasiri J pronounced the term a "meaningful step". Therefore, one must note that what amounts to meaningful steps is a question of fact and it is a matter for the court to decide.

In the case of *Kottasha Arachchige Ubhayaweera v. Range Forest Officer and Others*[27], K.K. Wickramasinghe J pronounced as follows:

"*We are of the view that the Appellant should have actively inspected and confirmed about a valid permit of the said timber especially when he had prior knowledge about his vehicle being used for such transportation from 70km away from his residence. As per the evidence of the Appellant in the vehicle inquiry, it is observed that in some occasions he had no control over the vehicle for two days. Therefore, it is understood that the Appellant had failed to discharge the burden cast on him.*"[28]

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[17] CA (PHC) *86/97*
[18] CA (PHC) 95/2012 decided on 04.09.2018.
[19] Ibid(17)
[20] C.A. Revision No. CA (PHC) APN 106/2013
[21] Ibid. (7)
[22] Ibid. (7)
[23] Ibid. (8)
[24] SC (SPL) LA 181/11
[25] Ibid. (14)
[26] C.A (PHC) No.89/2013
[27] Kottasha (n18) (18)
[28] Ibid. (18)

Absolute Owner V. Registered Owner

It is obvious that it is settled law that owner of a property should be heard at the confiscation inquiry. Recently, the Appellate Courts of Sri Lanka had to address and interpret the term "owner" used in statutes which contain the provisions for confiscation. In other words, which "owner" (Absolute owner or registered owner or both) should be afforded the opportunity to be heard at the confiscation inquiry, has been a question to be dealt with.

When a property is subjected to a Hire Purchase Agreement, there would be two owners. Namely, the absolute owner (Financial companies) and the registered owner. In this circumstances, if an offence is committed, who should be noticed for confiscation inquiry is a well-argued topic in recent times.

When the judgment in the case of *Manawadu V. A.G*[29] was delivered, there was no provision in the Code of Criminal Procedure as to Hire Purchase Agreements. At that time, the Courts were inclined to apply the rule of "audi alteram partem" in order to enable registered owner to take part at the confiscation inquiry.

By the development of business practices and the existence of Financial companies which facilitate "Hire Purchase Agreements", the need of specific provisions to be enacted, was realized.

Thus, section **433A(1) of the Code of Criminal Procedure (Amendment) Act**, **No.12 of 1990** stipulates as follows:

"*In the case of a vehicle let under a higher purchase or leasing agreement, the person registered as the* ***absolute owner of such vehicle under the Motor Traffic Act*** *(Chapter 203)* ***shall be deemed to be the person entitled to possession*** *of such vehicle for the purpose of this chapter.*"[30](*Emphasis added*)

Then, the Courts had to address the same rule (*audi alteram partem*) allowing the Financial Companies to take part at the confiscation inquiries.

In the case of *Merchantile Investment Ltd. V. Mohamed Mauloom and Others*[31], the Court held that in view of **s.433A(1) of Act No. 12 of 1990**, the petitioner being the absolute is entitled to possession of the vehicle, even though the claimant respondent had given its possession on the Lease Agreement. It was further stated as follows:

"*It was incumbent on the part of the magistrate to have given the petitioner an opportunity to show cause before he made the order to confiscate the vehicle*"[32].

After allowing the Financial Companies to take part at the confiscation inquiry, in some cases[33], it was argued that the burden to prove the above two elements is only upon the registered owner and that will not be applicable to an absolute owner. But in fact, that contention was rejected by the Supreme Court indicating as follows:

"*both the absolute owner and the registered owner should be treated equally and there cannot be a special privilege offered to an absolute owner such as financial company in terms of the applicable law in the country*"[34].

The Court further held the absolute owner also should discharge the burden of establishing the two elements[35].

Nevertheless, after some point of time, it was later understood about the trend that the Financial Companies after taking part of the confiscation inquiry and getting the vehicle released, gives the released vehicle back to the same registered owner.

[29] Manawadu(n9)
[30] Code of Criminal Procedure (Amendment) Act, No.12 of1990.
[31] 1998 3 SLR 32
[32] Ibid (35)
[33] 2010 2 SLR 220, SC Appeal No.120/2011.
[34] The finance(n16)(235)
[35] Ibid.

To limit this strategic crime, by using the property subjected to Financial Facility, to commit offences, the Courts were expected to address the issue carefully.

In the case of *Orient Financial Corp. Ltd v. Range Forest Officer and 1 Other*[36], two questions were posed as to whether it can be said the absolute owner committed the offence or it was committed with the knowledge or participation of the absolute owner. The Court said as follows:

"*The answer is obviously no. "Surely, a finance company cannot participate in the commission of an offence of this nature when the vehicle is not with them. It cannot be said that the finance company has the knowledge of commission of the offence when the vehicle is not with them*"[37].

Then, it created a doubt whether the absolute owner should be heard. Therefore, in this case, The Supreme Court had to address the above issue and made its view as who should be fit to be heard.

The view of the Learnt Magistrate reported in the said judgment was as follows:

"*In terms of the lease agreement the absolute owner can recover the loss from registered owner and failing that from guarantors and sureties. Further the Learnt Magistrate observed that even after the conviction of the registered owner, the appellant had failed to terminate the lease agreement. In the order, it was stated that if the vehicle is given to the appellant there was a possibility that it could give the vehicle back to the accused (registered owner). This will defeat the objective of section 40 of the Forest Ordinance"*[38].

The Court of Appeal was of this view and introduced a new interpretation to the term "owner" used in the Forest Ordinance. The Court applied the "control test" in order to explain who should be fit to be heard at the inquiry. The Court introduced a civil remedy recognized by law. Under the law of contract, the absolute owners can have a civil suit against registered owners and can recover their loss sustained by them because of an illegal act. The court insisted as follows:

"*if the agreement is terminated, he will be liable only for the balance installments and other charges. This will remove the deterrent effect on the registered owners and encourage them to use vehicles subject to finance to commit offence.*"[39]

The Court further said as follows:

"*when giving a vehicle on lease or hire, the company is aware of the risk when it hands over the full control and possession of the vehicle. Finance Companies charge higher interest rates due to this risk factor and also obtains additional security by way of guarantors*."[40]

Therefore, the Supreme Court finally came to the conclusion that,

"*the person who is in possession of vehicle is the best person to satisfy the court to prevent the commission of the offence*."[41]

In the case of *Peoples Leasing Co. Ltd v. The Forest Officer and 3 Others*[42], the registered owner never claimed his vehicle at all. But, still the Court of Appeal emphasized the principle drawn in the case of Orient Financial Corp. Ltd case. The Court emphasized that,

"*Handing over the vehicle to the registered owner itself shows that the power of the absolute owner to have the control over the vehicle is diminished. Moreover, control over the vehicle exercised by the absolute owner becomes very remote after handing over to the registered owner*".[43]

[36] Oreient (n10)
[37] Ibid (6)
[38] Ibid (6)-(7)
[39] Ibid (7)
[40] Ibid (7)
[41] Ibid(6)
[42] Peoples (n20)
[43] Ibid(10)

In the case of *Ceylinco Leasing Corp. Ltd v. M.H. Harison and Others*[44], the Courts were to be expected to address whether the term "owner" includes the absolute owner as well in connection with Forest Ordinance. Here, the appellant relied on the judgment of *Manawadu v. AG*[45] and relied on the **section 433A of the Code Criminal Procedure as amended No.12 of 1979** to justify its argument.

The Court justified by holding that,

"*Section 433A is a provision applicable when dealing with disposal of property by a Magistrate and a process which does not require the magistrate to determine the "ownership" of the property*".[46]

The Court further insisted as follows:

"*for the purpose of section 40 of the Forest Ordinance, the owner who has the possession and the control of the vehicle should be considered as the owner of the vehicle*"[47].

Therefore, it must be borne in mind that presently, the position is settled that the registered owner is the best person to be heard.

Nevertheless, this leaves a doubt or dilemma as to whether the position created by the Judgment of *Manawadu V. A.G*[48], is still in force, because the position that "the best person to be heard is the registered owner" formed by *Orient finance Case*[49] restricts or limits the right to claim of the absolute owner.

Conclusion

It can be presumed that the absolute owner who has the right to claim, is not in a position to exercise the right efficiently. Practically, the only option available to absolute owner is to seek civil remedies under contractual obligation suits.

Notwithstanding that, it is appreciated that the Appellate Courts of Sri Lanka are very much concerned about the intention of the legislature, making various practical interpretations appropriate to the current scenario.

It's commendable that The Courts have put a bar to control the commission of strategic crimes using the Financial Facility. Nevertheless, it is recommended that there should be proper mechanism to control these kinds of misuses in order to achieve the intention of the legislature.

[44] Ceylinco(n24)
[45] Manawadu(n9)
[46] Ceylinco(n24)(12)
[47] Ibid.(14)
[48] Manawadu(n9)
[49] Oreient (n10)

RECOGNIZING PROTECTION OF PERSONAL DATA UNDER THE FUNDAMENTAL RIGHTS (CONSTITUTIONAL RIGHTS) PERSPECTIVE IN SRI LANKA

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"Rapid technological developments and globalization have brought new challenges for the protection of personal data. The scale of the collection and sharing personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities"[1].

Use of data in an unprecedented scale and flow of data among irrelevant users would affect the personal life of any person. Most of the countries all over the world already addressed this issue by introducing laws for personal data protection. While countries like Portugal and Chile recognized this under the Constitution as 'Right to Personal Data Protection', some other countries recognized it under a specific piece of legislation such as 'Personal Data Protection Act'. This article is based on an analysis of possibilities for recognizing protection of personal data under the Constitutional Right perspective in Sri Lanka. This will be discussed under the sub headings,

1) Distinguish right to personal data protection from right to privacy.
2) Possibilities of guaranteeing right to personal data as a Constitutional right in Sri Lanka.
3) Suggestions for an Act of personal data protection which provides the legal framework with this Constitutional right (fundamental right) for personal data protection shall be exercised.

1) Distinguish right to personal data protection from right to privacy

Previously 'right to privacy' was treated as an umbrella clause which included most of the concepts relating to the personal life of an individual. Protection of personal data was one among those. Attempts to recognize protection of personal data as an independent concept which no longer depends on 'right to privacy' have emerged. Interestingly, a tendency to recognize these concepts as two different concepts which have their own way of independency was recognized recently. Famous scholarly discussions in this regard are mostly dependent on the opinions of De Hert and Gutwirth. These scholars propose an ingenious way to illustrate the differences in scope, rationale and logic between these two rights. They characterize privacy as a "tool of opacity" and data protection as a "tool of transparency." In connecting the invention and elaboration of these legal tools to the development of the democratic constitutional state and its principles, the above-mentioned authors state that:

"the development of the democratic constitutional state has led to the invention

[1] Article (6), Regulation (EU) 2016/679 of European Parliament and of the Council, Official Journal of the European Union, http://eur-lex.european/legal-content/EN/TXT/

and elaboration of two complementary sorts of legal tools which both aim at the same end, namely the control and limitation of power. We make a distinction between on the one hand tools that tend to guarantee non-interference in individual matters or the opacity of the individual, and on the other, tools that tend to guarantee the transparency/accountability of the powerful"

In developing the fundamental differences between these tools, the authors explain that:

"The tools of opacity are quite different in nature from the tools of transparency. Opacity tools embody normative choices about the limits of power; transparency tools come into play after these normative choices have been made in order still to channel the normatively accepted exercise of power. While the latter are thus directed towards the control and channelling of legitimate uses of power, the former are protecting the citizens against illegitimate and excessive uses of power" [2]

"Through the application of these ideas, governments try to reconcile fundamental but conflicting values such as privacy, free flow of information, governmental need for surveillance and taxation, etc "[3]

in mind the societal need to collect, store and process data, along with the relative ease through which entities collecting such data can abuse power and infringe privacy, data protection seems to assume an administrative role. In fact, and as Blume notes, this is one of the functions of traditional administrative law that has been extended to data protection law[4]

Privacy is a concept which is introduced to ensure non-interference in individual matters, including interference by government or by private sector which would make obstacles for personal autonomy. Data protection is not always so private. According to De Hert & Gutwirth it is a 'tool of transparency' which would ensure the processing of personal data. Most importantly Data protection is procedural while privacy is substantive in the face of rights. A matter of Data Protection is based on the procedural method of protecting personal data. The primary discussion of this article includes that the concepts of "personal data" and "data relating to personal life" are not the same and should not be confused as same concepts. The phrase "information relating to the personal life" describes any information which holds the credibility of damaging the dignity of any person if the information is revealed or might affect his or her private life in a significant manner and it is considered as the information which is protected under concept of "Right to Privacy". Privacy can be defined as 'deciding yourself who will get which information about you'. Apart from that any information which is connected with any natural person but not in the stage of damaging him or her private life, such identified or identifiable information can be recognized as "personal data". Furthermore "identifiable person" means a person who can be easily identified through given data.

According to the **Article 2 of the European Union (EU) Directive 95/46**, the enlarged idea of "personal data" clarifies that those data are treated as any information relating to an "identifiable natural person" who can be identified directly or indirectly, particularly by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity. This means that the information is directly about a person, or can be traced back to this person through

[2] De Hert P and Gutwirth.S , 'Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power' in Erik Claes and others (eds) , Privacy and the Criminal Law (Intersentia2006)

[3] ibid

[4] ibid

the name, email address, and contact numbers etc.

Recently, the difference between the 'right to privacy' and 'right to personal data' was recognized by the Chilean Constitution on 16th June of 2018 through an amendment Law No. 21.096. By this amendment it was proposed to distinguish the difference between right to personal data and the right to privacy. It ensures the possibility of imposing legal duties on third parties which can control personal data more effectively. They also included a new provision for personal data protection. This was treated as recognizing personal data protection as a fundamental right through the Constitution of Chile.

The above-mentioned amendment the **Article 19 of the Chilean Constitution** is as follows,

'The Constitution ensure to every person:
The respect and protection of private life and the honor of the person and family, and furthermore, the protection of personal data. The treatment and protection of this data will be put into the form and condition by law'[5]

It says while the phrase of ***the respect and protection of private life and the honor of the person and family*** ensure the right to privacy the phrase ***the protection of personal data. The treatment and protection of this data…*** ensure the personal data protection.

This exemplarily reveals that Right to privacy and right to personal data have their own perspectives and should be treated as two different rights. *It is clear that privacy, itself a fundamental right, is a value that the right to data protection seeks to protect*[6].

2) Possibilities of guaranteeing right to personal data as a fundamental right (constitutional right) in Sri Lanka

Rights are recognised as such because they protect particular values of a polity, and whilst rights violations often result in serious harm to claimants, this is not a necessary component of a claim because a breach of those rights is an attack on the values underpinning the legal system, and that is the harm that human rights jurisprudence seeks to protect against[7]

Fundamental rights are defined as *'rights contain in a Constitution or in a certain part of it, or if the right in question are classified by a Constitution as fundamental rights'*[8]. More specifically fundamental right is a basic or foundation, derived from law; a right deemed by the Supreme Court to receive the highest level of Constitutional protection against government interference.

Possibilities of recognizing personal data protection as a fundamental right should be considered with more relevant examples. Charter of Fundamental Rights of the European Union would be the best example which can be used. While international law instruments normally use the term 'human rights', the EU (and national legal orders) speak of 'fundamental rights. According to the preamble of the Charter 'it is necessary to strengthen the protection of fundamental rights in the lights of changes in society, social progress and scientific and technological development by making those rights more visible.' Furthermore, they admitted fundamental rights as a result of constitutional traditions and also as international obligations which are common to the Member States of the European Union.

[5] Chile Law No.21.091, One Trust DataGuidance, http://staging.privacypedia.org/laws/chile-law
[6] Yvonne McDermot , Conceptualising the right to data protection in an era of Big Data, http://journals.sagepub.com
[7] Ibid
[8] R Alexy , ' Discourse Theory and Fundamental Rights' in Agustin Jose' Menendez and Erik Oddvara Eriksen (eds), Arguing Fundamental Rights , (Dordrecht, Springer, 2006) 15 , quoted from Maria Tzanou, The Fundamental Right to Data Protection, Normative Value in the Context of Counter-Terrorism Surveillance.

The recognition of Data Protection as a Fundamental Right in the EU seems to broadly satisfy the criteria employed by international human rights scholars for the introduction of new human rights : Data Protection reflects fundamental social values in the era of the rapid advancement of the technologies ; it has been relevant for some time in national ,international and transnational systems.; it is consistent with the existing body of laws in the field ; it achieved a high degree of consensus at least in the EU; and it gives rise to 'identifiable rights and obligations '[9]

According to the EU Network of Independent Experts on Fundamental Rights, *finally there is a pragmatic reason for the elevation of data protection to the status of a fundamental right: individuals must be aware of its existence and conscious of the ability to enforce it in the light of the new challenges arising from the rapid development of information and communication technologies*[10].

This article treated fundamental rights and Constitutional rights as the same. *Constitutional rights have gradually been applied in horizontal relationships, their origin lies in regulating the vertical relationship, between citizen and state. Constitutional rights provide citizens with the freedom from governmental interference, for example in their private life or freedom of expression*. [11]

The values Constitutional rights protect are seen as particularly weighty and essential to human dignity or personal freedom – they concern matters such as privacy and freedom of expression, but also lay down procedural rules that regulate the state and its organs, such as the separation of powers, the authority of the different powers and the democratic voting process. The constitution is literally the constitution of a state which provides the fundaments on which the nation is based. Although the provisions in the constitution can generally be changed, it is often more difficult to alter those than non-constitutional rights. Many countries require a qualified majority to change the constitution and demand that two parliaments in a row, after elections having taken place, must agree on altering the constitution. This research would also include the possibilities of introducing the "right to protection of personal data" under the Constitution of Sri Lanka.

The best example for introducing right to personal data as a fundamental right is **Article 7 and Article 8 of the European Union Charter of Fundamental Rights**.

As mentioned in the Article 7: *Respect for private and family life*

Everyone has the right to respect for his or her private and family life, home and communication.

This has separately stated that the 'right to privacy' by means of protection of information relating to a private life and,

Article 8 of the Charter has given the recognition of right to protection of personal data as mentioned below,

Protection of personal data:

1. Everyone has the right to protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.
   Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

[9] Ibid

[10] EU Network of Independent Experts on Fundamental Rights

[11] Vicki C. Jackson & Mark Tushnet, *Comparative constitutional law* (St. Paul: Foundation Press 2014). Michel Rosenfeld & András Sajó, *The Oxford handbook of comparative constitutional law* (Oxford: Oxford University Press 2012). Walter F Murphy & Joseph Tanenhaus, *Comparative constitutional law: cases and commentaries* (London: Macmillan 1977).

3. Compliance with these rules shall be subject to control by an independent authority[12].

The concept of personal data protection as a constitutional right is not novel. 'Right to data protection' has been recognized by Constitution in many countries. **Article 35 of the Portugal Constitution** stated that specifically based on computerized data,

1) Every citizen has the right to access to all computerized data that concern him, to be informed of the purpose for which they are intended, all as laid down by law, and to require that they be corrected and updated.
2) Computers shall not be used to process data concerning political affiliation, religion, or private life, except where the processing of data is done for the purpose of processing statistical data that cannot be individually identified[13].

This has proven that right to personal data protection can be recognized also under the Constitution of Sri Lanka and this can be done similar to how Sri Lanka introduced 'right to information' under the **Article 14A of the Constitution**.

3) Suggestions for an Act of personal data protection to provide the legal framework under which the fundamental right to personal data protection shall be exercised

As mentioned above previously the 'right to information' under the Constitution was enabled by a piece of legislation named 'Right to Information Act 2016'. It is obvious that any right which has the Constitutional protection can have practical significance through an enabling Act. Likewise, 'Protection of Personal Data Act' can be suggested as the procedural legalized method of formulating the **processing** of personal data by both private companies and public authorities when making use of personal data. Essentially this has to be prohibited to prevent unnecessary processing of collected data.

> *'processing' means any operation or set of operation which is performed on personal data or on set of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction[14].*

This can be guided by the **Article 5 of the General Data Protection Regulation (GDPR) 2016/679**. It states that **principles relating to processing of personal data** under six categories as follows[15],

Personal data shall be:

*a) process lawfully, fairly and in a transparency manner in relation to the data subject (**lawfulness, fairness and transparency**);*
*b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in public interest, scientific or historical research purposes or statistical purpose shall, in accordance with the Article 89(1), not be considered to be incompatible with the initial purpose (**purpose limitation**);*

[12] Charter of Fundamental Rights of the European Union (2000/C 364/01), http://www.europal.europ.eu
[13] Article 35 of the Portugal Constitution, http://www.legislationline.org
[14] Article 4, Definitions, Regulation (EU) 2016/679 of European Parliament and of the Council, Official Journal of the European Union, http://eur-lex.european/legal-content/EN/TXT/
[15] Regulation (EU) 2016/679 of European Parliament and of the Council, Official Journal of the European Union, http://eur-lex.european/legal-content/EN/TXT/

c) *adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (**data minimisation**);*

d) *accurate and where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (**accuracy**);*

e) *Kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with the Article 89(1) subject to implementation of the appropriate technical and organizational measures required by this Regulation in order to safeguard the rights and freedom of the data subject (**storage limitation**) ;*

f) *Processes in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures (**integrity and confidentiality**).*

Furthermore, it requires the establishment of an Authority which regulate each and every entity engaged with data collecting and processing, namely Data Protection Authority. The main duty of the said Authority should be investigating the confirmation of above-mentioned rules proposed by General **Data Protection Regulation (GDPR) 2016/679.** Therefore, a new designation of Data Protection Officer can be introduced who can work in any private or public authority as mentioned in the **Article 37, 38 and 39 of GDPR** with the basis of professional qualities and the knowledge of data protection laws and practices. His/her task shall consist with informing and advising the controller or the processor of any data to carry out the processing in accordance with the regulations mentioned in the above proposed Act.

Conclusion

The purpose of introducing a legal regime for personal data protection should ensure the freedom of the persons related to that data. The law should facilitate possibilities that the person remains in control of his/her data. The owner of the data should be the one who decide with whom he needs to share the information including who has access to it, for how long and for what purposes. The foremost argument based on the discussions of introducing a law for data protection is, to update law to prevent both private companies and public authorities use personal data in an unprecedented scale in order to pursue their activities.

LEGAL TECHNOLOGY: MODERNIZING SRI LANKA'S CRIMINAL JUSTICE SYSTEM

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Introduction

Sri Lanka's criminal justice system experiences serious delays in case disposal. In 2017, a special committee on amending the **Penal Code and the Code Criminal Procedure Ac**t reported that the average length of time to taken conclude a criminal trial is 10.2 years. It also noted that a further period of seven years is spent during the appeal process.[1] Among other factors such as prescribed procedures, human resource shortfalls and coordination issues among the key stakeholders in the penal chain, the manual nature of case processing is a major source of inefficiency and delay.

In several other countries, legal technology has contributed to improving the quality of justice delivery and improving access to justice.[2] This article will discuss the need for the adoption of legal technology to improve the overall quality of justice delivery in Sri Lanka. It focuses on the need for the gradual adoption of legal technology in Sri Lanka to address the current manual case disposal in the criminal justice system. It argues that moving towards legal technology can help address inefficiencies and delays that have eroded public confidence in the present criminal justice system.[3]

Sri Lankan criminal justice system: justice delayed

In the recent past, key actors within the justice system, such as the Supreme Court and the Ministry of Justice have recognized the inordinate delays visible throughout the penal chain.[4] For instance, the Supreme Court recently found that 'undue delay and/or inaction by police in prosecuting the suspect' amounts to violation of **Article 12 (1) of the Constitution**, which guarantees all persons equal protection of the law.[5] In

[1] Sectoral Oversight Committee on Legal Affairs (Anti-Corruption) & Media, *Recommendations Pertaining to the Expeditious and Efficient Administration of Criminal Justice* (September 2017),<https://www.parliament.lk/uploads/comreports/1510738363068517.pdf> accessed 21 September 2019, at p.3. The committee also noted that the average time period between the date of commission of the offence and filing of the indictment was 4.7 years. The average time period between the date of the indictment and the date prosecution commenced was 3.7 years. Another period of 1.8 years is taken between the commencement of recording of evidence and the ruling of the case at the High Court.

[2] This includes initiatives such as KEI program (The Netherlands), eCourts Project (India), LexNet (Spain), Justice21 (France), eJusticeSOA (Germany) and Civil Resolution Tribunal (Canada). See Organization for Economic Cooperation and Development (OECD), *Equal Access to Justice, OECD 2nd Expert Roundtable, Background Notes* (December 2015) <http://www.oecd.org/gov/Equal-Access-Justice-Roundtable2-background-note.pdf> accessed 21 September 2019. p.14

[3] Department of Justice, Canada, 'Reducing Delays and Modernizing the Criminal Justice System' (2019) <https://www.justice.gc.ca/eng/cj-jp/redu/index.html_> accessed 22 September 2019.

[4] Ministry of Justice (Sri Lanka), *Performance Report* (2018) <https://www.parliament.lk/uploads/documents/paperspresented/performance-report-ministry-of-justice-prison-reforms-2018.pdf> accessed 21 September 2019. (MOJ Performance Report).

[5] *M.M. Leelawathie Hariot Perera and others v. N.K. Illangakoon, Inspector General of Police and Others*, SC/FR/Application No.372/2015, Supreme Court of Sri Lanka, decided on 17.11.2017.

this case, the police took over eight months to complete a murder investigation with direct evidence and another 11 months to forward the investigation notes for the Attorney General's advice.

Delays within the criminal justice system are detectable from the investigation stage to the trial and appeal stages. These delays are partly attributable to the excessive reliance on traditional methods of record keeping, such as handwritten notes and files, which remain in a hard copy format during the investigation, as well as the trial.[6] These manual methods give limited accessibility and transferability across actors in the penal chain. For instance, if an ongoing investigation were to be transferred from the area police to the Criminal Investigation Division (CID), it would lead to complete recommencement of the investigation, as the handover is manual. The investigators would have to allocate a considerable amount of time to read through the hard copies of documentation. Once the matter has reached the trial stage, if the judge is transferred mid-trial, the incoming judge would have to familiarize himself/herself solely through studying the physical case record. Therefore, if the victim gave evidence prior to the arrival of the second judge, the only source available to assess the demeanor of the victim is the paper-based documentation.

Under the present system, Judicial Medical Officers (JMO) must personally retain the sole copy of the Medico Legal Report (MLR) in a hard copy format. This raises two concerns – namely, (i) over reliance on a single hard copy report containing crucial evidentiary material, and (ii) the need to physically track the particular JMO (if the JMO has transferred out of the particular station) due to the lack of a centralized mechanism to store MLRs and details of the JMO. Delays coupled with other systemic features, which encourage inefficiencies, thrive within the Sri Lankan criminal justice system due to the minimal use of technology. Adoption of modern technology has the potential to resolve several delays within the case flow management.

Measures taken in Sri Lanka: court automation aspirations

As at September 2016, a total number of 745,191 cases were pending before the Sri Lankan court system.[7] To deal with the systemic inefficiencies, which continue to contribute to this developing case backlog, the Ministry of Justice has acknowledged the need to address delays in the criminal justice system through a technological solution.[8] However, the measures implemented so far range from increasing the cadre of the Attorney General's Department to establishing new court-houses.[9] The Ministry has proposed a 'court automation' project in a bid to upgrade the quality of justice administration.[10] While

[6] According to Sri Lanka police, 'modern technology is used in the fields of calling reports, dissemination of information, issuing clearance reports, traffic surveillance and crime investigation.' See Sri Lanka Police, *Performance Report* (2017) <http://www.parliament.lk/uploads/documents/paperspresented/performance-report-srilanka-police-2017.pdf> accessed 22 September 2019.

[7] Ministry of Justice (Sri Lanka), *Statistical Records on Cases* (2016) <https://moj.gov.lk/web/images/pdf/statistical_records_of_cases.pdf> accessed 22 September 2019.

[8] MOJ Performance report (n 4).

[9] Ibid.

[10] Ranjith Padmasiri, 'Laws' delays and the scourge of justice denied', *The Sunday Times*, (Colombo, 3 February 2019), < http://www.sundaytimes.lk/190203/news/laws-delays-and-the-scourge-of-justice-denied-334057.html> accessed 22 September 2019; According to a World Bank review of the Sri Lankan Justice Sector, pilot projects on court automation were launched in the Colombo and Kandy District Courts in 2006. The pilot project itself encompassed a case tracking system, but it did not address digitization of records or other elements of case management that might be automated. According to this report a rigorous assessment of its utility and possible

there appears to be a focus on the courts, there still appears to be no cohesive strategy to gradually adopt technological advancements across key agencies.

Potential solution to the delays: legal technology

Legal technology refers to the 'use of technology and software to provide and aid legal services'.[11] New technology relating to criminal justice is constantly evolving from every stage of the forensic process, to court hearings.[12] Horizontal and vertical integration of technology within the key institutions in the criminal justice system has proven to improve efficiency, cost-effectiveness and fairness of proceedings in several other jurisdictions.[13]

Timely adoption of legal technology has three benefits: (i) facilitating the provision of legal and justice services through the reduction of operational costs of courts, (ii) enabling integrated access to services in the justice system, and (iii) enhancing access to information through access to online legal assistance services.[14]

To evaluate the exact intervention required to execute a successful adoption of legal technology, the present uptake of technology within the justice system must be critically evaluated. This uptake can be viewed at three levels of digitization based on their complexity. First, there must be consistent use of basic technologies, i.e. the use of desktop computers, word processing, spreadsheets, and use of email.[15] It is only through the active use of basic technology that other complex and advanced technologies can be successfully introduced and integrated. For instance, European governments introduced equipment and office applications to courts in the 1990s. In Belgium, by 1997, all judges were provided with a laptop. Second, there must be consistent use of technology to support administrative personnel of the court.[16] This includes automated registers and case management systems. Third, sophisticated technologies must be deployed to support the activities of the judges.[17] The sentencing information system currently used in New South Wales, Australia contains sentencing principles, sentencing statistics, case law, legislation and other reference material for trial judges.[18]

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expansion as a system or utilization by other courts has not been carried out. See World Bank Group South Asia Region Poverty Reduction and Economic Management Unit, *Sri Lanka Justice Sector Review* (2013) <http://documents.worldbank.org/curated/en/255751468164662812/Sri-Lanka-Justice-sector-review > accessed 22 September 2019. At pp.19 & 44.

[11] 'What is legal technology and how is it changing our industry?' (*The Lawyer Portal*) <https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry/.> accessed 23 September 2019.

[12] 'Effect of New Technology on Court Trials', (*Sydney Criminal Lawyers*, 2014) <https://www.sydneycriminallawyers.com.au/blog/effect-of-new-technology-on-court-trials/> accessed 23 September 2019.

[13] Law Council of Australia, *The Justice Project, Final Report- Part 2, 'Court and Tribunals'* (2018) <https://www.lawcouncil.asn.au/files/webpdf/Justice%20Project/Final%20Report/Courts%20and%20Tribunals%20%28Part%202%29.pdf> accessed 23 September 2019; Charles Davison, 'Technology Transforms Criminal Law' (*LawNow.org,* 3 September 2015) <https://www.lawnow.org/technology-transforms-criminal-law/> accessed 28 September 2019.

[14] Productivity Commission Inquiry into Access to Justice Arrangements, *Attorney General's Department Submission* (2013) <https://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub137-access-justice.pdf> accessed 23 September 2019. p. 11.

[15] Marco Velicogna, 'Justice Systems and ICT: What can be learned from Europe?' 2007 Utrecht Law Review <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.41/> accessed 17 September 2019.

[16] Ibid.

[17] Ibid.

[18] Judicial Commission of New South Wales, *Judicial Information Research System (JIRS),* < https://www.judcom.nsw.gov.au/judicial-

The effectiveness of legal technology relies on a combination of factors such as reliable infrastructure to support online processes, compatible technology between parties, tech competent judicial officers, lawyers, investigators, non-judicial staff, and public to use technology.[19] More importantly, a willingness to adopt legal technology is indispensable.

Measures taken by other countries

Technological initiatives in other jurisdictions include consistent use of body cameras, license plate readers, 3D scanners (at crime scenes), digitized evidence inventory, entry bar code software, in court evidence cameras, presentation software, and monitors in court rooms. [20]

Sri Lanka could learn from the legal tech adoption experiences of India and Australia. In India, the 'eCourts Project' was launched to make justice delivery transparent for all the stakeholders. This system is dedicated towards the ICT enablement of the Indian judiciary. It allows for any party to access case status, details of next hearing, orders among other services with real time data, which is generated and updated continuously.[21]

In Australia, the Federal Court was one of the first courts to adopt an electronic filing system.[22] The Australian justice system has actively used technology to improve efficiency. These measures include: electronic filing of court documents; electronic payment of court fees; providing online access to court documents, court lists and forms; conducting hearings via Audio Visual Link (AVL)[23] and telephone; electronic databases and case management systems; greater reliance on email for direct communication between parties, the court and the judge's associate; and informative and accessible websites.[24]

Meanwhile, countries that have reached a higher level of technological sophistication in the criminal justice system are moving towards the introduction of blockchain technology.[25] For instance, in order to maintain the integrity of digital evidence, the Ministry of Justice in the United Kingdom is considering the possibility of using blockchain technology to store digital evidence such as documents, emails, and

information-research-system-jirs/ > accessed 30 September 2019.

[19] Law Council of Australia (n 13).

[20] Hank Kula, 'What technology has affected the criminal justice system?' (*L-Tron*, 28 March 2019) < https://www.l-tron.com/What-Technology-has-affected-the-criminal-justice-system> accessed 25 September 2019.

[21] 'eCourts Services, District and Taluka Courts of India', <https://services.ecourts.gov.in/ecourtindia_v6/static/about-us.php> accessed 25 September 2019.

[22] Robert Size, 'Taking advantage of advances in technology to enhance the rule of law' (Australian Academy of Law, October 2016) <http://www.academyoflaw.org.au/resources/Documents/2016%20Robert%20Size%20Joint%20Winner%20Australian%20Academy%20of%20Law%20Essay%20Prize%202016%20_%20Taking%20advantage%20of%20advances%20in%20technology%20to%20enhance%20the%20rule%20of%20law.pdf> accessed 23 September 2019.

[23] High Court of Australia, Press Release (2013) <http://www.hcourt.gov.au/assets/news/MR-audio-visual-recordings-Oct13.pdf> accessed 23 September 2019.

[24] Law Council of Australia (n 13).

[25] 'Blockchain is essentially a ledger, like an excel spreadsheet recording important information, except that the ledger is duplicated across a network of computers (each a 'participant') and regularly updated; everyone participating on a blockchain network can be confident that they are sharing the same ledger (in terms of the information held), without the need of a central trusted third party to do so… When a digital transaction is carried out, it is grouped together in a cryptographically protected block with other transactions that have occurred and sent out to the entire network. In order to determine the validity of a candidate block, users compete to solve a highly complex algorithm to verify it…The validated block of transactions is time-stamped and added to a chain in a linear, chronological order.'. See 'Blockchain: The legal implications of distributed systems' (*The Law Society, United Kingdom,* 2017) <https://www.lawsociety.org.uk/support-services/research-trends/horizon-scanning/blockchain/> accessed on 23 September 2019.

video footage with specific focus on storing evidence gathered through body cameras.[26]

Conclusion

This article discussed the areas and reasons for delay under Sri Lanka's present criminal justice system. It highlighted the need to digitize the criminal justice system to resolve the recognized causes of delay. The adoption of legal technology is not an instant solution, as it could disrupt the existing institutional culture. For sustainable adoption of technology, there must be a gradual and incremental introduction, beginning with the consistent use of basic technology. Introduction of legal technology will allow for the criminal justice system to enhance its efficiency, access, transparency and accountability among the key institutions. This article also identified the measures taken by other jurisdictions in terms of investigations and case disposal. Sri Lanka should seriously consider a tech adoption strategy rather than focusing on piecemeal approaches, as the delays will persist if all stakeholders are not given the technical know-how to harness the benefits of technology.

Sri Lanka is yet to introduce technological solutions to address the chronic delays in case disposal within the criminal justice system. Lethargic adoption of even the most basic technologies will make it difficult for the Sri Lankan justice system to seamlessly integrate modern technological solutions and fast-paced innovations. More importantly, this reticence toward adopting new technology and related innovations continue to deteriorate the quality of justice delivery in the country.[27] An inefficient criminal justice system, crippled with excessive delays, will eventually cause the loss of public confidence in the entire justice system. After all, 'justice delayed is justice denied'.

[26]Al Davidson, 'Increasing trust in criminal evidence with blockchains' (*Ministry of Justice*, 2 November 2017) <https://mojdigital.blog.gov.uk/2017/11/02/increasing-trust-in-criminal-evidence-with-blockchains/ > 23 September 2019; Sam Trendall, 'MoJ talks up potential blockchain benefits for criminal justice system' (*Public Technology.net*, 3 November 2017) <https://www.publictechnology.net/articles/news/moj-talks-potential-blockchain-benefits-criminal-justice-system> accessed 25 September 2019.

[27] MOJ Performance Report (n 4).

"Law Relating to Banker's Duty on Confidentiality"

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Introduction

Duties on the part of a banker towards its customers derive from the bank-customer relationship, which is governed by common law as well as statutory law. Generally, the bank-customer relationship was given birth as a result of various financial needs of people. Banking is considered to be a business, where it has turned out to be one of the indispensable institutions not only among the business community, but also among the ordinary community. The relationship between the bank and the ordinary community have grown into a new level, which has invited greater responsibilities and rights for both the bank and the customer.

The nature of the relationship between banks and customers begin with a transaction that does not limit only to money, however, extends to other material information of the customer, which are required and requested by the bank to be held by the bank. These information gives rise to a duty on the part of the bank to secure them without being disclosed to any other party.

The purpose of this article is to scrutinise especially regarding the duty of bankers to secure confidential information of their customers, how the duty on confidentiality emanated, and special focus will be made on the legal framework which provides the practical aspect on how this duty is currently recognized before law.

Bank-Customer relationship and Confidentiality

In terms of **section 86 of the Banking Act No. 30 of 1988**, a banking business means "*the business of receiving funds from the public through the acceptance of money deposits payable upon demand by cheque, draft, order or otherwise, and the use of such funds either in whole or in part for advances, investments or any other operation either authorised by law or by customary banking practices*". Apart from the above-mentioned situation practically more information of customers are being obtained by the banks. When a bank account in any nature is opened specific personal information of the customer are obtained[1] and the transactions done through that bank account make evident the pattern of expenditure and income of a customer, which is a matter of privacy. This reveals realities of lifestyle of a particular person that subsequently emphasize his or her right to privacy. Indeed, the right to privacy being a universally accepted human right under and by virtue of **Universal Declaration of Human Rights**[2] (UDHR) and **International Convention of Civil and Political Rights**[3] (ICCPR) give more importance to right to privacy. Regardless of this right not being absolute in nature, it vehemently demonstrates the need to secure confidentiality. This is equally applicable to banking sector as well.

Obligations of confidentiality apply to almost all professional relationships. Due to the sensitive nature of personal financial information, the banking profession was also one of the professions in which the law sought to impose positive duties.

With respect to the banking context, one of the earliest cases in the English common law

[1] Details of the National Identity Card, Parental details, occupational details, source of income as well as salary scale of a person etc.

[2] Article 12 of the UDHR

[3] Article 17 of the ICCPR

was the 1868 case of *Hardy v Veasey and Others*[4], a case of the Exchequer Court. Here the Court set out that a bank has an implied moral obligation that it will not disclose the financial affairs of its customers to third parties. Although this was not precisely a legal duty, this was the first step towards recognizing that bankers had an obligation to their customers to keep personal financial affairs confidential.[5] This position was later legally accepted[6] in the case of *Tournier v National Provincial and Union Bank of England Ltd*[7] by Bankes L.J which stated as follows;

> *'The privilege of nondisclosure to which a client or a customer is entitled may vary accordingly to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor the doctor, and the banker, though the underlying principles may be the same. The case of the banker and his customer appears to be the one in which the confidentiality relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence.'*

For that reason, there exists a greater responsibility of securing confidentiality on bankers towards their customers that need to be acted upon with due diligence.

Furthermore, the extent to which the information covered from this duty is a matter of relevance. In fact, there could be an argument *against* the continuance of strict application of this duty in respect of certain situations namely; illegal transactions, financing terrorism, and to the fact of less concern given to the transparency of monetary transactions between individuals as well as institutions. As a result the original purpose in which this duty was laid down no longer emanates a greater purpose on securing confidential information of banking customers in present context. Thus, the relationship between the bank and customer has now deviated from the original context. However, divulgence of details of a banking account need to be done with utmost diligence.

Change of Bank-Customer Relationship and Tournier Case

The duty of confidence arises when certain amount of confidential information is being given to an entity/person who is reckoned to secure them without divulging them to any other party. Throughout the time duty of confidentiality was prioritized until the landmark judgment on *Tournier v National Provincial and Union Bank of England Ltd*[8] was delivered in 1923. It was held in its headnote as follows;

> *"It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account,* ***unless*** *the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection*

[4] [1868] LR 3 Exch 107

[5] Muharem kianieff, 'Jones v Tsige: A Banking Law Perspective' [2013] 44(3) Ottawa Law Review <https://scholar.uwindsor.ca/lawpub/63/> accessed 20th September 2019

[6] ML Tannan, Tannan's Banking Law and Practice in India (23rd edn, Lexis Nexis 2010) 658

[7] [1923], 1 KB 461 at 474

[8] 1 KB 461

of the banker's own interests requires it."

Thus, it can be stated that in any event where the above qualifications are present the banker's duty on confidentiality will be relaxed. Therefore, the strict adherence of this duty has now been deviated through case precedence for a good cause. Moreover, courts possess a duty to look upon the necessity of disclosing information before any direction and/or order being made. For the reason that, there is an argument with regard to public interest as opposed to this duty on bankers. It was examined *in British Steel Corporation v Granada Television Ltd*[9] and pronounced by Lord Wilberforce that;

"...as to information obtained in confidence, and the legal duty, which may arise, to disclose it to a court of justice, the position is clear. Courts have an inherent wish to respect this confidence, whether it arises between doctor and patient, priest and penitent, banker and customer, between persons giving testimonials to employees, or in other relationships. But in all these cases the court may have to decide, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance."

Therefore, the matters deciding whether banking details to be disclosed or not depend on the facts of each case, and subsequently a duty is imposed upon the judge to carefully make his decisions. Hence, the court is by some means authorized to order to disclose banking information in respect of a specific account.

Legal Framework in Sri Lanka and the Principles to be followed when divulging Details of a Bank Account

Banking Act of Sri Lanka creates several provisions as per to the liability of bankers to maintain secrecy of bank accounts of its customers. This is established under **section 77 of the Banking Act No 30 of 1988 as amended by Act No. 02 of 2005**. Section 77(1) reads thus;

*(1) Every director, manager, officer or other person employed in the business of any licensed commercial bank or licensed specialised bank **shall observe strict secrecy** in respect of all transactions of the bank, its customers and the state of accounts of any person and all matters relating thereto and shall not reveal any such matter **except**—*

(a) *when required to do so—*

(i) by a court of law;

(ii)by the person to whom such matter relates;

(b) in the performance of the duties of the director, manager, officer or other person; or

(c) in order to comply with any of the provisions of this Act or any other written law.

Apart from the above said provision, only to mention, the **section 02 of the Act No. 39 of 1990**, a new part was introduced to the Banking Act under the heading of "***Numbered Accounts***"[10] and originally it contained **section 34A to 34D**, which gave protection to a special category of accounts. However, the status of numbered account was deviated under the provisions of the **section 2(1) of the Financial Transaction Reporting Act No. 06 of 2006** which read as follows;

[9] [1981] AC 1096

[10] In terms of Section 34B(3) numbered account means an account opened with a licensed commercial bank authorized by the Monetary Board under repealed section 34A, that is identified only by a number, code, word or such other means as was determined by the Monetary Board.

"No Institution shall open, operate or maintain an account, where the holder of such account cannot be identified, including any anonymous account or any account identified by number only, or any account which to the knowledge of the Institution is being operated in a fictitious or false name."

Thus, the category of "Numbered Accounts" is not in existence as at present, and accordingly, the commercial banks are not permitted to open and maintain "Numbered Accounts".

Applicability of the Evidence Ordinance

Observing the provisions in the Ordinance with relation to banker's duty on confidentiality, there exist several distinct provisions that point out thereunto. ***Section 90D*** states as follows;

"No officer of a bank shall, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the content of which can be proved under this Chapter, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of the court, or a Judge, made for special cause."

Apart from the above provision ***section 130(3)*** of the Evidence Ordinance further adds discussion with regarding the duty which reads as follows;

"No bank shall be compelled to produce the books of such bank in any legal proceeding to which such bank is not a party, except as provided by section 90D."

To that effect Mr. E.R.S.R Coomaraswamy[11] **in his book "*The Law of Evidence (Vol II – Book 1)*"** has commented as to the provisions of section 90D and section 130 as follows at page 163;

"section 90D is intended to confer on a bank and its officers an immunity, in any legal proceedings, to which the bank is not a party from producing the original books of the bank or from appearing as witness to prove the entries."

"But Section 90D also provides for exceptional cases where an order can be made by a court or a judge for special cause to do either the acts specified in the section. Section 130(3) of the Ordinance, however, states that no bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by section 90D. The two sections should be read together. It is also necessary to mention section 66 of the Code of Criminal Procedure Act, which deals with summons to produce documents. Section 66(3) provides that nothing in section 66 is to be deemed to affect the provisions, inter alia of section 130 of the Evidence Ordinance."

This leads to ***section 90E*** of the Evidence Ordinance, which clarifies the circumstances in which a judge may order to disclose details of a bank account, which reads as follows;

"(1) On the application of any party, to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner herein before directed in reference to certified copies.

[11] E.R.S.R Coomaraswamy, "*The Law of Evidence*" (Lake House Investments Lt, Vol II – Book 1)

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the court or Judge shall otherwise direct.

(3) The bank may at any time, before the time limited for obedience to any such order as aforesaid, either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

The above position goes along with the principle emanated from the *Tournier Case*. However, a question needs to be posed whether the power to order for inspection of banking books is absolute and/or unrestricted.

Mr. Coomaraswamy, in his book validate in fact of certain principles to be followed by the judiciary when such matters are concerned, and had commented as thus;

"The power to order inspection is a discretionary, and to be ***exercised with great caution, and on sufficient grounds only****. The court has also a discretionary power to make an order for inspection and copying before trial, which will ordinarily be made where the party applying cannot otherwise ascertain what entries are relevant and obtain copies of them."*

Moreover, in the case of *Arnott v Hayes (1987)*[12], it was held that;

"*The order, if made, should be limited to relevant entries. The order should only be made where the entries of which inspection is sought would be admissible in evidence at the trial*."

Thereafter, in *Owen v Sambrook (1981)*[13], it has been held that;

"*The judge must take care to ensure that the person whose bank account is to be inspected is not oppressed and the period of inspection is to be limited. He should also ensure that the prosecution is not using the power for ulterior purposes*."

Furthermore, Mr. Coomaraswamy in his book has set out the **guidelines** to be followed when making an order under section 90E of the Evidence Ordinance as discussed in the case of *R v Nottingham justices, ex parte Lynn (1984)*[14]**;** "The Lord Chief Justice then laid down certain principles as guidelines for the justices:

(a) *To warn themselves of the importance of the step which they were taking in making an order under section 7;*

(b) To recognise the care with which the jurisdiction should be exercised;

(c) To be alive to the requirement of not making the order extend beyond the true purpose of the charge before them;

(d) To make into account, inter alia, whether there was other evidence in the possession of the prosecution to support the charge or whether the application under section 7 was a fishing expedition in hope of finding some materials upon which the charge could be hung – perhaps the only evidence."

In terms of the above authorities it is abundantly clear that even though the court are vested with power to peruse banking books, specific guidelines need to be followed with due diligence.

Conclusion

As observed, it is very clear that the banker's duty with regard to the confidentiality of the account of its customers have deviated gradually from a strict application to a more lenient application. Thus, courts are permitted to order for perusal of any kind of banking book of a customer, and the

[12] 36 Ch.D 731 at 738
[13] Crim. L. Rev 329
[14] 79 Cr App Rep 238, 283

aforesaid provisions of the Banking Act as well as Evidence Ordinance substantiate to that effect. However, when doing so priority must be given as for the need of securing confidentiality of customers of a banks, and thus, the courts shall be bound by the principles established in the aforementioned authorities maintaining limits without abusing the power given from the legislature.

The Law on Prevention of Mosquito Breeding in Sri Lanka: Adequacy of the Legal Framework for Dengue Epidemic

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Introduction

Protecting and promoting the public health of the citizens is considered as one of the key functions of the Government of Sri Lanka. However, improper environmental circumstances have now become a major factor affecting the public health and spreading of communicable diseases among the community. The proper management of the environmental factors is the only way to prevent these negative impacts to the community health in Sri Lanka.

Due to the improper environmental conditions in highly populated areas, the outbreak of dengue fever and dengue haemorrhagic fever had become a critical health problem in Sri Lanka. 51659 dengue cases have been reported to the Epidemiology Unit of the Ministry of Health for the Year 2018[1]. As there is neither cure nor vaccine for this deadly disease, the best way to prevent the spread of this fever is to eliminate the improper environmental standards and destroy the breeding grounds which cause this mosquito borne illness. In order to provide a legal solution for this concern, Sri Lankan Legislature took necessary steps to regulate the law regarding the mosquito breeding environmental factors by enacting a law in 2007.

The Prevention of Mosquito Breeding Act No. 11 of 2007 (Hereinafter referred to as the Act) was certified by the Sri Lankan Parliament on the 7th April 2007, with the aim of preventing this health crisis with a national perspective. The Act takes a preventive approach making the precautionary and polluter pays theories as the foundation of the law. This enactment has neither been reviewed nor been amended. Hence it is a timely necessity to discuss the adequacy of the provisions of the Act and the effectiveness of the implementation process.

Discussion

The act provides number of provisions dealing with the liability of the owners and occupiers of premises to destroy and eradicate any conditions that encourage the breeding of mosquitos in their environment. Especially **Section 2** of the Act provides a detailed explanation on what conditions become favorable surroundings for mosquito breeding and it also imposes the obligation of eliminating such conditions on the owners or occupiers of such premises. **Section 25** of the Act interprets that an Owner includes not only co-owners, lessees or individual who claims any right over a premise, but it also includes an institution, body corporate or an official who has the authority to maintain a premise. An Occupier means an individual who is in charge or in control of any premises on behalf of himself or in the capacity of an

[1] <http://www.epid.gov.lk/web/index.php?option=com_content&view=article&id=171%3Adengue-update&catid=51%3Amessage-for-public&Itemid=487&lang=en> Accessed 25 July 2019

agent of another; however, this excludes the category of temporary residents[2].

The provisions of this Act are also applicable to all public authorities, Ministries and Departments that come under the authority of the Government of Sri Lanka[3]. Thus, it is apparent that the Act imposes the obligation on a large group of the public to maintain their properties in a state that is not favorable for breeding of mosquitoes. The term premises include a land together with a building or a part of a construction standing thereon[4]. Regrettably, the provisions of the Act are silent about the liability for maintaining any conditions favorable for vector breeding inside a vehicle, boat or a vessel or an aircraft.

Competent authority is given the entitlement to enter into any premises during a reasonable time of the day, for the purpose of inspecting the breeding sites[5]. However, for the purpose of entering and carrying out the inspection process, the consent of the owner or the occupier makes a pre requisite according to section 13(2). A competent authority is not eligible to enter any premises without obtaining such consent from the owner or the occupier. This precludes the competent authority from conducting random checkups and periodical follow-ups/ surveys of suspected premises. Therefore, it can be argued that this provision would be a barrier in carrying out inspections regarding improper environmental conditions that favor mosquito breeding.

If the competent authority is of the opinion that any premises is kept under a condition favorable for mosquito breeding, a written notice would be issued to the owner or the occupier of the premises directing him/ her to take necessary actions to eliminate or destroy the mosquito breeding state within a specific timeframe[6]. Such notice could be issued personally or by handing over the notice to the owner or occupier or by affixing the notice at a conspicuous place within the premises[7].

When section 03 is read together with the section 17 (1) of the Act, it is evident that generally a two-week time period would be granted to take any corrective actions to clean up or eliminate the improper environmental condition. The Act further provides that a further extension of another two-week period could be requested by the owner or occupier of such premises, and if it is granted, a total of four weeks would be granted as a grace period to take required remedial measures[8]. By granting such a long period to take corrective measures, the act indirectly allows such unhealthy environmental condition to be operative for four weeks. The ultimate consequence of allowing the existence of such condition for a period of four weeks is the creation of more mosquitoes during such period. Moreover, section 17 (2), (3) and (4) comprehensively describe the procedure of instituting legal action against such persons who had neglected or failed to carryout corrective measures, as mentioned in the notice. This process involves submission of recommendations by the Public Health Inspector, inspection of the premises followed by a submission of recommendations by Medical Officer of Health and granting of the final decision on

[2]Prevention of Mosquito Breeding Act No 11 of 2007, sec 25

[3] Prevention of Mosquito Breeding Act No 11 of 2007, sec 20

[4]Prevention of Mosquito Breeding Act No 11 of 2007, sec 25

[5]Prevention of Mosquito Breeding Act No 11 of 2007, sec 13(1)

[6]Prevention of Mosquito Breeding Act No 11 of 2007, sec 03

[7] Prevention of Mosquito Breeding Act No 11 of 2007, sec 19

[8] Prevention of Mosquito Breeding Act No 11 of 2007, sec 17 (1)

whether to prosecute or not by the Competent Authority, which would obviously take at least another two weeks. Apart from the fact that the conviction process of the Act is being complicated and time consuming, it can also be pointed out that the time taken to carry out justice would be providing a corridor for several generations of mosquitoes to breed.

Section 04 of the Act provides that if any owner or occupier neglect, fail or refuse to comply with the remedial actions to clean up the improper environmental condition, he would be convicted in the Magistrate Court after a summary trial. Upon the conviction, the Magistrate shall order the offender to pay a minimum sum of one thousand rupees (Rs.1000/=) and up to a maximum of twenty-five thousand rupees (Rs.25,000/=) as a fine. However, if the offence is being continued, a fine of hundred rupees would be added for each day of such continuance[9]. Though the Act provides for a prosecution process to punish an offender who keeps or maintains a breeding ground, the sanctions given in the Act are not satisfactory since the amount payable as the fine is comparatively low and since this offence is not punishable with imprisonment, many offenders have a tendency of neglecting their obligations under the Act.

According to section 05 of the Act, if any owner or occupier fail or neglect to undertake any rectifying measures within the time stipulated in the written notice, the Competent authority can authorize any officers to enter the premises and carry out the cleaning up measures, provided any expenses incurred during such cleaning up will have to be borne by the owner or occupier. In case if the owner or occupier fails or refuses to reimburse any expenses to the competent authority, the Magistrate is given the ultimate authority to inquire the matter and order the amount to be paid to the Court, considering it to be a fine[10]. However, such amount would be later transferred to the competent authority. This arrangement can be considered as a progressive provision, since the offenders would hardly neglect to pay an amount to the Court.

Section 08 reads that any owner or occupier who intentionally obstructs the entry of competent authority, who attempts to carry out any official duty under this Act, shall be an offender and be liable for a conviction before the Magistrate. At this juncture the Magistrate is granted the discretion to sanction such person not only with a fine less than fifty thousand rupees (Rs.50,000/=), but also with an imprisonment not exceeding six months[11].

The Act states that the competent authority can order the owner or occupier of a certain premises to spray pesticides to mosquito breeding places, within a given time period[12]. However, spraying pesticides would neither be the best solution for this deadly disease nor does it impact the environment positively. Therefore, when finding a solution to this social problem, the competing interests of public health and the sustainable development of the environment should be properly balanced.

Recommendations

Even though the act has introduced many positive provisions to prevent mosquito breeding, the above discussion discovers certain drawbacks in the Act. Thus suggesting new reforms to the Prevention of Mosquito Breeding Act, for the better and

[9] Prevention of Mosquito Breeding Act No 11 of 2007, sec 04

[10] Prevention of Mosquito Breeding Act No 11 of 2007, sec 06

[11] Prevention of Mosquito Breeding Act No 11 of 2007, sec 08 (2)

[12] Prevention of Mosquito Breeding Act No 11 of 2007, sec 07 (1)

productive implementation of the Act is a timely requirement.

- Expansion of liability-
  The obligation of the owners and occupiers of vehicles, aircrafts, vessels and boats must be held liable for keeping and maintaining improper environmental conditions of vector breeding. Especially when it comes to abandoned vehicles, vessels and aircrafts, high possibility of having grounds favorable for mosquito breeding exist.
- Empowering the Competent Authority-
  Competent authority or any authorized officer should have the right to enter any premises for the purpose of conducting an inspection or survey without obtaining the prior consent of the owner or occupier. This will make the inspection process faster and less complicated. The authorized offer who conducts the inspection should be given the authority to impose a spot fine on any owner or occupier. Such a fine could be not less than two thousand rupees (Rs.2000/=) and not more than five thousand rupees (Rs.5000/=).
  Further, he should be empowered to direct the owner or occupier of premises with prevailing or foreseeable improper environmental conditions favorable for mosquito breeding to eliminate or rectify such states. In case if the offender fails to comply with such directions, the authorized officer should have the authority to take legal action against such offender, without going through a lengthy administrative process.
- Special regulation on Construction Sites-
  Construction sites are generally being identified as a major source where mosquito breeding conditions exist[13].
  Thus, it is essential to introduce specific provisions to regulate construction sites. At the approval process of a designed construction project, conditions must be imposed on the project proponent to regularly maintain the construction site clear from conditions favorable for mosquito breeding. In case if a construction site has become a ground of mosquito breeding, the construction approval must be temporarily suspended, until corrective measures are taken.
- Elevate the penal sanction by increased fines and imprisonment-
  The penal sanction for maintaining a mosquito breeding ground in a premises and failure to comply with the directions should consist of paying of a fine and a minimum imprisonment. In imposing the fine, construction sites and other premises should be distinguished and higher fine should be imposed on construction sites. Further, the fine payable by the offender must be calculated based on the fact whether such person is a first-time offender or not. If the offender has previous records of maintaining unsafe environmental conditions that favors vector breeding, the fine payable must be higher.

[13] Kumuduni Hettiarachchi, 'Tackling the dengue danger rising from major construction sites' Sunday Times (Colombo, 2nd December 2018)

Conclusion

In conclusion, it is evident that despite having loopholes, the statutory law provides a decent backdrop for prevention of mosquito breeding in Sri Lanka. However, one significant fact to be kept in mind is that law alone would not offer the best solution for the eradication of dengue from Sri Lanka. Side by side with the legal provisions, the enhancement of public health and environmental education, active participation of the general public, open flow of information through proactive engagement of media also should be in place, in order to achieve a dengue free Sri Lanka.

ONLINE COPYRIGHT INFRINGEMENT AND THE LIABILITY OF INTERNET SERVICE PROVIDERS

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Introduction

The arena of copyright and related rights has immensely expanded, with the technological advancement of the last few decades, resulting in innovations through forms of worldwide communication via satellite broadcast and compact discs. Dissemination of works via the internet is however the latest development which has raised new questions concerning copyright. With the growing popularity of the internet, incidents of online fraud, theft, piracy and infringement have grown correspondingly.[1]

The internet, the phenomenon of the twentieth century, has been described as "*the world's biggest copy machine*."[2] The traditional technologies of photocopying and taping allow mechanical copying, but in limited quantities, in a considerable time, and of a lower quality than the original. Furthermore, such copies are physically located in the same place as the person making the copy. In contrast, on the Internet, a person can make an unlimited number of copies of any copyrighted work, virtually instantaneously, without any degradation in quality. Moreover, these copies can be transmitted to any location around the world in a matter of minutes, resulting the disruption of traditional markets for the sale of copies of copyrightable work such as computer programs, music, videos, games, art, books and movies.[3]

This transformation of technology through the internet which has created digital platforms inter-alia, resulted in the development of several areas of law, including the law on Copyright. From a legal perspective, the extension of intellectual property rights for works published or created in digital form has been central to these new developments. Unlike the traditional classification of copyright works such as literary work, artistic works, digitization has resulted in introducing many digital aspects to copyright works. This has also created legal issues since the copyright law had no experience of dealing with combination of work in its digital form. Hence, the new areas of copyright law are quite unique as it provides for the interpretation and identification of copyrightable work on digital space. Therefore, it is critical to fine-tune the existing legal system to respond to these new technological atmospheres in an effective and appropriate way both at national and international levels, as the Internet is a borderless medium.[4]

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[1] April M. Major, *Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the World Wide Web,* 24 RUTGERS **COMPUTER& TECH.** L.J. 75, 75 (1998).

[2] Maverick Kevin Kelly (*Wired* co-founder and Senior) at the inaugural NEXTWORK technology conference; https://www.wired.com/2011/06/kevin-kellys-internet-words/

[3] Intellectual Property Rights In Cyberspace By Akash Kamal Mishra; Cyberlekh Publication's; First Edition 2019

[4] WIPO "Permanent committee on cooperation for development related to intellectual property", Third session Geneva, October 28 to November 1, 2002

Internet content; whose rights are to be protected? Why is it so difficult to identify the parties?

The foremost issue related to the intellectual property rights for an online content publisher is the ownership of the content as there are many intellectual property rights involved in online content. When it comes to video streaming it becomes further complicated. The underlying property of a feature film, TV series, short film, play, musical or an animation, can be a book, comic, game, screen play, or a script which involves copyrights. There are trademarks involved in such products including the film title, character name, logo, insignia, website, or domain name. Additionally, there can be design rights for the costumes, interiors and rights for music in terms of the musical recording, lyrics, music, or the soundtrack[5]

As such a question arises as to who owns all these rights and who will have the legitimate right to take any legal action against the infringement, as here may be one or two major players owning all these rights, or few parties involved in right holding jointly. In such situations, the legal framework needs to address the rights of all the parties and it should facilitate remedies for such parties.

Internet Content and the ways of infringements

The content of the Internet can be broadly classified into few main categories such as Movies, Video games, TV series, music, E-books, and software. Depending on the type of the content, there are several ways of infringements.

Streaming or accessing – Through this method the user can view, listen or play content directly through the internet without downloading a copy. Watching television programs on Netflix or listening to music through services such as Spotify or Pandora will fall within this category.. Both legal and illegal ways of doing this are available on the internet and as a result obtaining unauthorized access through illegal methods has become increasingly popular. Large-scale copyright infringement on the Internet have been recorded by means of unauthorized streaming and or through peer -to-peer sites.[6]

Downloading – Through this method the user can transfer a copy of the file to the user's device. Downloading a music track to the user computer through iTunes or Amazon or downloading a movie through torrent are examples of this.. Downloading rate of movies through pirate software is also on the rise.[7]

Sharing – This method allows the user to make the file publicly available, send or upload the file online for someone else to download or stream access. For example, sharing files on your computer through an online service. Accordingly, the critical issue is whether such shared content is shared by its original author or a copyright holder or otherwise.

Liability of internet service providers

Although the internet as a new medium of communication has offered unparalleled new freedom, it is prone to vulnerabilities which expose it to exploitation. The Internet allows information to be sent anywhere at any time or to be downloaded, but not always with the rightful owner's permission.[8]

5 *Cathy Jewell, WIPO* "From Script to Screen: What Role for Intellectual Property?"*https://www.wipo.int/pressroom/en/stories/ip_and_film.html*

6 A. Strowel (ed.), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Cheltenham, UK / Northampton, MA, Edward Elgar, 2009.

7 https://parentinfo.org/article/what-is-and-isnt-legal-online

8 Ibid 76.

One major issue that has caused concern in this area is the position of those who provide the services and facilities which facilitate the copyright infringement on the internet.[9] Internet Service Providers (hereinafter ISPs) are the entities that have the most control over the flow of information, yet they disavow any affirmative responsibility to protect ownership rights.[10] ISPs provide the hardware and infrastructure for the society to enable the communication including access to web through local servers, bulletin boards and web sites where others can post information, and also internet cafes which provide temporary access to the net[11]. Different jurisdictions have taken different approaches with regard to the liability of the ISP on infringements. Accordingly, in many countries, ISP can be found liable for the traffic on the websites that they host.[12] Even though, the ISPs themselves are not undertaking any act that infringe copyright, the liability arises indirectly that they either contribute to, or encourage in some way, infringing activities, and therefore they are liable for any claim of indirect involvement by the affected copyright holders.[13]

Legal framework

With the advent of new technologies and novel forms of communication, the requirement of a dynamic legal framework has surfaced. Due to the high demand of new laws and rules, different jurisdictions enacted various legal instruments to cope with the new arrival of the technology and the services provided by the same.

The European Commission has decided to pre-empt the development of diverse national responses through a harmonizing directive, but has taken the view that ISP could incur liability on a number of bases such as defamation, copyright and obscenity. [14] The British approach was revealed in 2002 by its Electronic Commerce (EC Directive) Regulations which introduced three general immunities from liability namely mere conduits, caching and hosting.[15]

The new amendment to the Copyright Act 1968[16] intended to extend Australia's site blocking regime to cover search engines such as Google while making a range of amendments to the prevailing site blocking regime. This provides that a person may be liable for authorizing an act that infringes copyright.[17] The three main factors to be taken into account in determining whether a person has authorized an infringement; (i) the extent (if any) of the person's **power to prevent** the doing of the act concerned (ii) the nature of any **relationship** existing between the person and the person who did the act concerned (iii) whether the person took any **reasonable steps** to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.[18]

International approach

[9] WCT, Art 8 Note also the "Agreed Statement" annexed to the Treaty stating that the mere provision of facilities for the enabling or making a communication does not in itself amount to a communication within the meaning of the Treaty or the Berne Convention.

10 "Copyright Infringement on the Internet: Can the Wild, Wild West Be Tamed?" By David Allweiss, Touro Law Review, Volume 15 | Number 3 (1999)

11 "Intellectual Property Law" Lionel Bently and Brad Sherman, 2nd Edition (2004) Oxford University Press, p 149

[12] Watt, Richard and Mueller-Langer, Frank, Indirect Copyright Infringement Liability for an ISP: An Application of the Theory of the Economics of Contracts under Asymmetric Information (December 31, 2018). Review of Economic Research on Copyright Issues, 2018, 15(2), 57-79. Available at SSRN: https://ssrn.com/abstract=3311021

[13] Ibid

14 "Intellectual Property Law" Lionel Bently and Brad Sherman, 2nd Edition (2004) Oxford University Press, p.150

15 Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 in force on 21 Aug 2002

[16] Copyright Amendment (Online Infringement) Act No. 157, 2018 Australia

[17] S. 36 (1) and 101 (1) of the Copyright Act 1968 No 63 Australia

[18]Ibid S. 36 (1A) and 101 (1A)

The modern world has developed quite a comprehensive legal framework as a protection mechanism in its attempts to harmonize the law governing the creative work.

Berne Convention for the Protection of Literary and Artistic Works (Bern Convention)

The Bern Convention deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, and painters with the means to control how their works are used, by whom, and on what terms. The works of authors in a particular country are protected in all the member countries of the Berne Convention for the Protection of Literary and Artistic Works.

WIPO administered treaties

WIPO is deeply involved in the ongoing international debate to shape new standards for copyright protection in cyberspace. As a result, the WIPO has introduced two treaties namely WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT) which are administered by the organization. The two treaties lay down international norms related to preventing unauthorized access to and use of creative work on the internet or other digital work. The Copyright Treaty provides the protection for authors of literary and artistic works such as writings, musical works audiovisual works, works of fine art and photographs whereas the Performances and Phonogram Treaty provides the protection for authors rights of performers and producers of phonograms. The WCT and WPPT each contain several provisions that impose obligations derived from, and similar to, those in the TRIPS Agreement. Accordingly, countries whose laws are already in compliance with TRIPS would not need to make any amendments in order to satisfy these provisions of the two new treaties.[19]

WTO -TRIPS Agreement

The Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS) is also an international legal agreement between all the member countries of World Trade Organization (WTO) which has laid down minimum standards for the regulations on Copyrights, related rights and trademarks that are applicable to nationals of other WTO countries. However, the TRIPS provisions have already become somewhat outdated due to the rapid development of the Internet in the 1990s. Therefore, the WCT and WPPT try to bring up to date the TRIPS obligations, creating a contemporary and comprehensive legal framework for the digital age.[20]

Judicial decisions

The Pirate Bay

The Stockholm District Court delivered its verdict on the four-people charged with complicity in breach of the Copyright Act.[21] The subject matter in this case was criminal liability for complicity (aiding and abetting) in breaches of the Copyright Act of the individuals involved in the operation of the file sharing service, The Pirate Bay. The file sharing service used BitTorrent technology to make it possible for other people to share computer files containing, for example, copyright-protected music and films. The Court of Justice of the European Union ('CJEU') developed further its construction of the right of communication to the public within Article 3(1) of Directive 2001/292 in this judgment and explained the

[19] International Bureau of WIPO "The advantages of adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances And Phonograms Treaty (WPPT)"

[20] Ibid

[21] *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, EU:C:2017:456 ('The Pirate Bay', or 'Pirate Bay')

conditions under what the operators of an unlicensed online file-sharing platform shall be liable for copyright infringement.[22] The verdict of The Pirate Bay case can be considered as a meaningful victory in the war of combatting the digital piracy.[23]

Roadshow v iiNet[24]

This case is important in Australian copyright law because it tests copyright law changes required in the Australia–United States Free Trade Agreement and set a precedent for future law suits about the responsibility of Australian Internet service providers with regards to copyright infringement via their services. It dealt with the liability of an ISP, iiNet, for copyright infringements its customers had committed using peer-to-peer file-sharing technology to upload and download copyright films. The High Court found the ISP not liable, as it had not authorized the copyright infringement of its users. However, the judgment leaves open questions about the scope of authorization liability under the Copyright Act[25], and its applicability to modern technological contexts.

NRL v Optus TV Now[26]

This case established the fact that the Copyright Act[27] remains somewhat inflexible in addressing rapidly changing manner in which the users enjoy content, particularly through the internet and mobile devices. The court recognized the need of addressing the issues that have been created by the rapid developments in the light of copyright and internet. This case decision will also undoubtedly provide guidance to Australian Law Reform Commission's review of the Australian copyright law.[28]

Conclusion

In conclusion, this paper has observed that the rapid changes in the technology has created the need to change the laws related to all the aspects of usage of such technology. However, it is not easy to frame or speculate all the legal issues that can arise in one or few legal instruments since the technology is evolving rapidly.

In the process of reducing copyright infringements in the cyber space, it is evident that everyone plays a major role. The right holders shall ensure that their content can be easily accessed for an affordable price. Internet Service Providers need to ensure that reasonable steps are taken so that their systems are not been used to infringe copyrights. The role of the consumers to do the right thing and access content only in a lawful manner.[29] In this context, the striking a balance between the rights of copyright holders and usage rights of the customers seems to be important. Therefore, a comprehensive legal framework is much needed to eliminate the uncertainty and to maintain a fair balance of disparate interests.

[22] The CJEU Pirate Bay judgment and its impact on the liability of online platforms, by Eleonora Rosati, Associate Professor in Intellectual Property Law (University of Southampton)

[23] Min Yan, (Queen Mary University of London) "The Law Surrounding the Facilitation of Online Copyright Infringement (2012) 34(2)" European Intellectual Property Review

[24] [2012] HCA 16

[25] The Copyright Act 1968 No 63 Australia

26 [2012] FCAFC 59

[27] The Copyright Act 1968 No 63 Australia

28 http://www.alrc.gov.au/inquiries/copyright

[29] Online Copyright Infringement – Discussion Paper by Australian Government, July 2014

PROTECTION OF VICTIMS OF CRIME AND WITNESSES: A CONTEMPORANEOUS APPLICATION OF LAWS

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Introduction

The Protection of Victims and Witnesses, although crystalized into existence by the Assistance to and **Protection of Victims of Crime and Witnesses Act No. 4 of 2015** ('the 2015 Act'), was a mechanism that operated implicitly in Sri Lanka through a plethora of laws and procedures. Sri Lankan laws have sought to protect victims of crime ("victims") and witnesses through, *inter alia*, the Penal Code[1], the **Evidence Ordinance**[2] ("EO") and the **Code of Criminal Procedure Act**[3] ("CCPA").

This paper will first consider how, in the absence of a specific act, provision for the protection of victims and witnesses were considered in criminal legislation, prior to 2015. It will then proceed to consider the protections afforded by way of the 2015 Act and thereafter analyse how a contemporaneous application of the said Act together with the other existing laws would further strengthen and enhance the protective mechanisms afforded by law.

The need to afford protection to Victims and Witnesses

The success and comprehensive operation of the justice system of any state is largely dependent of the willingness of victims to come forward, and the availability of witnesses to testify in an impartial manner. Recognizing the integrity of the roles played by both victims and witnesses, many countries have adopted procedures, plans and programmes to encourage and afford protection to victims of crime and witnesses[4].

Inarguably, the responsibility of affording protection to victims and witnesses' rests on the State. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly (UNGA) in 1985 states that:

> *"The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by...(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation."*[5]

Recognizing the importance of affording protection to victims and witnesses, the law in Sri Lanka has sought to statutorily

[1] Penal Code, No. 02 of 1883 (as amended)
[2] Evidence Ordinance (EO), No. 14 of 1895 (as amended)
[3] Code of Criminal Procedure Act (CCPA), No. 15 of 1979 (as amended)
[4] Crime Victims' Rights Act of 2004, 18 US Code 3771; Domestic Violence, Crime and Victims Act 2004 (UK), 2018 c 28
[5] United Nations ('PJVC') (1985) The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, resolution GA/RES/40/34 of

provide for the same through numerous enactments.

Protection of Victims and Witnesses prior to the 2015 Act

The legal protection afforded to victims and witnesses prior to the 2015 Act was scattered across many legislations. While the consideration of the laws below is not exhaustive, it provides an understanding of the legal structures and schemes in place to secure the rights of victims and witnesses by acknowledging the vulnerabilities faced by them.

Being cognizant of the above, legislation has sought to address these vulnerabilities at different junctures. In the pendency of the trial, the CCPA addresses the requirement of making financial arrangements to facilitate witnesses in court, where the expenses incurred by them are to be reimbursed by the State[6]. Financial arrangements are to be made not only to facilitate the presence of witnesses in court, but also for the "expense, trouble or loss of time properly incurred in, or incidental to, giving evidence in a trial"[7]. At the end of a trial, the CCPA further empowers the court to demand from the Accused a sum to be paid in compensation to 'any person' affected by the offence[8]. Thus, affording protection not only to a victim, but "any person" the court determines as deserving of compensation.

In addressing women and children as victims and witnesses, legislation has addressed the difficulties they may face in providing protection to them. Subsequent to the **Evidence (Special Provisions) Act, No. 32 of 1999**, trial courts permit the evidence of children in cases of child abuse to be elicited in a video recording. To require children to testify in open court is likely to create psychological implications of having to re-live a crime; in light of the same, the EO has statutorily recognized this right available to child victims of an offence[9].

The National Child Protection Authority (NCPA) is empowered to search and inspect premises where there is reason to suspect child abuse[10]. It is further empowered to search and inspect any premises providing child care services in order to safeguard children entering the foster care system pursuant to being victims of crime[11]. This is a poignant example of how 'protection' was not confined to protection consequent to trial, even prior to the 2015 Act.

The **Prevention of Domestic Violence Act, No 34 of 2004** ("PDVA") provided for interim orders[12] and protection orders[13] to be issued against the respondent in a case of domestic violence, ensuring the protection of a battered victim during legal proceedings. The Act further criminalizes the publishing of any matter apart from the judgement in such cases[14]. The same is protected by way of the Penal Code, where publication of 'certain matters' in respect of specific provisions mentioned therein would be subject to penal sanctions[15]. While there is no specification on what amounts to 'certain matters', it may be inferred that the discretion to determine the same is vested with the court. The aforementioned provisions secure the anonymity of persons involved, shielding them from potential reprisals and social stigma.

The practice of taking evidence of witnesses '*in camera*'[16] is another protection afforded to witnesses under

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the General Assembly; 29 Nov 1985. See also UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2, 6 and 9

[6] CCPA, §243
[7] ibid, §243(1)(a)
[8] CCPA, §17(4)

[9] EO, §163A
[10] NCPA, §33
[11] NCPA, §§34
[12] ibid, §5
[13] ibid, §10
[14] ibid, §20
[15] Penal Code, §365C
[16] In Private, to the exclusion of the public

specific legislation[17]. As a matter of practice, courts have extended this right to victims of rape to generate a sense of security in the courthouse.

Additionally, there are mechanisms enforced by legislation to ensure that there is no interference with victims and witnesses. In this light, the offence of 'criminal intimidation'[18] as provided in the Penal Code, criminalizes any act done to threaten another with injury in order to prevent such person from doing something he is legally entitled to do. Therefore, where a witness is so intimidated, he may make a complaint to the police, thus instigating investigations under this offence and protecting him, both as a victim and witness.

The Bail Act No. 30 of 1997 affords similar protection in providing that "interference with witnesses or the evidence against him or otherwise obstruct the course of justice" is a ground for refusal of bail or cancellation of the bail by a court[19].

Similarly, the **Bribery Act No. 11 of 1954 (as amended)** has specifically criminalized the interference with witnesses. According to the relevant section a person who '*interferes, induces, threatens, injures or compels any witness to not give evidence or deter him from giving accurate evidence*" shall be liable to a penal sanction[20].

While the vulnerabilities of victims and witnesses were address in legislation prior to 2015, there was no recognition of their rights and entitlements that demanded that such protection be afforded to them.

Protection of Victims and Witnesses *vis-à-vis* the 2015 Act

By way of the 2015 Act, victims were endowed with express rights[21] and entitlements[22]. The Act considers both the physical and psychological protection of a victim and has guaranteed State obligations towards them[23]. Witnesses too, have express entitlements[24] where they are protected against *real* or *possible* harm, threat, intimidation, reprisal or retaliation resulting from him being a witness in a court of law or a commission. The sanctity of these rights and entitlements are acknowledged under Part III of the Act, which criminalizes a plethora of acts, which amount to 'offences against victims and witness'[25]. Such offences are categorized as cognizable and non-bailable[26], thus emphasizing the gravity and severity of such offences.

The Act further expanded the category of persons to whom these protections were afforded; persons who have assisted the process of justice by providing information, lodging a complaint or making statements to a court or a commission pertaining to the commission of an offence, an infringement of a fundamental right or a violation of a human right, were also guaranteed protection under the Act[27].

Part IV of the 2015 Act establishes the National Authority for the Protection of Victims and Witnesses ("NAPVW"). This Authority is vested with a myriad of duties and functions[28] including the positive power to 'investigate, inquire and inform about an alleged or imminent infringement'[29]; to provide assistance by

[17] Bribery Act §78(3); Children and Young Persons Ordinance, No. 48 of 1939; Human Right Commission of Sri Lanka, No. 21 of 1996 §16(3)
[18] Penal Code, §483
[19] Bail Act, §14(1)(a)(ii)
[20] Bribery Act, §73
[21] The 2015 Act, §3
[22] ibid, §4
[23] ibid, §3(e)
[24] ibid, §5
[25] ibid, §§8 and 9
[26] ibid, §10
[27] ibid, §6
[28] ibid, §13
[29] ibid, §13(d)

way of medical treatment, reparation, restitution and rehabilitation[30] and to make an award for the payment of compensation[31].

The 2015 Act introduced centralized agencies such as the NAPVW and the Police Protection Division. The primary mandate of these bodies is the effective protection of victims and witnesses. Further, under Section 21 of the Act, victims and witnesses are able to seek enhanced and extended protection from the numerous institutions specified therein[32].

It is important to note that the 2015 Act introduced specific protective measures that may be adopted in the protection of victims and witnesses. This provided for the lacuna in the law prior to the Act, where the determination of protective measures were left to the creativity of court[33]. However, the Act does not require the courts to be confined to the measures set out in this Section. Furthermore, Section 25(3) of the 2015 Act includes *inter alia* the codification of the practice of holding *in camera* legal proceedings; provision for the adoption of special measures to ensure the best interest of a child victim or witness during a legal proceeding; and provision to take steps to ensure anonymity of the witnesses. Such considerations have sought to enhance and guarantee the security of victims and witnesses.

While compensation is already addressed by the Judicature Act and the CCPA, the 2015 Act provides a structured guideline concerning the computation of compensation[34]. Prior to ordering the same, the court is empowered to call for, examine and consider *inter alia,* all relevant information relating to the victim of crime[35]. The 2015 Act affords victims "a formal opportunity to say how a crime has affected them"[36] by way of what is termed as a 'Victim Impact Statement'.

Contemporaneous application of the laws that existed prior to the 2015 act and the provisions of the 2015 Act. While the 2015 Act has centralized the provisions for the protection of victims and witnesses, it does not seek to override the protections afforded by other legislation. This section argues for a contemporaneous reading of laws. This is to mean that the protections safeguarded in the laws that existed prior to the 2015 Act, may be considered along with the 2015 Act in order to enhance the protective mechanisms that are available to victims and witnesses. Where such laws are applied contemporaneously, it would enable the law enforcement agencies to afford the maximum protection to victims and witnesses. This section of the paper will consider three areas of such contemporaneous application of laws in order to illustrate how the effect of the 2015 Act may be enhanced.

Contemporaneous application of Section 163A of the EO and Section 22(1)(f) and 25(1) of the 2015 Act

As discussed earlier in this Paper, Section 163A of the EO provides for the admission of a video recording of a victim's

[30] ibid, §13(e)

[31] ibid, §13(f)

[32] The National Authority for the Protection of Victims and Witnesses; the Victims and Witnesses Assistance and Protection Division of the Sri Lanka Police Department; in a Court of Law during the pendency of a trial or even after. Additionally, protection may be sought from subject specific institutions such as the Commission to Investigate Allegations of Bribery and Corruption (CIABOC), the Human Rights Commission (HRC), a Commission of Inquiry, or a Special Presidential Commission of Inquiry.

[33] §22 discusses the provision of security to person and property; provision of temporary or permanent relocation; temporary or permanent employment and provision for re-identification.

[34] The 2015 Act, §28(1)(a),(b)

[35] ibid, §28(2)(a) and §28(2)(b); See also ibid, §3(o)

[36] Archbold (2012), *Criminal Pleading, Evidence and Practice*, 585; See also, *Rathnasiri Silva Kaluperuma v The State*, CA 248/13.

testimony in a case of child abuse as evidence in a court of law. This section also stipulates two caveats to counter-balance the interest of the victim with the rights of the accused person: (a) the child must be available for cross examination; and (b) "the rules of court requiring the disclosure of the circumstances in which the video recording was made" must be complied with. The inherent limitation of this section is that it only permits the admission of a video recording of a victim of child abuse; to date the courts have failed to provide the same privilege to other identified vulnerable categories of persons due to the lack of a legal provision.

With the introduction of the 2015 Act, the courts and other law enforcement authorities are now empowered to take 'any […] measure which the authority shall consider necessary[37]' and 'all necessary steps that a court or commission deems necessary[38]' to assist and protect victims or witnesses. A purposive interpretation of this section would enable courts to allow *inter alia* video evidence of a broad category of persons as opposed to being limited to victims of child abuse cases. By way of a contemporaneous application of the aforementioned provisions, when extending the protections in the 2015 Act to enable admission of video recordings of a broader category of persons, court may adopt the caveats introduced in Section 163A of the EO. This will ensure that such purposive interpretation of the 2015 Act also meets the necessary standards of law that guarantee a fair trial to the Accused.

Similar to the task entrusted to the NCPA to record video evidence of a victim of a child abuse and submit the same to the court, it could be mooted that the NAPVW may be empowered, by the above-cited sections, to do the same in the case of victims and witnesses. Such a contemporaneous application of these sections would assist the court with the necessary legislative backing to better protect victims and witnesses.

Adequate Compensation of Victims

At the commencement of trial, if it so transpires that the Accused is willing to tender a plea of guilt, it has become a common practice in Courts to summon the victim in order to determine the impact caused to him as a result of the offence. Similarly, after a guilty verdict has been entered into, the prosecution submits to the court the position of the victim, and the consequent grievances and difficulties faced by him. The judges have adopted these procedures to determine the quantum of compensation that may be awarded pursuant to **section 17(4) of the CCPA**, as discussed in the preceding sections of this paper. However, there were no specific codified guidelines or factors that the court ought to have taken cognizance of when deciding on the quantum of compensation.

Section 28 of the 2015 Act has attempted to address this lacuna by introducing basic guidelines in relation to the awarding of compensation. It mandates that *inter alia* the court can call for all relevant information relating to the victim of crime, including the report of the Government Medical Officer who has examined the victim when determining compensation. A contemporaneous reading of the guidelines under **Section 28 of the 2015 Act read with Section 17(4) of the CCPA** (which gives court a broad discretion) will enable court to ensure that the maximum compensation is awarded to a victim.

National Authority for the Protection of Victims of Crime and Witnesses to be aided by laws outside the 2015 Act

It is important to note that the protective mechanisms listed in the 2015 Act are non-exhaustive. The Act empowers the

[37] The 2015 Act, §22(1)(f)

[38] The 2015 Act, §25(1)

Authority to take "any other measure" which the Authority considers necessary when providing protection. In this process, the Authority could be vastly assisted by protective mechanisms introduced by other subject specific legislations to provide the maximum protection to victims of crime and witnesses.

In a circumstance where an issue relating to a child victim or witness arises, the Authority may resort to the assistance of the officers of the NCPA. This would allow the Authority to go beyond the protective mechanisms introduced in the 2015 Act while still acting within the legal procedures in the NCPA.

Another Act that may aid the Authority in exercising its powers is the PDVA. Section 11 of the PDVA lists out prohibitions that a protection order may contain in order to safeguard the victim. The NAPVW in exercising its powers under Section 14(1)(a)(vii) is also empowered to "make appropriate orders" and therefore could seek the assistance of the aforementioned section in the PDVA to operate as a guideline when doing so. A contemporaneous application of this nature will enable protection to be provided not only in the case of 'real' harm but also 'possible' harm[39].

Moreover, another key right vested with victims and witnesses by way of the 2015 Act, is the right to make a written or oral complaint in respect of a real or possible harm[40]. However, the Act is silent on the manner in which such a complaint may be entertained. In the face of this lacuna, the Authority may seek to be guided by the Office of Missing Persons Act No 14 of 2016, a subsequent act, which enables confidentiality to be maintained when a complaint is made to the office of missing persons.[41] Similarly, the NAPVW may take cognizance of the necessity to ensure confidentiality by way of the contemporaneous application of these laws to ensure the identities of victims and witnesses are secured.

While specific guidelines and mechanisms are provided for in the subject specific legislation discussed above, it is proposed that the NAPVW may rely on the contemporaneous application of these laws and the 2015 Act in order to frame and formulate the most appropriate protective mechanisms.

Conclusion

As discussed above, it is important to acknowledge the plethora of laws that provided for the protection of victims and witnesses prior to the 2015 Act. With the introduction of the 2015 Act, the rights and entitlements of victims and witnesses and the protective measures available to them have received specific acknowledgement.

Therefore, in light of the considerations above, this paper proposed a contemporaneous application of different legislation, which provides for victim and witness protection along with the Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015. Having considered three areas of such contemporaneous application, it may be suggested that such an approach would assist the purposive interpretation of the 2015 Act in order to expand and strengthen the framework of protective mechanisms afforded by law.

[39] The 2015 Act, §3(d) and §5(3)
[40] The 2015 Act, §3(g) and §5(3)
[41] The 2015 Act, §12(c)(4)

TO LOCK THEM UP; OR NOTA BRIEF ANALYSIS ON WHETHER THE SANCTIONS FOR INSIDER DEALING SHOULD BE CRIMINAL ONLY, OR CIVIL ONLY, OR BOTH CRIMINAL AND CIVIL

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Gordon Gekko, the fictional wall street financier in the 1987 film "Wall Street" said, "the most valuable commodity I know of is information"[1]. The notion of "insider dealing"[2] refers to the dealing of "a security based on asymmetric information the inside trader has but which has yet to be reflected in the security price"[3]. In précis, it refers to making a profit or avoiding a loss by trading based on a confidential "inside" information which is yet to become public. It gives an advantage for the "inside dealer" at the expense of the others who are yet to receive the information. That is, perhaps, why the astute Gekko in advising a young greenhorn states that "If you're not inside, you're outside"[4].

Illegalising insider dealing

Despite the academic quandaries as to whether "insider dealing" should be a punishable offence or not, the United States became the forerunner in illegalising, and criminalising "insider trading" following the "Great Depression", and it is considered to be the country which "vigorously" regulates "insider dealing"[5]. After a few decades, the United Kingdom introduced criminal sanctions[6], and much later introduced civil regulatory mechanisms[7], through which EU directives[8] and regulation[9] on "insider dealing" were adapted.

In the US, the Securities Exchange Act of 1934 established the Securities and Exchange Commission (SEC), and section 10b of the Act empowered the SEC to enact rules against fraud in securities trading, and subsequently SEC enacted Rule 10b-5 - a broad anti-fraud provision. With no precise and substantive Federal Law particularly addressing "insider dealing", the regulation of "insider dealing" was developed through regulations and enforcement by the SEC, and case law resulting in a complex legal framework[10].

[1] Stanley Weiser and Oliver Stone, '"Wall Street" - Original Screenplay by Stanley Weiser and Oliver Stone'(*Dailyscript*, 23 April 1987) <http://www.dailyscript.com/scripts/wall_street.html> accessed 15 April 2018

[2] or "insider trading" – as termed in the US

[3] Colin Read, Market Inefficiencies and inequities of insider trading - an economic analysis. in Paul U Ali and Greg N Gregoriou (eds), *Insider Trading: Global Developments and Analysis* (CRC Press 2009) 3

[4] Stanley Weiser and Oliver Stone, '"Wall Street" - Original Screenplay by Stanley Weiser and Oliver Stone'(*Dailyscript*, 23 April 1987) <http://www.dailyscript.com/scripts/wall_street.html> accessed 15 April 2018

[5] Harvey L Pitt and David B Hardison, 'Games Without Frontiers: Trends in the International Response to Insider Trading' [1992] 55(4) Law and Contemporary Problems 199 - 230 in 200

[6] Part V, Companies Act 1980; Company Securities (Insider Dealing) Act 1985; Part V, Criminal Justice Act 1993

[7] Financial Services and Markets Act 2000

[8] Council Directive 89/592/EEC [1989] OJ L334/30; Directive of the European Parliament and of the Council 2003/6/EC [2003] OJ L096/16

[9] Regulation European Parliament and of the Council 596/2014 [2014] OJ L173/1

[10] Ventoruzzo Marco, 'Comparing Insider Trading in the United States and in the European Union: History and Recent Developments' [2014] European

It was not until 1980 "insider dealing" was criminalised in the UK[11]. Davies and Worthington note that the alternative approaches such as "mandatory disclosure" requirements, "prohibition of trading", general law remedies for breach of "director's fiduciary duties" and "breach of confidence" were "rarely an effective deterrent" of insider dealing[12]. Hence, the Companies Act of 1980 specifically criminalised "insider dealing"[13]. Currently, the offence of "insider dealing" is stipulated in Part V of the Criminal Justice Act of 1993 (CJA) which implemented the EEC Directive[14] on "Insider Dealing" in the UK[15]. The Financial Services and Markets Act of 2000 (FSMA) through which the EU Directive[16] was subsequently implemented[17], (and since 2016, the EU Market Abuse Regulation[18]) also prohibits "insider dealing" as a part of its prohibition on market abuse. It established the Financial Conduct Authority as the principal regulator of the financial market. The FSMA is the civil regulatory measure, counterpart to the purely criminal approach in the CJA. Hence, the UK has both criminal, and civil regimes applicable in parallel in the cases of "insider dealing". In Sri Lanka, it was in 1987 insider dealing was criminalised under **Part V of the Securities Council Act No 36 of 1987**[19] [20]. Section 32 of the SEC Act[21] comprehensively defines the offence of insider dealing. Further, Section 33 exposes public servants or former public servants to liability for insider dealing, and Section 33A provides for summary conviction, and fine and/or imprisonment for insider dealing.

Defining "Insider" – UK & Sri Lanka

United Kingdom

In the UK, **Section 57 of the CJA** defines "insider" as a person who has inside information and knows that it is inside information[22]; and who has inside information and knows that he has it from an inside source[23]. Under the CJA, only "individuals" can be prosecuted for "insider dealing"[24], implying that only natural persons can be "insiders", thus, legal persons are excluded from the definition. And this definition also imposes a *mens rea* requirement that, the individual should "know that it is inside information". In further elucidating, CJA stipulates three categories of "insiders". 1) a person has information from an inside source if and only if he has it through being a director, employee or shareholder of an issuer of securities[25]; 2) having access to the information by virtue of his employment, office or profession[26]. Individuals falling under these two categories are denoted as "primary insiders"[27].

Corporate Governance Institute (ECGI) - Law Working Paper No 257/2014 <https://ssrn.com/abstract=2442049> accessed 15 April 2018

[11] Part V, Companies Act 1980

[12] Paul Davies and Sarah Worthington, *Gower: Principles of Modern Company Law* (10th edn, Sweet & Maxwell 2016) 1029 - 1031

[13] Part V, Companies Act 1980

[14] Council Directive 89/592/EEC [1989] OJ L334/30

[15] Jane Welch, Matthias Pannier et al., *Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse* (The British Institute of International and Comparative Law 2005) 14 - 19

[16] Directive of the European Parliament and of the Council 2003/6/EC [2003] OJ L096/16

[17] Jane Welch, Matthias Pannier et al., *Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse* (The British Institute of International and Comparative Law 2005) 20 - 27

[18] Regulation European Parliament and of the Council 596/2014 [2014] OJ L173/1

[19] Later following the Securities Council (Amendment) Act No 26 of 1991, renamed as the Securities and Exchange Commission of Sri Lanka Act.

[20] later renamed as SEC Act

[21] Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)

[22] s.57(1)(a), Criminal Justice Act 1993

[23] s.57(1)(b), Criminal Justice Act 1993

[24] s.52, Criminal Justice Act 1993

[25] s.57(2)(a)(i), Criminal Justice Act 1993

[26] s.57(2)(a)(ii), Criminal Justice Act 1993

[27] *Attorney General's Reference (No.1 of 1988)* [1989] 1 AC 971; Kern Alexander, UK insider dealing and market abuse law: strengthening regulatory law to

The third category of "insiders" stipulated in the CJA is a person whose direct or indirect source of information is a person of the previous two categories[28]. Persons in this category are denoted as "secondary insiders"[29] or "tippees"[30]. This provision is broader than the US construal of "tippees"[31] as it is not required that the tip was consciously communicated. A mere overhearing or eavesdropping of inside information would sufficiently fall into this category[32]. *Mens rea* is a very important constituent of this definition. The person receiving the information from the "primary insider" should know that it is an inside information and it is coming a "primary insider", therefore as Davies and Worthington point out, in case of a "sub-tippee or sub-sub-tippee" proving that they had known that it is from a primary insider can be problematic[33].

The FSMA[34] definition is broader in scope than the CJA definition. Section **118B of FSMA** defines "insider". There are two notable additions in the FSMA definition compared to the CJA. First is the explicit stipulation of a person having inside information as a result of his criminal activities as an insider. By explicitly stipulating a person who obtained inside information through a criminal activity as an "insider", the FSMA annihilated any uncertainties that may be casted in insider dealing cases where inside information was illegally obtained through hacking and/or cybercrime[35]. Second notable addition is the provision that a person is an "insider" not only when he obtains inside information through other means which he knows is inside information, but also, he "could reasonably be expected to know, is inside information". This is an extension of the *mens rea* element in the FSMA compared to the CJA. Thus, the FSMA encompasses a broader spectrum of persons within the definition of "insider" compared to the CJA.

Sri Lanka

In Sri Lanka, **Section 32 of the SEC Act**[36] comprehensively defines the offence of insider dealing. Section 32(1) provides that, an individual connected with a company shall not trade in listed securities

combat market misconduct. in Stephen M Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing 2013) 415; Iwona Seredyńska, *Insider Dealing and Criminal Law* (Springer 2012) 20

[28] s.57(2)(b)

[29] *Attorney General's Reference (No.1 of 1988)* [1989] 1 AC 971; Kern Alexander, UK insider dealing and market abuse law: strengthening regulatory law to combat market misconduct. in Stephen M Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing 2013) 416

[30] Kern Alexander, UK insider dealing and market abuse law: strengthening regulatory law to combat market misconduct. in Stephen M Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing 2013) 416

[31] *Dirks v Securities and Exchange Commission* [1983] 463 US 646

[32] Paul Davies and Sarah Worthington, *Gower: Principles of Modern Company Law* (10th edn, Sweet & Maxwell 2016) 1040 - 1041

[33] *ibid*, 1041

[34] Financial Services and Markets Act 2000

[35] Sonal Sahel, 'Circumventing Insider Trading Laws by Cyberhacking: A Look into the Vulnerability of Cybersecurity Breaches in Regards to Insider Trading' [2016] 15(2) Journal of International Business and Law 239; Thomas O Gorman, 'SEC, Insider Trading and Cyber Security: An International Hacking—Insider Trading Ring' (*LexisNexis Legal Newsroom*, 8 December 2015) <https://www.lexisnexis.com/legalnewsroom/securities/b/securities/archive/2015/08/12/sec-insider-trading-and-cyber-security-an-international-hacking-insider-trading-ring.aspx> accessed 15 April 2018; Michelle Price, 'US SEC says hackers may have traded using stolen insider information' (*Reuters*, 21 September 2017) <https://uk.reuters.com/article/uk-sec-intrusion/u-s-sec-says-hackers-may-have-traded-using-stolen-insider-information-idUKKCN1BW0A4> accessed 15 April 2018; 'SEC fears insider trading after system hacked in 2016' (*Sky News*, 21 September 2017) <https://news.sky.com/story/sec-fears-insider-trading-after-system-hacked-in-2016-11046012> accessed 15 April 2018; Hannah Kuchler, 'Hackers target weakest links for insider trading gain' (*Financial Times*, 3 October 2017) <https://www.ft.com/content/13a317ce-a561-11e7-9e4f-7f5e6a7c98a2> accessed 15 April 2018.

[36] Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)

of that company if he has information which, (a) He holds by virtue of being connected with the Company; (b) It is reasonable to expect such a connected person by virtue of his position, not to disclose except for the proper execution of his official duties; and (c) He can reasonably be expected to know is unpublished price sensitive information in respect of those securities. Only when the above three criterions are satisfied, a person may be found guilty of the offence of "insider dealing". Hence, it is evident that the key category of "insiders" under the original SEC Act[37] are solely defined by "connection" with a company.

This "connection" may be determined by either the person being a director of the company concerned or a related company, or the person being an officer other than a director, or an employee of the company or a related company, or having a professional relationship with the company or a related company, and in both cases where his position is expected to have given him access to inside information in relation to either company. Hence, under the SEC Act[38] definition, a mere shareholder will not be an "insider", and this is a significant lacuna in the Sri Lankan law pertaining to "insider dealing". Furthermore, this "connection" test shares similarity to the position in the UK prior to the CJA 1993. Under CJA, shareholders are encompassed into the definition, and the "connection" test was replaced with the "access to information" test, thereby widening the coverage. However, by the 2003 amendment to the SEC Act[39] the "access to information" test is introduced in Sri Lanka, but it did not replace the "connection" test.

Sanctions

Sri Lanka, having only the criminal regime addressing "insider dealing", the issue of sanctions in straightforward. Section 33A of the SEC Act[40] provides for the criminalisation and sanctions for any contravention of the provisions of Part V of the Act, thereby making "insider dealing" an offence which shall be tried in summary and punishable with "a fine not less than one million rupees, or imprisonment of either description for a term not less than two years and not exceeding five years, or to both such fine and imprisonment"[41].

UK, having two parallel regimes governing "insider dealing" naturally raises the question of the very necessity of parallel regimes, and leads us to the main question whether the sanctions for insider dealing should be: criminal or civil or both. The CJA provides criminal penalties for "insider dealing", while the FSMA (in light of MAR[42]) stipulates civil regulatory sanctions. However, the criminal, and civil regulatory actions are mutually exclusive due to the *ne bis in idem* principle, which is stipulated in Article 4 of Protocol 7 of the ECHR. The ECtHR reiterated this principle in *Grande Stevens and Others v Italy*[43]. Thus, in an action against "insider dealing", the authority must make a choice in opting its path of action, as double jeopardy is barred. This narrows down the question to whether the sanctions for insider dealing should be: criminal or civil. To begin analysing this question, it is key to reconnoitre the sanctions provided under each of these regimes.

The CJA stipulates a fine not exceeding the statutory maximum and/or imprisonment not exceeding six months in case of

[37] Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)
[38] Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)
[39] Securities and Exchange Commission of Sri Lanka (Amendment) Act No 18 of 2003
[40] Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)
[41] Section 33A, Securities and Exchange Commission of Sri Lanka Act No 36 of 1987 (as amended)
[42] Regulation European Parliament and of the Council 596/2014 [2014] OJ L173/1
[43] [2014] ECHR 230

summary conviction[44], and a fine and/or imprisonment not exceeding seven years in case of conviction on indictment[45] for "insider dealing". The FSMA, on the other hand, empowers the FCA to impose a financial penalty "of such an amount as it considers appropriate"[46] on a person committed market abuse[47] which includes insider dealing, or instead of financial penalty make a public statement that the person has engaged in market abuse[48]. The FCA is also empowered to apply to court for an injunction to prevent market abuse[49], or for an injunction to remedy[50], or an injunction to freeze[51] or for a restitution order[52] in cases of market abuse. Further, the FCA may also require the person concerned to pay appropriate compensation[53].

At least three cardinal differences between the criminal and civil sanctions can be identified: 1) Incarceration as a punitive sanction is available only under the criminal regime; 2) The criminal sanctions can be imposed only by the respective Court of Law, while an administrative authority (FCA) is statutorily empowered to investigate, and impose financial sanctions or public statements under the civil regime; and 3) The criminal sanctions can be imposed only if the offence is proven "beyond reasonable doubt"[54], while the civil sanctions require a much lesser standard of proof: "more probably than not"[55] [56].

The paramount purpose of regulating "insider dealing" is to ensure "smooth functioning of securities markets and public confidence in markets"[57]. Analysing these differences in deference to its effect on curtailing "insider dealing" and promoting market confidence is crucial in answering the question whether the sanctions should be civil or criminal.

To lock them up; or not

In 2016, Martyn Dodgson, an investment banker who was found guilty by a jury for "insider dealing" was sentenced for four and a half years in prison. This is the longest prison sentence imposed thus far in the UK for "insider dealing"[58]. In the US the longest prison sentence imposed for "insider trading" thus far is 12 years[59]. Imprisonment is considered one of the serious forms of punishment, which, according to some scholars, impacts "physical", "mental", and "moral" deterioration on persons[60]. The "utilitarian justification" for punishment demands that the punishment must have a "deterrent effect" on the individual and society, "incapacitate" the person from recommitting the crime, "reinforce community norms", and "reform" the punished[61]. And the "retributive justification" for punishment demands that punishment be "proportional to the

[44] s.61(1)(a), Criminal Justice Act 1993
[45] s.61(1)(b), Criminal Justice Act 1993
[46] s.206(1), Financial Services and Markets Act 2000
[47] s.123(1), Financial Services and Markets Act 2000
[48] s.123(3), Financial Services and Markets Act 2000
[49] s.381(1), Financial Services and Markets Act 2000
[50] s.381(2), Financial Services and Markets Act 2000
[51] s.381(4), Financial Services and Markets Act 2000
[52] s.383, Financial Services and Markets Act 2000
[53] s.384, Financial Services and Markets Act 2000
[54] *Woolmington v DPP* [1935] 1 AC 462, in page 481; *Mancini v DPP* [1942] AC 1, in page 11; *R v Hepworth and Fearnley* [1955] 2 QB 600.
[55] *Miller v Minister of Pensions* [1947] 2 All ER 372; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, in para 55.
[56] i.e. balance of probabilities
[57] Preamble (2), Regulation European Parliament and of the Council 596/2014 [2014] OJ L173/1
[58] 'Banker given record sentence for insider dealing' (*BBC News*, 12 May 2016)<http://www.bbc.co.uk/news/business-36277818> accessed 20 April 2018
[59] Jonathan Stempel, 'Lawyer's record 12-year prison term for insider trading is upheld' (*Reuters*, 9 July 2013)<https://www.reuters.com/article/us-insidertrading-kluger/lawyers-record-12-year-prison-term-for-insider-trading-is-upheld-idUSBRE96814J20130709> accessed 20 April 2018
[60] Joycelyn M Pollock, The Rationale for Imprisonment. in Joycelyn M Pollock (ed), *Prisons Today and Tomorrow* (Jones & Bartlett Publishers 2009) 9
[61] Kent Greenawalt, 'Punishment' [1983] 74(2) Journal of Criminal Law and Criminology 350 - 352

degree of wrongdoing"[62]. This leads to the question, whether imprisonment is an appropriate punishment for "insider dealing".

In the strictest sense, "insider dealing" is a victimless crime. Manne ardently argued that "no one is injured by insider trading"[63]. In supporting Manne's position, Engelen and Van Liedekerke conclude that "there is very little harm caused by insider trading"[64] and distinguished "insider dealing" from market abuse. Nevertheless, the argument to the contrary seem to suggest that it is the market as a whole which is the victim[65]. Despite the moral righteous tone in this argument, it is an inordinate exaggeration of victimhood. The arguments in favour of illegalising "insider dealing", as presented in précis by Cole are: 1) "affects the efficiency of the market"; 2) "undermines investor confidence"; 3) "immoral", and "inherently unfair"; 3) "contrary to ethics"; 4) "damages companies and shareholders"[66]. While the efficiency and investor confidence arguments are disputed by several scholars[67], the foundation of the other arguments lie in "ethics, morality, and fairness" rather than "malice". In most cases of insider dealing the information used is "typically legitimately acquired as a consequence of one's occupational position"[68]. Nonetheless, studies[69] suggest that, "Insider Dealing" is a well calculated act, mostly committed knowing its wrong. Thus, entails the justification for punishment, and Öberg argues that imprisonment is the effective punishment[70].

On the other hand, it is not impossible to satisfy the "utilitarian justifications" and curtail "insider dealing" through civil regulatory sanctions. Even "retributive justice" to the ancient standard of "eye for eye, tooth for tooth"[71] would not warrant imprisonment over financial penalty for a financial crime. A punitive financial penalty, coupled with a public statement, and prohibition from trading and/or profession for a period of time would be a "proportional" punishment sufficiently effecting "deterrence", "incapacitation", and "reform", and "reinforce community norms". In support of this Bachner, a renowned defence attorney in several

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[62] *ibid,* in 348

[63] Henry G Manne, *Insider Trading and the Stock Market* (Free Press 1966)

[64] Peter-Jan Engelen and Luc Van Liedekerke, 'The Ethics of Insider Trading Revisited' [2007] 74(4) Journal of Business Ethics 497 – 507 in 502

[65] *United States of America v Raj Rajaratnam* [2011] S1 09 Cr 1184; *R v Christopher McQuoid* [2010] 1 Cr. App. R. (S.) 43; Norman S Douglas, 'Insider Trading: The Case Against The 'Victimless Crime' Hypothesis' [1988] 23(2) The Financial Review 127 – 142; David Kirk, 'Enforcement of criminal sanctions for market abuse: practicalities, problem solving and pitfalls'[2016] 17(3) ERA Forum 311 - 322 in 318

[66] Margaret Cole, 'Insider dealing in the City' [2007] 1(4) Law and Financial Markets Review 307 - 308

[67] Henry G Manne, *Insider Trading and the Stock Market* (Free Press 1966); Milton Friedman Quoted in Gilbert Geis, *White-Collar and Corporate Crime: A Documentary and Reference Guide* (ABC-CLIO 2011) 145; Donald J Boudreaux, 'Learning to Love Insider Trading' (The Wall Street Journal, 24th October)<http://www.wsj.com/articles/SB10001424052748704224004574489324091790350> accessed 15 April 2018; Peter-Jan Engelen and Luc Van Liedekerke, 'The Ethics of Insider Trading Revisited' [2007] 74(4) Journal of Business Ethics 497 – 507

[68] Elizabeth Szockyj and Gilbert Geis, 'Insider trading: Patterns and analysis' [2002] 30(2) Journal of Criminal Justice 273 - 286 in 283

[69] Elizabeth Szockyj and Gilbert Geis, 'Insider trading: Patterns and analysis' [2002] 30(2) Journal of Criminal Justice 273 – 286; Emily A Malone, 'Insider Trading: Why to Commit the Crime From a Legal and Psychological Perspective'[2003] 12(1) Journal of Law and Policy 327 - 368

[70] J Öberg, 'Is it 'essential' to imprison insider dealers to enforce insider dealing laws?' [2014] 14(1) Journal of Corporate Law Studies 111 - 138

[71] *The Holy Bible, New International Version (Anglicised), NIVUK* (Biblica 2011) <https://www.bible.com/bible/113/EXO.21.NIVUK> accessed April 30, 2018
Exodus 21:24

"insider dealing" cases in the US stated that "those involved in insider trading cases that result in civil charges rarely offend again". Firey, striding further, claims that "it's wrong to lock someone in a cage for acting rationally" and argues that "there is nothing for society to gain from sending [inside dealers] to prison"[72]. Even Öberg who grounds his argument in favour of imprisonment over civil penalties on the thesis that civil penalties don't result in "sufficiently strong moral condemnation"[73], apart from a theoretical appraisal, doesn't provide any empirical evidence to support his thesis. Hence, there seems no unequivocal reason, except for superficial and predominantly subjective "moral" considerations, to prefer imprisonment over civil sanctions.

Sanctions by Court or Administrative Authority

A criminal penalty under the CJA can only be imposed by a Court of Law after a fair trial, whereas the FSMA empowers the FCA to impose civil sanctions. In *Ridge v Baldwin*[74], the House of Lords held that principles of natural justice apply to administrative and quasi-judicial decision making as well. Accordingly, natural justice principle of "*nemo iudex in causa sua*"[75] becomes a key consideration when FCA acts as the regulator, prosecutor, and the imposer of civil sanctions. Rix LJ in *R (Kaur) v ILEx*[76] held that, "participation in a prosecutorial capacity… will disqualify or else raise concern in the mind of the fair-minded observer about the appearance of impartial justice. Even an employee of a prosecuting agency may fall within this disqualification or concern, even though not employed in a prosecutorial capacity... However, that would not apply to every employee. Similarly, mere membership of a prosecuting association will not disqualify, where there is no involvement in the case in question, but a more senior role in governance may possibly do so". Thus, it is not impossible for a regulatory authority to separate its inquiring and prosecuting arm from the decision-making arm in order to comply with the principles of natural justice. In fact, the FCA has a "separate" Regulatory Decisions Committee[77], which is not only separate from FCA's "executive management structure"[78], but also has its "own legal advisers and support staff" who are "separate from the FCA staff involved in conducting investigations"[79]. Further, it also provides for an appeal to an upper tribunal. Barnes, in his analysis of UK's enforcement track record, states that it is only after the introduction of the civil regime the enforcement was "pursued rigorously"[80]. A reason would be that the civil regulatory approach relaxes the procedural rigour archetypal to the criminal regime, and provides diverse options of sanctions, thus enabling effective enforcement on a case-by-case basis. In addition, the FCA is also empowered to bring criminal prosecutions under the CJA[81].

[72] Thomas A Firey, 'Insider Trading Should Be Legal' (*Foundation for Economic Education*, 18 May 2017) <https://fee.org/articles/insider-trading-should-be-legal/> accessed 25 April 2018

[73] J Öberg, 'Is it 'essential' to imprison insider dealers to enforce insider dealing laws?' [2014] 14(1) Journal of Corporate Law Studies 111 – 138 in 137 and 138

[74] [1964] AC 40

[75] *i.e.* no man shall be a judge in his own cause

[76] *R (Kaur) v Institute of Legal Executives Appeal Tribunal and another* [2011] EWCA Civ 1168 in para 35

[77] The nature and procedure of the RDC. in *The Decision Procedure and Penalties manual* (Financial Conduct Authority 2018) 3.1.1

[78] *ibid*, 3.1.2

[79] *ibid*, 3.1.3

[80] Paul Barnes, 'Insider dealing and market abuse: The UK's record on enforcement' [2011] 39(3) International Journal of Law, Crime and Justice 174 - 189

[81] s.402(1)(a), Financial Services and Markets Act 2000

Standard of proof

While the criminal regime requires the offence to be proved "beyond reasonable doubt"[82], the civil regime requires a lesser standard of "on the balance of probabilities"[83]. However, Lord Hope in *Clingham*[84] held that, "there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made"[85], and referring to Lord Bingham[86] stated that, "if this is done the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard"[87]. "Insider Dealing", despite the academic debates, is stipulated as a crime under the CJA, which *ipso facto* elevates its seriousness under the civil regulatory regime as well. Hence, the very existence of a parallel criminal regime for the same offence invites a higher standard of proof, if not the criminal standard, for the civil regime too. It seems that the Tribunal in *Davidson and Tatham*[88] has acknowledged this.

Conclusion

Imprisonment is the only sanction exclusive to the criminal regime. Ashworth contends that "custodial sentences should be used as sparingly as possible"[89]. As observed above, when the very criminality of "insider dealing" lies predominantly on ethics and morality, it warrants the question whether imprisonment is the appropriate sanction for "insider dealing". As stated by the South African judge Himestra J, imprisonment is "a harsh and drastic punishment [which must] be reserved for callous and impenitent characters"[90]. The civil regulatory regime is time and cost efficient[91], empowered to impose diverse sanctions varying from public statement to fines, and if necessary, empowered to prosecute under the criminal regime. Thus, it is more sensible to utilise the civil regulatory apparatus as the norm, and reserve the criminal regime for the "callous and impenitent" exceptions.

In Sri Lanka, where "insider dealing" is solely governed by a criminal law regime, and there are calls for a stronger civil regulatory and enforcement regime constantly being presented from various quarters[92]. As emerged from the discussion above, it is pivotal that an efficient civil regulatory regime, in addition to the criminal regime, is introduced in Sri Lanka without undue delay to efficiently deter "insider dealing".

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[82] *Woolmington v DPP* [1935] 1 AC 462, in page 481; *Mancini v DPP* [1942] AC 1, in page 11; *R v Hepworth and Fearnley* [1955] 2 QB 600.

[83] *Miller v Minister of Pensions* [1947] 2 All ER 372; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, in para 55.

[84] *Clingham (formerly C (a minor) v Royal Borough of Kensington and Chelsea* [2002] UKHL 39

[85] *Clingham (formerly C (a minor) v Royal Borough of Kensington and Chelsea* [2002] UKHL 39 in para 82

[86] in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 in 354, para 31

[87] *Clingham (formerly C (a minor) v Royal Borough of Kensington and Chelsea* [2002] UKHL 39 in para 83

[88] *Paul Davidson and Ashley Tatham v The Financial Services Authority* [2006] FIN/2003/0016 FIN/2003/0021 <https://assets.publishing.service.gov.uk/media/57528e6140f0b64328000010/DavidsonAndTatham.pdf> accessed 25 April 2018, in page 43

[89] Andrew Ashworth, *Sentencing and Penal Policy* (Weidenfeld and Nicolson 1983) 318

[90] *S v Benetti* [1975] 3 SA 603 (T) in 605G

[91] David Kirk, 'Enforcement of criminal sanctions for market abuse: practicalities, problem solving and pitfalls'[2016] 17(3) ERA Forum 311 - 322 in 322

[92] Securities and Exchange Commission of Sri Lanka, 'Proposal to amend the SEC Act to introduce a range of administrative and civil enforcement powers to deal with capital market offences' [2012] Consultation Paper No 10 <http://www.sec.gov.lk/wp-content/uploads/cover-page-10-consultation-paper.pdf> accessed 2 October 2019

පරිපාලන නීතිය සම්බන්ධ අධිකරණ තීරණ කෙරෙහි බලපානු ලබන න්‍යායන් සහ එකී න්‍යායන්හි උපයෝගීතාව

නීතිඥ සාරංග බණ්ඩාර සෙනෙවිරත්න

එල් එල්.බී. (ගෞරව) කොළඹ විශ්වවිද්‍යාලය

"රාජ්‍ය බලක්ෂේත්‍රයෙහි හිනිපෙත්තෙහි ඇති රජයෙන් සමාජය සමන්විත වේ. මේ න්‍යායෙන් බලන විට රජය යනු උත්තරීතර ව්‍යවස්ථාදායකය වන පාර්ලිමේන්තුවයි. ඊට අමතරව අධිකරණය සහ විධායකය වෙනස් කාර්යයන් ඉටුකරයි. අධිකරණය මගින් සමාලෝචනය ද විධායකය මගින් පරිපාලනය ද කෙරේ. හතරවන අංශය වූ සාමාන්‍ය පුරවැසියා පරිපාලන නීතියෙහි නාභියයි. එබැවින් ඕනෑම සමාජයක ව්‍යවස්ථාදායකය, විධායකය සහ අධිකරණය නමැති අංශ ත්‍රිත්වය පුරවැසියන් සඳහා කාර්යයන් තුනක් වෙනවෙන ම ඉටුකරයි. ව්‍යවස්ථාදායකය පුරවැසියාගේ අයිතිවාසිකම් සහ වගකීම් පනවා සම්මත කරයි. විධායකය එය ක්‍රියාවෙහි යොදවයි. එසේ ක්‍රියාවෙහි යොදවන පරිපාලන කටයුතු අධිකරණය විසින් සමාලෝචනය කරනු ලබයි. ඒ අනුව පරිපාලන නීතිය යනු, රාජ්‍ය පාලනය කෙරෙහි අධිකරණමය ආකල්ප සහ මාර්ගෝපදේශ නියම කරන සිද්ධාන්ත සමූහයකි. එය පරිපාලන බලධාරීන් විසින් ක්‍රියාත්මක කෙරෙන බලතල සහ කාර්යයන් විග්‍රහ කරන සිද්ධාන්ත සමූහයක ස්වරූපය ගනී".[1]

යථෝක්ත ප්‍රකාශයට අනුව ගම්‍ය වන්නේ, පරිපාලන නීතිය යනු, රාජ්‍ය පාලනයට අදාළ වන නීතිය බවයි. මෙහි මුඛ්‍ය අරමුණ වන්නේ, රාජ්‍ය බලතල පාලනය කිරීමය. යම් පරිපාලන ක්‍රියාවක නීත්‍යානුකූලභාවය තීරණය කරනුයේ, බලතල, අභිමතය සහ අයිතිවාසිකම් යන ප්‍රපංචයන් අනුවය. මෙහිදී බලතල අභිභවා යන්නේ, අභිමතය අනිසි ලෙස භාවිත කළ විට වන අතර ඒ තුළින් අයිතිවාසිකම්ද බණ්ඩනයට ලක්වේ. මෙහිදී යුතුකම් බණ්ඩනයට ලක්වූ පුද්ගලයා අධිකරණයෙහි සහාය පැතීම සුලබ ලක්ෂණයකි. පරිපාලන නීතියේදී අධිකරණයෙහි කාර්යභාරය සම්බන්ධව සාකච්ඡා කිරීමේදී අදළ වන න්‍යායන් ද්විත්වයක් වන රත්පැහැ න්‍යාය (Red light Theory) සහ හරිතපැහැ න්‍යාය (Green light Theory) පිළිබඳව සාකච්ඡා කිරීම මෙම අධ්‍යයනය මගින් අපේක්ෂිතය. මහාචාර්ය Harlow සහ Rawlings යන නීතිවේදීන් විසින් පරිපාලන නීතිය සම්බන්ධයෙන් වන නීතිවිද්‍යාත්මක පසුබිමක් වශයෙන් මෙම න්‍යායන් ද්විත්වය හඳුන්වා දී ඇත. මෙම න්‍යායන්හි අරමුණ වන්නේ, යම් පරිපාලන ආයතනයක් බලය භාවිත කළ යුතු ආකාරය සම්බන්ධයෙන් අධිකරණය දක්වන්නාවූ ප්‍රවේශයන්ය. එබැවින් මෙම න්‍යායන්හි ලාක්ෂණික ගුණාංගයන් පිළිබඳව මෙම අධ්‍යයනය තුළින් විග්‍රහ කිරීමට අපේක්ෂිතය.

රත්පැහැ න්‍යායෙහි හරය වන්නේ, නීතියේ බලය යන සංකල්පයයි.[2] එනම්, අධිකරණ විමර්ශනය මගින් පරිපාලන ආයතන විසින් ගනු ලබන තීරණයන් පාලනය කිරීමත්, පුරවැසියන්ගේ අයිතිවාසිකම් ආරක්ෂා කිරීමත් මෙම න්‍යාය තුළින් සිදුවන බැවිනි.[3] රත්පැහැ න්‍යාය සම්බන්ධයෙන් Harlow සහ Rawlings යන නීතිවේදීන් සාකච්ඡා කර ඇත්තේ, ඒ.වී. ඩයිසි නම් නීතිවේදියා නීතියේ ආධිපත්‍යය සම්බන්ධව දක්වා ඇති අදහස් උපස්ථම්භක කොටගනිමිනි. එනම්, නීතියෙහි ආධිපත්‍යය ගොඩනැඟී ඇත්තේ, රාජ්‍ය පාලනයේදී සාමාන්‍ය නීතිය උත්තරීතර කොට සැලකීම, නීතිය ඉදිරියේ සියලුදෙනාම එක හා සමාන වීම, රජය පනවන නීති මගින් පුරවැසි අයිතිවාසිකම් තහවුරු කොට පවත්වාගෙන යෑම යන මූලධර්මයන් පදනම් කොටගෙන බව ඔහු දක්වයි. Harlow සහ

[1] **Ram Banda v. River Valleys Development Board** (1969) 71 NLR 25 at p. 37- Weeramanthree J

[2] C. Harlow and R. Rawlings, *Law and Administration* (3rd, Cambridge University Press, Cambridge 2009) 25

[3] Above, p. 25.

Rawlings විසින් මෙම රත්පැහැ න්‍යායෙහි කාර්යය දක්වා ඇත්තේ, පරිපාලන අධිකාරීන් විසින් ගනු ලබන තීරණ සඳහා අධිකරණය සෑම විටම මැදිහත් වන අතර එසේ මැදිහත්වී පරිපාලන අධිකාරියක් යම් අභිමතයක් හෝ නෛතික යුතුමක් අවභාවිතය කර ඇති විට එය එනයින්ම අවලංගු කිරීම රත්පැහැ න්‍යායේ දී සිදුවන බවයි. රත්පැහැ න්‍යායේදී සිදුවන්නේ, පුද්ගල අයිතිවාසිකම් ආරක්ෂා වන පරිදි රාජ්‍යයෙහි නීත්‍යනුකූල නොවන පරිපාලන ක්‍රියා අධිකරණය විසින් මර්දනය කිරීමයි.[4] Oxford Journals of Legal Studies නීති සඟරාවෙහි දක්වන්නේ,

රත්පැහැ න්‍යායේදී;

(1) නීතිය ආණ්ඩුවට වඩා උත්තරීතර බව,
(2) රාජ්‍ය පාලනය නිතර පරීක්ෂා කිරීම,
(3) රාජ්‍ය පාලනය පරීක්ෂා කිරීම අධිකරණය මගින් සිදුවන බව,
(4) එසේ කිරීම තුළින් පුද්ගල අයිතිවාසිකම් ආරක්ෂා වීම යන කරුණු සංස්ථාපනය වන බවයි.[5]

හරිතපැහැ න්‍යායේදී අධිකරණය ක්‍රියාකරනුයේ, පරිපාලනය සහ ජනතාව අතර මැදිහත්කරුවෙකු වශයෙනි.[6] මෙහිදී අධිකරණය පරිපාලනයට පහසුකම් සපයන්නෙකුගේ කෘත්‍යය ඉටුකරන අතර අධිකරණය විසින් මෙම න්‍යාය යටතේ පරිපාලන අධිකාරීන් විසින් ගනු ලබන සෑම තීරණයකටම මැදිහත් නොවී හිතුවක්කාරී තීරණ ගැනීම් පමණක් වළක්වනු ලබයි. ***Hughes v. Department of Health and Social Security***[7] නඩුවේදී Lord Diplock ප්‍රකාශ කළේ, දේශපාලන වටපිටාව වෙනස්වීමට සමගාමීව පරිපාලනය සංකීර්ණ වන නිසා පරිපාලන ආයතනවල ප්‍රතිපත්ති ක්‍රියාවෙහි යෙදවීමේදී අධිකරණයෙහි මැදිහත්භාවය අවම කර ඔවුන්ට සාධාරණ නිදහසක් ලබා දිය යුතු බවය. තත්ත්වාකාරවාදී සහ සමාජවිද්‍යාත්මක නීති ගුරුකුලයන්හි ලාක්ෂණික ගුණාංගයන් ඔස්සේ ජනිත වූ හරිතපැහැ න්‍යාය තුළින් නීතිය, දේශපාලනය සහ පරිපාලනය යන ක්ෂේත්‍රයන්හි සමතුලිතතාවයක් ඇති කරයි. හරිතපැහැ න්‍යායට පක්ෂ බොහෝ නීතිවේදීන් ප්‍රකාශ කරන්නේ, පරිපාලන අධිකාරීන් ගන්නා තීරණ කෙරෙහි අධිකරණ බලපෑම අවම කළ යුතු බවයි.[8] Oxford Journals of Legal Studies නීති සඟරාවට අනුව හරිතපැහැ න්‍යායේදී;

(1) අධිකරණය හුදෙක් පරිපාලන තීරණවලට අනුශාසනා කළ යුතු බව සහ පරිපාලනය ඉක්මවා අධිකරණය කටයුතු නොකළ යුතු බව,
(2) සෑමවිටම පරිපාලන අධිකාරීන් අනර්ථයක් සිදුකරන්නේය යන පූර්වනිගමනය බැහැර කිරීම,
(3) සෑම අවස්ථාවකදීම නීතිය මගින් පරිපාලනය මත බාධා නොපමුණුවා හැකි සෑම විට ම පරිපාලන ආයතන ක්‍රියා කළ යුතු ආකාරයට අවශ්‍ය කදිම මාර්ගය පෙන්වා දීම මගින්,
(4) පුද්ගල අයිතිවාසිකම් ආරක්ෂා වීම සිදුවන බවයි.[9]

පරිපාලන නීතියෙහි මූලික සංකල්පයක් වන නීතියේ බලය (Rule of Law) යන්න පරිපාලන නීතිය කෙරෙහි යෙදෙන ආකාරය පිළිබඳ ව විමසා බැලිය යුතුය. පරිපාලන අධිකාරියක් විසින් ගනු ලබන තීරණයන්හි නීත්‍යනුකූලභාවය අධිකරණ විමර්ශන පදනම් අනුව අධිකරණය විසින් සමාලෝචනයට ලක්කරනු ලබන අතර ඊට අමතරව එම තීරණයන්ට නීති ප්‍රතිකර්ම සිදුකිරීමද පරිපාලන නීතිය මගින් සිදුවේ. ***R v. Electricity Commissioners, exp. London Electricity Joint Committee Company***[10] නඩුතීරණයේදී ඇට්කින් සාමිවරයා ප්‍රකාශ කළේ, සර්ටියොරාරි ආදී පරමාධිකාරී ආඥා සියලුම පුද්ගලයන්ට, ව්‍යවස්ථාපිත හෝ ව්‍යවස්ථාපිත නොකළ යන සීමාවන් නොතකා අදාළ වන අතර යම්

[4] Above, p. 1-4.
[5] Tomkin, *"In Defence of the Political Constitution"* [2002] Oxford Journals of Legal Studies 151,157-175
[6] C. Harlow and R. Rawlings, *Law and Administration* (3rd, Cambridge University Press, Cambridge 2009) 32
[7] [1985] AC 776
[8] C. Harlow and R. Rawlings, *Law and Administration* (3rd, Cambridge University Press, Cambridge 2009) 37
[9] Tomkin, *"In Defence of the Political Constitution"* [2002] Oxford Journals of Legal Studies 151,157-175
[10] [1924] 1 KB 171

ආයතනයක් පිහිටුවන ලබන පනතෙන් ලබාදී ඇති සීමිත බලතල අතික්‍රමණය කළහොත් එවන් ක්‍රියා අධිකරණයෙහි සමාලෝචනයට යටත් වන බවය. එනම්, ජනතාවගේ අයිතිවාසිකම්වලට බලපාන ගැටලු නිශ්චය කිරීමේ නෛතික බලය සහ විනිශ්චයක ආකාරයෙන් කටයුතු කිරීමේ යුතුකමක් පැවරී තිබෙන පුද්ගල මණ්ඩලයක් ඔවුන්ට ලැබී ඇති නෛතික බලය ඉක්මවා ක්‍රියාකරන විට ඔවුහු අධිකරණයෙහි පාලන බලයට යටත් වන බවයි.

රත්පැහැ න්‍යායෙහි මූලිකම යහපත් ලක්ෂණයක් වන්නේ, නීතියෙහි ආධිපත්‍යය සුරක්ෂිත වීමය. පරිපාලන නීතියේ දී නොමනා පාලනය සුමගට ගැනීම උදෙසා අධිකරණය විසින් අනිවාර්ය ප්‍රතිකර්මයක් ලබා දෙයි. එනම්, රිට් ආඥා ලබා දීම සිදුකරනු ලබයි.[11] ඕනෑම පරිපාලන තීරණයකට එරෙහිව අධිකරණයට රිට් ආඥා නිකුත් කිරීමේ හැකියාව පවතින්නේ, නීතියේ බලය යන සංකල්පයෙහි බලාත්මකභාවයෙනි. එම නිසා අධිකරණ තීරණ අනුව විශද වන්නේ, විනිසුරුවරුන් රත්පැහැ න්‍යාය හරහා නොමනා පරිපාලන තීරණයන්ට මැදිහත්වී ඒවා අවලංගු කර ඇති බවයි.

R v. Criminal Injuries Compensation Board[12] නඩුතීරණයේදී ප්‍රශ්නගත ආයතනය ව්‍යවස්ථාපිත ආයතනයක් නොවූවද ස්ථාපනය කර තිබුණේ, පරමාධිකාරී රාජඅාඥාවකිනි. තවද, මුදල් සපයන ලද්දේ, පාර්ලිමේන්තුව විසිනි. මෙහිදී අධිකරණය ප්‍රකාශ කළේ, මෙය ව්‍යවස්ථාපිත ආයතනයක් නොවූවත් පොදු ස්වභාවයෙන් කටයුතු කරන නිසා එයින් පුද්ගල අයිතිවාසිකම්වලට බලපෑමක් එල්ල වන නිසා සර්ටියොරාරි අඥාවක් නිකුත් කළ හැකි බවයි. ඒ අනුව රත්පැහැ න්‍යායේ දී අධිකරණය පරිපාලන ආයතන සමග කටයුතු කර ඇත්තේ, සටන්කරුවෙකු පරිද්දෙනි.[13] එනම්, අධිකරණය නීතියේ ආධිපත්‍යය මත පදනම් වෙමින් නොමනා පරිපාලන තීරණ වළක්වාලීම අරමුණු කරගෙන කටයුතු කර ඇත.

කෙසේ වෙතත් හරිතපැහැ න්‍යායේදී සිදුවන්නේ, නීතියේ ආධිපත්‍යය යන්න යටපත් වී පාර්ලිමේන්තු ස්වාධිපත්‍යය යන සංකල්පය ඉස්මතු වීමය. එනම්, නීතියේ බලය යටපත් වීම හරිතපැහැ න්‍යායෙහි පවතින නිශේධනීය ලක්ෂණයක් වන නමුත් මෙමගින් පාර්ලිමේන්තු ස්වාධිපත්‍යය ඉස්මතු වීම හරිතපැහැ න්‍යාය සාධාරණීකරණය කරන්නෙකුට නිරවද්‍ය ලෙස පෙනෙනු ඇත. ඩේවි සහ පිලිප්ස් යන නීතිවේදීන් දක්වන්නේ, *"ව්‍යවස්ථා සම්පාදනය කිරීමේ පරමාධිකාරී බලතල පාර්ලිමේන්තුවෙහි අනුග්‍රහයෙන් නොනැසී රඳා පවතින බවත් එසේම රට තුළ පාවිච්චි කරනු ලබන වෙනත් යම් යම් ව්‍යවස්ථාදායක බලතල පාර්ලිමේන්තුවෙහි අධිබලයෙන් නිෂ්පන්න විය යුතු බවත් පාර්ලිමේන්තු රාජ්‍යෙෂත්වය පිළිබඳ නවීන සිද්ධාන්තයෙන් අදහස් වේ"*[14] යනුවෙනි. එනම්, ව්‍යවස්ථාදායකය විසින් ව්‍යවස්ථා හරහා පනවනු ලබන පරිපාලන තීරණ සහ පරිපාලන බලතල නිෂ්පන්න කළ හැක්කේ, ව්‍යවස්ථාදායකටම පමණක් වන බව පැහැදිලි වේ. පහත නඩුතීරණවලදී අධිකරණ ක්‍රියා කර ඇත්තේ, උක්ත කරුණ සනාථ වන පරිදිය.

Bapio Action Ltd. v. Secretary of State[15] නඩුතීරණයේදී පෙත්සම්කරුවන් වසර දෙකක දීර්ඝකාලීන සෞඛ්‍ය සේවා පුහුණුවක් ඉන්දියානු, ශ්‍රී ලාංකික, බංග්ලාදේශය ඇතුළු රටවල් කිහිපයක වෛද්‍ය අභ්‍යාසලාභීන්ට ලබාදෙන ලදී. ඉන්පසු බ්‍රිතාන්‍ය පාර්ලිමේන්තුව නව ව්‍යවස්ථාවක් පනවමින් ආගමන විගමන නීති සංශෝධනය කරන ලදී. එහිදී අදාළ වෛද්‍ය පුහුණුව වසර 03ක් දක්වා දීර්ඝ කිරීමටත් බ්‍රිතාන්‍ය ජාතිකයින් හැර වෙනත් රටවල පිරිස් අභ්‍යාසලාභීන් ලෙස බඳවා ගැනීම සීමාකිරීමටත් කටයුතු කරන ලදී. මෙහිදී අදාළ ආයතනය සහ වෛද්‍යවරුන් ප්‍රකාශ කළේ, දැනට පිරිසක් පුහුණුව ලබන හෙයින් මෙම නව ව්‍යවස්ථා පැනවීම මත ඔවුන්ගේ නීත්‍යානුකූල අපේක්ෂාව කඩවී ඇති බවයි. මෙහිදී Lord Justice Maurice ප්‍රකාශ කළේ, මේ සම්බන්ධව අධිකරණයට ගත

[11] W. Wade and C. Forsyth, *Administrative Law* (9th, Oxford University Press, Oxford 2004) 4-5
[12] [1967] 3 WLR 348
[13] M. Elliott, Beatson, *Matthews and Elliott's Administrative Law* (4th, Oxford University Press, Oxford 2011) 3

[14] fâõ iy ms,smaia" *wdKavql%u kS;sh* ∧i;ajk uqøKh" wOHdmk m%ldYk fomd¾;fika;=j" fld<U 1970& 717
[15] [2007] EWCA civ. 1139

හැකි ප්‍රතිකර්මයක් නොමැති බවය. එනම්, ආගමන විගමන නීති සංශෝධනය කිරීමේ තනි හා අනන්‍ය බලය ව්‍යවස්ථාදායකය වෙත පැවරී ඇති බැවිනි. ඒ අනුව මෙහිදී රජයෙහි තීරණය කෙරෙහි අධිකරණය කොළ එළියක් දක්වමින් නීතියේ බලය යටපත් කරමින් පාර්ලිමේන්තු ස්වාධිපත්‍යය ආරක්ෂා කර ඇත.

West minister Corporation v. London and North Western[16] නඩුවේදී මාර්ගය යටින් වැසිකිළි සැදීමට පළාත් පාලන ආයතනය සතු බලය උපයෝගී කරගනිමින් අදාළ සමාගම මාර්ගයෙහි එක්පසෙක සිට අනෙක්පසට යෑමට උමගක් තනන ලදී. මෙම නඩුවේදී අධිකරණය ප්‍රකාශ කළේ, පළාත් පාලන ආයතනය කළ ක්‍රියාව, දී ඇති බලය තුළ සිය අභිමතය භාවිත කිරීමක් වන හෙයින් අධිකරණයට ප්‍රශ්න කළ නොහැකි බවයි. ඒ අනුව අධිකරණය මෙහිදී ද කොළ එළියක් දල්වා ඇත. මෙහිදී ගම්‍යවන්නේ, ඇතැම් අවස්ථාවල ව්‍යවස්ථාදායක පරමාධිපත්‍යය ආරක්ෂා වීම හරිතපැහැ න්‍යායෙහි යහපත් ලක්ෂණයක් වුවත් ඊට සාපේක්ෂ ව නීතියේ බලය හීනවීම මෙහි පවත්නා අයහපත් ලක්ෂණයක් බවය.

රත්පැහැ න්‍යායෙහි සුභාවිතය මගින් පරිපාලන නීතිය සංවර්ධනය වීම ඉතා ප්‍රගතිශීලී ලාක්ෂණික ගුණාංගයකි. මූලික අයිතිවාසිකම් සම්බන්ධ විෂයක්ෂේත්‍රයේදී නෛතික ස්ථිතිය යන සාධකය වර්ධනය කිරීම උදෙසා මෙම න්‍යාය දායක වී ඇති ආකාරය *Shriyani Silva v. O.I.C. Iddamalgoda*[17] නඩුතීරණය මගින් පැහැදිලි වේ. මෙහිදී පොලිස් අත්අඩංගුවේදී මියගිය ස්වාමිපුරුෂයාගේ මූලික අයිතිවාසිකම් උල්ලංඝණය වීම සම්බන්ධයෙන් නඩුකටයුත්තක් පවරා පවත්වාගෙන යෑමට බිරිඳට නෛතික ස්ථිතියක් පවතින බවට අධිකරණය දක්වන ලදී. ශිරාණි බණ්ඩාරනායක විනිසුරුතුමිය ප්‍රකාශ කරන්නට යෙදුණේ, දැඩි වචනාර්ථයෙන් ව්‍යවස්ථා අර්ථකථනය තුළින් අයුක්ති සහගත ප්‍රතිඵල ඇති නොකළ යුතු බවත් අයිතිවාසිකම් බලගැන්වෙන ලෙස නීතිය අර්ථකථනය කළ යුතු අතර එමගින් මහජන පීඩාවන් යටපත් කළ යුතු බවත්ය.[18] රත්පැහැ න්‍යාය ගරුකරන්නන් මෙය යහපත් ලක්ෂණයක් සේ දුටුවද හරිතපැහැ න්‍යාය ගරුකරන්නන් මෙය අයහපත් ලක්ෂණයක් සේ දක්නා බවට සැකයක් නැත. මන්ද, ඔවුන්ගේ මතය වන්නේ, මෙමගින් ආණ්ඩුක්‍රම ව්‍යවස්ථාවෙහි 126(2)වන අනුව්‍යවස්ථාව වෙනස්කිරීමක් සිදුවන බවත් ඒ තුළ පාර්ලිමේන්තු ස්වාධිපත්‍යය සහ රටෙහි උත්තරීතර මූලික නීතියෙහි හරයාත්මක පදනම විනාශ වන බවත්ය. එමෙන්ම *Wewalage Rani Fernando v. O.I.C., Seeduva*[19] නඩුතීරණයේදී ද උක්ත කරුණ අවධාරණය කරන ලදී.

මේ හැරුණු විට රත්පැහැ න්‍යාය මගින් පරිපාලන නීතියෙහි අධිකරණ විමර්ශනය සම්බන්ධයෙන් වන නීතික්ෂේත්‍රයද සංවර්ධනයට ලක්කර ඇත. *Harjani and Another v. Indian Overseas Bank and Others*[20] නඩුතීරණයේදී වගඋත්තරකාර බැංකුව ව්‍යවස්ථාපිත ව පිහිටුවන ලද ආයතනයක් නොවූවද අධිකරණය විසින් එයට එරෙහිව රිට් ආඥාවක් නිකුත් කරනු ලැබීය. අධිකරණය ප්‍රකාශ කළේ, වගඋත්තරකාර බැංකුව ව්‍යවස්ථාපිතව පිහිටුවන ලද ආයතනයක් නොවූව ද ඉන් ඉටුකෙරෙන කාර්යය මහජන කාර්යයක ස්වරූපය දරන හෙයින් එවන් ආයතනයකට එරෙහිව රිට් නිකුත් කළ හැකි බවය. තවද, *Saheer and Others v. Boards of Governors Zahira College and Others*[21] නඩුවේදී සහිරා විද්‍යාලය තුළ ජාත්‍යන්තර පාසලක් පිහිටුවීමට එහි භාරකරුවන් විසින් තීරණය කිරීම ප්‍රශ්නගත විය. මෙහිදී දෙමාපියන් විසින් අදාළ තීරණයට එරෙහිව නඩු පැවරූ අතර ඒ අනුව අධිකරණය ප්‍රකාශ කළේ, සහිරා විදුහලේ භාරකරුවන් සහ දෙමාපියන් අතර පැවතියේ ගිවිසුම්ක සබඳතාවයක් බවයි. එසේ ම එම විද්‍යාලය රජයේ යම් ආධාරයක් ලැබුවද පරිපාලනය පවත්වාගෙන යෑම පෞද්ගලික භාරකරුවන් විසින් සිදුකරනු ලැබීය. එම නිසා මෙය ව්‍යවස්ථාපිතව පිහිටවූ ආයතනයක් ලෙස සැලකිය නොහැකිය. නමුත් නිහාල් ජයසේකර විනිසුරුතුමන් ප්‍රකාශ කළේ, රජයෙහි අධ්‍යාපන ප්‍රතිපත්තිය යටතේ ක්‍රියාත්මක වන ඇතැම් ආධාර සහ උපකාර ලබන සහිරා විදුහල පෞද්ගලික පාසලක් ලෙස අර්ථ දැක්විය හැකි

[16] [1905] AC 426
[17] (2003) 1 Sri L.R. 14
[18] (2003) 1 Sri L.R. 21
[19] SC (F/R) No. 700/2002, SCM 26/7/2004
[20] (2005) 1 Sri L.R. 16
[21] (2002) 3 Sri L.R. 405

වුවද පොදු කර්තව්‍යයක් ඉටුකරන බැවින් සර්ටියොරාරි ආඥාවක් නිකුත් කළ හැකි බවයි. මෙහිදී රත්පැහැ න්‍යාය මගින් අදාළ පරිපාලන තීරණයන් වළක්වමින් පෞද්ගලික අයිතිවාසිකම් සුරක්ෂණය උදෙසාද නීතියෙහි රැකවරණය ලබාදී ඇති බව අනාවරණය වේ.

රත්පැහැ න්‍යායෙහිදී ප්‍රාථමික විනිශ්චක සභාවල ක්‍රියාවන්හි නීත්‍යානුකූලභාවයද පරීක්ෂා කිරීමක් සිදුවන අතර ඒ තුළින්ද පුරවැසියන්ගේ අයිතිවාසිකම් ආරක්ෂා වේ.[22] මෙය ***Anisminic Ltd. v. Foreign Compensation Commission***[23] නඩුව මගින් මනාව පැහැදිලි වේ. 1956 සූවස් අර්බුදය නිසා මෙම සිද්ධිය ඇතිවිය. මෙම නඩුවෙහි අභියාචක වූ බ්‍රිතාන්‍ය සමාගම සතුව ඊජිප්තුවෙහි දේපළක් වූ අතර එය ඊජිප්තු ආණ්ඩුව විසින් ජනසතු කරන ලදී. ඊජිප්තුව එම දෝෂ සඳහා වූ වන්දි පසුව බ්‍රිතාන්‍යයට ගෙවන ලදී. එම වන්දි හිමිකරුවන් අතර බෙදා දීම වන්දි කොමිසම වෙත පැවරිණි. කොමිසම අභියාචකයන්ගේ ඉල්ලීම ප්‍රතික්ෂේප කරමින් කියා සිටියේ, වන්දි ඉල්ලීමට අයිතියක් ඔවුන් සතු නොවන බවයි. (ඊට හේතුව දේපළේ වත්මන් අනුප්‍රාප්තිකයා ඊජිප්තු පුරවැසියෙකු වූ බැවිනි. 1950 විදේශ වන්දි පනතෙහි 4වන වගන්තිය යටතේ වන්දි යාචනය කිරීමට හැකිවූයේ, ඇමුණුමේ සඳහන් පුද්ගලයන්ට සහ ඔවුන්ගේ අනුප්‍රාප්තිකයන්ට පමණක් වූ අතර අදාළ කාලසීමාව තුළ ඔවුන් බ්‍රිතාන්‍ය පුරවැසියන් වීමද අත්‍යවශ්‍ය විය). කොමිසමේ තීරණය නිෂ්ප්‍රභ කරමින් සාමිමණ්ඩලය තීරණය කළේ, නඩුවෙහි කරුණු අනුව වන්දි යාචනය කළ හැක්කේ, අභියාචකයන්ට මිස ඊජිප්තු සමාගමට නොවන බවයි. මෙහිදී රීඩ් සාමිවරයා සහ පියර්ස් සාමිවරයා ප්‍රකාශ කළේ, කොමිසම සැලකිල්ලට නොගත යුතු කරුණු සැලකිල්ලට ගැනීම නිසා වාර්තාව මතුපිට පෙනෙන දෝෂයක් පවතින බවය. එනම්, ඔවුන්ගේ තීරණය වූයේ, කොමිසම ව්‍යවස්ථාපිත ලේඛන සාවද්‍ය ලෙස අර්ථනිරූපණය කර ඇති බවත් සැලකිල්ලට නොගත යුතු කරුණු සැලකිල්ලට ගෙන ඇති බවත්ය. තවද, ***Weerakesari v. Fernando***[24] නඩුවේදී ප්‍රශ්නගත වූයේ, වැඩවර්ජනයක් හේතුවෙන් සේවකයන්ගේ සේවය අත්හිටුවීමය. සේවකයන් තර්ක කළේ, මෙය පිටලෑමක් බවය. මෙහි දී වීරසූරිය විනිසුරුතුමන් විසින් ප්‍රකාශ කරන ලද්දේ, විනිශ්චක සභාවක් තමාගේ පරීක්ෂණයේදී ලබාගන්නා සියලුම සාක්ෂි තීරණයට පදනම් වූ වාර්තාවෙහි කොටසක් බවත් ඇතැම් සාක්ෂි නොසලකා හැරීමෙන් වාර්තාව මතුපිට නීතිමය දෝෂයක් ඇතිවිය හැකි බවත්ය. මෙහිදී සිදුව ඇත්තේ, සේවායෝජකයා විසින් සේවාදායකයන්ට යැවූ සේවා ලිපියක් වැරදි ලෙස අර්ථනිරූපණය කිරීමය. ඒ අනුව අදාළ අවස්ථාවේදී දෝෂය සඟවාගත යුතු නිසා විනිශ්චක සභාව තීරණයට හේතු දක්වා නොමැති හෙයින් අධිකරණය අදාළ විනිශ්චක සභාවට රතුඑළියක් දැල්වීමට පසුබට වූයේ නැත.

හරිතපැහැ න්‍යායේදී අධිකරණයෙහි මැදිහත්භාවය අවම වීමත් අධිකරණයෙහි උපදෙස් මත පසුව ගැටලුකාරී තත්ත්වයන් නිර්මාණය වීමත් මෙහි පවතින අයහපත් ලක්ෂණයකි. මෙය ***Wishal Bhashitha Kaviratne v. Commissioner General of Examinations and Others***[25] නඩුතීරණය තුළින් මනාව විශද වේ. මෙහිදී 2011 වර්ෂයේ දී අ.පොෂ. උසස් පෙළ විභාගයට පෙනී සිටි සිසුන් 16 දෙනෙක් ආණ්ඩුක්‍රම ව්‍යවස්ථාවෙහි 12(1) අනුව්‍යවස්ථාව යටතේ මූලික අයිතිවාසිකම් කඩ වූ බවට පෙත්සමක් ඉදිරිපත් කරමින් ප්‍රකාශ කළේ, දිස්ත්‍රික් ශ්‍රේණි සහ දිවයින් ශ්‍රේණි අතර අනනුකූලතාවයක් තිබූ බවත් විභාග ප්‍රතිඵල ප්‍රමාද වූ බවත් දක්වමිනි. ගරු ශිරාණී බණ්ඩාරනායක විනිසුරුතුමිය ප්‍රකාශ කළේ, පැරණි සහ නව විෂය නිර්දේශයන්ට එකම සූත්‍රයක් යටතේ z අගයන් ගණනය කිරීම වැරදි සහගත වන බවත් නව සහ පැරණි විෂය නිර්දේශවලට අදාළ z අගයන් වෙන වෙන ම ගණනය කර නැවත ප්‍රසිද්ධ කරන ලෙසත්ය. හරිතපැහැ න්‍යායේදී අධිකරණය සිදුකරනුයේ, පරිපාලන ආයතනයන් හෝ පරිපාලන නිලධාරීන් අතින් සිදු වූ වැරදි නිවැරදි කරගැනීමට අවස්ථාව සලසා දීමය.[26] මෙය මෙම

[22] D. Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action* (6th, Sweet and Maxwell, United Kingdom 2007) 5-16
[23] [1969] 2 AC 147
[24] 66 NLR 145

[25] SC (F/R) Application 29 of 2012
[26] M. Elliott, Beatson, *Matthews and Elliott's Administrative Law* (4th, Oxford University Press, Oxford 2011) 5

න්‍යායෙහි යහපත් ලක්ෂණයකි. කෙසේ වෙතත් හරිතපැහැ න්‍යාය අනුව දෙන ලද මෙම තීරණයේදී අධිකරණයෙහි මැදිහත්භාවය හේතු කොටගෙන පශ්චාත් බලපෑම් රාශියක් ඇති වී තිබේ. ඒ අතරින් ප්‍රමුඛ කාරණයක් නම් විශ්ව විද්‍යාල තුළට බඳවාගත් සිසුන් ප්‍රමාණය අධික වීම නිසා අනවශ්‍ය තදබදයක් ඇති වී තිබීමය. ඇතැම් විට හරිතපැහැ න්‍යායේදී අධිකරණය පරිපාලනයට සහයකයෙකු ලෙස මැදිහත් වීම නිසා මෙවන් පරිපාලන ගැටලු උද්ගත වීම තුළ විශද වන්නේ, හරිතපැහැ න්‍යායෙහි අයහපත් ලක්ෂණයකි.

ඇතැම් අවස්ථාවලදී හරිතපැහැ න්‍යායේදී අසත්‍ය හේතු මත පදනම් ව ස්වභාවික යුක්ති මූලධර්මයන්ට පටහැනිව සිදුකරන ඇතැම් පරිපාලන ක්‍රියා සම්බන්ධයෙන් අධිකරණයෙහි මැදිහත්වීම අල්ප බව ***Mendis, Fauzi v. Gunawardhane, Silva***[27] නඩුතීරණය මගින් පැහැදිලි වේ. ගරු වෛද්‍යලිංගම් විනිසුරුතුමන් ප්‍රකාශ කළේ, අසත්‍ය හේතු මත පදනම්ව සහ ස්වභාවික යුක්ති මූලධර්මයන්ට පටහැනිව, වැරදි මූලධර්ම මත තක්සේරු වාර්තා සකස් කිරීම, වැරදි කරුණු මත ආගමන නිලධාරියෙකු විසින් ඇතුළු වීමට අවසර දීම ප්‍රතික්ෂේප කිරීම, සූදුපොළකට සාධාරණ සවන් දීමකින් තොරව සහතිකයක් නිකුත් කිරීම ප්‍රතික්ෂේප කිරීම යන කරුණු සියල්ලම පරිපාලන තීරණ වන අතර එවැනි තීරණ සම්බන්ධයෙන් බොහෝ විට අධිකරණය නමැති මූලාංගයෙහි අදාළත්වය අල්ප වන බවය.

එමෙන්ම අධිකරණ විමර්ශන බලය බැහැර කිරීම සම්බන්ධයෙන්ද අදාළ වනුයේ, හරිතපැහැ න්‍යායය. මෙය හරිතපැහැ න්‍යායෙහි නිශේධනීය ලක්ෂණයකි. ***Smith v. East Elloe Rural District Council and Others***[28] නඩුතීරණයේදී ඉඩම් අත්පත් කරගැනීමේ පනතෙහි 16වන වගන්තිය ප්‍රකාරව ඉඩම් අත්පත් කරගැනීම සම්බන්ධව පරිපාලන ආයතන ලබාදුන් නියෝග කිසිඳු අධිකරණයක ප්‍රශ්නගත කළ නොහැක යනුවෙන් සඳහන්වූ කරුණ මගින් අධිකරණ විමර්ශන බලය බැහැර කිරීමේ සංකල්පයට බලාත්මකභාවයක් ලැබෙන බවත් අධිකරණයට ඒ සම්බන්ධව කටයුතු කළ නොහැකි බවත් Lord Reid ප්‍රකාශ කරන ලදී. මේ සම්බන්ධව Wade සහ Forsyth යන නීතිවේදීන් විවේචනාත්මක දෘෂ්ටියකින් විමසා බලා ඇත. ඔවුන් දක්වන්නේ, *"බලය ඉක්මවා යෑමකදී අධිකරණ බලය බැහැර කිරීමේ වගන්තියක් මගින් අධිකරණයේ මැදිහත්වීම වළක්වන්නේ නැත. විමර්ශනය කළ නොහැකි පරිපාලනය යනු පරිපාලන නීතියෙහි සපුරාම විරුද්ධ අර්ථයක් වන අත්තනෝමතික අභිමතයට ඉඩ ලබාදීමකි"*[29] යනුවෙනි.

පරිපාලන නීතිය සම්බන්ධයෙන් සලකා බැලීමේ දී බොහෝ අධිකරණයන්හි පිරිසිදු රත්පැහැ න්‍යාය හෝ පිරිසිදු හරිතපැහැ න්‍යාය දක්නට නොලැබේ.[30] Wade සහ Forsyth යන නීතිවේදීන් ප්‍රකාශ කරන්නේ, "මෙම න්‍යායන් රත්පැහැ සහ හරිතපැහැ යනුවෙන් නොව "හුණු" සහ "චීස්" යනුවෙන් (Chalk and Cheese) හැඳින්විය යුතුය"[31] යනුවෙනි. මෙහිදී මොවුන් රත්පැහැ න්‍යායට හුණු යන අර්ථය ලබා දීම තුළ එහි පවතින දෘඩ බව ගම්‍ය වන අතර හරිතපැහැ න්‍යායට චීස් යන අර්ථය ලබා දීම තුළ එහි පවතින මෘදු බව ගම්‍ය වේ. කෙසේ වෙතත් පරිපාලන නීතියෙහි අරමුණු සාක්ෂාත් කරගැනීම උදෙසා රත්පැහැ න්‍යාය සහ හරිතපැහැ න්‍යාය යන න්‍යායන් ද්විත්වය ම උපස්ථම්භක වන බව අනාවරණය වේ.[32]

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[27] (1979) 2 Sri L.R. 322

[28] [1956] AC 736

[29] W. Wade and C. Forsyth, *Administrative Law* (9th, Oxford University Press, Oxford 2004) 733-734

[30] C. Harlow and R. Rawlings, *Law and Administration* (3rd, Cambridge University Press, Cambridge 2009) 127

[31] W. Wade and C. Forsyth, *Administrative Law* (9th, Oxford University Press, Oxford 2004) 7

[32] M. Elliott, Beatson, *Matthews and Elliott's Administrative Law* (4th, Oxford University Press, Oxford 2011) 5

ANTI-COMPETATIVE PRACTICES & COMPETITION LAW OF SRI LANKA – A CALL FOR REFORM

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1) Introduction

Competition law or Anti-trust law is a branch of law which promotes and maintains market competition by regulating anti-competitive practices carried out by companies thereby reducing the competition between competing companies in a market. Competition in the economic sense could be defined as the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms.

The universal goal of competition law at present is to prohibit, supervise and regulate any activity which would

restrict free trade and competition between businesses. While the substance of competition law varies from one jurisdiction to another, the fundamental objectives of this law such as, the protection of interests of the consumer and ensuring the equal opportunity to compete in the open market are universal and common to all jurisdictions. Various national and regional competition authorities[1] have been formed for the purposes of specific enforcement of the law and strengthen regional co-operation to deal with issues arising from anti-competitive practices. At present competition authorities of many developed states operate alongside each other, on a day-to-day basis, with foreign counterparts for the purposes of enforcement of laws and sharing of key information.

Sri Lanka, following the footsteps of many other nations which adopted competition law to their legal regime, has enacted several Acts which specifically deal with consumer protection and competition law over a span of 40 years. However, the suitability, compatibility and robustness of the laws that were introduced through these acts in contrast with the 21st century free market economy in Sri Lanka were thoroughly debated over the years and instantly paved way for the repealing of several legislative enactments. This article focuses on the amendments and changes that were brought to the prevailing laws of Sri Lanka in order to elevate the standards of conduct in the free market and

[1]European Union, Organisation for Economic Co-operation and Development etc

enforcement of the said laws while making comparisons to existing moreover successful, foreign laws.

2) Law Governing Competition in Sri Lanka – Contrast and Criticism

2.1) Legal Framework

Competition law and policy has been, relatively, of very recent origin in Sri Lanka. Until 1977, the Governments that ruled the country alternately did not follow a policy of promoting competition through competition law and policy. Instead they followed a policy of consumer protection through consumer subsidies and price control.[2] Two years after opening the economy in November 1977, the State introduced the Consumer Protection Act of 1979, the first legislative enactment in the country which dealt with consumer protection. However, this Act failed to address the issues of unfair competition due to various reasons.

Thereafter, the Fair Trading Commission Act of 1987was introduced repealing the Consumer Protection Act of 1979. It was intended to enact legislation to deal with the control of monopolies, mergers and anti-competitive practices. However, this Act was later repealed and replaced by the Consumer Affairs Authority Act No.9 of 2003 which, at present is the governing and applicable law in relation to competition law in Sri Lanka.

It should be noted that apart from the Consumer Affairs Authority Act, The Intellectual Property Act No. 36 of 2003and Public Utilities Commission Act No.35 of 2002 of Sri Lanka play pivotal roles in upholding competition law principles embodied in the legal system of the country. It should however be stated that this article solely focuses on the issues pertaining to the Consumer Affairs Authority Act and related matters.

2.2) Sri Lankan Law on Competition vis-à-vis UK and USA Legislation

The Sri Lankan competition regime, when pitted against the UK and USA competition laws, may unravel weaknesses and lacunas in the legal structure which will hereinafter be discussed in detail. While it may seems like a comparison made between David and Goliath, such a comparison would allow the reader to obtain a broader picture with regards to unfair competition, recognized anti-competitive practices and the approaches adopted by the aforementioned states and their institutions to combat these practices mainly, to protect the interests of the consumers despite the fundamental divergences of interests between these systems of law.

Although the law on competition has been relatively of recent origin in Sri Lanka, the same cannot be said with regard to the United States' and United Kingdom's laws on competition. The United States antitrust legal regime itself

[2]Prof. ADV de S Indraratna, "Competition Policy Law and Consumer protection: Sri Lankan Case" [2003] Asian Conference on the Post-Doha Competition Issues and on Consumer Protection, Competition Policy and Law, Kuala Lumpur

is one of the two most influential and largest systems of competition regulation, the counterpart being the European Union Competition Law. The legal framework of the USA pertaining to competition comprises of the **Sherman Antitrust Act of 1890**[3], **Clayton Antitrust Act of 1914**[4] and **Federal Trade Commission Act of 1914**[5] et al. while the United Kingdom is empowered with the **Competition Act of 1998**[6], **Enterprise and Regulatory Reform Act of 2013**[7] and the Treaty on the Functioning of the European Union[8]et al. The contrasts of these laws and modes of improvement to the competition laws in the national legislation could be perused under several themes which will be discussed hereafter.

2.3) Enforcement through Competition Regulators

A competition regulator is a statutory authority, empowered by a legislative enactment of a country that regulates and enforces competition laws and consumer protection laws. The Consumer Affairs Authority Act provides for the establishment and constitution of a Consumer Affairs Authority of Sri Lanka (CAA) which in turn regulates and enforces the law of the country. The Authority shall consist of a Chairman and not less than ten other members who shall be appointed by the Minister from among persons who possess recognized qualifications, have had wide experience and have distinguished themselves in the field of industry, law, economics, commerce, administration, accountancy, science or health.[9] The main purposes of the Authority are to safeguard consumer rights and interests through consumer empowerment, regulation of trade and promotion of healthy competition.[10] The main functions of this Authority would be to control and eliminate anti-competitive practices, promote effective competition between companies, ensure consumer protection and promote competitive pricing of goods to name a few.[11]Further, the Act provides for the establishment and constitution of Consumer Affairs Council[12]to carry out the function of hearing and determining all applications and references made to it under this Act.[13]

While the regulative bodies in USA and UK exercise similar powers to the Authority established in Sri Lanka, it

[3]The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7

[4]The Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53

[5]The Federal Trade Commission Act 1914, 15 U.S.C. §§ 41-51

[6] Competition Act1998

[7]Enterprise and Regulatory Reform Act 2013

[8] Treaty on the Functioning of the European Union [2007] Articles 101-106

[9] Consumer Affairs Authority Act of 2003, § 3(1)

[10]Consumer Affairs Authority, *Annual Report*(2011)

[11]*supra note 9,* § 8

[12]*ibid*, § 39

[13]*ibid*, § 40(1)

could be observed that the powers that have been conferred upon them are much wider in scope. Moreover, the powers and functions of the Federal Trade Commission (FTC) established by the Federal Trade Commission Act of 1914[14] in the United States, and the Competition and Markets Authority (CMA) established by the Enterprise and Regulatory Reform Act of 2013 in the United Kingdom, could be regarded as pure and unhindered due to the minimal interference by political authorities as opposed to the process in Sri Lanka where the Minister of Finance appoints the Chairman and Members of the Authority as well as the Council.[15]This is a mammoth drawback for an institution exercising quasi-judicial functions.

While the CAA is empowered under the 2003 Act to investigate the prevalence of any anti-competitive practices either on its own motion or on a complaint or request made to it by any person, any organization of consumers or an association of traders[16], the USA Act has improvised and adopted more advanced and progressive modes of investigation to deal with the expanding market of the 21st century. For instance, the FTC is empowered to require the filing of annual or special reports or answers in writing to specific questions for the purpose of obtaining information about the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the entities to whom the inquiry is addressed.[17]Such accumulated information could later be used against such institution where violations of antitrust laws occur. It is the opinion of the writer that the introduction of such a procedure to the Sri Lankan system would allow the regulating authority to track the harmful activities carried out by relevant institutions which in turn would ensure market equality and promote healthy competition among business entities.

2.4) Recognised Unfair Competition Practices

Another cardinal matter with regard to the law of competition would be the manner in which Unfair Competition practices have been defined in the legislation. This definition is of paramount importance in legal proceedings as it could break or make an action against anti-competitive practices carried out in reality. Although the CAA Act of Sri Lanka has provided definitions for a few unfair competition practices it has shied away from thoroughly defining the whole gamut of unfair competition practices and penalties for engaging in such practices which could adversely affect the enforcement and application of the said laws. Further, the absence of

[14]The Federal Trade Commission Act of 1914 15 U.S.C. §§ 41-51

[15]*supra note 9,* §3 &§39

[16]While §34 of Consumer Affairs Authority Act gives the ability for the Authority to conduct required investigations, §43 &§44 empowers the Consumer Affairs Council to carry out further investigations and obtain evidence

[17]Federal Trade Commission Act, 15 U.S.C., § 46

such thorough definitions would absolutely render the purpose of these laws nugatory by leaving unnecessary room for contesting the orders of the Authority. According to Section 35 of the CAA Act;

"an anti-competitive practice shall be deemed to prevail, where a person in the course of business, pursues a course of conduct which of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in Sri Lanka or the supply or securing of services in Sri Lanka."

The Sri Lankan Act through the functions of the Authority seeks to control or eliminate the following practices[18]

- Restrictive trade agreements among enterprises.
- Arrangements amongst enterprises with regard to prices.
- Abuse of a dominant position with regard to domestic trade or economic development within the market or in a substantial part of the market.
- Any restraint of competition adversely affecting domestic or international trade or economic development.

When perusing the related USA & UK legislations however, it could be observed that the unfair competition practices and the relevant penalties recognised by the law are much wider in scope. The Sherman Act expressly provides that;

"every contract, combination ***in the form of trust or otherwise, or conspiracy****, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."*[19]

This provision serves as a direct blockade to prevent cartel activities[20]which takes place in the business industry. Further, it has is illegal to select customers through price discrimination and engage in the payment of commissions to promote sales.[21] Additionally, penalties for violating these antitrust laws include both criminal and civil penalties.

For any violation of the Clayton Act, individuals injured by antitrust violations can sue the violators in court for three times the amount of damages actually suffered. These are known as treble-damages, and can also be sought in class-action antitrust lawsuits.

Therefore, upon careful perusal it could be observed that, even though the Sri Lankan law has room for interpretation, it lacks the specificity that is essential for the enforcement of the laws by the Authority.

[18]*supra note 9,* § 8(a)

[19]Sherman Antitrust Act of 1890, §1

[20]A cartel is a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them. Action against cartels is a specific type of antitrust enforcement.

[21]Clayton Antitrust Act of 1914, §2

While the need for specific provisions regarding anti-competitive mergers, cartel activities, criminal sanctions and private rights are of prime importance, the fact that the Authority has so far been concerned mostly with matters pertaining to pricing and the protection of consumers rather than carrying out investigations into areas where anti-competitive practices are alleged to have been carried out can be seen as a total letdown from the point of view of the general public.

2.5) Further Criticism of the Sri Lankan Competition law

While the Consumer Affairs Authority Act could be identified as a stronger legislative enactment than the earlier legislation, it may be less effective solely as competition legislation which curbs and controls acts committed against the interests of consumers. This is mainly due to the fact that it does not directly address and differentiate between the recognised anti-competitive practices such as unfair mergers and acquisitions, cartel activities and monopolies. Even though the inclusion of the provisions to investigate any anti-competitive practice in general may somewhat fill this vacuum, the State must soon introduce legislation in respect of unfair monopolies and cartels to effectively implement its competition policy as the absence of these provisions could leave room to contest the orders of the authority.[22]

The Act is also subject to criticism in several quarters for other reasons. It has been criticised for giving far too much power to the Minister. The appointment of members to the Authority and the Council by the Minister, for instance, could potentially affect the autonomy and independence, which a competition and consumer authority like this very much needs. The fact that the minister has been given the free will to appoint members could hinder the basic purpose of establishing the authority since such minister's affiliations could easily influence any decision taken by such body.

The conclusion that emerges from all the above discussed matter is that CAA Act by itself is weak as competition legislation; it has to be complemented by anti-monopoly legislation without delay. Provision also must be made for interface with other regulatory bodies. There are other deficiencies with regard to definitions and interpretations.[23]The successful implementation of competition regulations in other nations showcases the effectiveness of their legislation as opposed to our failing legislation.

3) A Call for Change

With the development of economy and current social infrastructure, it would be

[22]The aspect of unfair mergers and acquisitions have somewhat been curbed by the Company Take-overs and Mergers Code 1995, as amended in 2003 which was introduced by the Securities and Exchange Commission of Sri Lanka

[23]*supra note 5*

prudent for the legislature to improve the standards of the prevailing competition law. This could be done through introducing new provisions to cover up the lacunas and the legally grey areas including ensuring impartiality and independence of the Consumer Affairs Authority. The Act shall further address issues which the consumers and companies as well as the Authority itself may have to encounter while dealing with the modern market economy. Moreover, the Consumer Affairs Authority should be given the opportunity to interact directly with corporations and other commercially-driven entities regularly which would in turn, give the Authority an 'upper hand' when tackling illegal competitive practices.

Amending the prevailing law itself will not solely contribute to overcome the challenges our market and the Authorities are facing. These issues should be looked at from a socio-political point of view as well. The lack of knowledge regarding competition laws and economic practices of the country of the general population and, the consumers' inability to realise his vital role has caused many issues in the modern-day market. To tackle this, competition issues should be made part and parcel of both the law and economics curriculum at universities and other institutes of higher and professional education to create a broader base of professionals.

Ultimately it should be stated that none of these above mentioned suggestions to change the prevailing system will be of any effect unless there is a strong legal regime backing the Authority. Therefore, it should be necessary to bring the Sri Lankan law in line with widely recognised, competitive legal systems as we observed.

4) Conclusion

The developed legal culture of Sri Lanka combines elements of several traditions. Much of the law about property and matrimonial matters can be traced to the Dutch-Roman law and the prevailing customary laws while the laws dealing with companies, financial and intellectual property matters derives more from English sources. The legal aspects relating to competition policies in Sri Lanka have also been drawn from the system which prevailed and still prevails in the British Commonwealth. Despite this strong influence of English law on our competition legal regime, the consumer protection policies and the related institutions in Sri Lanka appear frail upon comparison.

It would be correct to state that while the competition policies of developed nations have blossomed into a near-perfect system of laws, the national laws and institutions have stagnated over the course of time. These issues could be averted through establishing impartial and unbiased institutions, implementing practical policies and building a strong economy with a free market. While it may seem simple at the outset, it would take decades for the fruition of such a task. This issue again could only be avoided through the proper implementation of policies in a

benevolent manner, by the decision-making authorities of the country.

IMPACT OF ESTABLISHING SPECIALIZED ENVIRONMENTAL TRIBUNALS: LESSONS FOR SRI LANKA

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Abstract

The judiciary plays a unique and distinct role in the environmental enforcement chain by bringing about a judicious balance between ecological interest and economical interest. Thus, as a modification of International Environmental Law, for an enhanced environmental adjudication, Environmental courts and tribunals (ECTs) were introduced and now this has become a dynamic substitution to the general courts, for providing better access to environmental justice. There has been an exponential growth in ECTs irrespective of the nature of the country. But in Sri Lanka, still environmental adjudication is done through regular courts. So the problem is whether that environmental adjudication is effective under ordinary courts or whether Sri Lanka requires a separate judicial body for environmental adjudication.

Accordingly, the objectives of this article are to discuss whether Sri Lanka has an authentic requirement of a separate judicial body for environmental adjudication, to analyze the drawbacks of existing Environmental adjudication in Sri Lanka and to propose an ideal model and code of best practice for Sri Lanka. For this purpose, this study examines Environmental Tribunals, function in India and Pakistan.

This article follows a qualitative legal research methodology based on both primary and secondary sources.

Introduction

Since the era of *Hominid Primates,* 25 million years ago up to *Homo sapiens* today, the relationship between man and the environment is tightly woven with each other. Various religious teachings of the great teachers, such as Lord Buddha, Prophet Muhammad, and Christ all have told that the resources of the Earth belong to the Earth and that man is only the trustee of those resources and that he should be very careful in handling such resources. Correspondingly the environmental rule of law requires adherence to environmental laws and emphasizes the need to establish strong and effective frameworks of justice, governance, and law for environmental sustainability. Based on this pledge there should be a healthy relationship between all living beings on the planet and a careful appropriation of its resources particularly by human kind. However, at present, this constancy has changed due to the involvement of human activities which destroy the environment and ultimately initiated a dispute.

Environmental disputes have an impressive history and it's not something novel. For an example famous cases such as the *Pacific Fur*

Seal case (1893)[1] the *Trail Smelter case (1941)*[2] and the *Lac Lanoux case* (*1957*)[3] can be considered. In fact, in all these well-known cases, the main reason why a dispute came in to exist was due to the clash between economic interest and ecological interest. The Judiciary is the crucial partner in bringing about a judicious balance between these two interests and in promoting a culture of compliance with legal norms and standards. Therefore, there is a very crucial necessity of striking a balance between these two competing interests.

Concept of ECTs

However, with the passage of time, the number of environmental disputes has drastically increased and the dissatisfaction of the general court system due to numerous reasons was emphasized. Therefore, as a dynamic alternative to the general courts, for providing better access to environmental justice, judicial courts and administrative tribunals which are known as Environmental Courts and Tribunals (ECTs) that specialize in adjudicating environmental, resource development, land use, and similar litigation[4] became a worldwide phenomenon and one of the most dramatic developments[5] in modern environmental law.

Simply, Environmental Courts and Tribunals (ECTs) are "public bodies or officials in the judicial or administrative branch of government, specializing in adjudicating environmental, resource development, Land use and related disputes[6]. The starting point for the development of ECTs came about with the 1972 UN Conference on the Human Environment in Stockholm. Then the first environmental courts and tribunals were created in Japan, Denmark, Ireland and in a Canadian province (Ontario) as a response. However, it is not until the 1992 UN Conference on Environment and Development in Rio de Janeiro that the real booming ECT development occurred. The main stimulus behind the global exponential increase of ECTs was the Principle 10 of the Rio Declaration[7].

The rationale for special ECTs is that because many environmental issues are assumed to be highly complex and technical, they require specialized institutions for evaluation of claims and evidence.[8] Starting

[1] Which concerned a dispute between the United Kingdom and the United States as to the circumstances in which the United States could interfere with British fishing activities on the high seas.

[2] Which was between United States and Canada, concerned the trans boundary pollution by sulphur deposits originating from Canada onto United States territory.

[3] Which was between France and Spain concerning the circumstances in which one State made lawfully use of shared international waters.

[4] George (Rock) Pring and Catherine (Kitty) Pring, '' Environmental Courts and Tribunals '' (*University of Denver Environmental Courts and Tribunals Study*, 2016) <http://www.law.du.edu/documents/ect-study/Encyclopedia-Chapter-on-ECTs-2016.pdf> accessed 19 September 2019.

[5] George (Rock) Pring and Catherine (Kitty) Pring, 'The future of environmental dispute resolution' (*Denver Journal Of International Law & Policy*, 10 January 2013) <http://www.law.du.edu/documents/ect-study/Pring-Macro-FINAL-3-15-12.pdf> accessed 20 September 2019.

[6] George (Rock) Pring and Catherine (Kitty) Pring, '' Environmental Courts and Tribunals '' (*University of Denver Environmental Courts and Tribunals Study*, 2016) <http://www.law.du.edu/documents/ect-study/Encyclopedia-Chapter-on-ECTs-2016.pdf> accessed 15September 2019.

[7] Rio Declaration on Environment and Development 1992, United Nations ,Principle10 ; http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf *Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision---making processes. States shall facilitate and encourage public awareness and participation by making in formation widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

[8]Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-making' (9

from only a handful in 2000, there are now more than 1,200 environmental courts and tribunals (ECTs)[9] flourishing in many countries in all types of legal systems by 2016. It clearly shows that the role of the judiciary in environmental adjudication continues to not only to grow in importance but an institution to further expand and be strengthened in the future.

In a world of diminishing resources with the exponential population growth and rapid development, escalating environmental disputes are common phenomena. Hence Sri Lanka has proven to be **no exception** to this global trend. Typical environmental disputes in Sri Lanka are like trespass, nuisance and toxic tort cases between private parties, environmental cost recovery cases, and environmental enforcement proceedings.

In such instance the immediate step followed is filing a complaint at the police station or directly informing the Central Environmental Authority, by the victimized party himself or by a third party like a Non-governmental Organization (NGO). However, ultimately in seek of justice this case is heard before an available ordinary court which could be the Magistrate Court or the Court of Appeal or the Supreme. However, due to common obstacles in those ordinary courts, such as being long delays, huge case backlogs, poor case management, lack of environmental expertise, narrow definitions of plaintiff standing, lack of consistent decisions, intimidation, and corruption; justice, which the parties deserve is denied or delayed which makes affected parties and the environment itself suffer to a point beyond repair during that period.

But in other developing countries like India, Pakistan, and Bangladesh and as well as developed countries like Australia, New Zealand, United States, they have a separate specialized judicial body, namely the Environmental Court or Environmental Tribunal, which offers a pragmatic solution to the environmental legal disputes (which includes claims from administrative matters, such as planning permission, to serious prosecutions involving environmental contamination) under environmental adjudication.

Environmental law principles and legal concepts relevant for ECTs

Environmental governance and Environmental rule of law are vital concepts regarding ECTs. People's rights of access to information, access to public participation and access to justice in environmental matters are considered as the "3 Pillars" of the environmental rule of law[10]. The third pillar "access to justice" as articulated in Principle 10 of the Rio Declaration is now seen as the primary driver of ECTs. Further, in the development of ECTs, there is a growing body of international environmental law principles. These are the international precepts that are emerging as guidelines in treaties, decisions and scholarship, but may not yet be viewed as enforceable "hard law."[11] These principles

December 2005) <http://s3.amazonaws.com/academia.edu.documents/6979284/07_ch06.pdfopenelement.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1477714600&Signature=Oz%2F99%2B5fxAmgJKFhrp5lbMYcymc%3D&responsecontentdisposition=inline%3B%20filename%3DPublic_participation_in_environmental_de.pdf> accessed 21 September 2019.

[9] George (Rock) Pring and Catherine (Kitty) Pring, '‘ Environmental Courts and Tribunals ’' (*University of Denver Environmental Courts and Tribunals Study*, 2016) <http://www.law.du.edu/documents/ect-study/Encyclopedia-Chapter-on-ECTs-2016.pdf> accessed 19 September 2019.

[10] George Pring and Catherine Pring, 'Environmental Courts & Tribunals A Guide for Policy Makers' (2016) <http://www.unep.org/environmentalgovernance/Portals/8/publications/environmental-courts-tribunals.pdf> accessed 25 September 2019.

[11] ibid.

are Sustainable Development, Integration and Interdependence; Inter-Generational and Intra-Generational Equity; Responsibility for Trans boundary Harm; Transparency, Public Participation and Access to Information and Remedies; Cooperation, and Common but Differentiated Responsibilities; Precautionary Principle; Prevention; Polluter Pays Principle; Access and Benefit Sharing regarding Natural Resources; Common Heritage and Common Concern of Humankind; Good Governance

How ECTs differ from other courts?

An ECT is different from the general courts because it specializes in environmental cases and has adjudicators trained in environmental law. They are specialized simply for the reason to provide a pragmatic solution to the environmental legal disputes in relation to complex environmental issues. Environmental courts (ECs) range from fully developed, independent judicial branch bodies with highly trained staffs and large budgets all the way to simple. Environmental tribunals (ETs) range of complex administrative-branch bodies chaired by ex-Supreme Court justices with law judges and science-economics-engineering PhDs, to local community land use planning boards with no law judges[12]. Unlike other courts, ECTs have very comprehensive powers, including civil, criminal and administrative law powers combined. Also, some have jurisdiction over the country's full range of both environmental and land use planning/development laws, while others are limited to one such as the adequacy of environmental impact assessments (EIAs).

Current environmental law status of Sri Lanka

Sri Lanka being a developing country in the South Asian region often encounters environmental disputes such as issues arising due to pollution, environmental administration and violation of environmental laws etc. Constitution of Sri Lanka contains two references to the environment. First, under the 'Directive Principles of State Policy' in Chapter VI, the State is required to 'protect, preserve and improve the environment for the benefit of the community[13]. Secondly, under the section on 'fundamental duties' in the same chapter, it is the duty of every person in Sri Lanka 'to protect nature and conserve its riches'[14]. Thus, there is a shared responsibility between the state and the community to ensure environmental protection. These Directive Principles have today been linked to the 'public trust' principle and should guide state functionaries, from lowest to highest, in how they exercise their powers[15]. Also environment related issues are declared within the ambit of fundamental rights, under **Article 12 (1)**[16] and in some cases under **Article 14**[17].. The Supreme Court has also allowed environmental organizations to intervene in environment-related cases filed

[12] ibid.

[13] Article 27(14) of the Constitution of Sri Lanka. These Directive Principles are supposed to 'guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka under Article 27(1) of the Constitution of Sri Lanka.

[14] Article 28(f) of the Constitution of Sri Lanka.

[15] Per Justice Tilakawardane in *Sugathapala Mendis v Chandrika Bandaranaike Kumaratunga* S.C.F.R. 352/2007, S.C. Minutes of 01.10.2008 (the Water's Edge case).

[16] All persons are equal before the law and are entitled to the equal protection of the law.

[17] In the *Environmental Foundation Ltd., v. Urban Development Authority of Sri Lanka* S.C.F.R. 47/2004 (Galle Face Green case) already referred to, the Environmental Foundation Limited invoked Article 12(1) along with Articles 14(1)(a) and 14(1)(g).

by private parties[18]. The writ jurisdiction conferred by Article 140 of the Constitution is one of the principal safeguards against excess and abuse of executive power. It is linked to the 'public trust' doctrine[19]. **Chapter IX of the Code of Criminal Procedure Act under Section 98 (1)**[20] Public Nuisances empowers a Magistrate to make orders. An action for public nuisance is criminal in nature and not a 'sui generis' action. Hence there is a right of appeal to the High Court of the relevant province under Chapter XXVIII of the Code of Criminal Procedure[21]. The National Environmental Act[22] (NEA) is the most important piece of substantive legislation which has extensive provisions on pollution control, regulation of development activities and preparation of management plans for the protection of the environment[23]. The Environmental Protection License (EPL) and the Environmental Impact Assessment (EIA) are two important tools introduced by the NEA to integrate environmental protection in the economic development process. Further, the Coast Conservation Act[24], Fauna and Flora Protection Act[25], Forest Ordinance contain provisions to ensure that environmental concerns are considered during development activities.

Therefore, often calling cases before ordinary courts could either be a public Nuisance case, breach of a Fundamental Right case, Violation of an EIA or EPL and any other violations of aforementioned acts and ordinances. However, unlike other ordinary matters such as land disputes, divorce matters that ordinary courts often encounter, environmental matters are more sensitive. Simply the result cannot be seen right at that moment and perhaps results might be more severe than the action.

Violations of environmental laws often result in damage to health and property. Therefore, affected persons need to be compensated and the wrongful actions should be halted; Sometimes the law expressly provides for enforcement of the 'polluter pays' principle by which the polluter is made to bear the cost of environmental restoration. But in reality, it is hard to achieve these motives due to many problems.

The first problem is the long delays that occur in general courts. General court dockets in Sri Lanka are overloaded, and it may take years for a filed case to be heard.

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[18] Al Haj M.T.M. Ashik v R.P.S. Bandula, OIC Weligama, (the Noise pollutioncase) S.C.F.R. No. 38/2005, S.C. Minutes of 09.11.2007. Reported in 'Some Significant Environmental Judgments in Sri Lanka', pub. Environmental Foundation Limited at p.1the Environmental Foundation Limited which was not a party to this case, which involved a dispute between two groups wanting to use loudspeakers, was permitted to intervene as amicus curiae on behalf of the public.

[19] '*Powers vested in public authorities are not absolute and unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes' ;* Fernando, J. in Heather Therese Mundy v Central Environmental Authority S.C. Appeal 58/2003, S.C. Minutes 20.01.2004.

[20] Section 98 (1) Code of Criminal Procedure Act No. 15 of 1979 (as amended).

any unlawful obstruction or nuisance in any public way, harbour, lake, river or channel; any trade or occupation or the keeping of any goods or merchandise that is injurious to the health or physical comfort of the community; the construction of any building or the disposal of any substance that is likely to cause conflagration or explosion; any building or tree that is in such condition that it is likely to fall and injure passers by;any tank, well or excavation adjacent to any public way or place which may be a danger to the public.

[21] Sections 316 – 330 of the Code of Criminal Procedure and Fernando v Cooray, [1991] 1 Sri L.R. 281; (1999) 6 S.A.E.L.R 31.

[22] Act No. 47 of 1980 (as amended).

[23] Bakary Kante, 'Judges & Environmental Law A Handbook for the Sri Lankan Judiciary' (2009) <http://www.unep.org/delc/Portals/119/publications/judges-environmental-law-sri-lankan-judiciary.pdf> accessed 1 October 2019.

[24] Act No. 57 of 1981 (as amended).

[25] Act No. 2 of 1937 (as amended).

Time is money and delays are costly. Hence, for citizens, public interest groups and lawyers these delays mean environmental damage which is irreversible.

The second problem with general courts is that they frequently present more than a temporal delay. People's access to justice can be restricted by complicated filing procedures, lack of knowledge about the courts[26], limited understanding about the issue and how to challenge it, substantial physical distance between the location of the controversy and the location of the court, minimal to no institutionalized procedures for public participation, narrow court standing requirements etc.

Lack of scientific and technical expertise limits the competence of the general jurisdiction court, which generally must rely on the testimony of the parties' expert witnesses for information. Most general court judges and juries do not have the expertise to evaluate expert testimony or to predict probable outcomes, a crucial gap given the complex issues that can arise in environmental cases.

Lack of technical competence or interest may even result in a judge's unwillingness to set a complicated case for hearing.

So due to these drawbacks come across before general courts (as stated by legal practitioners and the legal experts), environmental justice and the rule of environmental law are not being delivered to citizens in a way that is accessible, fair, fast, and affordable.

Ideal model for Sri Lanka: TRIBUNAL or COURT?

There are many different models of ECTs around the world. ECTs can be either courts or tribunals both reflecting the social, economic and environmental characteristics of the country. Some are free standing and independent, while others are captives inside the agency whose decisions, they review[27].

Courts are required to be comprised of judges who usually come from a legal background. Hence Law-trained judges are the typical decision makers. The proceedings are presided over by a judge or a magistrate and have a strict code of procedure. Therefore, Judges have to comply with court rules and the processes of the adversary system.

Unlike courts, tribunals deal with more specialized matters. Thus, they provide specialized adjudications. Due to this narrow focus, it makes easier to adjudicate on specific matters in an efficient and expert manner. Unlike a judge, a specialist or an expert in the subject matter in which the tribunal adjudicates can involve in decision making. Tribunals are created via legislation and have much more flexibility in their structure and functioning, both with regard to procedure and evidence. Therefore, members can play a more active role in the proceedings. Also, tribunal members may adopt an inquisitorial role and use more creative means to help the parties achieve justice. Due to the informal and consequently fewer intimidating proceedings, it reduces the cost and duration of the litigation.

Therefore, when deciding whether an Environmental Court (EC) or a Tribunal (ET)is to be established, a practitioner will be better suited with a tribunal being established. Because generally an environmental issue combines both law and science. because unlike a court, a tribunal can be given all civil, criminal and administrative jurisdictional powers since it focuses on one category. Further, in contrast

[27] George Pring and Catherine Pring, 'Environmental Courts & Tribunals A Guide for Policy Makers' (2016) <http://www.unep.org/environmentalgovernance/Portals/8/publications/environmental-courts-tribunals.pdf> accessed 2 October 2019.

to courts which are bound by the previous decisions, tribunals generally assess each matter on its individual merits.

The UN Environment ECT study has identified 3 different types of environmental tribunals (ETs), based on their decision-making independence[28]: (1) Operationally Independent ET (separate, fully or largely independent environmental tribunal which are not under the control of another government agency, department, or ministry) ; (2) Decisional Independent ET (under another agency's supervision, but not the one whose decisions they review) and (3) Captive ET (within the control of the agency whose decisions they review). This study emphasizes that from the 3 types of tribunals aforementioned ET of Sri Lanka should not be an independent tribunal which becomes isolated from the public and stakeholders, but better to have an Independent ET which is under another agency's supervision, but not the one whose decisions they review.

Even India and Pakistan have ETs and both are independent ETs. India initially, used the Supreme Court as the access point for parties to voice their environmental concerns via public interest litigation, and recently restructured the process towards an independent National Green Tribunal with a two-tiered system[29]. The National Green Tribunal Act of 2010, recently enacted in India led to the establishment of the National Green Tribunal. The Pakistan Environmental Protection Act PEPA introduced a separate, comprehensive judicial institutional framework[30], including environmental tribunals and environmental magistrates in Pakistan.

How the environmental tribunal of Sri Lanka be proposed?

Regardless of the model chosen; what matters is the best practice of it. The best practices can be divided into two categories depending on the stage of planning, design-stage and operating-stage. Design best practices should be considered during the planning and creation stage of the ECT; operating ones can be assessed after the ECT is implemented. Operating best practices include both procedural and substantive, that promote access to justice and the rule of law[31]. This ET can educate the public, stakeholders, government officials, attorneys, NGOs and academia fully about the structure of the ET and its process soo that it will help people understand the importance and ways of using it effectively. For this purpose, techniques like an interactive website with FAQs, forms and potentially online filing for complainants, printed materials that cover the FAQs in all relevant languages, posting online notices of hearings and written decisions can be used. If the ET is user friendly and service oriented, this will increase access to justice. Therefore, features such as accessibility for the physically disabled, special support systems for the blind and deaf and translation services free of charge can be provided. There should be a proper case management service for moving a case from filing through adjudication. This will help to improve the efficiency, reduce costs and to promote access to justice.

[28] George Pring and Catherine Pring, 'Environmental Courts & Tribunals A Guide for Policy Makers' (2016) <http://www.unep.org/environmentalgovernance/Portals/8/publications/environmental-courts-tribunals.pdf> accessed 5 October 2019.

[29] Ria Guidone, 'Environmental Court Tribunals , An introduction to national experiences, lessons learned and good practice example' <http://foreversabah.org/wp-content/uploads/2016/06/Environmental-Courts-Tribunals-Legal-Innovation-Working-Paper-No.1-2016.pdf> accessed 4 October 2019.

[30] Also adopted by the Punjab Act and the Balochistan Act.

[31] ibid.

Further, in order to promote maximum reliability and efficiency, it is a best practice to have rules and procedures for "managing" expert testimony and evidence. Thus, multiple methods of expert witness techniques can be used. "Justice delayed is justice denied" and "Only the rich can afford court" are two common themes in all judicial reform[32]. Therefore, having a procedure to control and lower costs in time and money is a best practice. Permitting self-representation without lawyers, consolidating similar complaints into one adjudication process and setting reasonable or no court fees for the litigants are a few techniques which can be used for this. Therefore, if the proposed Environmental Tribunal can be supplemented with these best practices of both stages, it will ensure a better environmental justice in Sri Lanka.

[32] ibid.