

THE MANURAWA LAW JOURNAL 2020



LAW STUDENTS'
HUMAN RIGHTS
MOVEMENT

— SINCE 1997 —

THE MANURAWA LAW JOURNAL 2020



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The Law Students' Human Rights Movement
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Submission of materials for future publication:

The Editorial Committee welcomes any previously unpublished work for publication in future edition of the Manurawa Journal. Only manuscripts which, in the opinion of the Law Students' Human Rights Movement, are worthy of publication will be published.

Reviews, responses and criticism:

The Editorial Committee of the Law Students' Human Rights Movement welcomes any reviews, responses and criticism of the contents published in this issue.

All communication could be made to:

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Student's articles reviewed and selected by

DR. D.M. Karunaratne, Attorney-at-Law

PHOTOGRAPHY

The best eight entries selected through a contest open to all Law Students and have been included in Manurawa E-Journal 2020

Themes: Humanity/ Love is a Human Right/ Freedom is the breath of life/
More equality-More hope

The best entries selected by:

Eminent Photographer Mr. Ruvinda Isuru
Owner of the Ruvinda Isuru Photography
Software Quality Assurance Engineer at Tech One Sanje
Photographer at RedAnt Weddings

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Message from Prime Minister Mahinda Rajapaksa on the Launch of the Manurawa Law Journal

It is with great pleasure that I send this message on the occasion of the launch of the Manurawa Law Journal published by the Law Students Human Rights Movement.

The Human Rights Movement of the Sri Lanka Law College is an active student body within the Sri Lanka Law College that works towards the protection, promotion and education of human rights and related subjects. It carries out valuable programs for the benefit of law students, including visits to the Parliament and prisons, and conducting guest lecturers of contemporary significance. The commitment and dedication of the Law Students Human Rights Movement have enabled it to traverse beyond the boundaries of the Sri Lanka Law College, empowering different segments of society, especially in the form of legal aid programs, legal awareness programs and publications.



Through the Manurawa e-journal, the Law students Human Rights Movement has managed to create an important platform to promote the debate and exchange of ideas on a range of serious human rights issues. It is important to note that this legal literature is available not only to the legal fraternity but also to the lay person. Contributions of articles, research papers, case notes and reviews from eminent personalities such as retired judges, officers of the Attorney General's Department, leading lawyers of the unofficial bar, legal academics and law students are sure to make this journal important reading for anyone with an interest in human rights.

I take this opportunity to congratulate the editorial board and the committee members of the Law Students' Human Rights Movement for their untiring efforts in making the publication of the Manurawa academic journal a success. I wish the Movement all the very best in their future endeavors.

Mahinda Rajapaksa

Prime Minister of the Democratic Socialist Republic of Sri Lanka



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இலங்கைச் சட்டத்தரணிகள் சங்கம்
BAR ASSOCIATION OF SRI LANKA

MESSAGE FROM THE PRESIDENT BAR ASSOCIATION OF SRI LANKA

I am extremely pleased to pen this message to “Manurawa 2020” journal published by the Law Student’s Human Rights Movement of the Sri Lanka Law College.

At a time, when the entire world is compelled to deviate from our ordinary life style due to Covid19, it is commendable that the Human Rights Movement has decided to publish this magazine/journal.

In the past, the Journal has published many high quality articles. I am personally aware that even the legal practitioners make reference to some of those articles for furtherance of academic learning.

Legal literature forms an integral part in every legal system. I hope that this year Journal, would keep upto the high standards in the past.

I wish the Law Student’s Human Rights Movement every success in their future programmes.



Kalinga Indatissa, PC
President
Bar Association of Sri Lanka

Message from the Patron

As the principle of Law College and the Patron of the Law Students' Human Rights Movement, it is a pleasure to contribute this message to the current issue of "Manurawa Law Journal 2020" published by the Human Rights Movement of the Sri Lanka Law College.

The Human Rights Movement of the Sri Lanka Law College is an active student body within the College which works towards the protection, promotion and education of human rights and related activities.



The "Manurawa" Law Journal, which is a symbol of rich literature available not only to the legal fraternity but also to the lay person alike. This journal consists of articles, research papers, case notes and interviews of high quality.

It is not an easy task to publish a journal of this nature. I wish the Law Students' Human Rights Movement all success and good luck in their future endeavours.

Special thanks to the President and the Committee members for the good work done.

"Congratulations".

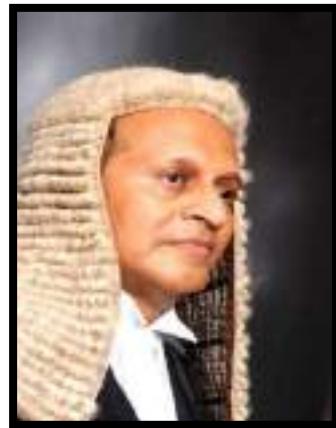
Indira Samarasinghe PC

Principal,

Sri Lanka Law College

Felicitation Message by the Senior Advisor

COVID 19, the virus had changed the scope of Human Rights, both in Sri Lanka and the world. Restriction of movement due to lockdown, Right to privacy due to exposure of people who got affected are some of basic human rights directly breached. Right to have employment is deprived or curtailed, due to lockdown specially of daily wage earners and ones who are retrenched due to over staff. Discrimination and thereby Right to equality is evident in Education, where lectures are conducted through Internet, where poor children without a computer, laptop or a smart phone cannot have access to such online education. But Educational programme conducted through television, had bridged the gap of education of town and village, rich and poor, National school and a remote school.



“Manurawa” is a journal published annually by the Human Rights Movement. It is a high quality magazine with a wide range of articles in law, thereby enriching the legal literature. Deadly virus, COVID 19 had not affected the spirit of these young girls and boys, who initiated in publishing the E-Manurawa journal. I respect them for their determination and courage, as their Senior Adviser, I am proud of them, with the belief that future of preservation, enhancement of Human right is assured.

Prasantha Lal De Alwis PC

Senior Advisor

The Law Students’ Human Rights Movement

Message from the Hon. Chief Guest

It is with great pleasure that I pen this message in the event of the online launch of Manurawa Law Journal – 2020. In spite of the dissemination of knowledge is always of paramount importance, it is particularly significant to publish literature on themes such as law and human rights outlining their relevancy and application to the contemporary society since the knowledge on such topics will help to establish a law abiding society comprised of citizens with legal literacy and healthy attitudes on their fellow human beings. The Human Rights Movement of Sri Lanka Law College, which works towards the protection, promotion and education of Human Rights and related subjects has taken the lead role in the great endeavour of publishing “Manurawa” Law Journal without being hampered by the pandemic situation created by the widespread of Corona virus, which crippled the normal activities of the people in our country and the entire world.



The current volume of Manurawa contributes immensely to enrich the legal literature in Sri Lanka in an easily accessible form by providing a necessary platform to the lawyers, law students as well as to the general public who wish to achieve their thrust to pursuit of knowledge.

Let me wish all the best for the authors of the very interesting articles published in the present volume and the officer bearers and the members of the Human Rights Movement of Sri Lanka Law College for this wonderful endeavour. I hope that this volume will lead to several volumes to be published in the years to come with more and more interesting research articles that bridge the knowledge gap in the legal literature on human rights.

Professor Wasantha Seneviratne

Attorney-at-Law, Professor in Public and International Law,
Head, Department Public and International Law, Faculty of Law University of Colombo
Director ,Center of studies of Human Rights(CSHR), University of Colombo ,
Member of constitution making of Sri Lanka

Message from the President

As the incumbent president of the Law Students' Human Rights Movement, it is with immense pleasure that I forward this message to the "Manurawa e-journal 2020"

The annual launch of the Manurawa Law Journal has throughout the years been the hallmark event in the event calendar of the Human Rights Movement and hence it is with great commitment and dedication ,we strive to bring forward this rich source of literature every passing year.



Though the initial expectations and plans with regards to the journal this year, were altered due to the unique challenge of Covid-19 pandemic, we were thoroughly determined to proceed in bringing out the best publication for the year with the timely adjustments as required.

Hence,with lifted spirits and enthusiasm, for the first time in our history, we launch the Manurawa e-journal 2020, widening the scope and exposure of Manurawa.

As a movement that believes in learning different facets of the field through hands-on experience, the Law Students Human Rights Movement conducts various programmes such as the legal aid programs, legal awareness programs, prison visits, parliament visits and education assistance programs throughout the year. Though all these projects require genuine hard work and commitment, our movement with an unwavering determination have fulfilled this great responsibility over the years.

At this instance, I take this as an opportunity to extend my heartfelt gratitude to our patron Madam Principal Mrs. Indira Samarasinghe P.C. and our senior advisor Mr. PrashanthaLal De Alwis PC for the support and guidance given to us in making all of the afore mentioned projects a success.

I also wholeheartedly thank the contributors of articles, sponsors, and well-wishers for the help extended in making this project a success.

It is also my duty to thank the members of the previous committees and all other students who helped in numerous ways to the Law Students Human Rights Movement.

Further I extend my gratitude to the students of the Law college and other unions in assisting us in our projects.

Last but not the least, I appreciate my team of committee members for putting in the hard work, dedication and commitment in making every project a success. It would have been an impossible task to achieve the goals if it weren't for the effort and support provided by each one of you.

I extend my heartiest wishes to the Law Students Human Rights Movement for all the future endeavours.

Hashini Atapattu,

President,

The Law Students' Human Rights Movement 2020

General Secretary's Message

It is a true honour and privilege to take over the reign as General Secretary of the Law Students' Human Rights Movement 2020. When we took over the committee we, indeed, were having a plan to thrive it to the next phase while trying to follow in the footsteps of those who have gone before.

Unfortunately due to the COVID 19 pandemic, we were unable to complete the valuable projects that we usually organize which are very well known amongst law students as being informative as well as effective.



However, It gives me immense satisfaction that our committee could launch the prestigious Law Journal Manurawa with so many difficulties despite the long term locked down and the other consequences of the pandemic.

I would like to extend my heartfelt gratitude to all who have been rendering their great support throughout the year. And especially to our committee members for providing their contribution in whichever way possible.

I hope that the upcoming year committee will continue to organize all the events which are proudly possessed by our committee and I wish that the year 2021 may bring back normalcy and all the things we miss about day to day life.

Inshaff M. Sajeer

General Secretary

The Law Students' Human Rights Movement 2020

Message from the Senior Editor

Manurawa, the prestigious law journal by the Law Students' Human Rights Movement is a collection of law and human rights related articles which are usually penned down by Judges, Attorneys, Academicians as well as Law Students. This year is a special year in the history of the Manurawa Law Journal as it is launched as an e- journal.

It is not a secret that 2020 has been a very challenging year for all of us due to the spread of the corona virus.

But we did our best to carry out the heavy task of launching the Manurawa Law Journal. As responsible law students, we wanted to launch this journal in line with the health rules, therefore we decided to launch The Manurawa Law Journal this time as an e-journal. We believe this is a very good platform and it is not limited to a few but is also open to the international community as well.

Further It is a great achievement for us to be able to add sixty - four articles to the journal. Many law students submitted their articles to us expressing their gratitude for the opportunity given to them by the Law Students' Human Rights Movement through the journal Manurawa .

Moreover a large number of photographs were submitted by law students to the photography competition which was held in line with Manurawa and we are glad that we could reserve space for all of them in our e-journal.

I would like to thank Mrs. Indira Samarasinghe PC, The Principal of Sri Lanka Law College, Mr. Prasantha Lal De Alwis, the Senior Advisor of Human Rights Movement, our valuable authors and the last year committee of The Human Rights Movement for the extensive support given to us in making this new challenge a success..

Finally, the Law Student Human Rights Movement is glad to bring to you this



innovative experience and we believe our effort as a team set a good example in moving forward in the face of challenges.

Thilini Gamage,

Senior Editor,

The Law Students' Human Rights Movement 2020

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64. Why it is Essential to Have an Amendment in Sri Lankan Abortion Law

S. Asvinijaa

THE POSITIVE AND NEGATIVE EFFECTS OF BILATERAL AND REGIONAL INVESTMENT TREATIES ON INTELLECTUAL PROPERTY

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Abstract

Investment treaties on intellectual property are agreements between countries to attract foreign direct investment¹ by exploitation of intellectual property while providing benefits which are subject to the agreed terms and conditions. These treaties encourage investments between states and non-governmental organisations.² There are different types of investment treaties like bilateral, multilateral and regional. This study analyses the positive and negative effects of bilateral and regional investment treaties on intellectual property, and provides recommendations to minimise the issues therewith.

Introduction

Bilateral Investment Treaties (BITs) are formed between two countries and Regional Investment Treaties (RITs) are formed among several countries within a region. The latter may have sometimes been

referred to as Investment Chapters of Regional Trade Agreements (RTAs). BITs could sometimes exist in the form of a Free Trade Agreement (FTA) such as the 1994 US-Canada North American Free Trade Agreement (NAFTA) and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). Although intellectual property (IP) rights are territorial, investment treaties could lift them up to create bilateral and regional economic relationships to gain competitive advantages by mutual exploitation of innovations.

Sri Lanka has become party to several investment treaties on IP, such as India-Sri Lanka Free Trade Agreement (FTA) (2001), USA-Sri Lanka BIT on Encouragement and Reciprocal Protection of Investment (1993), USA-Sri Lanka BIT on Agreement on the Protection and Enforcement of Intellectual Property Rights (IPR) (1991) and Japan-Sri Lanka BIT on Concerning the Promotion and Protection of Investment (1982). In addition, we are party to several Regional Economic Integration Treaties such as Agreement on

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¹ Y. Mupangavanh, 'African Union rising to the need for continental IP protection? The establishment of the Pan-African Intellectual

Property Organization' (2015) 59 (1) Journal of African Law 1, 3.

² Republic of Ecuador v. Occidental Exploration and Production Company [2005] EWHC 774 (Aikens J).

Magistrate / Additional District Judge, Bandarawela.

South Asian Free Trade Area (2006), Framework Agreement on the BIMST-EC Free Trade Area (2004), Global System of Trade Preferences among Developing Countries (1989), Charter of the South Asian Association for Regional Cooperation (1985) and First Agreement on Trade Negotiations among developing member countries of the Economic and Social Commission for Asia and the Pacific (1976).

Positive effects

There are many benefits of Investment Treaties on IP for both developed and developing countries. For instance, if USA and Sri Lanka have a BIT on a patented pharmaceutical drug, the latter could seek price benefits, while the former could insist to restrict providing compulsory licences during the agreed period. Compulsory licensing is a process where a third party may obtain a non-exclusive licence from the Director General of IP to exploit a patent. According to Section 86 (2) (a) of the IP Act 2003 of Sri Lanka,

'Any person, body of persons, a government department or a statutory body may make an application to the Director General for the purpose of obtaining a licence to exploit a patent...'³

³Intellectual Property Act No. 36 of 2003 of Sri Lanka, s 86 (2) (a).

⁴ ibid s 86 (2) (b).

⁵The Patents Act 1977 UK, s 48.

⁶Manoranjan, 'FTAs knitting a web of higher intellectual property standards globally?' (2015) 37(2) European Intellectual Property Review 97.

According to Section 86 (2) (b) of the said Act,

'Upon the receipt of such application, the Director General may issue a licence for exploitation if he is satisfied that the applicant has made efforts to obtain approval from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time'.⁴

A similar feature is found within the Compulsory Licensing system in the UK. Accordingly, if the patent holder had not commercialised his invention over the last three years, he is prevented from enjoying the exclusive rights on it because a compulsory licence could be granted to a third-party applicant.⁵

The developed countries could form BITs including not only the provisions of the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) 1994, but also the 'TRIPS-plus' provisions to maintain a higher standard in which they are interested in,⁶ and bring in significant revenue by exporting IP.⁷ Developed countries could use investment treaties to create protection of IP for different areas. For instance, in the case of Anheuser-Busch, Inc v. Budvar, the advantages of a

⁷ Carsten Fink, Patrick Reichenmiller, 'Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements' in Richard Newfarmer (eds.) 'Trade, Doha, and Development: A Window into the Issues' (2nd edn, IBRD 2006) 289.

BIT between Austria and Czechoslovakia in terms of protecting a trademark were considered in depth.⁸

In the European Union (EU), the '*Principle of Free Movement of People (FMP)*', have an impact upon the territorial IP rights. Investment treaties could provide a solution to this by imposing certain restrictions or providing exemptions among the members.

On the other hand, the Developing and the Least Developed Countries (LDC) could receive significant benefits from investment treaties, as they depend on many innovations generated in the developed world, to satisfy their basic needs such as public health, agriculture and genetic resources.⁹ For instance, developing states and LDCs which do not have the adequate infrastructure, technology and human resources in order to carry research and development on biological materials such as micro-organisms, endemic plants, animals, plant varieties, forest produce and any substances therein, could share them with developed countries in exchange for the outcome of such researches such as scientific know-how, training, experience, products or processing techniques for free or a concessional price in order to improve

public health, agriculture and genetic resources.

Innovations are created by using inventors' resources¹⁰ by following specific inventive steps.¹¹ Therefore, it would not be unreasonable for developing countries to accept any reasonable terms and conditions embodied in BITs in order to gain access to essential IP products and services available in developed countries. Although investment treaties are mainly focused on patents, they could also be formed to exploit copyrights as the right holder could outsource the job of publishing¹² to a publisher abroad and generate royalty.

Furthermore, in the health sector, investment treaties could support more for developing effective vaccinations for diseases such as Ebola which devastated many LDCs. The RITs in African countries provide numerous benefits among members by expanding market and resources.¹³

Negative effects

There would be no significant issues if all investment treaties contain only minimum standards laid down by TRIPS. Unfortunately, it does not seem to happen right now, because most of the developed

⁸[2011] E.T.M.R. 31.

⁹Commission for Intellectual Property Right 'Integrating Intellectual Property Rights and Development Policy' (CIPR 2002) 10.

¹⁰ Charlotte Waelde, Graeme Laurie, Abbe Brown, Smita Kheria and Jane Cornwell, *Contemporary Intellectual Property Law and Policy* (3rd edition, OUP 2013) 7, para 1.23.

¹¹ Intellectual Property Act No.36 of 2003 of Sri Lanka, s 63; and Patents Act 1977 UK, s 1 (1) (b).

¹² David Bainbridge, *Intellectual Property* (8th edn, Pearson 2010) 31, [1].

¹³Olasupo Owoeye, 'The TRIPS Agreement and regionalism: free trade and access to medicines in Africa;' (2015) 37(4) E.I.P.R 232, 238. as cited in (S.J. Powell and T. Low, "Is the WTO Quietly Fading Away? The New Regionalism and Global Trade Rules" (2011) 9 Georgetown Journal of Law & Public Policy 261, 267).

countries tend to include ‘TRIPS-Plus’ provisions, such as providing exclusivity for data, extending patent terms, creating links between patents, prohibiting parallel importation and restricting compulsory licences.¹⁴ For instance, most of the FTAs between EU and the developing countries contain provisions to extend patent terms for medicines.¹⁵ Under these circumstances, three main negative effects could be identified in the area of investment treaties on IP such as the implementation of higher economic standards, adverse effects on the harmonization of IP law and negative effects on the public health.

Implementation of Higher Economic Standards

Investment treaties may maintain substantially higher economic standards which would adversely affect even the non-signatories of those treaties. Consequently, importance of multilateral negotiations under the umbrella of World Trade Organisation (WTO) could be undermined.¹⁶ In addition, despite long term economic disadvantages, many

developing countries accept BITs including ‘TRIPS-Plus’ provisions due to short term benefits.¹⁷ For instance, EU and USA have imposed higher patent protection conditions upon LDCs in Africa, by including ‘TRIPS-Plus’ provisions in investment treaties.¹⁸

According to the ‘Most-Favoured-Nation (MFN)’ principle for the purpose of IP protection, with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a WTO member state to the nationals of any other state shall be accorded immediately and unconditionally to the nationals of all other member states.¹⁹ In other words, this principle equalises the granting of privileges among member nations.²⁰ For instance, if USA and Sri Lanka are to sign a BIT on IP protection, the same benefits should be offered to other WTO members, subject to some terms and conditions provided in the said agreement. The General Agreement on Tariffs and Trade (GATT) 1947 (as amended in 1994) and the General Agreement on Trade in Services

¹⁴Manoranjan, ‘FTAs knitting a web of higher intellectual property standards globally?’ (2015) 37(2), European Intellectual Property Review 97.

¹⁵ Daniel Acquah, Extending the limits of protection of pharmaceutical patents and data outside the EU - is there a need to rebalance? (2014) 45(3) International Review of Intellectual Property and Competition Law 256.

¹⁶ N.S. Gopalakrishnan, ‘Principles for intellectual property provisions in bilateral and regional agreements - reflections on the ongoing negotiations of an EU-India FTA’(2013) 44(8) International Review of

Intellectual.Property and Competition Law 920.

¹⁷ibid 920.

¹⁸ Thaddeus Manu, ‘Essential medicines and the complexity of implementing nationally based compulsory licensing: on the need for a regional system of compulsory licensing in sub-Saharan Africa’ (2014) 36 (1) European Intellectual Property Review 39, 40.

¹⁹ Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) (as amended on 23 January 2017), art 4.

²⁰Peter Drahos, ‘BITS and BIPS, Bilateralism in Intellectual Property (2001) 4 Journal of World Intellectual Property 791, 802.

(GATS) 1995, both contain the MFN principle along with an exemption to it.²¹

However, TRIPS does not expressly provide many exemptions to the MFN principle, though it was formulated to achieve the principles of GATT.²² The exemptions provided in the Article 31 *bis* have a limited scope. Therefore, those economically higher terms and conditions of investment treaties like so called TRIPS-Plus, infiltrate into countries that are not signatories to those treaties. For instance, a string of investment treaties signed by developed states like USA and EU could establish new IP standards which consequently prevent the developing countries and LDCs relying on the flexibilities provided by TRIPS. This is not what was truly expected from the mandate of TRIPS. For instance, though in terms of compulsory licensing in copyrights, the licensee has the right to deny payments on grounds of unfair terms in the licence,²³ a BIT containing higher economic standard may sometimes deprive such rights and open a forum for unfair terms. Consequently, entities such as ‘Patent Trolls’²⁴ may sometimes attempt to obtain undue advantage from conflicts arising out from BITs.

Furthermore, it could be harmful if a BIT was created in a manner that it could prevent the application of domestic competition laws. As a result, a set of anti-

competitive terms and conditions such as unfair price fixing, limiting of production and avoidance of selling to potential buyers could be included in the BIT. In addition, there could also be an issue if such BIT falls within the scope of Technology Transfer Block Exemption (TTBE), which provides exemption to the agreed parties to avoid any effect from the competition law.

Adverse effects on the harmonization of IP Law

Investment treaties could have an adverse impact upon the harmonization of IP. The TRIPS agreement has made an effort to globalize the general principles of IP. According to TRIPS, a balance must be struck between the right holders and the beneficiaries when protecting and enforcing IP.²⁵ For instance, compulsory licences could be granted if the patentee refuses to issue a licence on reasonable commercial terms and conditions.²⁶ In addition, though the patentee has a right to commercial exploitation of his patent, once the patent expires, anybody could exploit it. These general principles have been established by the TRIPS to enable flexibility in the process of harmonization of International IP Law.

However, investment treaties which contain ‘TRIPS-Plus’ provisions could significantly damage the fundamental character of aforesaid general principles of

²¹ General Agreement on Tariffs and Trade (GATT)1947 (as amended in 1994), art I ; and General Agreement on Trade in Services (GATS) 1995, art II

²²TRIPS, preamble (a).

²³ Lionel Bently, Brad Sherman, *Intellectual Property Law* (4th edition, OUP 2014) 302, para 7.1.

²⁴ Sujitha Subramanian, ‘Patent trolls in thickets: who is fishing under the bridge?’ (2008) 30 (5) European Intellectual Property Review 182.

²⁵TRIPS, art 7.

²⁶ ibid art 31 and art 31 *bis*.

IP embodied in TRIPS. For instance, a ‘TRIPS-Plus’ agreement might contain a provision to extend the duration of a patent beyond twenty years, which would ultimately, prevent the public interest in exploiting the patent after the statutory prescribed period mentioned under Section 83 (1) of the IP Act No.36 of 2003 which says, ‘...*a patent shall expire twenty years after the filing date of application for its registration*’.²⁷ The purpose of patent law is not to provide an eternal absolute monopoly, but to offer a time limited exclusive right to the patentee to commercially exploit the patent²⁸ and conclude licensing contracts²⁹ and assignments³⁰ subject to a public disclosure.³¹ This limited monopoly is a type of reward³² to encourage him. Therefore, it is expected that the public has the right to commercially exploit the patent without any restriction from the patentee after the patent expires. However, that objective could not be achieved in the case where a BIT had ‘TRIPS-Plus’ provisions, which could give discretion to a state to extend the patent continuously and dominate the market as long as they

expected. Consequently, such an imbalance status of IP protection would be extended as a global standard due to the application of the MFN principle.³³

Negative effects on the Public Health

Investment treaties could negatively affect public health among member countries. The right to access essential medicine is a part of a human right of physical and mental health.³⁴ However, due to ‘TRIPS-Plus’ investment treaties, the said human right could be infringed in certain situations. For instance, although there is a scarcity of essential medicine in Sub-Saharan Africa, they are not contemplating upon the flexibility provided by TRIPS. This could be attributed to political pressure and risk of economic sanctions.³⁵

In terms of public health, ‘Compulsory Licensing Systems’ have become vital components of IP, especially in LDCs and developing countries. Although TRIPS has not provided specific restrictions for issuing compulsory licenses, BITs have created tight restrictions in this regard. For

²⁷Intellectual Property Act No.36 of 2003 of Sri Lanka, s 83 (1).

²⁸TRIPS, art 28 (1) (a) and (b); and Intellectual Property Act No.36 of 2003 of Sri Lanka, s 84 (1) (a).

²⁹ibid art 28(2); and Intellectual Property Act No.36 of 2003 of Sri Lanka s 84 (1) (c); and Patent Act 1977 of UK, s 30 (4).

³⁰ Intellectual Property Act No.36 of 2003 of Sri Lanka, s 84 (1) (b); and Patent Act 1977 UK, s 30 (2).

³¹ibid s 71 (3); and Patent Act 1977 UK, s 14 (3) and s 72 (1) (c) and (d).

³² Charlotte Waelde, Graeme Laurie, Abbe Brown, SmitaKheria and Jane Cornwell,

Contemporary Intellectual Property Law and Policy (3rd edition, OUP 2013) para1.31.

³³Manoranjan, ‘FTAs knitting a web of higher intellectual property standards globally?’ (2015) 37(2), E.I.P.R 97, 99.

³⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR), art 12.

³⁵ Thaddeus Manu, ‘Essential medicines and the complexity of implementing nationally based compulsory licensing: on the need for a regional system of compulsory licensing in sub-Saharan Africa’ (2014) 36 (1) European Intellectual Property Review 39, 40.

instance, in US-Vietnam BIT, compulsory licensing is limited to emergency situations, antitrust remedies and public non-commercial use.³⁶ This is not compatible with the Doha Declaration,³⁷ which has given absolute freedom to determine the grounds upon granting compulsory licences. For instance, in the UK, a compulsory licence could be granted if the patentee had not exploited the patent within a period of three years from the grant.³⁸ In *NatcoPharma Ltd v. Bayer Corporation*, Court upheld the decision of the patent controller granting compulsory licence to Natco Pharma to commercially utilize the sale of a drug for cancer patients in India.³⁹ The ground for granting this licence was a refusal made by Bayer Corporation to issue a licence to Natco on their request.

Thus, if a developing country or least developed country, becomes a party to a BIT with a developed country, then the former is supposed to follow the conditions set out by the BIT which would sometimes in the end restrict its IP rights to keep the latter in a dominant position. This has become a noteworthy issue, especially when importing patented pharmaceutical products, because BITs could sometimes unfairly prevent or control access to essential medicine.⁴⁰ In addition, certain

long-term BITs could define highly restrictive conditions in respect of the compulsory licensing of drugs. Consequently, this would create an unfair monopoly and always keep the developed country in an unapprovable dominant position.

Generally, LDCs tend to seek benefits of IP by adopting at least the minimum standards of TRIPS while developing countries preferred to adopt it with minor modifications. For instance, in India, an innovation is patentable only if it is remarkably different in terms of properties with regard to efficacy.⁴¹ Whereas the Section 3 (d) of the Indian Patent Act says,

*'The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant'.*⁴²

The rationale behind such provision is to increase the availability and accessibility of medicine to the large population of India. In the case of *Novartis v. Union of India*, Court held that when designing the

³⁶ Carsten Fink, Patrick Reichenmiller, 'Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements' in Richard Newfarmer (eds.) 'Trade, Doha, and Development: A Window into the Issues' (2nd edn, IBRD 2006) 289, 290.

³⁷ WTO Ministerial Conference in Doha on November 14, 2001.

³⁸The Patents Act 1977, s 48 (1) and 48 (A).

³⁹*Bayer Corporation v. Union Of India* (Bombay High Court), (Writ Petition No. 1323 of 2013)

Judgment dated 15 JULY 2014 (Sanklecha CJ); and *Bayer Corporation v Union of India* (special leave petition-(Supreme Court), Order dated 12 December 2014.

⁴⁰Manoranjan, 'FTAs knitting a web of higher intellectual property standards globally?' (2015) 37(2), E.I.P.R 97, 98.

⁴¹The Patent Act 1970 of India (as amended in 2005), s 3 (d).

⁴²ibid s 3 (d).

patent law, a special reference must be given to the economic conditions of the country, its scientific and technological advancement and its future needs.⁴³ This approach is consistent with basic patentability standards⁴⁴ laid down in TRIPS.

However, such flexibility could be diminished by investment treaties, if they seek to force the implementation of higher economic standards preferred by developed countries, to keep them in a dominant position. This situation could have been different only in case where the patent is owned by a developing country which has the advantage of bargaining. However, it is a rare occurrence because most of the developing countries in general, need to adhere to the terms and conditions imposed by the developed countries in order to have access to a preferential market available within the latter.

Another issue is the Bio-Piracy where developed countries gain exclusive rights over the biological materials such as micro-organisms, endemic plants, animals, plant varieties and substances in the developing and least developed countries. This could prevent, restrict or interfere with the use of the biological material and products.⁴⁵ Although, plants and animals other than transgenic micro-organisms are not

patentable in terms of Section 62 (3) of the IP Act 2003, investment treaties which include TRIPS-Plus provisions could provide a platform where developed countries gain exclusive monopoly rights over endemic plant varieties in Sri Lanka.

Recommendations

Over control or less control over IP could cause problems.⁴⁶ Therefore, a balance must be struck between the agreed parties in investment treaties. According to David Vaver, though balance is not a universal solvent, it emphasizes the need for equal treatment and respect.⁴⁷ This point must be considered when preparing investment treaties on IP. In the sphere of pharmaceutical industry, investment treaties should not impose extreme restrictions on compulsory licensing, especially on Anti-Retroviral Drugs, as such licences are effective methods which could open the doors to those drugs without any hindrance.⁴⁸ Investment Treaties should not restrict the '*Principle of Exhaustion*',⁴⁹ because this principle could assist developing countries to enjoy the benefits of parallel importing of IP, especially in the realm of essential

⁴³Novartis AG v India (Supreme Court of India) Civil Appeal No 2706-2716 of 1 April 2013 (Novartis case), [38] [AftabAlam J]; AIR 2013 SC 1331.

⁴⁴TRIPS, art 27 (2), (3).

⁴⁵JagathGunawardana, 'The Bio-Theft and Bio-Piracy Issues' [2019] vol (v) Judges Journal 163.

⁴⁶Graham M. Dutfield and Uma Suthersanen, 'the innovation dilemma: intellectual property

and the historical legacy of cumulative creativity' (2004) 4 IPQ 379, 421.

⁴⁷D Vaver, 'Intellectual property: still a "bargain"?' (Editorial) E.I.P.R. 2012, 34(9), 579, 586.

⁴⁸Horace E. Anderson, 'We Can Work it Out: Co-Op Compulsory Licensing as the Way Forward in Improving Access to Anti-Retroviral Drugs', (2010) 16 B.U. J. Sci. & Tech. L. 167.

⁴⁹TRIPS, art 6.

medicine⁵⁰. A sound example is the African Regional Trade Agreement (ARTA) which has significantly improved the parallel importing of drugs within its designated free trade zone.⁵¹

In order to achieve a successful balance between intellectual property rights and public interest, investment treaties should be streamlined. For instance, desirable practices such as MPI Principles 2012 introduced by Max Planck Institute for Innovation and Competition (MPI) may be of assistance in this regard.⁵² According to these principles, parties to investment treaties should develop their ‘own proactive agenda’ and ‘evaluate the impact’ of it against the public interest.⁵³ This would be a significant strategy for a developing country such as Sri Lanka, to do an impact assessment about the long-term implications to the status of international economy and the public health sector, especially in terms of the pharmaceutical industry. MPI principles insist that the terms and conditions of an investment treaty should go through a ‘Public Negotiation Process’⁵⁴ and the agreement should be subjected to previous ‘international obligations’.⁵⁵

One of the main issues in respect of investment treaties is the effect to public health, because of extreme restrictions on compulsory licensing and also on parallel

imports. Such issues could be averted by applying the MPI principles, because they guide to be consistent with the general principles laid down by TRIPS on Public Health.⁵⁶

Further, if more MFN exemptions could be introduced within TRIPS, it could then avoid the adverse effects of BITs over non-signatories of those treaties. Such exemptions could avoid spreading higher economic ‘TRIPS-plus’ standards throughout the world. The TRIPS flexibilities such as parallel trade and compulsory licensing could be put forward by the RTAs between Sri Lanka and other developing countries to strike a balance between the interest of public and that of the pharmaceutical patent holders.

In order to minimise the bio-piracy issues arising as a result of investment treaties on IP, the unauthorised exports of biological material should be strictly prohibited by using the available laws such as Fauna and Flora Protection Ordinance and Forest Ordinance. According to Forest Ordinance it is prohibited to export forest produce including, plants, parts of plants, extracts of plants, leaf litter and topsoil that is used to isolate useful micro organisms, without a permit. The Fauna and Flora Protection Ordinance by Section 40 (1) has prohibited exporting of, (a) any mammal, bird, reptile,

⁵⁰OlasupoOwoeye. ‘Access to medicines and parallel trade in patented pharmaceuticals’ (2015) 37(6), E.I.P.R. 359.

⁵¹OlasupoOwoeye, ‘The TRIPS Agreement and regionalism: free trade and access to medicines in Africa;’ (2015) 37(4) E.I.P.R 232.

⁵² Jeremy De Beer, ‘Applying best practice principles to international intellectual property law making’ (2013) 44(8) IIC 884, 886.

⁵³Rochelle Cooper Dreyfuss, ‘The Max Planck principles as an aspect of global administrative law’ (2013) 44 (8) IIC 906, 909.

⁵⁴MPI principles 2012, para 17.

⁵⁵ibidpara 20.

⁵⁶ibid para 21.

amphibian, fish, coral or invertebrate whether dead or alive; (b) the eggs, feathers, or plumage of any bird, the horns, antlers, skin or hide of any mammal or reptile, or any part of any mammal, bird, reptile, amphibian, fish, coral or invertebrate; except under the authority of a permit.

The unauthorised activities on plants could be restricted by Section 42 of the Fauna and Flora Protection Ordinance which prohibited to, (a) remove, uproot or destroy or cause any damage or injury to, any plant which is for the time being included in Schedule V and which is growing on the property of any other person or in any public place ; (b) destroy any plant which is for the time being included in Schedule V, and growing on his own property ; (c) sell or expose for sale any plant for the time being included in Schedule V ; (d) remove ,uproot or destroy, or cause any damage or injury to any tree upon which any orchid or any other epiphytic plant is growing'.

Further, a Material Transfer Agreement (MTA) of biological material could be entered into between an exporting party and an importing party and the relevant government department, to prevent bio-piracy issues and share the benefits among the parties.⁵⁷

Conclusion

Despite the benefits enjoyed by both developed and developing countries as party to investment treaties on IP, one cannot overlook the impending disadvantages as well. The negative effects

has reduced the degree of flexibilities provided by TRIPS, and therefore has an adverse impact upon the developing countries and least developed countries compared to developed countries. Providing compulsory licences, parallel importing of IP, the principle of exhaustion, MPI principles, prohibiting unauthorised exports of biological material such as micro-organisms, endemic plants, animals, plant varieties and substances are important in striking a balance between the interests of the IP rights holder and that of the public to utilize investment treaties in a more effective manner.

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⁵⁷JagathGunawardana, 'The Bio-Theft and Bio-Piracy Issues' [2019] vol (v) Judges Journal 163, 166.

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MANURAWA 2020

CHILD RIGHTS IN SRI LANKA

THE GAP BETWEEN THEORY AND PRACTICE

Indira Samarasinghe PC

It was Nelson Mandela who said:

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

On 12th July 1991 Sri Lanka ratified the UN Convention on the Rights of the Child. Sri Lanka had already recognized the inextricable link between needs and rights, the indivisibility of rights and the importance of responding need of children within a right based contextual framework. A short time later the Children’s Charter was promulgated incorporating the accepted commitments under the Convention.

The ratification of the Convention without reservations and the promulgation of a Children’s Charter reflect a will on the part of the State to promote the interests of children and youth and to ensure their full mental, moral, religious and social development.

In Sri Lanka, law defines “children” as beings below the age of eighteen. Under the Charter of the Rights of the Child, a child means “every human being below the age of eighteen years.”

The unborn are regarded as persons in so far as it may tend to their benefit, but not to their disadvantage. Children yet unborn are

considered as already born, whenever their interests are in question; and they may therefore succeed *ab intestato*, though they may not have been conceived at the time the person whose succession is in question.

The best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether undertaken by any social welfare institution, court of law, administrative authority or any legislative body.

If we look at our domestic law Chapter 3 of our Constitution embodies provisions relating to Fundamental Rights. The Fundamental Rights applicable to children are:

1. The right to Freedom of thought, conscience and religion
2. The right not to be subjected to torture or to cruel, inhuman, degrading treatment or punishment
3. The right to equality and equal protection under the law and non-discrimination on the ground of race, religion, language, caste, sex, political opinion or place of birth
4. The right not to be arrested except according to the procedure established by the law and only upon being informed of the reason for the arrest. A child so charged is

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entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent court.

A child like any other person will be presumed innocent but maybe called upon to prove particular facts. In terms of the Penal Code a child below the age of 8 years is not liable for any offence. Those between 8 and 12 will be liable only if the prosecution proves that the child was mature enough to realize the gravity of the offence.

The Directive Principles of State Policy is contained in Chapter 6 of our Constitution. Here the State pledges to secure an adequate standard of living for all citizens and their families. To protect the family unit as a basic unit of society, to promote with special care the interests of children and youth, so as that to ensure their full development., physical, mental, moral, religious and social and to protect them from exploitation and discrimination and finally its pledge to the complete eradication of illiteracy and assurance to all persons of the right to universal and equal access to education at all levels.

Adoption was completely unknown to the Roman Dutch Law and the General Law relating to adoption is entirely statutory. The State shall ensure that the adoption of a child is authorized only in accordance with applicable law and procedures and on the basis of all information, ascertained as regards the child's status, relating to his parents, relatives and guardians and where necessary consent of the parents or guardians shall be obtained for the adoption. The prevailing law recognizes inter country adoption as an alternative means of childcare if the child cannot be

placed in a foster or an adoptive family or cared for in any suitable manner locally.

Article 19 of the Child Rights Convention imposes an obligation on the State to take appropriate measures to prevent maltreatment or abuse of the child.

The statutory framework for Judicial Intervention in Sri Lanka found in the Children's and Young Person's Act which empowers a Magistrate to deal with a child 'in need of care and protection'.

Once a child has been found to be 'in need of care and protection' a Magistrate may order him to be sent to an approved or certified school if he has reached the age of 12, or commit him to the care of any 'fit' person whether such a person be a relative or not.

The child protection issues became visible during this time. Media exposure was very much centered on the commercial sexual exploitation of children as a global industry, including child phonography.

The optional protocol on the sale of children, child prostitution and child phonography came into force in 2002 and was ratified by Sri Lanka. It clearly defines State responsibility to take necessary legal and administrative measures related to implementation. There was much concern to protect children from perpetrators of child abuse through internet "grooming". Perpetrators of abuse can include parents, members of the extended family, friends, friends of the family, neighbours, teachers, principals, caretakers, including clergy, all of whom children are taught to trust and respect from childhood as people of authority. Older children could also be perpetrators.

Later the issues relating to abuse and violence to children in families were recognized. These include schools, childcare institutions and juvenile detention centres. After the CRC non-violent forms and alternative forms of discipline, began being promoted, but are yet to be completely adopted and practiced. Though children have rights as adults do, they lack the awareness and power to report and respond to such situations and the younger the child, the greater the vulnerability and inability to articulate traumatic events.

Many children recruited by separatist groups lost their lives, their childhood and their families during war. They became disabled and were traumatized. The UNICEF data base on child soldiers set up from 2006 till 2008 recorded more than 6700 children, boys and girls who had been forcibly recruited as child soldiers.

As a response to protection concerns, a presidential task force on child protection was established in 1996. The National Child Protection Authority (NCPA) saw the light of day in 1998. The NCPA was established by Act, No.50 of 1998. This was intended to be a strong and powerful mechanism functioning independent of the Government. It was empowered to conduct investigations into child abuse and monitor the court proceedings on behalf of the victim child. The NCPA was also entrusted with the task of formulating national policies on the protection of children. The NCPA currently provides services in relation to therapy, counseling and rehabilitation for children who have been victims of abuse, violence and exploitation.

The Penal Code was amended in 1995 and 1997 to include child sexual abuse as a Penal Code offence. Since laws alone are

not effective, a law enforcement dedicated to women and children was set up with trained women police. A help line for reporting was also established by the police as well as the National Child Protection Authority.

The Daily News reported (in 2019) that a total of 4568 cases of statutory rape of girls below 16 years of age had been reported in the country in the last three years (2016 to 2018), the Performance Report of Sri Lanka Police indicated. The Report, which was tabled in Parliament last month said 3796 cases of them happened with the consent of the victim as a result of love affairs, whereas 772 statutory rape were without the consent of the victim. The total number of rape cases of women reported in the last three year stood 5558.

Most of those cases of consensual sex are between young children having an intimate relationship. The boy is also below the age of 18 and yet a child. The law provides mandatory sentence for sexual offences. The Supreme Court has held that notwithstanding the mandatory provisions court has discretion, mainly due to these cases. The male child is penalized though he too is a child.

The tsunami of December 2004 raised fresh concerns for children. The Tsunami (Special Provisions) Act was enacted which included special legal provisions to protect children who had lost their parents. Public pressure promoting institutionalization for children, who had lost their parents, was circumvented by government policy introducing aftercare for such children through foster care. A data base was established by the NCPA.

Access to education, and not education, but quality education remains a child right concern, and always will be. This includes reduction of school drop-outs, which occurs in disadvantaged families. State should ensure the child's access to the highest attainable standard of health and treatment of illness, including action to reduce infant and child mortality, and to guarantee appropriate maternal, prenatal and postnatal health care.

It's connected with child labour. Another important area for continued attention. Elimination of hazardous child labour, particularly domestic labour was undertaken by the Ministry of Labour, supported by the International Labour Organization. Children who are involved in child labour are at risk of violence and abuse, deprivation of education and separation from home. Children in child labour including working children, child domestic labour, child combatants, children caught in commercial sex networks, street children and disabled children are particularly vulnerable to abuse.

Children with disabilities need greater care, both prevention and early detection and better access to special education. They are often at greater risk of neglect and abuse and therefore need protection. Corporal punishment still continues in homes, schools, childcare institutions and juvenile detention centres. Fulfilling another 2019 Budget proposal, the government has increased the monthly allowance of over 7000 differently abled persons to Rs.5000/-

Today, there are child rights concerns still to address. This includes abuse and violence in homes, schools, childcare homes and abandonment. The root causes lie in family background, poverty,

alcoholism, drug abuse, domestic violence, single parent families, those with migrant mothers and unemployment. Children in such families need protection.

Since I have been highlighting the main legal provisions relating to Child Rights it is apt to look at two case studies. These relate to child rights violations that took place in 2018.

A homeless mother of a ten-year-old girl handed over her child to an orphanage. The mother then went in search of jobs and worked as a domestic help in a house. The mother was accused of stealing jewellery from the house and ended up in prison. The child was physically and psychologically abused on a daily basis. She was woken up every morning by the carer kicking her on her face. The child suffered abuse in silence wondering why the mother did not even come on New Year's Day to see her. The child didn't know her Mother was in prison. The mother was released from prison and she went in search of the government official who took over the child. The official refused to tell her where the child was. A lady lawyer was consulted by the mother. She made a round of calls and found the child. She and the mother visited the child. The child was unhappy and wanted to live with the Mother. The Lawyer cleared the mother's criminal cases and convinced the Judge of the Juvenile Courts that the mother is fit to provide care and protection for the child.

After careful observation of the mother's economic status and the report of the Forensic psychiatrist on the mother's parenting skills the judge after obtaining a Probation report on the dwelling that the lawyer had found for the mother where she also could carry out income generation

activities the judge gave the custody of the child to the mother.

The mother and child are living happily. This is classic example of an effective family strengthening program. Regulations for childcare institutions should be based on child rights. Regular monitoring and access to confidential reporting systems for children are necessary, including remedial action.

A mother of a three-day old baby informed an agent sending housemaids to the Middle East that she did not want the child. The agent who was a young lady asked her mother to take the baby and look after her. The child lived happily with her foster mother and was studying at Elementary School in an International school. The foster mother was economically strong to look after her as she was a person engaging in business. After 3 years the biological mother wanted the child back.

The child only knew the foster mother and refused to go. The biological mother made a complaint to the Police that the Foster Mother kidnapped the child. The Judge hearing the case sent the child to an orphanage, the child while in the orphanage did not eat or drink but cried nonstop. The child could speak only Tamil and English and was unable to communicate in Sinhala with the staff at the orphanage.

A lady lawyer made an application to court after seeing the child suffering in the orphanage. The Judge after listening to her submissions said that there was a strong suspicion that the biological mother was asking for the child to be trafficked to a foreign country. The Judge considered the foster mother a ‘fit person’ as stipulated under the

Children’s and Young Person’s Act and gave custody to the foster mother.

The two case studies illustrate that mere laws in law books are insufficient to make child rights a reality, the community leaders have to come forward and play a proactive role to make child rights a reality. There should be a commitment by all to improve the lives of all the children living in one’s community. Although legislation has been passed by Parliament there is the problem of implementing these laws together with the commitment of the Government there is a need for trained manpower and adequate institutional structure for their effective implementation. In addition, in most countries, there is limitation of resources, cultural factors and a lack of awareness on child rights which have had a negative impact on the implementation of existing laws.

Who is really responsible for the implementation of the rights of the children in Sri Lanka? Since it is the State which ratified the CRC, it has the primary obligation to undertake necessary measures to develop policy and action plans and to allocate sufficient resources. The civil society organizations, professional bodies, religious organizations, the business sector, the media, the judiciary and care systems also have a greater responsibility to make child rights a reality.

Dr. Hiranthi Wijemanne, a mother and grandmother herself stated that in her experience children are extremely precious and that a country should put its children first in the family and the community. She said that the development of a country cannot be judged by the number of skyscrapers it has or the number of luxury shops. The development of a country is

judged by how that country looks after its children. If we are looking after our children we will automatically be looking after the future of our nation.

Once incidents have occurred, the response in terms of law enforcement, judicial action, rehabilitation and reintegration could take a very long time. This can contribute to continuation of abuse. The criminal justice system must place high penalties on the victimization of children. The majority of Sri Lankan communities still do not view crimes against children as serious. Unless perpetrators are made to know that their actions will have severe consequences, and they cannot get away with impunity even if they are related to the child victim, such incidents will continue.

Effective responses must be ensured for child victims and child witnesses by all those involved in the criminal justice system, starting with the scene of the crime, and continuing through prosecution. A positive environment, without child abuse or exploitation should be created in homes, communities, schools and childcare institutions. This will require public and parent education, advocacy and the training of teachers and care givers. This must be accompanied by the development of child friendly and child sensitive procedures for investigating cases of child abuse which avoid child victims being subjected to various interviews and investigations.

We have to work at least in a small way to promote and protect the rights of children because they are the future leaders and the life blood of our society.

We should all be alert and speak out and do whatever we can to prevent violence

against children and prevent all forms of child abuse.

Children need to have outdoor playtime, they need to listen to stories, to paint draw and make music and dance.

The Guardian newspaper reported recently that a Secondary School Teacher complained that the Year 7 intake no longer knew how to tell a story.

Miss Gaby Hinsliff (Journalist) said that our children were being turned into Grammar Robots. She said Writing stories is craft that is crucial for life. And if the Government insists, you can test it, measure it and use it in commerce too!' She suggests.

It is necessary to give priority to the ideas of the children in matters affect them, provide opportunities for the freedom of expression and to access relevant information. Child participation needs greater priority. Access to leisure, play and recreation is a child's right. Most of the parents give priority for studies only and concentrate on academic/professional qualifications.

It was Frederick Douglas (Social Reformer/writer) who said:

"It is easier to build strong children than to repair broken adults."

Society is changing and we must look after the young ones. We need to have compassion. I feel every child has a right to love and care by his or her parents.

Just don't let your child be the MEAN kid!

CORPORATE BODIES AS INSTRUMENTALITIES OF THE STATE AND THE JURISDICTION OF THE SUPREME COURT

Chandaka Jayasundara*

Article 12 (1) of the Constitution of Sri Lanka provides and guarantees to all persons the equality before the law as well as the concomitant right of equal protection of the law.

In the case of Jayanetti Vs. The Land Reform Commission¹ Wanasundara J held that:

“The rule of law was a fundamental principle of English Constitutional Law and it was a right of the subject to challenge acts of the state from whichever organ it emanated and compel it to justify its legality. It was not confined only to Legislation but intended to every class and category of acts done by or at the instance of the State. That concept is included and embodied in Article 12”.

Wade² observes that Courts have through their decisions extended the pale of judicial review “to bodies which, by the traditional test, would not be subject to judicial review and which, in some cases, fall outside the sphere of government altogether.”

A variety of government/State owned commercial organizations although incorporated as limited liability companies under the provisions of the Companies Act nevertheless engage in activities which,

although devoid of any statutory flavor or status may be considered acts of the State or the government due to the connection and control such corporate entities have with the State or the Government. This is more so in the context of recent history in Sri Lanka where the Government/State takes an pro-active role in the market place in commercial activities ranging from the management of airlines and Ports to providing even basic grocery, catering, medical and other services for the general public.

As held in Harjani v. Indian Overseas Bank³ Courts in Sri Lanka and elsewhere have demonstrated a willingness to ‘recognize the realities of executive power’ and to review the decisions of a number of such bodies. In their desire to prevent the abuse of ‘executive power’ in the hands of these powerful non-statutory bodies, the courts have ventured to review the decisions of these bodies. It must be noted that this willingness is not a purely Sri Lankan initiative but was started in the English Courts.

As held in Harjani’s case, Courts have extended the application of prerogative remedies to the non-statutory bodies

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¹ 1984 2 SLR 172 at 184

² H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 8th Edition, 627

³ [2005] 1 Sri LR 167 at 172- 173

regulating industries on a voluntary basis through a process of self-regulation⁴.

This development with regard to prerogative remedies has also been applied in full with regard to the fundamental rights jurisdiction by the Supreme Court in a series of judgements, culminating in the judgement of Prasanna Jayawardena J in Captain Channa D.L. Abeygunewardena Vs. Sri Lanka Ports Authority & others⁵ which will be discussed in detail below. In that context, in Perera Vs. Universities Grants Commission⁶, Sharvananda J, as his Lordship then was, held that:

"The wrongful act of any individual, unsupported by State authority is simply a private wrong. Only if it is sanctioned by the State or done by the State authority, does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the State. In the context of fundamental rights, the 'State' includes every repository of State power. The expression 'executive or administrative action' embraces executive action of the State or its agencies or instrumentalities exercising Governmental functions. It refers to exertion of State power in all its forms"

On the same lines, in Wijetunga vs. Insurance Corporation⁷, Sharvananda J observed:

⁴ R v. Panel on Takeovers and Mergers ex parte Datain [1987] 1 QB 815

⁵ S.C F.R. 57/2016, decided on: 20th January 2017,

"The term 'executive action' comprehends official actions of all Government Officers When private individuals or groups are endowed by the State with power or functions, governmental in nature, they become agencies or instrumentalities of the State subject to the constitutional inhibitions of the State."

Atukorale J's in Rajaratne vs. Air Lanka Ltd⁸ that,

"..... by resorting to this device of the corporate entity, the government cannot be permitted to liberate itself from its constitutional obligations in respect of fundamental rights which it and its organs are enjoined to respect, secure and advance. Consequently, when ascertaining whether a corporate body is an agency or instrumentality of the State, the Court should endeavour to perceptively examine with an investigative bent of mind, the character of the corporate body and the features of its management and operations and, thereby, determine whether the corporate body is, in truth and in fact, an agency or instrumentality of the State. A Court has to look behind any cosmetic artifices of incorporation or illusory distancing placed between State and the corporate body and dissects the flesh, blood and bones of the corporate body to expose its real

http://www.supremecourt.lk/images/documents/sc_fr_57_2016.pdf

⁶ [1978-79-80 1 SLR 128 at 137-138]

⁷ 1982 1 SLR 1 at p.5-6

⁸ 1987 2 SLR 128

kinship and association with the State.”

In examining the fundamental rights jurisdiction bestowed on the Supreme Court in terms of article 126 of the Constitution, Atukorale J held that:

- The sole and exclusive jurisdiction vested in the Supreme Court by Article 126 of the Constitution to hear and determine questions relating to the infringement (actual or threatened) of fundamental rights enshrined in Chapter 111 are confined to those that arise out of executive or administrative action.
- In so far as fundamental rights are concerned, it is only infringement or imminent infringement by executive or administrative action which falls to be justiciable in this Court under Article 126.
- The question therefore arises as to what is meant by the expression executive or administrative action. Our Constitution contains no definition of this expression.
- The trend of decisions, however, has been to construe this expression as being equivalent to action of the Government or of an organ or instrument of the Government.

In Wijeratne v. The People s Bank⁹ Sharvananda, J observed that: the cardinal question as to whether the People's Bank is properly to be regarded as merely an instrument subservient to the State or in truth is a commercial bank, not identifiable with the State has to be decided by looking

into the function and control of the bank; On the material before Court it was held that the major role of the People's Bank was in the commercial sphere; that it was a commercial bank, that there was no nexus between the State and its banking activities that the State was not involved in the Commercial activities of the bank and that such commercial activity of the bank did not qualify as State action; and the action of the bank in reorganizing its security services, being a part of its commercial activities, did not amount to executive or administrative action.

However, in AriyapalaGuneratne v. The People's Bank¹⁰Wanasundera J distinguishing Wijeratne vs Peoples Bank, pointing out that numerous provisions of the People's Bank Act; No. 29 of 1961, which indicated a close nexus of the Bank with the Government and also Government control of the Bank, held that the People's Bank constituted the State or the Government within the meaning of S. 18 of the 1972 Constitution in so far as the matter in issue before him was concerned. He also added that in his view even under the 1978 Constitution the concept of State was a wider concept than "the expression executive or administrative action".

Thus, in the background of the above judicial authorities, the term “organs of the government” used in Article 4 (d) of the Constitution encompasses not only the State per se but also its “agencies and instrumentalities” which exercise Governmental functions.

⁹ (1984) 1 Sri LR 1

¹⁰ (1986) 1 Sri LR 338

As examples of the expansion of the jurisdiction of the Supreme Court in terms of Article 126:

- In Perera vs. Universities Grants Commission¹¹ the Supreme Court held that the University Grants Commission, which was a corporate body established by Statute, performed a “very important governmental function” and was financed by the State, which made it “an organ or delegate of the Government”;
- In Rajaratne vs. Air Lanka Ltd the Supreme Court held that taking into consideration the fact that Air Lanka was established and its existence was for carrying out a function of great public importance, once carried out by the government through a statutory corporation, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors Air Lanka Limited is an agency or instrumentality of the government.
- In Jayanetti vs. Land Reform Commission¹², the Supreme Court held that the Land Reform Commission, which was a corporate body established by Statute, was an instrumentality of the State since it was set up to manage vast acres of State land in compliance with State policy and subject to close State control in its activities and its finances.
- In Dahanayake vs. De Silva¹³, the Supreme Court regarded the Ceylon Petroleum Corporation as an agency of the State since it had a monopoly on the sale of petroleum products which are not a mere consumer item of private trade and since it provided an essential service by distributing and selling these petroleum products to the people.
- In Ariyapala Guneratne v. The People's Bank¹⁴ distinguishing the judgement of Wijeratne vs. Peoples Bank¹⁵ which held that the Peoples Bank was not an agency or instrumentality of the State that the Peoples Bank indeed is an agency or instrumentality of the State.
- In Jayakody vs. Sri Lanka Insurance Corporation and Robinson Hotel Company Ltd¹⁶, the Supreme Court held that, a duly incorporated limited liability Company which carried on a solely commercial enterprise was an agency or instrumentality of the State if the State had effective ownership and control of that Company. The Supreme Court held that this would be so even if the ownership was through another legal entity and the control was exercised through another legal entity who acted as the agent.

¹¹ supra

¹² supra

¹³ 1978-79-80 1 SLR 47

¹⁴ supra

¹⁵ supra

¹⁶ 2001 1 SLR 365

Fernando J held [at p.373] that: “*The chain of ownership and control may extend indefinitely: e.g. the State may set up a corporation which it (in substance) owns and controls; that corporation may set up a limited liability company which it (in substance) owns and controls; and that company in turn may set up another company or other entity . . . and so on*”. And further: “*But however long the chain may be, if ultimately it is the State which has effective ownership and control, all those entities -every link in that chain -are State agency*” and “*Even if it was performing purely commercial functions, it would nevertheless be a State agency, albeit a State agency performing commercial functions.*”

- In Wijewardhana vs. Kurunegala Plantations Ltd¹⁷, it was accepted by the Court that, a duly incorporated limited liability Company which was subject to ministerial control, was to be regarded as being an agency or instrumentality of the State.

The above being some of the instances, where the Supreme Court has found that government agencies including Corporations set up by Statute and limited liability companies are amenable to the fundamental rights jurisdiction of the Supreme Court, in Dharmaratne vs. Institute of Fundamental Studies¹⁸, the Supreme Court held that courts have applied various tests to determine whether

a particular person, institution or other body whose action is alleged to be challenged under Article 126 of the Constitution, is an emanation or agency of the State exercising executive or administrative functions.

Marsoof J held that where the body whose action is sought to be impugned is a corporate entity the tests that have been used included, among other things:

- on the nature of the functions performed by the relevant body,
- the question whether the state is the beneficiary of its activities,
- the manner of its constitution,
- Whether by statutory incorporation or otherwise, the dependence of the body whose action is sought to be challenged on state funds,
- The degree of control exercised by the State,
- The existence in it of sovereign characteristics or features, and
- Whether it is otherwise an instrumentality or agency of the State.

As such, some of the features which demonstrate that a corporate body (incorporated by Statue or otherwise) to be an agency or instrumentality of the State, will be:

- The State, either directly or indirectly, having ownership of the corporate body or a substantial stake

¹⁷ [S.C F.R.24/2013 decided on 03.09.2014 http://www.supremecourt.lk/images/documents/scfr_24_13.pdf

¹⁸ [2013] 1 SRI L.R. page 365

- in the ownership of the corporate body;
 - The corporate body performing functions of public importance which are closely related to Governmental functions;
 - The corporate body having taken over the functions of a Department of the State;
 - The State having deep and pervasive control of the corporate body;
 - The State having the power to appoint Directors and Officers of the corporate body;
 - The State providing a substantial amount of financial assistance to the corporate body;
 - The corporate body transferring its profits to the State;
 - The State deriving benefits from the operation of the corporate body;
 - The State providing benefits, concessions or assistance to the corporate body which are usually granted to organs of the State;
 - The Accounts of the corporate body being subject to audit by the Auditor General or having to be submitted to the State or an official of the State;
 - The State having conferred a monopoly or near monopoly in its field of business to the corporate body or the State protecting such a monopoly or near monopoly;
 - Officers of the corporate body enjoying immunity from suit for acts done in their official capacity.
- This brings us to the recent and the last judgement in this series which is *Abeygunewardena v. Sri Lanka Ports Authority*¹⁹ once again setting out in detail the applicable tests that have been used by the Supreme Court in order to determine whether any particular functionary or entity falls with the definition of ‘executive or administrative action.’
- In this case the Petitioner was employed as the Deputy General (Bunkering) of a duly incorporated Company named Magampura Port Management Company Ltd [“MPMC”]. MPMC is fully owned by the Sri Lanka Ports Authority [“SLPA”].
- The Petitioner’s case was that he was suspended from service without pay signed by the Managing Director of the SLPA.
 - The Petitioner filed a fundamental rights application alleging that, the Respondents’ acts of suspending him from service and subsequently terminating his services, were a violation of the Petitioner’s fundamental rights guaranteed by Articles 12 (1), 12 (2) and 14 (1) (g) of the Constitution.
 - The Respondents raised two preliminary objections to the Petitioner’s ability to maintain the application. Their first objection was that, the impugned acts do not constitute “executive or administrative action” as contemplated in Article 126 of the

¹⁹ supra

Constitution and that, therefore, the Court does not have the jurisdiction to entertain the application.

- Their second objection was that, in any event, the impugned acts do not attract a Public Law remedy, and, for that reason, the Petitioner cannot invoke the fundamental rights jurisdiction of this Court.
- The Petitioner contended that although MPMC is a Company incorporated under the Companies Act No. 07 of 2007, MPMC is a body fully owned by, financed by, operated by and answerable only to the Government of Sri Lanka and the control exercised by SLPA permeates the functioning of MPMC at every level. The Petitioner also contended that the composition of the Board of Directors of MPMC reveals this control exercised by SLPA and that the facts before the Court make apparent the close nexus and inextricable link between the State, SLPA and MPMC. On this basis, it was contended that the impugned acts amount to “executive or administrative action” as contemplated in Article 126 (1) of the Constitution.
- The response of the Respondents was that MPMC is independent of the State and cannot be regarded as being “an agency or instrumentality” of the State and that the material which is before the Court establishes that, the State does not have “deep and pervasive” control over the management of MPMC. Secondly, they also

contended that, in any event, the impugned acts arise from or relate to a Contract of Employment which is commercial in nature and which has no ‘statutory underpinnings’ and that, therefore, the Petitioner’s remedy is limited to Private Law.

After an exhaustive study of the earlier judgements of the Court, Jayawardena J holds as follows:

- The Constitution does not define or describe what is meant by the term “executive or administrative action”. Thus, while Chapter III of the Constitution sets out the several fundamental rights guaranteed by the Constitution and the limited situations in which the exercise of these fundamental rights may be restricted, Article 17 in Chapter III only provides that, every person shall be entitled to apply to the Supreme Court respect of the infringement of any of his fundamental rights by “executive or administrative action”.
- In turn, Article 126 (1) only stipulates that, the Supreme Court shall have jurisdiction to hear and determine any question relating to the infringement of fundamental rights by “executive or administrative action” and Article 126 (2) only provides that, any person who alleges that any of his fundamental rights have been infringed by “executive or administrative action”, may apply to the Supreme Court for redress.
- Although the term “executive or administrative action” has not been

specifically defined or described in the Constitution, Article 4 (d) indicates that, this term refers to organs of the Government when it states “the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of the government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided”;

- Accordingly... this Court recognized that, the term “organs of the government” used in Article 4 (d) of the Constitution encompasses both the State and also its “agencies and instrumentalities” which exercise Governmental functions. It should be made clear that, in the context of the meaning of the term “executive or administrative action”, the words “State” and “Government” are used interchangeably and with the same meaning. Naturally so, since acts by the State or on behalf of the State are performed by the members and officers of the Government.
- When an impugned act is committed by or on behalf of the State by an Officer of the State or by a Department of the State, such an act will constitute “executive or administrative action” since in each such case it is, quite obviously, an “organ of the Government” which commits the act.
- However, the position is less clear when the act is committed by an incorporated body which has been established by the State or which is

connected to the State. In such circumstances, the corporate body which commits the impugned act has a legal persona and identity which is distinct from the State. This may make it not immediately evident whether or not the act committed by that corporate body, amounts to “executive or administrative action” as contemplated in Articles 17 and 126 (1).

- Therefore, in such situations where it is alleged that an impugned act committed by a corporate body amounts to “executive or administrative action” as contemplated in Articles 17 and 126 (1), it is necessary to ascertain whether that corporate body can be properly regarded as falling within the aforesaid description of an ‘agency or instrumentality of the State’ referred to by Sharvananda Jin Perera vs. Universities Grants Commission and Wijetunga vs. Insurance Corporation.
- The criteria applied in Wijetunga vs. Insurance Corporation, Chandrasena vs. National Paper Corporation, Wijeratne vs. People’s Bank and Jayanetti vs. Land Reform Commission are sometimes referred to as the “functional test” and the “Governmental control test”. The approach taken in these cases appears to have been on the lines that, the “functional test” would be satisfied only if the Statute establishing the corporate body vested it with the duty of performing

important Governmental functions which have traditionally been the sole and exclusive preserve of the State and that, the “Governmental control test” would be satisfied only if the Statute establishing the corporate body made it subject to very close State control coupled with financial dependence on the State.

- In subsequent cases, the Supreme Court has (while not jettisoning the “functional test” and the “Governmental control test”) adopted a more investigative approach when determining whether a corporate body is an agency or instrumentality of the State.
- The Supreme Court has been more ready to pull aside the veil of incorporation and probe deeper to see whether “the brooding presence of the State” as evocatively termed by Krishna Iyer J in Som Prakash vs. Union of India²⁰, lies behind the corporate body making it, in truth and in fact, an agency or instrumentality of the State.
- Consequently, the somewhat narrow and rigid tests referred to in the aforesaid early cases were expanded in the later Cases with the Supreme Court preferring to adopt a less restrictive approach which looked to ascertaining the real relationship which exists between the State and a corporate body.
- This approach was necessary since the Court was alive to the reality that, the modern State has an array of corporate entities which are formed by the State or on the directions of the State, to engage in a variety of activities including the provision of services, administration, manufacturing and commerce.
- Though these corporate bodies are legal persons in their own right and their legal identity is distinct from the State, they often operate in terms of State policy or are closely associated with the State or perform functions on behalf of the State or are largely controlled by the State or are financed by the State.
- In many cases, they conform to many or all of these characteristics. Frequently, the power and authority of the State lies behind these corporate bodies when they deal with the people. They are, in truth and fact, agencies or instrumentalities of the State which, therefore, must be held to be bound by Article 4 (d) of the Constitution, which requires all organs of the Government to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution.
- Citing Rajaratne vs. Air Lanka ltd, Sukhdev Singh vs. Bhagatram²¹ and the decisions of Ramana Dayaram Shetty vs. The International Airport Authority of

²⁰ AIR 1981 SC 212 at p.229

²¹ AIR 1975 SC 1331

India²², **Ajay Hasia vs. Khalid Mujib** and **Som Prakash vs. Union of India** in which the Indian Supreme Court described some of the identifying characteristics which show a corporate body to be, in fact, an agency or instrumentality of the State Atukorale J in Rajaratne's case followed the approach taken in these Indian decisions, which he described [at p.146] as "the test of governmental agency or instrumentality".

- This broader and more investigative approach was adopted in **Roberts vs. Ratnayake**²³, **Wijenaike vs. Air Lanka Ltd**²⁴, **Wickrematunga vs. Ratwatte**²⁵, **Samson vs. Sri Lankan Airlines Ltd**²⁶, **Jayakody vs. Sri Lanka Insurance and Robinson Hotel Company Ltd**²⁷, **Organization of Protection of Human Rights & Rights of Insurance Employees vs. Public Enterprise Reform Commission**²⁸, **Dharmaratne vs. Institute of Fundamental Studi**²⁹ and **Wijewardhana vs. Kurunegala Plantations Ltd**³⁰.
- The Judgments quoted illustrate some of the identifying characteristics of a corporate body which is an agency or instrumentality of the State, but it is important to keep in mind that, this list is by no means exhaustive.

²² AIR 1979 SC 1682

²³ 1986 2 SLR 36

²⁴ 1990 1 SLR 293

²⁵ 1998 1 SLR 201

²⁶ 2001 1 SLR 94

- It must be stressed that, the presence of one or more of these identifying characteristics does not, necessarily, lead to the conclusion that a corporate body is an agency or instrumentality of the State. Instead it is, usually, the cumulative effect of some of these identifying characteristics being found in a corporate body, which leads to the conclusion that it is an agency or instrumentality of the State.
- It has to be kept in mind that, the modern State often resorts to the mechanism of incorporating Statutory Bodies and Companies to carry on the myriad activities which a modern State engages in, including commercial enterprises. It also has to be kept in mind that, although at first blush these corporate bodies may seem to be distinct from the State by virtue of their incorporation as limited liability Companies or because they engage in a solely commercial enterprise or for other reasons, some of them are, in truth and in fact, agencies and instrumentalities of the State which not only enjoy the privileges of an organ of the State but also have the power of the State strengthening their hand when dealing with the people.
- The Supreme Court, which is entrusted with the guardianship of

²⁷ 2001 1 SLR 365

²⁸ 2007 2 SLR 316

²⁹ *supra*

³⁰ *supra*

fundamental rights under the Constitution, has a duty to ensure that, if a corporate body is, in truth and in fact, an agency or instrumentality of the State, that corporate body is held accountable to honor and abide by Article 4 (d) of the Constitution which requires all organs of the government to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution.

- Consequently, when ascertaining whether a corporate body is an agency or instrumentality of the State, the Court should endeavor to perceptively examine with an investigative bent of mind, the character of the corporate body and the features of its management and operations and, thereby, determine whether the corporate body is, in truth and in fact, an agency or instrumentality of the State.
- The circumstances referred to in the judgment establish that, the State both directly and through its organ, the SLPA, has deep and pervasive control over MPMC.
- The Supreme Court must look to the reality of the situation rather than the rules in Articles of Association and the reality of the situation is that the State controls MPMC.
- His Lordship quotes Krishan Aiyar J in **SOM PRAKASH vs. UNION OF INDIA** [at p.218] who stated, “.....merely because a Company or other legal person has functional and jural individuality for certain purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under our constitutional scheme, we could not scan the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State, constitutional lawyers must not blink at these facts and frustrate the enforcement of fundamental rights.....”.
- That the fundamental rights jurisdiction of the Supreme Court can be invoked by a Petitioner who alleges that an organ, agency or instrumentality of the State has violated his fundamental rights in the course of dealings under and in terms of a contract entered into between them.
- That this has to be so for the simple reason that, Article 4 (d) of the Constitution has an overarching effect which binds all organs, agencies and instrumentalities of the State in all things they do and at all points of time. Therefore, the fact that an organ, agency or instrumentality of the Government has entered into a contract cannot release it from its duty, under Article 4 (d) of the Constitution, to respect, secure and advance the fundamental rights of the contracting party in the course of dealings under that contract. This duty will, necessarily, continue at all stages of the contract.

- This is a duty which an organ, agency or instrumentality of the State cannot escape from by entering into a contract and it is a right which the contracting party cannot cede or abandon by entering into a contract. The validity of this conclusion is confirmed by the fact that, Article 15 of the Constitution allows restrictions on fundamental rights only in the limited situations specified therein and only if so prescribed by Law. There is no provision made in the Constitution to restrict the operation of fundamental rights by contract.
- The terms of the contract between the State and the contracting party will, naturally, determine the rights and obligations of both parties and a Court would give full recognition to the principle that, parties are free to determine the contents of the contract and should be held to what they have agreed to. Thus, the terms and conditions of the contract would usually determine whether or not the rights of either party have been violated.
- However, when one of the contracting parties is an organ, agency or instrumentality of the State, there is the overriding obligation cast on it to comply with Article 4 (d) of the Constitution and not violate the fundamental rights of the other party in the course of dealings under the contract.
- In practice, this means that, while the terms of the contract would, usually, be the determining factor when assessing whether an organ, agency or instrumentality of the State has violated the rights of the other party in the course of dealings under a contract and the general rule is that, a party who acts in accordance with the terms of the contract does not violate the rights of the other party, the position would be different if the organ, agency or instrumentality of the State has used the terms of the contract as a cover for malicious, perverse or arbitrary acts.
- This is so since the State and its organs, agencies and instrumentalities are enjoined to act with good faith in their dealings with the people including where such dealings are in pursuance of a contract.
- Thus, organs, agencies and instrumentalities of the State are to be guided by the requirement of good faith in their contractual dealings and a departure from this standard by misusing a contractual term or committing a deliberate breach of contract in a malicious or perverse or arbitrary or manifestly unreasonable manner, could well amount to an act which violates the fundamental rights of the victim if the impugned act violates one or more of his fundamental rights declared and recognized in Chapter III of the Constitution.
- Where an organ, agency or instrumentality of the State acts in breach of a contract due to bona fide commercial or operational factors or

inadherence or unavoidable circumstances or as a result of a bona fide revised policy or for similar reasons, that breach per se is unlikely to amount to a violation of the fundamental rights of the other party and would, usually, attract only the remedies available under the contract. A Court would, naturally and advisedly, be unwilling to substitute its own opinion of what should have been done under the contract in place of the decision taken by the contracting party.

- But, where there has been a deliberate misuse of a term of the contract or a deliberate breach of the contract in a malicious or perverse or arbitrary or manifestly unreasonable manner, then there could be a violation of the fundamental rights of the other party. This is because, in such cases, the impugned act may amount to a violation of Article 12 (1) or another Article in Chapter III of the Constitution by reason of the malice, perversity, arbitrariness or manifest unreasonableness of the impugned act.
- Each such case would have to be determined upon the facts and circumstances before the Court and in the context of the contract between the parties. When doing so, it should be kept in mind that, as mentioned earlier, the parties have agreed to be bound by the terms of the contract and the remedies available under the contract and that, therefore, unless the nature of

the impugned act warrants the invocation of the fundamental rights of this Court for the reasons set out above or for such other reasons as the Court may consider relevant, the parties should be required to seek their remedies under the contract they have entered into.

- These principles are equally applicable whether the contract is of a commercial nature or is a contract of employment. An employer which is an organ, agency or instrumentality of the State, has the duty, under and in terms Article 4 (d) of the Constitution, to respect, secure and advance the fundamental rights of its employees. This entitles an employee of an organ, agency or instrumentality of the State to invoke the fundamental rights jurisdiction of this Court if he alleges that his employer has violated his fundamental rights in connection with the contract of employment in the manner set out above. The fact that, the employee is not categorized as a 'public servant' cannot disentitle him from that constitutional right.

Thus the Judgement of Jayawardena J clearly and unambiguously lays down and follows the more expansive jurisdiction of the Supreme Court that the modern State often resorts to the mechanism of incorporating Statutory Bodies and Companies to carry on the myriad activities which a modern State engages in, including commercial enterprises, and that although at first blush these corporate bodies may seem to be distinct from the State by virtue of their incorporation as limited liability

Companies or because they engage in a solely commercial enterprise or for other reasons, some of them are, in truth and in fact, agencies and instrumentalities of the State which not only enjoy the privileges of an organ of the State but also have the power of the State strengthening their hand when dealing with the people.

The criteria to identify such bodies as agencies or instrumentalities of the State are clearly set out in the series of judgements quoted but such criteria are not exhaustive, and each case must be considered on its own distinguishing characteristics.

Therefore the Supreme Court, which is entrusted with the guardianship of fundamental rights under the Constitution, has a duty to ensure that, if a corporate body is, in truth and in fact, an agency or instrumentality of the State, that corporate body is held accountable to honor and abide by Article 4 (d) of the Constitution which requires all organs of the government to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution

BURDEN OF PROOF IN CRIMINAL CASES

Srinika Raigamkorale*

Inception with comparing inquisitorial system

In studying the numerous legal systems utilized by different localities all over the world, basically two trial systems can be identified. They have popularly gained recognition as the adversarial system and the inquisitorial system of trials. As in most common law countries Sri Lanka has opted for the adversarial system of trials.

The adversarial system which is also often referred to as the accusatory system, as the name suggests, is accusatory in nature, whereby two or more opposing parties gather and present evidence to an impartial judge or jury who is not conscious of the case till it is presented before them. In such criminal trials the defendant is not required to testify.

On the contrary, the inquisitorial system involves a primary judge who actively steers the search for evidence and questions the witnesses, including the respondent or defendant and is responsible for supervising the gathering of evidence necessary for each case on a *pro rata* basis. Here the attorneys play a more passive role unlike in an accusatorial system.

In both trial systems the emphasis is on finding the truth but the two approaches used for such are distinct. While the adversarial system pits the parties against one another with the hope that competition will reveal the truth, the inquisitorial system questions those familiar to the case. According to Dr. K. N. Chandrasekharan Pillai “The adversarial system places a premium on the individual rights of the accused, whereas the inquisitorial system places the rights of the accused secondary to the search for truth”¹. Under both systems, the trial judge is vested with the power to conduct the trials accordingly. The presumption of innocence and where the burden of proof lies is generally of the same context in both systems. The standard of proof in a civil litigation in both the systems is on a balance of probabilities whereas in criminal litigation the standard required is beyond reasonable doubt. Thus, both the systems have common features and rules of procedure.

The weight put upon the concept of ‘presumption of innocence’ is higher in the

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¹ Chandrasekharan Pillai K.N., (2003), Burden of Proof in Criminal Cases and the Supreme

Court - New Trends, 2003) 8 SCC (Jour) 49, available at <http://www.supremecourtcases.com>

practice followed by the functionaries in the adversarial system which seems to give an undue advantage to the defence. This is not a prominent feature in the inquisitorial system.

Even though *prima facie* there doesn't seem to be much of a difference between the two systems of trial it is generally asserted that a major portion of the convictions that are registered arise under the inquisitorial system rather than the through the adversarial system of trials. The reason for this appears to be the approach that practitioners adopt towards the principles².

Prosecution should prove its case beyond reasonable doubt

In a criminal trial, English law treated the burden to prove the case of the prosecution beyond reasonable doubt as sacrosanct and the trial generally begins with the presumption of innocence on the part of the accused. In other words, the prosecution should prove its case beyond reasonable doubt in order to negate the 'presumption of innocence'.

As held in *Woolmington vs. DPP*³ "Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to.. the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the

evidence given by either the prosecution or the prisoner..." However in *Padmathilake vs. Bribery Commissioner*⁴ the court emphasized that 'Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The benefit of doubt to which the accused is entitled, is reasonable doubt; the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind.'

As per *Karunadasa vs. OIC, Nittambuwa* cited in *Mudiyanse Appuhamy vs. State*⁵ the court further said that "The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness in the defence. When the guilt of the accused is not established beyond reasonable doubt he is liable to be acquitted as a matter of right. What the (trial) court has done in this case perhaps unwittingly, is to bolster up a weak case for the prosecution by referring to the weaknesses in the defence case. This is not permissible". And also in *Kamal Addaraarachchi vs. State*⁶ "The case of the prosecution is not considered to be proven until the 'presumption of innocence' is disproved regarding the defendant. Statements made by the defendant or the stance taken by him being rejected does not prove the prosecution case".

This position was approved in the case of *Mahinda Herath vs. AG*⁷, where it was held that, "The trial judge must always bear in mind that the accused is presumed to be

² Chandrasekharan Pillai K.N., (2003), Burden of Proof in Criminal Cases and the Supreme Court - New Trends, 2003) 8 SCC (Jour) 49, available at

<http://www.supremecourtcases.com>

³ 1935 AC 462

⁴ SC 99/07 dated 30.07.2009

⁵ CA 61/98 dated 11.01.2001

⁶ 2008 3 SLR 393

⁷ CA 21/2001 dated 13.09.2005

innocent until the charge against him is proven beyond reasonable doubt. What happens when a plea of alibi or complete denial is taken up by an accused person is rejected? The trial judge should not forget the above legal principles regarding the burden of proof and the presumption of innocence”.

Defendant's case

The defendant is not obligated to prove his case unless the prosecution proves the case beyond reasonable doubt. In the Nan vs. Dewage Wilmon case⁸ referring to the **James Chandrasekara** case the court held that “According to Section 105 of the Evidence Ordinance, the court must presume the absence of such defence [any general exceptions in the penal code, or within any special exceptions or proviso contained in any other part of the same Code, or in any law defining the offence] unless it is proven to the satisfaction of court on a balance of probability that such circumstances did exist”. Further in King vs. James Chandrasekara⁹ it was held that “Creating a doubt with regard to a general exception is not sufficient and further that it must be proved on a balance of evidence that such circumstances, indicative of the existence of such exceptions have to be proved on a balance of probability”. Balance of probability does not in itself mean only the defendant calling for evidence and proving but if the relevant exception is unfolded from within the Plaintiff's case itself, then the defendant need not call for extra evidence. In S. L.

Farook vs. AG case¹⁰ **Shirani Thilakawardena J** was of opinion that “The defence that a sudden fight occurred has been proved on additional evidence by cross examining the Prosecution's evidence and dock statements made by the defendant”.

The dossier prepared by the investigating judicial officer under the inquisitional system of trial weakens the presumption of innocence. However, as the organized power of the State has been at the command of the prosecution, it was generally the impression that if there is any doubts on the accuracy of the prosecution case, the benefit of doubt should go to the defendant who is the weaker between the two.

In the plea of an *alibi* no burden of proof exists on the defence to prove such *alibi* since it is neither a special nor a general exception. But such *alibi* should be submitted without undue delay. (Section 126 of the Code of Criminal Procedure as amended by No 14 of 2005 Act). An *alibi* proceeds to create substantial doubt and the case is not proved beyond reasonable doubt if the defence of *alibi* is not struck out *ab initio*. It was held in Punchi Banda vs. The State¹¹, **G. P. A. de Silva J.** “When an alibi is pleaded in defence, the burden of proof on the accused is not similar to that in a case where the accused raises a mitigatory or exculpatory plea. Where the defence is that of an *alibi*, the accused has no burden as such of establishing any fact to any degree of probability”. Further, in King vs. James Chandrasekara¹², **Soertz J** held that ‘In a

⁸ CA 122/2008 dated 12.11.2007

⁹ 44 NLR 97

¹⁰ SC dated 27.06.2008

¹¹ 76 NLR 293

¹² 44 NLR 97 (at page 126)

case where the accused's plea is simply that he is not guilty, or in a case where he pleads an alibi, if he creates a sufficient doubt in the minds of the jury as to whether he was present or not, or as to whether he had the necessary *mens rea* or not, the accused is entitled to be acquitted because, in such an event, the prosecution has not sufficiently proved its case".

System responses to low conviction rate

The above principles had been insistently upheld by the courts in common law countries which had created the impression that many offenders escape the clutches of law making the system to respond to it in a different manner. While some jurisdictions excluded the *mens rea* component of crimes others shifted the burden from the prosecution to the defendant¹³.

1. Strict liability offences

Here the defendant is held liable for the criminal offence committed even in the absence of *mens rea*. In spite of the defendant's ignorance that he is committing a crime the doctrine of strict liability holds him liable for the criminal offences committed.

All offences under the penal code require the mental element, but some offences created by the legislature towards the latter part which do not contain the mental element to it are called strict liability

¹³ Chandrasekharan Pillai K.N., (2003), Burden of Proof in Criminal Cases and the Supreme Court - New Trends, 2003) 8 SCC (Jour) 49, available at <http://www.supremecourtcases.com>

offences. In the case of *Casie Chetty vs. Ahamudu*¹⁴ and *Perumal vs. Arumugam*¹⁵ it was held that '*mens rea* was not an essential element of the offence'. Therefore in the two cases above the offences were regarded as strict liability offences.

However, Prof. G. L. Peiris has pointed out in *Principles of Criminal Liability In Ceylon, A comparative Analysis* that; "In Sri Lanka there is no such (as Common Law Crimes and Statutory Crimes) classification and all the offences are statutory provided. Mainly the Penal Code gives room for the offences by interpreting and denoting the sentences. Rest is included in other legislative enactments. Most of the offences include the mental element in to their definitions while some of them do not. Anyhow the basic rule is regardless of including or not in the Penal Code is subject to the operation of the general exception which is defined in the Penal Code [according to Sec 38(2)]. If the defendant can prove the general exceptions stated in chapter IV of the Penal Code on a balance of probability, we will be able to exonerate from the criminal liability. Hence mistake of fact which embodied in Sec. 69 and Sec. 72 is applicable to the entire body of criminal law in Sri Lanka."

2. Ellen borough Dictum

It is considered that a duty arises in the defendant to provide for an explanation of his innocence even though such

¹⁴ 1915 18 NLR 84

¹⁵ 1939 40 NLR 532

explanation is not necessary, in the contrary it has been held in *Rex vs. Cockraine*¹⁶ that the does not provide an explanation because of his guilty conscience. This is famously known as the Ellen borough Principle. Accordingly, “no person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which is attached to him; but nevertheless if he refuses to do so where a strong prima facie case has been made out where it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so, only from the conviction that the evidence so suppressed or not adduced, would operate adversely to his interests”.¹⁷ Also it was held in *M. A. Samy & four others vs. AG*¹⁸ that “If the prosecution had failed to establish a strong prima facie case against the 3rd accused-appellant, prosecution does not warrant the application of the dictum of Lord Ellen borough”.

Adherence to principles; analysis through Indian cases

Adherence to fundamental principles is a very good practice but, undue adherence to such is not always advised upon. In *Shivaji Sahabroo Bobade vs. State of Maharashtra*¹⁹ Justice K. Iyer in India warned about undue adherence to the fundamental principles.

“The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community.”

Justice Krishna Iyer further stated that:

“We must observe that even if a witness is not reliable, he need not be false and even if the police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused.”

In pursuance of this view in *Kali Ram vs. State of H.P.*²⁰ the observations of Justice Iyer misinterpreted and Khanna J clarified

¹⁶ 1814 Gurney's Report 479

¹⁷ Ref. *W. M. Sirisena vs. AG* dated 22.03.1999

¹⁸ See 2005 BASL Law journal

¹⁹ 1973 SCC (Cri) 1033

²⁰ 1973 SCC (Cri) 1048

thus “observations in a recent decision of this Court, *Shivaji Sahabroo Bobade vs. State of Maharashtra* to which reference has been made during arguments were not intended to make a departure from the rule of the presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. One of the cardinal principles, which has always to be kept in view in our system of administration of justice for criminal cases, is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused.”

Khanna, J. emphasised on the importance of the fundamental principles thus:

“Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is

also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt.”

The abovementioned principle was rationalized by the learned Judge as thus:

“It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse; however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable.”

Furthermore it was observed by Dr. K.N. Chandrasekharan Pillai that “It is apparent that strict adherence to the basic principles of presumption of innocence and burden of proof require delicate balancing of the trial procedures by the impartial and independent Judge. Our system reposes much faith in the impartiality of the Judge inasmuch as it confers on him many powers with potential for abuse”.

As per Dr. K.N. Chandrasekharan Pillai, a fitting example for the above can be observed in *Ram Chander vs. State of*

Haryana²¹ where a trial judge in accordance with this provision, firmly rebuked and virtually threatened the witnesses with prosecution for perjury in order to make them speak what he thought must be the truth. The Supreme Court found it impossible to justify this attitude and refused to accept any portion of the evidence of the two eyewitnesses recorded by the Sessions Judge. This position was explained by the Court as:

“We may go further than Lord Denning and say that it is the duty of a Judge to discover the truth and for that purpose he may ‘ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant’ (Section 165 of the Evidence Act- India). But this he must do, without unduly trespassing upon the functions of the Public Prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him.”

The approach taken by Justice Thomas in such a situation in State of W.B. vs. Mohd. Omar²² is of particular interest where the Public Prosecutor did not inquire regarding the nature of the injury and the court did not have the doctor’s opinion to decide the gravity of the offence. Justice Thomas answered to this situation thus, “no doubt it would have been of advantage to the court if the Public Prosecutor had put the said question to the doctor when he was examined. But mere omission to put that question is not enough for the court to reach a wrong conclusion. Though not an expert

as PW 30, the Sessions Judge himself would have been an experienced judicial officer. Looking at the injuries he himself could have deduced whether those injuries were sufficient in the ordinary course of nature to cause death.”

Justice Thomas declared his view regarding the change of outlook on presumption of innocence as thus: “the pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty. In this case when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.”

Further Justice Thomas also dwelt on the role of the trial court in the reasoning process. Accordingly he said “when it is proved to the satisfaction of the Court that Mahesh (deceased) was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction, the permitted reasoning process would enable the Court to draw the presumption that the accused have

²¹ 1981 SCC (Cri) 683

²² SCC (Cri) 1516

murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.”

Conclusion

Inspite of all the new developments in the legal arena our criminal justice system has not been successful in ensuring conviction in all cases. The critics were of the opinion that this shortcoming was due to the sacred adherence of judges to the presumption of innocence and the requirement of proving *mens rea*. Although there is no harm in reversing the trend of frequent acquittals on technicalities, this reversal should not be at the cost of losing the credibility and reputation of the Judges as impartial functionaries. Even though judges may be impartial and independent their credibility depends upon how they function.

ADDRESSING THE IMPERIAL PROMISE OF PROTECTION IN THE 19TH CENTURY INTERNATIONAL LAW: THE CASE OF KANDYAN KINGDOM IN CEYLON

Punsara Amarasinghe*

Radheeka Weerakoon*

Introduction

The whole notion of “protection” in 19th-century international law has been an interesting topic for the scholars those who want to explore the historiography of modern international law from an apologetic point of view as 19th century was known as an epoch for imperialists for legitimizing the colonial expansion. The universality of international law was eclipsed by positivism that pervaded in the whole domain of 19th-century international law. (Anghie, 2005) The idea of universality in international law propounded by the pioneers of Salamanca School in the 16th century by reformulating the importance of natural law doctrine was scorned and reversed by the 19th-century positivists. Thus, positivists ensured the idea that people outside a national boundary may acquire sovereignty by possessing it. However, the idea revered by European jurists based on the Westphalian notion of nationality was a peculiar form for the non-European nation paving the path for European colonial enterprises to justify the idea of a protectorate from European projection of sovereignty. The evolving trajectory of the idea of “Protection” in international law was filled with jurisdictional politics and religious claims within the European political order. The 16th century Spanish and Portuguese empires clung to the Catholic Church’s special claim to protect the categories of vulnerable groups such as

orphans, widows and travelers. (Koskenniemi,2011)The necessity of the principle of protection reached an important stage when the Spanish empire began to sore its growth rapidly in the 16th century. Especially, this principle was applied during Spanish colonial expansion in America, wherein the logic of protecting the vulnerable subjects was formed to remove Indians from the jurisdiction of the inquisition.

To some degree, the early assertion of protectorate concept in international law owed its foundational development to the juridical thinking of some European jurists. In bolstering the Spanish claim to protect its interests in America, Francisco de Vitoria’s contention on the protection of the right to travel and commerce for Spanish people in America provided a plausible cause for Spanish to justify their colonial expansion. In refuting the claim made by Vitoria on the construction of protection in the history of international law, Anthony Anghie points out how evasively Vitoria excluded the Indian tribes from waging war against the Spanish regardless of Vitoria’s initial claim on the universality of natural reason, which he applied for Indian tribes in America.(Anghie,2006) Yet, the lack of explicit sovereignty in compliance with European projection staved off Indians from protecting themselves, which resulted in their

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inevitable subjugation before Spanish. However, the dubious growth of European imperial interests in non-European spaces envisaged different legal cultures, which accelerated and improvised the early understanding of ‘protection’. In examining how British Empire encompassed the newly acquired territories and remaining sovereignties under the guise of protection, the whole mechanism appears to be little more than a prelude to fortify their colonial ambitions excused by the 19th-century international law. In writing their most astute account on the issue of protection in “A Rage for Order”, Lauren Benton and Lisa Ford state

“British officials self-consciously described schemes to overhaul judicial administration in newly acquired imperial territories as projects to shore up the property rights and privileges of vulnerable people and/or British traders. Men, sometimes with scant legal training, found themselves charged with overhauling complex colonial legal orders to consolidate imperial power and with commenting on phenomena with an international character” (Benton & Ford, 2016; 86)

The tracing the concept of protectorate and applicability are akin to the history of imperialism. As a matter of fact, the any endeavor of tracing the idea of protectorates in international law will envisage how imperialism had carved the antecedent events that paved the path for notion of protectorate. Since the publication of Orientalism by Edward Said, the interests of exploring the traces of imperialism in many subjects have been drastically increased and said illuminatingly reminded the importance of retrospection of imperialism when he wrote

“To believe that politics in the form of imperialism bears upon the production of literature, scholarship, social theory, and history writing is by no means equivalent to

saying that culture is therefore a demeaned or denigrated thing. Quite the contrary: my whole point is to say that we can better understand the persistence and the durability of saturating hegemonic systems like culture when we realize that their internal constraints upon writers and thinkers were productive, not unilaterally inhibiting”. (Said, 1978; 46)

In this paper we seek to explore the acquisition of Kandyan kingdom of Ceylon in 1815 through a convention resulting the end of last remaining native sovereignty in the island from the perspective of how early development of 19th century international law subtly used the legality of protection for imperial interests. The encounters arrayed in the Kandyan kingdom as a declining power before a dominant European power was a major illustration in British imperial history as it was the first moment that British Empire directly involved in providing a protection for weaker power. The English East Company had been able to consolidate much of power by both military victories and political chicanery in Indian subcontinent at the end of 18th century. In particular, the doctrine of lapse adopted by the Company showed the policy of annexing the princely states in India after those states signed treaties with the company by subordinating their external affairs with the promise of protection. (Iyer, 2010; 23) However, the usage of protection in Kandyan kingdom exposes the emergence of new doctrine of protectorate in 19th century British imperial expansion. Moreover, slogan of protection under the guise of providing adequate defense for the weaker subject positioned British Empire in a unique position as an imperial polity with the legitimacy to intervene when the necessity was required to do so. Benton and Ford state

“Discourses of protection could blend with calls to defend the status quo. More often, as

the nineteenth century progressed, they connoted something more... advocacy of colonial legal reform, the reordering of the rights and privileges of plantation owners or squatters, imperial expansion, or the exercise of new jurisdiction over foreign policies. For British officials, promises of protection did not rest on the universal rights of those whom British power claimed to protect: they served to reinforce the legitimacy of British imperial jurisdiction.” (Benton& Ford, 2016; 56)

Thus, the examining the Kandyan convention signed between the British and the local elites unfolds the early developments of “protection” in the gamut of imperial expansion in an era where the affinity between intervention and jurisdiction was not a direct part of international law as it has been now depicted under Responsibility to Protect.

Kingdom of Kandy at Bay

European interest in Ceylon dates back to the 16th century and the Portuguese happened to be the first European imperial power to hold the maritime provinces of Ceylon under their dominion, then their power began to decline by the arrival of the Dutch and finally Portuguese were supplemented by the Dutch in 1658. However, the occupation of the whole coastal provinces of the island under two European powers made no detrimental threat to the independent existence of the Kandyan Kingdom and the efforts made by both Portuguese and the Dutch to subdue this last sovereign polity in the central highland of the island got nipped in the bud by the strong resistance of the Kandyan military. Bolstered by the ideal landscape of nature, the terrain of Kandyan kingdom appeared to be a graveyard for European invaders regardless of their predilection of conquering it. (Sivasundaram, 2007; 30) On the other hand, having realized their own technological inferiority to meddle

with European invaders, rulers of Kandyan kingdom adopted a stratagem of playing a new European power against the existing one, offering assistance in exchange for the newcomer removing the incumbent colonial power. For European powers, the importance of the annexation of the Kandyan kingdom was not only confined to gain the full control of the island, but also to widen their imperial expansion in South Asia. In accomplishing this task, the whole position of Trincomalee harbor was seen by both Dutch and British and even French as a crucial factor in establishing naval control in the region. (Mendis, 1971)

In 1766 the Dutch were partially successful in subduing Kandyan kingdom when the king of Kandy was failed in an invasion to the coastal provinces, followed by Dutch retaliation which resulted in the sacking of Kandy by the Dutch forces. In the same year, a treaty was signed between the Dutch and King of Kandy which can be regarded as an ideal unequal treaty that compelled the king of Kandy to acknowledge the Dutch occupation of the maritime provinces of the island including the Trincomalee harbour, also the treaty explicitly impeded the king from making relations with other European powers.

When British acquired the power of the Maritime Provinces in Ceylon from Dutch in 1796, the geo political map of the island took a rather odd shape with the existence of Kandyan kingdom in the central highland surrounded by the British governed Maritime Provinces. When Dutch ceded the Maritime Provinces in Ceylon to the British East India Company, the danger of French invasion became a pivotal factor and the British were rather vigilant to uphold their power in the Maritime Provinces. The political events that took place in Europe between Britain and post-revolutionary France intensified the British expansion in Indian Ocean. The British

position in Ceylon was legitimized by the Article V of the Amiens treaty of 1802 which officially ended the rule of Dutch East India Company in the coastal provinces of Ceylon and in the same year the Maritime Provinces in Ceylon became a crown colony to British Empire. In this period the stability of Kandyan kingdom had been in the doldrums as a result of its internal political chaos, mainly the discontent among the Kandyan aristocrats towards the king *Sri WickramaRajasinghe* was a notable factor that weakened the internal political stability of the Kandyan kingdom.

The First British Governor of Ceylon, Sir Fredrick North firstly attempted to convince the king of Kandy for a treaty and this was the most common method that British were known for in their colonial expansion. The treaty suggested by North in 1802 to the king of Kandyan kingdom referred to the promise of British imperial protection and in return North expected to gain the fullest trade authority of whole island, also the treaty connoted that king should abstain from forming any relation with other European nations or Malay traders. Moreover, this treaty mainly stipulated that “King should sponsor and allow one British regiment to stay in the Kandyan kingdom for the “for the better fulfillment of His Britannic Majesty’s Engagement to protect the Person and authority of the King of Candy.” (De Silva, 2005) It was by no means an equal treaty signed between the European powers of 19th century and the conditions invoked by North were much favorable to the British interests. Meanwhile, the internal stability of the Kandyan kingdom had reached a chaotic status as king was gradually transforming himself to an autocrat, which displeased native Sinhalese ministers around him in the court. Driven by the indignation towards King’s autocracy, some of the ministers in Kandyan kingdom sought the protection from the British. Especially the First Adigar the Kandyan

equivalent to Prime Minister *Pilimatalawe* seized the opportunity of Protection to impugn the legitimacy of King’s rule in Kingdom of Kandy and his claim was based on king’s foreign ancestry to the throne of Kandyan kingdom. North was convinced by the plea of Kandyan aristocrats to overthrow the King in Kandy, yet he was hesitant to wage a war against Kandyan kingdom as there was no palpable threat appeared to be. Given the context of such an uncertainty between the king and British rule in the Maritime Provinces in Ceylon, in the year of 1803 North saw an ideal opportunity to launch a military campaign against the kingdom of Kandy. In that year the officers of Kandyan king confiscated the goods carried by the merchants came from the Maritime Provinces and this act was seen by North as an act of provocation. Initially North demanded a compensation for the losses from the King of Kandy indicating his legitimate right as the representative of the British crown in the island. When North demand was not reciprocated by the Kandyan King, North led the British troops under Major Daves to capture Kandy in the early quarter of 1803. Again, the British idea of protection to its subjects played an interesting role as a justification in this military campaign as North exclaimed “the protection which I owe to the people subject to my Government” would require him to go to war against Kandy if the king did not settle the claim. (Mendis, 1971) North made a tireless effort to compel the king for subordination, but to no avail. This tense situation between the king of Kandy and British finally made the path for the First Kandyan War. However, the military campaign brought no satisfactory results for British troops contrary to the high expectations of North. Driven by the great advantage of the geographic terrain, Kandyans retreated their forces by allowing the British troops to step into the city and began to slaughter British troops in following month.

After the military debacle of 1803, Sir Fredrick North was caught in a great dilemma of maintaining the British legal order in island with an independent sovereign polity in the center of the island. After his departure from the island his successor Sir Thomas Maitland envisaged rather an ambivalent position in holding the British power in the island. Maitland being a professional soldier and a military strategist foresaw the grave danger of keeping another sovereignty in a crown colony as it would be a detrimental threat to secure the British legal and political order in the island. In one of his letters to the colonial secretary, Maitland stated “a narrow strip of land on the sea coast all-round the island” with the center “occupied by a people, we must ever consider our constant and natural enemies here, on whom no Treaty is binding”. (Benton & Ford, 2016; 103)

Maitland distrusted the entire native bureaucratic machinery around him, particularly he vehemently critiqued the administrative powers vested upon the class of local mudilyars by the Dutch as weakening factor to consolidate British authority. Also, his own legal charter he implemented in Ceylon in 1810 by restoring the Dutch courts: ‘landrad’ in some districts and increasing the supreme court of the colony established by North in 1802 boomeranged upon him. (Mendis, 1971; 81) To his biggest dismay, this charter increased the power of the chief justice, which paved the path to a conflict. This deteriorated states between Maitland and the local judiciary prolonged his plan of launching another military campaign to Kandyan kingdom and on the other hand colonial secretary in London urged recognition of Kandy’s autonomy and promoted a vision of pacifying the interior enough to build a road across it, with or without a permanent diplomatic presence. The military stalemate of Maitland’s years seemed to suggest the

possibility of a lasting balance of power on the island.

The resistance upheld by the kingdom of Kandy made Governor Maitland and his successor weary. In facing this imbalance of power, Maitland relied on reforming the legal ethnography of the Maritime Provinces in Ceylon that would underpin the expansion of British colonial rule around the island and also before his departure from Ceylon, he initiated a project to gather the customary laws of the island. (Benton& Ford, 2016) This project was culminated under Maitland’s successor Robert Brownrigg, who saw the necessity of capturing Kandy and the task of observing the internal instability of Kandyan kingdom was bestowed upon a Cambridge educated classist named John O Doyle. Doyle’s role in acquiring Kandyan kingdom as a protectorate for British Empire was rather an interesting mission filled with intrigues and Brownrigg completely believed in D’Oyly’s acumen. As a British civil servant showing a genuine knack on Kandyan customs and Buddhist values, he could make strong affinity with Kandyan chieftains paving the path for British to fathom how politics functions in the kingdom of Kandy. D’Oyly carefully carved the promise of protection for the anxious Kandyan aristocrats driven by the antipathy against the king who had deprived the rights of many Sinhalese aristocrats. Moreover, the draconian system of criminal justice in Kandyan kingdom oppressed its inhabitants and the manner how king relied on it as his ultimate justice intensified the clandestine campaign of the D’Oyly in undermining the stability of Kandyan kingdom. The portrayal depicted by D’Oyly on British justice to the Kandyan chieftains convinced them the justness of British legal system, which enabled the Kandyan chiefs to accept British as protectors who would harbor them to end the tyranny of a foreign king.

The illustration of oriental despotism and lack of understanding of Afro Asiatic societies or rather reluctance to appreciate the cultural difference played pivotal causes for British to contempt on the systems of justice in African and Asian sovereignties. Since they were no accustomed to different methods of adjudication outside the European legal space, British embraced themselves to play a role of protectors for the inhabitants from despots and their oppressive rules. One of leading international lawyer's and a proponent of civilizational discourse in international law Prof. John Westlake states in "Government in the test of Civilization".

" When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have become accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and wellbeing at least not less than they had enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it" (Westlake, 1894:141)

The trajectories that were looming before the last stage of Kandyan kingdom recall the civilizational rhetoric aggrandized by 19th century international lawyers. D'Oyly was ahead of the curve in manipulating Kandyan chieftains against King and also listened to the grievances of Sinhalese aristocrats zealously indicating the determination of the British to assist Kandyan nobles. The nobility's

resentment towards the king seems to have risen from rooted political causes filled with political and cultural factors since the day the king was coroneted in Kandy. The eleventh hour of the Kandyan kingdom reached, when King ruthlessly massacred the whole family of the First Adigar (Chief Minister) *Ahalepola Dissawa* in 1814 that finally set the cause for remaining Kandyan chieftains and masses to look for British as saviors. However, in examining the prelude before British invaded Kandyan kingdom in 1815 that we can ascertain the British did little to dispel the building dissension around the executions. (Godden&Casinader, 2017) Indeed, the well-established notion on Kandyan king's savagery and Doyle's well-crafted idea on the British justice became a strategy for governor Brownrigg to wage war against an independent sovereign. British historians later fantasized the British protection for the natives in Kandyan kingdom as a humanitarian intervention that saved them from a tyrant. As an example, Emerson Tennent wrote in 1858

"During this interval, the career of the Kandyan king presents a picture of tyrannous atrocity unsurpassed, if it be even paralleled, in its savage excesses, by any recorded example of human depravity" (Tennent, 1858: 86,92)

The promise of protection

North's successor, Sir Robert Brownrigg was an expansionist who awaited an opportunity to expand the British power in the island and the loyalty showed by Kandyan chieftains to the British gave him a cause to proceed his expansionist policy. He wrote a letter to colonial secretary in London to change British neutrality to the kingdom of Kandy by asking some "well-considered system of policy". (Benton & Mulich, 2015; 162) Following the evasive British strategy of protecting the consent of the natives, Brownrigg did not make

a quick decision to meddle with the internal affairs of the kingdom and connoted that Kandyans should show a genuine interest in receiving the British protection, which would legitimize their intervention in another sovereign kingdom. D’Oyly being the voice of Brownrigg in the Kandyan territory convinced the chieftains to formally ask British protection indicating that British government would not come to aid subjects of a sovereign kingdom unless it saw an “it saw a distinct and unequivocal proof of the general wishes of the Kandyan people. “It was impossible, he explained, “to commence a war . . . without a distinct and manifest proof that the whole Kandyan people are determined to withdraw their allegiance from the present ruler, and take refuge under the protection of the British government”. (Somasundarem, 2008; 100)

When the tension between the king and his chieftains reached its apex in January 1815, Brownrigg formally made a proclamation that stated “The unavoidable necessity of resolving to carry His Majesty’s Arms in the Kandyan country”. (Brownrigg, 1815) The proclamation granted ample cover for war, yet Brownrigg made two pretexts in his document before launching the military campaign in February 1815. The two main causes were mentioned in the proclamation justifying the military campaign: the provocation of a series of minor border incursions and the duty to aid Kandyans who had “implored the protection of the British government” from the “tyranny and oppression of their ruler.” The juxtaposition of those two factors became the justification for the Second Kandyan war and more importantly, the proclamation affirmed Kandyan kingdom as a nation rather than a mere territory without the sovereignty that could be easily assimilated under *terra nullius* doctrine which was often used by European nations in their colonial expansion in Africa, America and Australia during the 19th

century.(Benton & Mulich,2015:165) Indeed, the British military intervention in the kingdom of Kandy took a complete different direction from the previous two European invaders. For instance, when Portuguese invaded Kandyan kingdom in 1594, their motive was focused on putting their preferred candidate Queen Dona Katherina in the throne of Kandy as their puppet ruler. Thus, Portuguese rejected to accept Kandyan kingdom as an independent sovereignty. Moreover, the 16th century temporal authority that Portuguese inherited from Pope Nicolas in conquering the heathen lands to convert them into Christianity was another solid reason that compelled Portuguese to reject Kandyan kingdom as a nation in their doomed military expedition in the 16th century. After two centuries Brownrigg aptly hid the real imperial cause under the guise of protection which was welcomed by the oppressed inhabitants in the kingdom of Kandy. The depiction of the proclamation was placed as a kind response to a petition. It states

“His Excellency the Governor and Commander in Chief of the British Settlements in the Island of Ceylon, could not hear with indifference the prayers of the Inhabitants of Five Extensive Provinces who, with one unanimous voice raised against the tyranny and oppression of their Ruler, taking up Arms in defense of their lives, or flying from his power, implored the Protection of the British Government.

Neither could His Excellency contemplate, without the liveliest emotions of indignation and resentment, the atrocious barbarity recently perpetrated in Kandy upon Ten innocent subjects of the British Government. (Brownrigg, 1815)

Reminding of the natural rights doctrine, which was imbued in the 16th century

international law, the proclamation referred to the rights of the Kandyan people to shield themselves from the brutal rule of the tyrannical king and the right seek assistance was legitimized by the proclamation as the inherent natural right of the inhabitants in Kandyan kingdom. It stated, “His Excellency proclaims Hostility against that Tyrannical Power alone who has deluged the land with the blood of his subjects, and by the violation of every religious and moral law become an object of abhorrence to mankind”. (Brownrigg, 1815)

Considering the alacrity shown by Brownrigg in assisting the resistance of Kandyan kingdom by providing British protection, it becomes an evident factor that governor Brownrigg did not want to lose this chance to subdue the last remaining sovereign polity of the island to British Empire. The correspondences exchanged between Brownrigg and Lord Bathurst, colonial secretary gives the clear picture of the sheer motive of capturing Kandy. (Mendis, 1971) Especially, British fear of other European intervention in the affairs of Ceylon had not been waned even in 1815 that led to include a provision in the proclamation by stating that “Against all the foreign and domestic enemies”. In addition to that, the legality of the proclamation was embellished by providing a humanitarian look for the whole military conquest. In particular, British troops were advised to deal with inhabitants of Kandyan kingdom gently, convincing them that the motive of the British campaign was to protect them from a “foreign born” merciless king. At the same time troops were told to treat Moors and *Malabars* residing in Kandy with sense dignity as they were promised to give a safe passage to India. Defining the legal status of the foreign prisoners of war, the proclamation stated “The *Malabars* and *Moors* could be promised safe passage back to South India and should be “exhort to keep in mind”

that they were “by their birth and parentage the natural subjects of His Britannic Majesty.” If they opposed British force, they would be labeled “not only as enemies, but as traitors.” (Benton, 2016; 96)

The 1815 Convention

Emboldened by the given support of the Kandyan chieftains, Brownrigg launched a military campaign in 1815 February and this campaign envisaged no severe resistance from the king’s army at the frontier as they were instructed by the chieftains to pledge the loyalty to British invaders.(Somasundarum, 2008) Brownrigg’s orders to invade the Kingdom and occupy the capital were only given when it was assured that the King would be captured and that no harm would come to the Adigar (Chief Officer of State), who was supporting the British and was the source of much intelligence for John D’Oyly. Upon hearing of the British advance, the Kandyan King fled and was later captured on 18 February 1815.

Soon after the capture of king and the capital of Kandyan kingdom, D’Oyly was involved himself drafting the convention which would legitimately transfer the power to British Empire and under his affinity with the Kandyan chieftains, British could finally see an end of an independent sovereignty. The convention was signed on the 2nd of March in 1815 between the British and Kandyan chieftains in Kandy which resulted in the formal subordination of the Kandyan kingdom as a protectorate to the British Empire. Nevertheless, the stricture of convention was crafted illustrating the transformation of a sovereign state to another sovereign state. Also, the content of the convention resonates with the assumption that ‘Empire, actual or potential was ... supported by an ideology that claimed universal authority over all peoples’.

(Henkin, 1993; 54) Yet, a legitimate question remains still unanswered is that the idea of transferring the sovereignty of Kandyan kingdom was rather ambiguous from Kandyan chieftain's side due the context of the language. The convention was officially drafted in English and the Kandyan chieftains signed the Sinhalese translation which has left a true question of their understanding of the substance of the convention.

The overarching structure of the convention appeared to be a formal legal document signed between two parties elucidating a formal power transition, which has given a legitimacy for British occupation in the Kandyan kingdom as an offshoot of a plea came from the oppressed people in the kingdom of Kandy. Like all the other contemporary colonial treaties and conventions, the preamble of 1815 Kandyan convention has illustrated the status of Robert Brownrigg as the agent of the British crown in the island whilst the other provisions have reflected the legal status of British authority in the maritime that they inherited from Dutch East Company in the year of 1796. Besides referring to the legal status of British colonial rulers in the island the convention has described the British common colonial practices and the internal officialdom existed in the Kandyan kingdom prior to British campaign. Nevertheless, the first four articles in the convention have emphasized rigorously on the rationale of British intervention as a protector to expel the tyrannical king. The very first article of the convention states

"That the Cruelties and oppressions of the Malabar Ruler in the arbitrary and unjust in fiction of bodily tortures and pains of Death without Trial ... have become arrogant, enormous and intolerable ... entirely devoid of that Justice which should secure the safety of his subjects" (Ceylon Government Gazette Extraordinary, n(2), 1815)

The reiteration of the cruelty, arbitrary rule of the previous ruler while mentioning his foreign pedigree indicates way British persisted in justifying their role as protectors of the people in the kingdom of Kandy. The analogy illuminated in the first four articles by abhorring the inhuman cruelty of the regal justice prevailed in Kandyan kingdom under former king *Sri Wickramasinghe Rajasinghe* had not risen out of the blue as it showed the contemporary British attitude towards the liberty of persons inspired by the 18th century age of enlightenment in Europe. Indeed, the reference to king's draconian rule and Kandyan customs based on bodily tortures was a reminder of "Oriental Despotism "pervaded in European psyche which created a bleak picture of the East as a place devoid of justice. In the article titled "Kandyan Convention 1815: Consolidating the British Empire in Colonial Ceylon" Goddenn and Casinader argue that even though there is no direct evidence, it is likely that D'Oyly played a pivotal role in incorporating the liberal thoughts he learnt at Cambridge in early 19th century Ceylon. (Goddenn&Casinader, 2017:37) Moreover, D'Oyly realized the practical necessity of obliterating Malabar clan's claim to the throne in Kandy by the law was inevitable to secure the position of the British in Kandy. While depicting the intervention of the British to protect the lives of the inhabitants in Kandy, D'Oyly went on to include a specific article which legally abolished the *Malabar Nayakkar* dynasty in Kandyan kingdom. Article III of the convention enforced the expulsion of the King and 'all-male persons of the Malabar cast.

The next paramount important feature of the convention was its special emphasis on Buddhism by the Article V. The creation of the article was completely attributed to John D'Oyly as he was aware of the crucial importance of keeping a rapport with Buddhist

priests in the kingdom of Kandy for the preservation of the British rule. D’Oyly’s diary records the sentiment: ‘I beg the Priests will rest assured that they will receive under the British government full Protection and Security. In examining the imperial history of the British Empire, one can ascertain that British colonial policies were not completely detached from the influence of the Anglican Church. (Koke, 2015) Even though the gamut of the church influence was not as strong as how the Catholic Church controlled Spanish and Portuguese empires, the Anglican priests in the British Empire were in a position to influence. Besides securing the main interests related to political powers, British alluded themselves to involvement in a civilizing mission in the East. (Pomeranz, 2005:45) Given a context of such a situation prone to missionary activities and converting natives to Christianity; the special privilege to Buddhism under Article V of the Kandyan Convention was rather a unique factor. It states “The religion of *Boodhoo* professed by the Chiefs and Inhabitants of these provinces is declared inviolable, and its rites, ministers, and places of worship are to be maintained and protected”.

In analyzing the correspondences between Governor Brownrigg and Secretary of State for War and the Colonies, it becomes evident that British authorities in London were gutted by the inclusion of special privilege for non-Christian oriental religion under His Majesty’s law. Shortly after the convention was signed, Brownrigg wrote to Lord Bathurst by stating

“The 5th [Article] confirms the superstition of *Boodhoo* in a manner more emphatically than would have been my choice. But as the Reverence felt towards it at present by all of the classes of inhabitants is unbounded and mixed with a strong shade of Jealousy and doubt about its future protection and that in

truth our secure possession of the country hinged upon this point, I found it necessary to quiet all unceasing respecting it by an article of guarantee couched in the most unqualified terms”. (Brownrigg to Bathurst, 1815)

This explanation of British governor has affirmed the relevance Article V in upholding the direct position of Kandyan kingdom as protectors and that would later legitimize their control over the whole island.

The setting up the new rule in Kandyan kingdom in the transitory period after 1815 convention took rather a different approach. From a vantage point, the protectorate status of the Kandyan kingdom appeared to a conquered territory within a conquered territory as the convention was signed between two sovereign governments. Hence, Brownrigg sought to thwart the Supreme Court’s authority in the Kandyan territory. Considering the *sui generis* nature of Kandy as a protectorate, he showed his vehement opposition of applying the British judicial order existed in Maritime Provinces in the territory of Kandy. Brownrigg wrote “I will not conceal from your Lordship my opinion, that a very considerable period must lapse before His Majesty’s new Territory will safely admit the exercise of any Authority political civil or juridical, which does not in a direct and ostensible manner emanate from the Executive Government”. (Brownrigg, 1818)

Brownrigg’s position on Kandyan kingdom was akin to more advanced one than what colonial judges of the British administration expected to implement under their purview. By rejecting the entry of colonial judiciary and the laws existed in the Maritime Provinces to newly acquired Kandyan territory, Brownrigg persuaded to place the comity between British power and Kandy under the international framework. (Benton& Ford, 2016) Locating the position of Kandy as a protectorate of the

British Empire, Brownrigg may have assumed that legal order of the whole island should place under an imperial constitutional structure where plural legal structures can co-exist. The task of inquiring the basic customary laws in the Kandyan kingdom without altering them substantially was bestowed upon John D'Oyly. Having been appointed as the British resident of Kandyan kingdom, D'Oyly spent considerable time in codifying the customary laws of Kandyan kingdom which was later published posthumously as "*A Sketch of the Constitution of the Kandyan Kingdom*, a detailed account of the legal order in Kandy. The reception of Kandyan territory before British imperial order had created a unique juncture in 19th-century imperial history. By placing the Kandyan kingdom under the protectorate of the empire British made an experiment in their early years of colonial expansion. It is an indispensable factor that legal encounter that British experimented in the kingdom of Kandy was the first direct treaty for the British crown in South Asia because Ceylon was placed as a crown colony since 1802 by removing the influence of English East India Company. Hence, the convention stood as a pure form of example for a formal treaty engagement between two sovereignties. (Benton& Ford ,2016) In comparing this situation with the dubious strategies embraced by East India Company in expanding their power in Indian sub-continent we can ascertain that company's rule in India projected itself on more militarily based expansion which led to unequal treaties and annexations till India became a crown colony under British empire by Government of India Act in 1858. Regarding the unique nature of Kandy as a protectorate, Benton and Ford state

"In representing the Kandyan Convention both as a treaty and as the foundation of a new plural legal order in Kandy, the British used the ambiguous discourse of protection to conjure

an unbounded constitutional framework. Kandy served as a site of constitutional experiment in semi-authorized legal reform by gubernatorial autocracy". (Benton& Ford, 2016:96)

However, the British experiment of molding Kandyan kingdom as a protectorate was short-lived with the discontents and the anxieties showed by the Chieftains those who welcomed British as protectors. Cajoled by their hopes on reestablishing their own dynasty in Kandyan kingdom, chieftains realized that British had softly taken them for a ride through a convention and spreading influence. This tense situation and the compunction of losing their sovereignty to British paved the path for a rebellion in Kandyan provinces within three years after the Kandyan convention.

Conclusion

The idea of protection in 19th century British legal thought was a complex notion stirred up by multiple motives. From one side it sought to bind indigenous people, those who asked British justice within the imperial jurisdiction. But from the other side, the "protection" was meant to be an evasive strategy in expanding the imperial influence to tricky sovereign polities. The robust policies implemented under the guise of protections often resulted in obliterating the remaining sovereignties of those territories. The example that we discussed on Kandyan kingdom as a British protectorate was developed as the finest example of the early colonial engagement of British Empire in the 19th century which was interwoven with Intra imperial protection for its people and also it safeguarded the position of the British as well. The promise of protection given by British to the people in Kandyan kingdom has some similar characteristics of the Treaty of Waitangi in 1840 that established the British sovereign

order in New Zealand by protecting the interests of Maori people. However, when the peaceful co-existence between the British and Kandyan chieftains came to its end as an offshoot of the dissatisfaction of the chieftains towards the British rule, the convention was contravened and chieftains openly joined the rebellion against British rule. In retaliation, British clung to the very essence of the Kandyan convention which they signed with the chieftains in 1815 as a binding legal document as it was enforced by the voluntary consent of the Kandyan people. When the rebellion broke out in 1817 in *Uva* province of Ceylon, where some chieftains and people rallied around a Malabar pretender who claimed to the throne; British dismissed the people rights to resists on the ground of treason as the Kandyan Convention was taken as a purely legal document signed between two sovereignties. By contrast, the British brought the civilizational rhetoric claiming that people in Kandy should not abandon the benefits of British civilizational values upon them. It was proclaimed that the people in Kandy "would have been so sensible of the benefits and security which they enjoy in the Religion, Persons and Property that there would have been no Kandyan wicked and base enough to plunge His Country into all the horrors of War, in a feeble attempt to set up a Pretender to the Crown ". (Ceylon Government Gazette, 1817) In a fervid claim made by the British over their legitimate rights in the Kandyan kingdom, they clearly affirmed that it was the Kandyan chieftains and the people who relinquished the independence to obtain the protection of the British justice. Thus, Chieftains or Kandyan people were devoid of their right to resist the British rule or its protection. The main result emerged from the rebellion of 1818 was that British consolidated their power in Kandyan kingdom than ever. In 1818 they made a proclamation which revoked the former status of Kandyan kingdom as a protectorate and this

was followed by the cession of the sovereignty. (Casinader, 2013)

Nevertheless, the whole process of utilizing the phase "Protection" in the 19th century British notion of international law was conceived under pure colonial settings, where Britain's ambition was to legitimize its colonial expansion albeit such a mechanism of protection formed certain multiple legal orders. The practiced started by East India Company in the early 18th century during their initial power expansion in Indian subcontinent as they compelled the states to sign the treaties for company's protection finally became a strategy experiment by Britain in its imperial mission. As we discussed though out this paper the case of Kandyan kingdom was a unique scenario in British legal history as it happened to be the maiden event that British adhered to the principle of protection in their imperial order and more importantly the Kandyan convention was signed between two sovereignties. Even though the events followed by the Kandyan convention saw an unmitigated disaster, British gained decisive impacts from their experiment as protectors in Kandyan kingdom. Especially, the idea of appearing to be protectors began to wane when British intensified their process of colonialism by dawn of Victorian era in mid-19th century and the sheer positivistic notion of sovereignty engulfed the European international law, which excluded the non-European spaces. In the colonial enterprises that British, Germans, French and Belgians involved themselves with much gusto in African during late 19th century had less concern for crating treaties with the natives under the preview of ensuring the external protection for them as the late 19th century understanding of international law dwelled in the concept of civilization.(Anghie,2005:123) In this process, the colonized nations or newly acquired territories in Africa were devoid of the so-

called civility and sovereignty in accordance with the positivist thoughts prevailed in the 19th century. This Berlin conference of 1884-1885 was the apogee of the positivist international law which unequivocally divided Western Africa between the European powers and it simply discarded the legal personality of the many African tribal kingdoms.

All in all, the idea of protectorate and way it experimented in Kandyan kingdom in early 19th century Ceylon embodied a crucial message as Kandyan convention stood as a formal power transformation between imperial power and a sovereign polity located within a partially colonized island. In today's academia, there has been longing for deconstructing the colonial construction of international law from a critical point of view among the legal historians and by all means, the case of Kandyan kingdom will always remain a moot point to evaluate the usage of protection in early 19th century international before it got completely straddled with positivism.

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MANURAWA 2020

SPECIAL CHARACTERISTICS OF THE PARTITION ACT: AMENDMENT OF THE PLAINT AFTER RETURNING THE PRELIMINARY SURVEY IN A PARTITION ACTION

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Historical Back Ground

Co-ownership* of the undivided land is a major land dispute in the scenario of Sri Lankan land Law. A Partition action is the mostly recommended mechanism to terminate the co-ownership among all the co-owners by the intervention of judiciary. The partition law had been introduced through British legal system by way of a Partition ordinance No 10 of 1863 which is an instrument to end-up the co- ownership. In additionally drafting a Partition deed among all the co-owners is another mechanism of terminating the co-ownership, but if there is a lack of intention of following the agreement to divide the land, the partition action is the only solution to terminate the Co-ownership. According to the No 16 of 1951 Partition Act, a separate procedure had been introduced to conduct a partition action.

The Partition Act No 21 of 1977 has been enacted to accurate the partition procedure but most of the core materials which are relevant to the action, have been absorbed from the Partition Act No 13 of 1951. The distinguish fact is that the final partition decree considers as a *jus in rem* (against the whole world) and the final decree gives the *ab intio*, a clear title to the land.

In the case of Hettige Don Tudor Vs Hettige Don Ananda Chandrasiri and others
(Unreported , SC Appeal 134/2016 Decided On 19.02.2018) Eva Wanasundara J held that:

“An action for partition of land is an action in rem. When the decree in a partition action is entered, it is a decree in rem which binds the whole world and not only the parties to the partition action. It will be effective at all times. That is the vital point and the basis for the Partition Law being enacted. The provisions are imperative.”

Special Characteristics of the Partition Act No 21of 1977

According to section 25 of the partition Act gives paramount directions to the Trial Judge for identifying the corpus and investigating the title in a proper manner.

Section 25(1) of the partition act read as follows:

“(1) On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.”

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Further, in the case of Jayasuriya vs Ubaid (61 NLR 352) Sansoni CJ held that

In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open him to call for further evidence(in regular manner) in order to make a proper investigation.

In the case of Sopinona Vs. Pitipanaarachchi and two others, (2010 1 S.L.R. 87) Marsoof J clearly held that;

Clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title.

On perusal of the above judgments, there is a special duty cast on the Trial Judge to identify the corpus. However the mere discrepancies with regard to the extent between the preliminary survey report and the schedule to the plaint can be ignored without dismissing the action.

In the case of Gabrial Perera Vs Agnes Perera (43 CLW 82) held that :

In a deed the partition of the land conveyed is clearly described and can precisely ascertained, a mere inconsistency as to the extent thereof should be treated as a mere false demonstration not affecting that which is already sufficiently conveyed.

The above decision was followed in Yapa Vs Dissanayake Sedara (1999 1 SLR 361) and Sopiya Silva Vs Magilin Silva (1989 2 SLR 105) S.N Silva J held that,

If the land surveyed is substantially different from the land as described in. the

schedule to the plaint, the Court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed.”

According to the above judgments, Superior Courts encourage the Trial Judges to move their attention towards the fundamental factors in order to the identification of the corpus without dismissing the case. The Section 18(1) iii of the Partition Act No 21 of 1977 has directed to Preliminary surveyor to properly report his opinion regarding the corpus as follows:

Section 18(1) iii of the Partition Act read as follows:

“(iii) whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint;”

The above mentioned requirement binds with the finality of the partition decree which is described in the section 48(1) of the Partition Act. This legal contention was clearly described in Sopiya Silva Vs Magilin Silva (Supra) as follows:

“The surveyor under section 18(1)(a)(iii) of the Partition Law must in his report state whether or not the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the plaint. Considering the finality and conclusiveness that attach in terms of s. 48(1) of the Partition Law to the decree in a partition action, the Court should insist upon due compliance with this requirement by the surveyor.”

The Sopiya Silva Vs Magilin Silva (supra) is the land mark case law which has introduced the guidance to the trial Judges to decide to take proper actions after receiving the Preliminary Survey with the discrepancy of the extent of the Corpus. Justice S.N. Silva observed that there are 3 major options to follow by the parties with permission of the Court. Those are read as follows:

“On receipt of the surveyor's return which disclosed that a substantially larger land was surveyed the District Judge should have decided on one of the following courses after hearing the parties:

(i) to reissue the Commission with instructions to survey the land as described in the plaint. The surveyor could have been examined as provided in section 18(2) of the Partition Law to consider the feasibility of this course of action.

(ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.

(iii) to permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law.”

It is crystal clear that the Court has discretionary powers to grant permission to the Plaintiff to amend his plaint after receiving the Preliminary Survey under subject to the conditions which can be imposed by the Court.

Further it is a settled law that the Court can only issue a Preliminary commission to the Court Commissioner and after receiving the preliminary survey, the Court has no powers to issue another commission to another commissioner by request of a party.

“The provision under Sec.16 does not recognize any second plan in a partition action. In any single partition action there should be only one preliminary plan that is made by the court commissioner and all the plans relied upon by the parties are to be superimposed on the said preliminary plan. After the preliminary plan is made and filed in Court, if necessary, the trial Court is entitled to issue a commission to the Surveyor General to prepare a plan to identify the corpus, on its own motion or at the instance of the parties to the action. If the necessity arises to survey any larger or smaller land than that pointed out by the plaintiff, where a party claims that such survey is necessary for the adjudication of that action, such commission can be issued to the same commissioner who made the preliminary plan. It cannot be issued to another surveyor.” Hettige Don Tudor Vs Hettige Don Ananda Chandrasiri and others (Unreported, SC Appeal 134/2016 Decided On 19.02.2018)

Practically, most of the parties of the partition actions are accepted the subsequent survey commission as the preliminary survey, thus aforesaid case clearly indicates that 1st commission of the action or otherwise survey General Survey can be considered as the Preliminary Survey of a partition action.

“.....Then such plan and the report of the Surveyor General would be the preliminary plan in the case. Issuing another commission to another second surveyor other than the

commissioner who did the preliminary plan is contrary to the partition law and is erroneous.” Hettige Don Tudor Vs Hettige Don Ananda Chandrasiri and others (Unreported, SC Appeal 134/2016 Decided On 19.02.2018 p 12).

According to section 75 of the Partition Act indicates the remarkable intention of the legislature in order to enhance the opportunities to terminate the co-ownership through the judicial intervention, exempting the *res judicata* concept.

Section 75 of the Partition Act read as follows:

“(1) The dismissal of a partition action in respect of any land under section 10, section 12, section 29, section 63, section 66 or section 71 shall not operate as a bar to the institution of another partition action in respect of that land.

(2) The dismissal of a partition action under section 29, section 63, section 66 or section 71 shall not affect the final and conclusive effect given by section 48 to the interlocutory decree entered in such action.”

According to this section, a dismissal of a partition action is not the conclusion or the termination of the co-ownership process. Any party can institute a new partition action to the same land which was failed to partition or process.

After fixing the Trial, partition law allows to call the fresh witnesses and the documentary evidences by way of filling an additional list of witnesses and documents, 30 days prior to upcoming trial date.

Section 23 (1) of the Partition Act read as follows:

“(1) Every party to a partition action shall, not less than thirty days before the date of the trial of the action, file or cause to be filed in court a list of documents on which he relies to prove his right, share or interest to, of or in the land together with an abstract of the contents of such documents. No party shall, except with the leave of the court which may be granted on such terms as the court may determine, be at liberty to put any document in evidence on his behalf in the action if that document is not specified in a list filed as aforesaid. Nothing in this subsection shall apply to documents produced for cross-examination or handed to a witness merely to refresh his memory.....”

In the case of *Pushpa vs Leelawathi and another* (2004 3 SLR 162) S.N. Sliva CJ held that :

“When section 23(1) is considered with section 25(1) it is clear that the date of trial is not necessarily the first date on which the case is fixed for trial but would also include any date to which the trial is postponed.”

On perusal of the above case law, Partition Law can be considered as a flexible procedure to ascertain all the material facts of the action. This flexibility indicates that before entering the *jus in rem* decree of the partition action; the main elements named in the identification of the Corpus and the investigation of the title should be achieved at a satisfactory level.

In light of the above guidance, the Partition Law encourages the litigants to process with their respective partition actions successfully without any delays. However some special procedures of the partition may be taken much time to conclude the action. However aforesaid special characteristics of the

Partition Act support to amend the pleadings of the action and permit to present a strong case to each party, subject to the discretionary powers of the Court.

Amendment of the Plaintiff after receiving the Preliminary Survey: Legal Back Ground

The cardinal principle of the amendment of pleadings has not been clearly mentioned in the Partition Act No 21 of 1977, but section 79 of the said Act deals with the *casus omissus* situations as follows:

Section 79 of Partition Act no 21 of 1977

79. In any matter or question of procedure not provided for In this Law. the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the court, if such procedure is not Inconsistent with the provisions of this Law.

Therefore section 93(1) of the Civil Procedure Code covers the amendments of the pleadings of partition suits. When the matter has not been fixed for trial at the 1st date and subsection 1 of the said section can be adopted under the scenario.

Section 93(1) of the Civil Procedure Code

(1) Upon application made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the parties to the action, the Court shall have full power of amending in its discretion, all pleadings in the action, by way of addition, or alteration, or of omission.

In the terms of the above section, Court has eminent powers to amend all the pleadings in

this action by way of addition, or alteration or of omission by using the discretionary powers.

The section 93(3) and the provision of section 46 indicate some guidelines to follow. However the proposed amendments to the plaintiff of the matter should be reasonable and if Court disallows the amendments it may cause to gravity and irremediable injustice to the Plaintiff. Further, the case has not been fixed for trial and the amendments to the plaintiff should not harm to the Defendants and they should have opportunity to amend their Statement of Claims too.

In the case of Senanayake Vs Antony (69 NLR 225), Thambiah J had explained the test regarding allows the amendments of pleadings as follows:

“The principles governing the amendment of a plaint have been clearly set out by my Lord the Chief Justice who, after an exhaustive review of all the authorities, laid down the following propositions (vide Daryanani v. Eastern Silk Emporium L td) (1963) 64 N LR. 529)

1. the amendment should be allowed if it is necessary for the purpose of raising the real question between the parties ; and

2. an amendment which works an injustice to the other side should not be allowed.”

In this juncture, it is a settled law that, a partition action in respect of one land cannot be converted into an action in respect of another land by way of the amendment of pleadings. The case of Uberis Vs Jayawardhane 62 NLR 217, inclined with the above legal principle. According to these, the proposed amendments to the Plaintiff do not seek to convert the corpus to another land.

Amendment to the Pleading can deal with the schedule to the Plaintiff. In this context there might be done clerical mistakes on the pleadings by all the parties of the action. If parties had shown the boundaries to the Surveyor and that amendment to the schedule should not affect to the parties and it should be a compulsory amendment to the Plaintiff. As a result of that amendment ,there should not any converting of the corpus to another land.

Therefore the plaintiff has a duty to disclose the present boundaries to identify the corpus properly. But amendment to the plaintiff should not be caused to change the land.

The rationale of the aforesaid amendment is explained as follows: When the Defendants had reserved their right to tender the statement of claims after receiving the preliminary commission. So they had a chance to go through the commission and report before preparing their pleadings, but that kind of opportunity does not arise to the plaintiff and his only opportunity is to amend the Plaintiff. Because the final partition decree considers as a *jus in rem* and section 25 of the partition act directs the paramount duty to the Trial Judge to identify the corpus and the investigation of the title. Therefore at the 1st instance the Plaintiff can make an application to amend the Plaintiff according to smooth partition procedure. On perusal of those aforesaid proposed amendments are reasonable and not harming to the Defendants.

After receiving the preliminary plan and the report, the legal structure of the amendments to the plaintiff should investigate according to the granted Judicial Directions through Sopiya Silva vs Magilin Silva (1989 2 SLR 105.)

It was held that if there is a discrepancy of the extent, the reasons should be disclosed even

amending the plaint and the lis pendens for the larger land.

Sopiya Silva vs Magilin Silva (1989 2 SLR 105)

(ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.

Applicability of the rule of “an amendment which leads to an injustice to the other party should not be allowed”

The action is proceeding with preliminary steps; the Court has a wide discretion to allow the proposing amendments to the Plaintiff. The Defendants have a chance to amend their own pleadings with the permission of the Court and there should not any injustice cause to the Defendants by allowing amendments to the plaint. If the Court disallows the amendments, the Plaintiff might be suffered from gravity and irremediable injustice; because the plaintiff should have pay the survey cost before returning the commission. The amendment to Plaintiff before returning the commission may be important to ascertain the partition decree *jus in rem*.

In the case of W.M. Mendis & Co Vs Excise Commissioner (1999 1 SLR 351) De Silva J held regarding the rule of procedural law as follows:

"The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence."

Conclusion

In light of the above vital legal principles, the Court has full discretionary powers to allow the proposing amendments to the original Plaintiff of a partition action. But the plaintiff should not guilty of leaches and if the proposing amendments disallows by the Court, the plaintiff has to establish that it may cause gravity and irremediable injustice. But also the proposing amendments should not cause any injustice to the Defendants. The partition Law is one of the dying laws in Sri Lanka due to the Title Registration process. Once covering all the lands by title registration, the partition law will become a historical concept in Sri Lanka. Whatsoever, the special characteristics of the partition law grant more discretion to the Judiciary to facilitate the litigation process in the Law of Partition.

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Sopiya Silva Vs Magilin Silva (1989 2 SLR 105)

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INTRODUCTION TO BIO-PIRACY AND EXISTING LEGAL MECHANISMS RELATED TO PROTECTION OF BIOLOGICAL RESOURCES IN SRI LANKA

Yasmada Lakshari Lokunarangoda*

Introduction

Decades ago significant attention was paid on conservation and utilization of biological resources but, with the recent developments and the technological transformations, the discussions relating to the ownership of biodiversity related practices, knowledge and the inventions derived from biological materials have become a significant area of interest in the contemporary world. With the up-to-date changes in the world, the necessity to prevent the environmental crimes and preserve the rich diversity of the world's natural resources have become an important feature of sustainability and it is one of the most challenging problems facing by the governments. The moment when a protected plant is taken out of its natural habitat without obtaining necessary approval then it becomes bio-theft and if a protected plant has been smuggled outside of the country to obtain monopolies, to introduce any other product derived from a protected plant then, it becomes bio-piracy. In simple words bio-piracy means, an illegal acquisition of indigenous knowledge, genetically modified materials, living organisms in order to earn profits on them. Manifestly, high-tech pirates are focusing on smuggling valuable plants,

animals, indigenous knowledge today to earn quick bucks.

Sri Lanka- A major victim of bio-piracy

Sri Lanka is a small island with rich biodiversity and the result is that Sri Lanka has turned into a major target of the bio-pirates. Bio-piracy means obtaining the exclusive monopoly rights over the biological material of one country by individuals, institutions or companies of other countries that ultimately leads to the denial of the rights of the country of origin. This has become one of the most fast spreading mafias in the world today.

Developing countries like Sri Lanka which are rich in biological resources are in the hands of the developed countries and always subject to over exploitation of the biological resources due to the loopholes in the existing framework. It is well evident that, Sri Lanka has introduced number of legislations complying with the international standards to protect biological resources, prevent bio-piracy and other environmental harms such as pollution, deforestation.

However, it is quite clear that the newspapers, Medias of the country continuously report the incidents of bio-

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piracy, over exploitation of biological resources of the country. The incidents dealing with ‘Kothalahimbutu’ piracy, the piracy of microbes, the piracy of Wallapatta and the alleged bio-piracy of our ‘RathuKekulu’ served as a launching pad to open the eyes of all the people in Sri Lanka. As discussed earlier, bio-piracy has become one of the most challenging and spreading mafias in the world and it threatens the human beings by violating most basic rights such as right to land, right to health and right food when the locals had to pay for their products and it threatens the economy of the country as well.

Moreover, it privatizes the biological resources within the country by allowing patents and it threatens the all endemic living beings and the ecosystem. Danger of being extinct of endemic plant could be named as another consequence of the bio-piracy.

The existing legal mechanism related to protection of biological resources in Sri Lanka

There is no comprehensive legal instrument relating to bio-piracy in Sri Lanka, thus this paper elaborates on the existing laws related to protection of biological resources, biodiversity of Sri Lanka.

The writer explores on the provisions of the Constitution 1978, Flora and Fauna Protection Ordinance No.2 of 1937, Intellectual Property Act No. 36 of 2003, Forest Ordinance No.16 of 1907, National Environmental Act No.47 of 1980, National Heritage and Wilderness Areas Act No.3 of 1988, Custom Ordinance No 17 of 1869 and its subsequent Amendments, Plant Protection Act No 35 of 1999 and Seed Act No 22 of 2003.

(1) The Constitution of Democratic, Socialist, Republic of Sri Lanka 1987

As stipulated in Article 27(14) of the Constitution, the State shall protect, preserve and improve the environment for the benefit of community and Article 28(f) states that, every person in Sri Lanka owes a duty to protect nature and conserve its riches. The supreme law of the country has laid down the provisions relating to the protection of environment and trying to open the eyes of the people regarding their duty towards the environment. These provisions under the Directive Principles provide some useful directions reminding the people’s duty towards the environment. It is well clear that the people of this country have moral obligation towards protecting the environment. As there is no legally binding obligation under the directive principles under Constitution of Sri Lanka, effectiveness and success of protecting the environment is highly debatable. The writer believes that inadequacy of legally enforceable mechanism under the Supreme Law of the country will encourage the offenders to commit crimes against the environment more and more.

Moreover, Article 14 guarantees that every citizen is entitled to the freedom of speech, freedom of peaceful assembly, freedom of association, freedom or form or join trade union etc. and the writer believes that these provisions will make good platform for the farmers, peasants, breeders, local community groups to raise their voices to protect the natural wealth and the writer thinks that human rights movements, educating the world through social medias

are some of the best ways to face the challenges of bio piracy.

(2) Flora and Fauna Protection Ordinance No.2 of 1937 and its subsequent Amendments

This Ordinance and its subsequent Amendments could be named as one of the core instruments relating to the protection of bio-diversity in Sri Lanka. The main objective of this written paper is protection of flora and fauna in reserves, sanctuaries and jungles in Sri Lanka. According to Section 42 of the Ordinance, it is illegal to remove, uproot or destroy, or cause any damage or injury to, any plant or sell or expose or offer for sale any plant under this Ordinance.

As stipulated in Section 3, it constraint the human beings from entering national reserve areas and barricade the access to the endemic and indigenous herbal plants or fauna.

Moreover, Section 4, strictly prohibits the access in to a strict Natural Reserve except official duties and for the purpose of scientific researches. In these circumstances a written permission should be obtained from the director. According to the Section 6, no person shall take, collect or remove any plant from National Reserves, obstructs persons by entering intermediate zone, state land within any sanctuary and prohibited collect, take or remove any plant from those sensitive areas.

Act No.22 of 2009 touches the offence bio piracy under Section 71(2)(f) in the following lines as all matters necessary for the regulation of access to the genetic

resources from fauna and flora indigenous to Sri Lanka and the revenue generated from such genetic resources. This provision limits the access to the genetic resources, endemic plants and thereby protects the biological wealth in our territory.

If there is an effective mechanism to regulate the access to genetic resources of Sri Lanka, no one could steal the natural wealth and no one could obtain monopolies over the natural resources illegally. The people, organisations, MNCs those who are willing to obtain access to genetic resources should have to reveal their identities and they should have to give their consent to certain conditions. These steps will arrange good flow of benefit sharing among the holders of genetic resources and the other groups of people who engages in the process of sharing the benefits.

(3) Intellectual Property Act No. 36 of 2003

As a signatory party to TRIPS agreement, Sri Lanka has a legally binding obligation to implement its provisions domestically. As a result of that, Sri Lanka has enacted Intellectual Property Act to protect the intellectual rights of its people. As stipulated in Section 62(3) (b) plants, animals and other micro-organism (other than transgenic-micro-organism and an essentially biological processes for the production of plants and animals other than non-biological and microbiological processes) shall not be patentable. Moreover, sub section (f) also stipulates that 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.

Violations of the provisions of the Act, any infringements of the rights of the holders may order damages, compensation and such other relief as the court may deem just and equitable under Section 170.

As stipulated in Section 181, any person who wilfully infringes the rights of any registered owner, assignee or licensee of a patent shall be guilty of an offence and shall be liable on conviction after trial before a Magistrate to fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment.

(4) Forest Ordinance No.16 of 1907 and its subsequent Amendments

Fitting to the provisions of the Ordinance and its Amendments it is very well evident that conservation, protection and sustainable management of the forest resources and utilization of forest produce the core objectives behind these legal instruments.

Section 6 of No.16 of 1907 stipulates that, any person who will fully strips off the bark or leaves from, or girdles, lops, taps, bums or otherwise damages, any tree shall be guilty of an offence and be liable for conviction. As stipulated in Section 21 of No.16 of 1907, the breach of any of the provisions of, or rules made under, this chapter shall constitute an offence punishable by a fine not exceeding one hundred rupees, or by imprisonment which may extend to six months.

In addition, Section 2 of No.30 of 1945 Act any person who fells, cuts, saws, converts, collects, removes or transports any trees or timber or collects, removes or trans-ports any forest produce or has in his possession custody or control any tree, timber or forest produce; shall be guilty of an offence and liable for conviction to imprisonment for a term which may extend to six months or to fine which may extend to five hundred rupees, or to both in addition to such compensation for damage done to the forest as the convicting court may direct to be paid. Such compensation when awarded shall be treated in all respects as a fine, shall be recoverable as such, and shall not exceed one amount of fine which such court has power to impose.

Concentrating on the Ordinance and its subsequent Amendments it is well clear that, no one can collect or remove any macro, micro or derivatives from any tree or plant and these hard binding laws support to reduce bio piracy issues in the country. Apparently, many changes have been visible in the Amendments to the Forest Ordinance and these gradual changes support to protect biological wealth from the pirates. Likewise, it is very clear that the legislature has broaden the definitions and punishments, has made the laws rigid tackle the issues.

(5) National Environmental Act No.47 of 1980

The main objective of the enactment is to establish a Central Environment Authority and to protect the environment.

As stipulated in Section 21 of the principal enactment ,the Authority shall recommend to the Minister a system of management

policies for rational exploitation of forest resources, regulation of the marketing of threatened forest resources, conservation of threatened species of flora, and the encouragement of citizen participation therewith to keep the country's forest resources at maximum productivity at all times.

(6) National Heritage and Wilderness Areas Act No.3 of 1988

This Act provides protection to the forests rich in biological diversities, unique ecosystems and genetic and natural resources.

According to Section 2, the core purposes of this instrument are preserving in their natural state, unique eco-systems, and genetic resources; or physical of National heritage and biological formations and precisely delineated areas wilderness which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation etc. Apparently, the provisions of this Act support to protect fauna and flora habitat in Sri Lanka from the bio pirates.

Section 3 of the Act, restricts the entry into National Heritage Wilderness Areas. Moreover, as per Section 4, no person in a National Heritage Area cut, remove, sell, shoot any plant/ forest produce.

As stipulated in Section 12 any person who acts in contravention of any provisions of this Act, or any regulation made there under shall be guilty of an offence and shall on conviction by a Magistrate be liable to a fine not less than two hundred rupees and not exceeding twenty thousand rupees or to

imprisonment of either description for a term which may extend to six months or to both such fine and imprisonment.

(7) Custom Ordinance No 17 of 1869 and its subsequent Amendments

Customs is one of the oldest administration departments in Sri Lanka and its Ordinance and other regulations govern the functions of the Customs. It is quite evident that this paper work also provides a fair support to avert bio piracy. According to the Section 12 of No. 83 of 1988, the prohibited and restricted items are laid down in Schedule B according to the Section 12 of No. 83 of 1988 and it has clearly stipulated that those items should not be imported or brought into exported or taken out of Sri Lanka. According to the Schedule dead or live animal or its parts, live fish (Prohibited species) , protected plants listed under the Fauna and Flora Protection Ordinance etc. should not be imported or brought into exported or taken out of Sri Lanka.

As stipulated in Section 130, every person who shall be concerned in exporting or taking out of Sri Lanka or attempting to export or take out of Sri Lanka any prohibited goods or any goods the exportation of which is restricted, shall in those circumstances either treble the value of the goods or be liable to a penalty of one hundred thousand rupees at the election of the Director General.

(8).Plant Protection Act No 35 of 1999 and Seed Act No 22 of 2003

As stipulated in Section 12 of the Plant Protection Act, the minister in charge has powers to make regulations restricting

transfer of plants, plant products or organisms from one locality in Sri Lanka to another. However, it is quite obvious that those regulations are not mandatory and making regulations to protect the plants, products of plants etc. from the green terrors are within the hands of the Minister.

Protection of new plant varieties could be named as one of the best practices in the world even though it is novel concept to Sri Lanka. Under Section 6 (h) of the Seeds Act has introduced a provision to protect the new plant varieties. As stipulated in the section, the National Seed Council should take appropriate measures to protect the new plant varieties.

Concluding Remarks

The researchers of the Western countries, the people attached to big companies hand some dollars on local people and then, local people sell biological resources to earn quick bucks. It is very clear that, the people engage in stealing the endemic plants, animals never interested on the natural resources, they engage in these types of misconducts just to earn money. Thus, the penalties imposed on the existing legislations are not making any impact on the culprits who are illegally using the biological resources as it is a big network and the penalties are not sufficient to stop them committing the same misconduct. The people who are part of those networks engage in same misconduct repeatedly to earn a quick buck. Though, Sri Lanka has sufficient paper work, its effectiveness is questionable.

Moreover, the writer believes that the traditional penalties are not adequate enough to bring the culprits before the

justice system. It is evident that, punishing one member of the networks would not prevent the others who are parts of the big networks from smuggling the biological resources and therefore, the writer suggests to deviate from the traditional sentencing policies and recommends to introduce new penal sanctions fitting to the modern necessities.

Conferring to the Immanuel Kant's theory of retributivism, punishment must always be inflicted upon the wrongdoer only because he/she has committed a crime and he has described punishment as being justified only when it is an immediate response to a wrong act. Focusing on the existing legal mechanism of Sri Lanka, it is quite obvious that most of the punishments are based on retributivism and the writer thinks that this theory has an effect of deterrence rather than restoring harm happened to the society. However, the writer believes that, this theory itself would not sufficient enough to tackle the issues relating to bio-piracy. The process of stealing the natural wealth may have linked with many networks and there may be a more than one individual connect to this business. Thus, inflicting punishment on one person never stops others from committing the same offence again and again.

Practically, all countries make use of transplanted laws such as laws relating to crimes against environment, crimes against humanity etc. As stated by the scholar AsankaPerera, the transplanted laws should be matched with the legal cultural background of the recipient State. In other words the transplanted laws should be adopted, adapted and adjusted fitting to the legal and cultural background of the

recipient country. “Drafting legislation suitable to a country is a specialised skill and it is of utmost importance to be concerned with how the social, economic or cultural conditions or attitudes are addressed in such legislation. Unfortunately, in Sri Lanka, legislators have overlooked these important factors when formulating the draft”. In accord with the perception of the scholar AsankaPerera, the writer recommends that, Sri Lankan legislature should have to consider the current changes in the world, agricultural system in the country, the rights of the local communities in the country.

The writer thinks that, understanding of the socio-cultural and ethical background of the legal system is essential when drafting legislations and the penalties should have to impose accordingly. Moreover, the writer considers the failures of the existing mechanism as major drawbacks to tackle the issues of bio-piracy in the country.

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UNIVERSAL FRANCHISE AND THE CIVIL SOCIETY'S ROLE IN PROTECTING DEMOCRACY (A STUDY OF SRI LANKAN POLITICAL CONTEXT)

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Introduction

Democracy literally means ‘rule by people’, though, in fact, only the elite class had the right to rule and participate. Up to now there is still no consensus exists on how to define democracy. There is merely the identification of the core elements which are legal equality, political freedom and rule of law. Hence, the lack of a unanimous definition of “democracy” leads to the diversified interpretation, implementation and gaps. In many countries, the definition of democracy has been contested and interpreted differently. Some believe that having merely an election is enough to be democratic while some believe that there are many more democratic values such as respect the minority, rule of law, political freedom and so forth in order to be considered as democratic.

Sri Lanka has been governed by three constitutions since independence. The first was rejected in the early 1970s as it was considered a colonial relic, a document that lacked legitimacy. The 1st Republican constitution of 1972 was heralded as autochthonous and therefore, more legitimate. We have enjoyed franchise since as far back as 1931. Unlike some of

her South Asian neighbours, Sri Lanka enjoyed uninterrupted democracy. However, especially since the 1980s, Sri Lankan democracy has gradually incorporated elements of authoritarianism into its fold. Since then politicians have become less and less accountable to their electorates, while corruption has become a kind of a new social contract. In the backdrop of patronage politics, elections have become less efficient in upholding and improving the quality of democracy. Issues such as minority rights, rights of various economic groups, rampant corruption, accountability etc. have always been the slogans of the parties in the opposition which, once in power, they ignore. In this context, this article critically analyzes the role of the Sri Lankan Civil Society contributed immensely to uphold the democratic fabric of South Asia’s oldest democracy.

Universal franchise is one of the most important human rights included in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It says that “Everyone has the right to take part in the government of his country, directly or through freely

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chosen representatives.”² The United Nations Declaration also proclaims that “the will of the people shall be the basis of the authority of government,”³ and adds that the will of people “shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁴

On the other hand, right to vote is the most important political right in any democratic society, livelihood or right to earn a living without which even franchise would be meaningless. However, we are living in a nation in which the constitution declares that ‘Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.’⁵

Franchise or the right to vote did not receive express recognition as a fundamental right in the Republican Constitution of 1972 or the Constitution of Sri Lanka. Although the franchise is not expressly included among the fundamental Rights enshrined in Chapter III of the Constitution of Sri Lanka, it is clearly recognized in Article 3 of the Constitution which deals with the Sovereignty of the people.⁶

In the time I’m writing this article I observe a complete change of attitude on the Democracy, Rule of Law and good governance within the executive presidency and also legislature. The Article 3 of the Constitution clearly says that the Sovereignty lies with the people of this Country and under Article 4 of the Constitution the Members of the Parliament represent and exercise our sovereignty in the legislature.⁷ Chapter XIV of the Constitution then goes on make detailed

² The Universal Declaration of Human Rights, Article 21 (1)

³ ibid, Article 21 (3)

⁴ ibid

⁵ ‘Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.’ Article 01, Sri Lankan Constitution 1978.

⁶ ‘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.’ Article 3 of the Constitution of Sri Lanka

⁷ ‘The Sovereignty of the people shall be exercised and enjoyed in the following manner

(a) The legislative power of the people shall be exercised by Parliament, consisting of elected representatives of the people and by the people at a referendum;

(b) The executive power of the people, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the people.....

(e) The franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.’, Article 4 of the Constitution of Sri Lanka

provisions regarding franchise and elections, and Chapter XIVA provides for the establishment of an independent Election Commission.

Electoral system, the Right to vote and the Representative Democracy

Democratic elections are widely recognized as a foundation of legitimate government. By allowing citizens to choose the manner in which they are governed, elections form the starting point for all other democratic institutions and practices. This inevitably makes an electoral system in a multi-ethnic and a multi-cultural society a critical component to ensure democratic principles.

Sri Lanka had experienced a number of elections held under the proportional representation system. From the elections so far held the proportional representation system, appears to be a more democratic system where the representation in parliament alone is concerned. But it had resulted in forming loose coalition Governments which would not last long. Moreover, over dependence on small parties, a majority of which are formed on communal lines would defeat the ultimate goal of achieving one nation, one Sri Lanka.

Since 1931, Sri Lanka has resorted to a whole range of electoral devices, single and multimember constituencies, weightage for rural areas, nominated seats for minorities

and proportionate system. Since independence, it has changed the structure of its democratic system from a Parliamentary one (1948-1977) to an Executive Presidency (since 1978). Almost all the changes were devised to cope with conflicting demands of its diverse population ever since its independence and the episodes of violence that erupted in different phases in its history.

At the time of transfer of power (1947-1948) Sri Lanka was a unique case in British Colonial history, when a colony seeking its independence already had an electorate based on universal suffrage. In fact, a detail examination of electoral systems was an integral part of the negotiations for the transfer of power. Then the Board of Ministers had to gain the support of the three quarters of all the members of the national legislature, the State Council in a situation where representatives of the Sinhalese Majority were insistent on territorial representation and the minorities had represented demanded for “balanced representation” which presupposed the creation of some form of communal electorate. The Ministers squared the circle by adopting an electoral structure based on the weightage in favor of the rural areas. The advantages of such scheme were many. It was acceptable to the majority Sinhalese because the communal representation was avoided.⁸

⁸ Welikala, Asanga and Edirisinghe, Rohan (2008) The Electoral Reforms Debate in Sri Lanka, Centre for Policy Alternatives, Colombo. Fonseka Bhavani; Jayawardena, Supipi and Raheem Mirak (2010) A brief commentary and

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The right to vote is not explicitly provided for in the Constitution in the chapter on fundamental rights. However, there are several references to the franchise, and the fact that voting has to be free, equal and by secret ballot.

Article 93 of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978) states that, ‘the voting for the election of the President of the Republic and of the members of Parliament and at every Referendum shall be free equal and by secret ballot’.

Election laws mean little in the absence of an independent, non-partisan and competent election authority. The election authority must be willing and able to apply the electoral law fairly, to use sanctions (and the power of persuasion) to deter violations of the law, and to competently administer the electoral process and to challenge any attempts to subvert that process. The Sri Lankan electoral system has, in recent years, been tainted by widespread corruption and malpractice. Though the election laws have been fashioned to ensure standards of freedom, fairness and legality, the electoral process has deteriorated to the extent that voter confidence in the whole electoral system has been endangered. Since 1947 the Department of Elections has been entrusted with the task of maintaining the neutrality of the election management mechanism.

[authoritieselections-amendment-bill-2010](#) /

Accessed in 17th February 2013

⁹ The Commissioner of Elections shall exercise, perform or discharge all such powers, duties or functions as may be conferred or imposed on or vested in him by the law for the time being

Article 103 of the Constitution provides for the appointment of the Commissioner of Elections. According to this section, the Commissioner of Elections shall be appointed by the President and would hold office during good behaviour. This is a wholly irregular provision as the appointment of the Commissioner by the President gives rise to a valid fear of partiality and a lack of independence on the part of the Commissioner. Article 104 of the Constitution⁹ states the Commissioner of Elections is responsible for the superintendence, direction and control of the preparation of accurate electoral registers annually and for the conduct of elections. The Election Commissioner has been subjected to considerable political pressure from political parties and government officials who seeking to interfere with the electoral process.

It was therefore not surprising that in several landmark decisions, the Supreme Court held that the right to vote was implicit in the freedom of speech and expression. The court has in a series of decisions, issued directions which have sought to uphold the right to vote, and the integrity of the electoral process.

However, this development is paralleled by a more restrained, legalistic approach that is being adopted by the courts when determining election petitions, which are the more familiar of the types of litigation

in force relating to elections to the office of President of the Republic and of Members of Parliament and to Referenda, or by any other written law.

relating to the electoral process. Indeed, this overly rigid approach has made it virtually impossible for a Petitioner alleging a breach of the election laws or the commission of malpractices or irregularities to succeed in these cases.

Athukorala v. Attorney General¹⁰

In this case it was strenuously argued that Article 4 (e) is not exhaustive of the manner in which the franchise is exercisable and included pradesha sabha elections even though not expressly mentioned in that article. The Supreme Court took a narrow view of Article 4 (e) and rejected this argument. The Court observed that,

“It would appear from the above provisions that having extended the Concept of Sovereignty by adding fundamental rights and the franchise, limited it to voting at the occasions referred to in Article 4 (e). The wider meaning of franchise which would include voting at other elections such as election of local bodies ...”¹¹

In the landmark decision of **Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of elections and others**¹² the question surfaced once again. This time in the context of provincial Council elections, the petitioner challenged in fundamental rights proceedings, the proclamation made by the president of Sri Lanka under section 2 of the public security ordinance bringing the provisions of part II of the ordinance into operation throughout Sri Lanka, as well as the emergency

Regulation made by the president under Section 5 of the ordinance had the legal effect of cancelling the date of the poll with respect to five provincial councils for which nominations had already closed.

In the much-publicized election petition case **Sirimavo Bandaranaike v Ranasinghe Premadasa and Chandananda De Silva**¹³ which challenged the election of President Premadasa at the presidential election of 1988, the interpretation of the law and the principles of law as clarified and laid down by the Supreme Court has made it extremely difficult for elections to be successfully challenged. The desirability and logic of this position needs to be questioned, especially in view of the recent affirmation of the right to vote and the interventions of the Supreme Court in the area of the franchise, particularly in the exercise of its fundamental rights jurisdiction under Articles 17 and 126 of the Constitution.

In many jurisdictions, the judiciary has acknowledged that in matters relating to the franchise, the courts have a special responsibility to guarantee the sanctity of the democratic process. The decisions of the Supreme Court of Sri Lanka on the right to vote may be viewed as being consistent with the Ely approach.

Sri Lankan Political context and the civil society's role in protecting Democracy

¹⁰ (1996) 1SLR 238

¹¹ (1996) 1SLR 238 to 242

¹² (1999) 1SLR 157

¹³ (1992) 2 SLR.1

Civil society and its institutions are playing a vital role in building and strengthening democracy and its institutions. In fact, it plays as an intermediate between state and the citizen and link these two institutions for good governance. However, it is very difficult to define the concept 'civil society' because of the different view of the concept. Civil society describes them altitude of associations, movements and groups where citizens organize to pursue shared objectives or common interests. The effective states are based on an evolving relationship between the state and the citizens. Civil society can make a significant difference in improving democracy and governance as investigators of state abuse, monitors of state institutions.

The importance of civil society lies in the capacity of its organizations to address the caring needs and functions of society. A strong civil society entails (a) the existence of rule of law conditions that effectively protect citizens from state arbitrariness, (b) the existence of strongly organized non-state interest groups capable of checking eventual abuse of power by those control the means of administration and coercion, (c) the existence of a balanced pluralism among civil society interests so that none can establish absolute domination.¹⁴

Democracy needs mechanisms for the civil society to express their interests and check the exercise of state power continuously.¹⁵

¹⁴[https://www.researchgate.net/publication/301285328 Civil Society Activism for Democracy and Peace-Building in Sri Lanka](https://www.researchgate.net/publication/301285328_Civil_Society_Activism_for_Democracy_and_Peace-Building_in_Sri_Lanka)

¹⁵ Diamond L. 1999. Developing Democracy: Toward Consolidation, JHU Press

As the Lankan experience has repeatedly indicated without free, fair and regular elections, regimes cannot be held accountable. However, just holding elections alone do not necessarily ensure an accountable democracy and rule of law. The ruling elites appear to have manipulated the judiciary and all other arms of government.¹⁶ It is essential therefore that the values of civil society need to go beyond narrow individual interests and grasp social interests as the norm. Even when democracy is established, civil society action is needed for keeping its quality.

Conclusion

The above analyze explains how the practice of Sri Lankan democracy has contributed towards the illiberal democracy over the past era and the role of the Sri Lankan civil society how contribute to uphold the liberal democratic character of good governance in the context. The electoral reforms in the Sri Lankan context have passed various milestones in its political history from pre-independent era, from a first-past-the post system to a proportionate representation to a mixed system. However, the challenges of representative democracy in a multi-ethnic, multi-religious state remains active for the policy makers. While the proposed system. Hence, it is for all the political parties to

¹⁶<http://www.freedomfromtorture.org/news-blogs/8786>

make the effort to demand to review the new law and suggest improvements considering this post-war window of opportunity to make positive contributions to legislative changes that will have significant implications for democracy and governance in Sri Lanka.

For that, Sri Lanka needs a fresh Constitution to overcome the crisis and maintaining and improving the liberal democratic character of good governance. For that we have embarked on an ambitious national project to adapt a new constitution designed to strengthen democracy, enthroned the rule of law, promote the integrity of the judicially and freedoms of all citizens and reach a just settlement of the issues that have divided the nation. The active participation of all the political parties and civil society gives cause for cautious optimism. Every country claims to have a constitution but majority of people in the world do not live under constitutional government. The immense challenge facing Sri Lanka is to achieve and maintain constitutional government. This cannot be done by politicians and officials. It needs also a supporting popular culture to which professional bodies, civil society organs and grass roots leadership can and must make critical contributions.

Civil society and its organizations are important in linking people with state and controlling state power. They are playing a vital role in building and strengthening democracy and its institutions. In fact, it plays as an intermediate between state and the citizen and link these two institutions for good governance. Sri Lankan democracy is yet to become more liberal, transparent, and institutionalized. Only civil society through its activity can engender the political pressure and power to push those who had been elected to bring about reform. Otherwise the cycle of violence, corruption, social inequity and ethnic scapegoating could again become the norm.

What is the main reason for the weakness of civil society in Sri Lanka is that the failure to build and integrate strong civil society in Sri Lanka, in fact, contemporary civil society and its organizations are fragmented in nature and deeply controlled by state power and donors. Then, how it can contribute or influence in democratization in a positive way, Therefore, it is necessary to rebuild or strengthen civil society organizations toward democracy and good governance in contemporary Sri Lanka.

RIGHT TO BE A PARENT IN SRI LANKA; ADOPTION, ABORTION, SURROGATION& ARTIFICIAL INSEMINATION.

Sularika Wickramatunge*

Introduction

Humans are yet another species living on Earth. Even though the civilization along with the development of skills and technology vary humans from other animals, the basic purpose of living beings remains the same; That is reproduction. The only preliminary way of becoming a parent is the process of natural reproduction. Yet, with the complicated lifestyles of mankind and the different forms which have been emerged to the concept of family, the way of becoming a parent no longer depends on the basic natural reproduction system.

Until the recent past the world recognized marriage as '*a union for life of one man and one woman*' (*Hyde v. Hyde*, [1866]). A marriage between a man and a woman, setting aside circumstantial health issues, allow them to start a family in the natural and the conservative way. The issue is the world no more remains conservative.

In the modern world marriages are no more heterosexual. Yet, there are heterosexual couples who are unable to have children due to medical reasons. Further, there are couples involved in homosexual relationships who are willing to be parents; there are couples compelled to avoid reproduction due to socially transmitting diseases (STD) yet desire to be parents and

have a family. There are couple who are in a living in relationship yet expect to start a family; further, there are independent singles who are willing to be single parents.

Therefore, it is clear that being a parent is not as simple as it used to be decades ago. The above-mentioned scenarios are very much common in the western society. Not only in the western society, our neighbour country India too has recognized many of the abovementioned situations thus has implemented laws to address them. Yet, Sri Lanka still being a self-enclosed society regarding many socially important legal matters, has successfully ignored addressing this prominent social need.

Right to be parent also known as the right to form a family has been identified by Article 16 of the Universal Declaration of Human Rights (1948). Similarly, 'the right of men and women of marriageable age to marry and to find a family' has been recognized by Article 23(2) of the International Covenant on Civil and Political Rights (1966). Article 8 of the European Convention on Human Rights (1953) and article 9 of European Union Charter of Fundamental Rights (2009) too have recognized the right to find a family as one of the most important rights of human beings several decades ago.

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Parenthood is a reciprocal process. It must be a responsibility as much as it should be a right. The responsibilities vest on parents are being monitored and governed by the laws and government bodies in Sri Lanka such as the Ministry of Women and Child Affairs and National Child Protection Authority.

Therefore it is important to identify the right to be a parent in Sri Lankan context in the light of adoption, abortion, surrogation - when only the womb is been surrogated, surrogation - when one partner of the intended parents is infertile therefore either the gamete of the mother or the gamete of the father is involved in the process and artificial insemination when a woman intends to become a single mother without a designated father.

The cultural beliefs of the Sri Lankan society have blocked most of the abovementioned options of becoming parents to an extent where majority of Sri Lankans who have been deprived of the opportunity of having a family due to medical or other circumstantial reasons do not even know that they have such wide options and most importantly they have a right as human beings to become a parent and form a family. It is very important to study the developments in the laws related to this topic in India as its judiciary has successfully upheld the liberty and human rights of its citizens despite being the largest conservative traditional hub in Asia.

Adoption

An adoption of a child involves a two- step judicial process where the rights of the biological parents towards the child are being terminated and new rights and obligations between the child and the

adoptive parents are being created. Adoption is a creation of parent – child relationship between individuals who do not biologically share the same bond. This process of adoption gives the child the rights, privileges and duties of a natural child and heir of the adoptive family (Adoption, 2003).

The common law governing adoption in Sri Lanka is the Adoption of Children Ordinance No. 24 of 1941. This Ordinance has been amended several times thereafter. Kandyan Law Ordinance No. 39 of 1938 and Thesawalamai Regulation No. 10 of 1806 govern the laws related to adoption under Kandyan law and Thesawalamai law respectively. Adoption is not recognized under the Muslim law of Sri Lanka. Yet, the Muslims can adopt a child under the common law, yet the adopted child is not entitled to success inheritance of the said parents (*Ghouse v. Ghouse, [1988]*).

The Adoption of Children Ordinance recognizes children under the age of fourteen as a child for the purpose of this Ordinance (s.30). According to the Sri Lankan ordinance generally an individual must make an application to adopt a child (s.2). If two people are intending to adopt the same child, they must be spouses to be qualified to adopt the child jointly (s.2). Further the Applicant must be at least twenty-five years old and he/she must be at least twenty-one years older than the adoptee (ss. 3[1][a], 3[1][b]).

The only legally recognized form of marriage in Sri Lanka is the heterosexual marriages. If a married couple decides to adopt a child and successfully meets the abovementioned requirements, they can apply to adopt a child and court will issue

the order of adoption upon receiving the consent of both spouses.

This clearly indicates that the couples who are in live in relationships are not allowed to jointly apply to adopt a child in Sri Lanka. It is arguable that one of the partners in the live-in relationship can apply for an adoption. This could raise many legal issues if the child is a girl. It is not an easy task for the intended father to adopt her as he must satisfy the courts that there are ‘justifiable special circumstances’ to adopt this child (s.3[2]). On the other hand, the intended mother can singlehandedly adopt a child. Yet, the issue here is the child will remain without a legal father and he/she will not receive succession rights of the intended father.

Reports regarding adoption cases filed by an individual with intention of becoming a single parent and/or a couple in a live in relationship who are intending to adopt a child or a parent who is diagnosed with a socially transmitting disease thus intending to adopt a child in Sri Lanka are not to be found. Further, since Sri Lanka does not recognize homosexual marriages before law, adopting children by such couples is a matter that is not even remotely foreseeable in near future, yet an address-worthy topic.

Independent singles who are willing to start a family by adopting a child and becoming a single parent must be encouraged in Sri Lanka. There are a lot of financially stable, successful, unmarried individuals in Sri Lanka who grow old without forming a family. The reason for them being prevented from having a family is the traditional belief system in Sri Lanka that makes people believe the only way of starting a family is marriage. This has resulted a generation of successful

individuals dying without an heir and support during old age and hundreds of children stuck at orphanages never having the opportunity to be a part of a family.

The right of an unmarried individual to adopt a child and form a family in Sri Lanka can be addressed under the existing adoption law of Sri Lanka. Therefore, what requires regarding that is the mental liberalism of independent individuals in Sri Lanka as the law has been opened for them since 1941.

India being one of the largest conservative countries in the world and as a country with a majority of young citizens has started moving forward with the requirements of the modern world and its young blood by implementing and updating necessary rules and regulations to address issues that concerns the current generation of the nation.

One of the earliest and most famous examples of single parenting by an unmarried individual is the Bollywood celebrity Sushmitha Sen stepping forward and adopting a child. This set an example for many individuals all around India and inspired them to follow her footstep.

The Juvenile Justice (Care and Protection of Children) Act, 2015 governs the law of adoption in India. The Central Adoption Resource Authority which comes under the Ministry of Women and Child Development is the authoritative body which handles adoptions regarding Indian children (CARA- Central Adoption Resource Authority, 2014). The Juvenile Justice Act, 2015 has set out eligibility criteria for prospective adoptive parents. This Act has created space to for singles and divorcees to adopt children upon

fulfilling the criteria set out by the Authority (s.57[3]). Similar to Sri Lanka, Indian law too requires a prospective parent to be at least twenty-five years of age. Yet, considering the nature of the society of India and protection of children the Act has prohibited single men from adopting girl children (s.57 [4]).

Abortion

Sri Lanka is considered as one of the strictest countries regarding the laws of abortion. Abortion is allowed in Sri Lanka only for the purpose of saving the life in good faith of a mother carrying a child. Except for that reason abortion is identified as a criminal offence under the Penal Code of the country (s.303).

According to the Penal Code of Sri Lanka any person causes a woman with child to miscarry except in good faith for the purpose of saving the woman's life is committing a criminal offence and shall be punished with imprisonment extend to three years or with fine or with both. In the explanation of section 303 the woman who causes a miscarriage herself too has been included within the meaning of the said section.

The Penal Code has further identified causing miscarriage without the consent of the woman, death of a woman caused by an act done with the intention of causing a miscarriage and an act done with the intention of preventing a child from being born as offences related abortion in Sri Lanka (ss. 304,305,306,307).

Sri Lankan Penal Code was enacted in 1883, more than a century ago. Proposals to amend the laws related to abortion to meet the needs of the modern society have been

brought up several times, especially in 1995 and 2013 which did not succeed. In 1995 the Ministry of Justice drafted a bill to present the parliament to amend the provisions of the Penal Code in order to relax the strict prohibition on the termination of pregnancy. It was proposed to de-criminalize abortion of pregnancy in cases of rape, incest and congenital abnormalities incompatible with life. Yet, the said proposal was withdrawn from the bill before it was presented to the parliament thus section 306 remained unamended.

In 2013 the Law Commission of Sri Lanka brought forward a proposal to amend the abovementioned rules and introduce 'medical termination of pregnancy' in order to expand the law related to abortion. According to section 3 of the proposed Medical Termination of Pregnancy (Special Provisions) Act three circumstances have been introduced under which medical termination of pregnancy must be allowed apart from the ground already exists under section 303 of the Penal Code. According to the proposed act a pregnancy caused by rape, statutory rape and foetal impairment have been introduced as grounds under which termination of pregnancy must be allowed (Law Commission of Sri Lanka, 2013). Unfortunately, this Bill too was not passed by the parliament of Sri Lanka.

Different jurisdictions around the world have identified eight grounds on which termination of pregnancy must be allowed. By 2013, 97 per cent of the countries in the world had permitted abortion for the purpose of saving a woman's life. Apart from that, preserving the physical health of a woman, preserving the mental health of a woman, pregnancy caused as a result of

rape or incest, foetal impairment, economic or social reasons and upon request are recognized as the other circumstances under which different countries of the world legally allow termination of pregnancy (Abortion policies and reproductive health around the world, 2014).

Therefore, it is evident that Sri Lanka has one of the strictest stands regarding the law of abortion compared to the other countries of the world. Yet, considering the grounds that have already been accepted by the rest of the world it can be argued that Sri Lanka needs to address this issue in a modern perspective without sticking with a centuries old Law and consider abortion in the perspective of women and having a child as a part of her right to be a parent as the birth of a child is equally a responsibility and a right.

Surrogation

Surrogacy can be defined as an agreement by which a woman agrees to get pregnant and deliver a child for another couple. There are two types of surrogacy, such as the traditional surrogacy and the gestational surrogacy. In traditional surrogacy the surrogate mother gets pregnant with the sperm of the husband of the intended couple with the understanding that the resulting child would be legally the child of the intended couple – sperm donor husband and his legally married wife (Surrogacy Law and Legal Definition, 2019).

On the other hand, in gestational surrogacy the sperm of a married man and the egg of his wife are artificially inseminated and the resulting embryo will be implanted in another woman's womb. A famous example for a gestational surrogacy is the

birth of the third son of the famous Bollywood celebrity ShahRukh Khan and his wife.

In Sri Lanka there are no legal provisions to regulate surrogacy. This does not mean surrogation does not take place in Sri Lanka. Many foreigners come to Sri Lanka seeking surrogate mothers as it has become a cheap destination for surrogacy (Abeyrathna, 2019). Such foreigners do not have to spend much money on medical treatments of the surrogate mothers in Sri Lanka as they would have to do in other countries. The silence in law regarding surrogacy in Sri Lanka is welcoming commercial surrogation as well. Therefore, it is essential to address this issue as it has already become a serious issue as human trafficking in countries like India and Bangladesh.

India to address the abovementioned issue enacted the Surrogacy (Regulation) Bill, 2019 which is a very much detailed piece of legislation. Section 4 of the said Act has set out the circumstances under which surrogation is allowed in India. According to that either or both members of the intended parents must be proven to suffer from infertility and the surrogation must take place without the involvement of a money consideration or commercial purpose. Further, under section 2 of the Act, a couple has been defined as a married couple thus India has blocked single parents and couples in live-in relationships the right to become parents by way of surrogation.

Human Fertilisation and Embryology Act, 2008 of the United Kingdom has recognized surrogacy and surrogacy agreements yet does not accept commercializing surrogation. Yet in the USA intended parents can a surrogate a fee

called as ‘inconvenience fee’ in addition to other expenses (Young, 2019).

Artificial Insemination

Artificial insemination is defined as a solution for infertility, impotence or as a way by which an unmarried woman can become pregnant. This has a reported history since 1884 in the USA and is generally done by injecting collected semen into the uterus of the woman under a physician’s supervision (Luetkemeyer and West, 2015).

There are two types of artificial insemination procedures that have been identified by medical practitioners. “A child born as a result of artificial insemination using the sperm of the intended father is referred as AIH while a child born as a result of artificial insemination using the sperm of a third-party donor is referred to as AID” (Artificial Insemination, 2020). The later procedure is mostly used in the western world with women who are intending to become single mothers. In the USA eighty thousand such procedures using sperm donors are performed each year, resulting in the birth of thirty thousand babies.

Yet, even in the USA the legitimacy of an AID child remains unanswered in matters where the intended mother of a married couple goes under AID process as the child born as a result of such procedure is not biologically related to the intended mothers’ husband. This clashes with the laws related to adultery therefore calls for new law enforcements (Radler, 1955).

Therefore, it is evident that even though artificial insemination is a great opportunity for those who are willing to become

parents, yet it comes with a lot of legal issues especially regarding the legitimacy of the child which can be sorted only by introducing new laws to address the said issues.

Conclusion

South Africa can be considered as one of the most progressive countries when it comes to laws related to alternative reproduction options. The Children’s Act, 2005 of South Africa has accepted artificial insemination, surrogacy, LGBT parenting rights and co-parenting allowing its citizens to enjoy their right to form a family in a wide space (Sperm Donor & Co-Parenting Laws in South Africa, 2020). This should be set as an example for the level of liberty people should have regarding being a parent as it can reduce the number of children who suffer in shelters.

Right to be a parent and form a family can be identified as yet another human right which most people are not even aware of. In Sri Lanka there are many married couples who are childless due to medical reasons and the only option they are aware of is adoption. Thus, having the conservative mind setup of needing to have a biological child of their own prevents them from adopting a child. This issue can be easily addressed if options like surrogation or artificial insemination is introduced to such couples.

Sri Lanka unlike India is still not mentally or socially prepared to accept single parenting, live-in relationships and homosexual marriages. Therefore, even the open minded people who are willing to be a parent in a non-conservative way are being deprived from their basic human right of being a parent and forming a family which

has been recognized by the International Conventions, as a result of the non-flexibility of the Sri Lankan society and law makers.

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THE APPLICABILITY OF DYING DEPOSITION IN CRIMINAL CASES

Aruni H Wijayath*

Introduction

Dying Declaration has based on maxim called “*Nemo moriturus praesumitur mentire*”; man will not meet his maker with a lie in his mouth. In ***R V Pike***¹ the court held that "when the person at the point of death and when every hope of this world is gone, the mind is induced to tell the truth and it is equal to the evidence given in a court of justice under an oath". When a person badly injured and near the door of death, is uttering facts about his death or any other circumstantial facts about the perpetrator is called “dying deposition/dying declaration”.

Dying deposition is not apiece of direct evidence and categorized under hearsay as the witness does not live anymore while the second person who heard the utterance of the deceased and give evidence in the courthouse. According to the English Law rules, hearsay evidence does not give any evidential value whether it is oral or written, facts in issue or relevant facts and are not admissible. Phipson says that “oral or written statements that are not parties or witnesses of the case is inadmissible to prove the truth”.² According to Cross “any other person's statements both verbal and

written except witness, unable to testify and inadmissible in the courthouse”³.

Dying Declarations in Sri Lankan Context

Hearsay evidence is inadmissible in Sri Lanka, though some exceptions. Section 32 of Evidence Ordinance of Sri Lanka is one of the exceptions to the hearsay rule. It is stated about a person who cannot called as a witness. This section provides 8 relevant facts and 4 types of persons. The 8 relevant facts are the statement, **written or verbal** of **relevant fact made by a person who is dead**, or who **cannot be found** or who is become **incapable of giving evidence** or **whose attendance cannot be procured without an amount of delay or expense** with **under circumstances of the case, appears to the court unreasonable**. Four types of persons can be found in section 32(1) of Evidence Ordinance. They are, when a **statement is made by a person as to the cause of his death**, or as to any **circumstances of the transaction**, which **resulted in his death** in cases in which cause of the **person's death come in to question**.

When applying the section 32(1) of Evidence Ordinance the declarant should not be an alive person and it is inadmissible

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¹*R V Pike C & P 1829,3:598*

² Phipson on the Law of Evidence,9th Edition, Sidney Lovell Phipson, London sweet & Maxwell,195

³ Cross and Tapper on Evidence,12th Edition, Colin Tapper

under the live declarant. In *Chandra Nath Roy V Nilmadhab Bhattacharjee*⁴ case, court held that if the statement made by several persons and one or few have died and rest are alive, the section is admissible.

In *Mendis V Paramaswamy*⁵ case, court held that "a dying declaration cannot be admissible unless it comes with very words of the deceased person".

According to section 32, the statement may be written or verbal. In *Alisandiris case*⁶, a dying child symbolized on his murder through signs to his father. In this matter court held that "verbal" words cover wide area and signs also categorized under "verbal".

In Section 32(1) it is stated: "dying declaration should comprise of the cause of death or circumstances of the transaction which resulted in death". In other words, the declaration has been made after the cause of death arise or the statement made before the deceased had any reason to expect to be killed? For this problem, an Indian case gave a clear answer. "In *Swami Case*⁷ the court stated that "before the cause of death occurs or before the deceased person had facts to foresight about his death, those are not important. The important thing is the statement must come out after the incident & deceased shall rate near-death & circumstances can only include the acts done when & where the death was caused".

When considering on English Law and Sri Lankan law, both of them are derived from the same legal principles. Even though the

applicability of principles are different due to court practices and circumstances of the facts of the cases. In English Law, the declarant should have been in danger of death and should get away from all the hopes in this world and should not have any hope of recovery. But in Sri Lankan law the dying depositions are relevant whether the person who made them was or was not at the time when they were made, under the expectation of death. In *King V Marshall Appuhamy*⁸, the deceased woman told her mother that the accused made her an improper suggestion two or three days before her death. Then accused stabbed her to death. The defence argued that the deceased declaration cannot admit as dying deposition as it did not contain any fact on her death. But the court held that it was having a nexus between the death and the declaration.

In England, dying depositions are admissible only in homicidal such as murder and manslaughter cases. But in Sri Lankan context, it is admissible not only for homicidal cases but for robbery and rape cases as death comes in to the question. In England, the deposition is not admissible other than the declarant, whereas in our law it is admissible not only to the declarant but also to other victims also. In *Samarakoon Banda Case*⁹ the accused charged with the murder of Kiribanda. Within the same transaction, the accused murdered Punchi Banda and deceased Punchi Banda gave a dying deposition divulging the way of approach of accused to the murder and approach of Kiribanda to the incident. The

⁴ 1898,26 Cal 236

⁵ 1958,62 NLR

⁶ 1936,38 NLR 256

⁷ 1939,1 all E.R 396

⁸ (1950) 51 NLR 272

⁹ (1943) 44 NLR 169

court admitted this deposition to the Kiribandas' murder also.

The English Law does not admit dying deposition of the child of tender years as the court thinks such tender year's child cannot understand the result of the deposition.

When considering the Sri Lankan context, dying deposition of a child is admissible. In Palaniyandi V State¹⁰ case Allas J held that: "if the child unable to understand the nature of an oath without affirmation or oath, the child's evidence shall not be inadmissible or invalidated. If the child declares the cause of his death and the court may satisfy his competency, it can be admissible".

Some factors are influenced by the admissibility of a dying deposition and these factors are developed with the case law.

(i)The death of the declarant shall happen before the legal action.

(ii) The deposition shall be mentioned about the cause of death of the declarant. In Herashmy Case¹¹, the deceased was assaulted and he was lying on the bed due to injuries for three months. Later, he was died due to Septicemia caused by bedsores. The court held that "the deceased statement made after assaulting cannot be admissible as dying deposition due to the distance of the death and assaulting". Furthermore, it can't be admitted as "circumstances of the transaction which resulted in his death"under Section 32(1) of Evidence Ordinance.

(iii)The informant shall be render the deposition in actual words, uttered by the declarant. In Sheela Sinharage V AG¹² case, illegal abortion was done by the accused and victim died due to high bleeding. Before death, the deceased made a statement to a doctor. When giving evidence in the Magistrate Court and High Court doctors' evidence was highly contradicted. The court held that "when a dying deposition comprised of contradiction and if the declaration unable to prove by independent evidence is not fit to convict the accused".

(iv)The statement shall be stated on the cause of death or any circumstances of the transaction which resulted in death.

(Marshall Appuhamy case¹³).In Sathasiwam Case¹⁴ the accused charged with the murder of his wife. Before her death, she sent a letter to the Inspector of Police to seek protection from the Police against her husband. The court held that "the letter cannot be admitted as a dying deposition as it was contained only the feeling of fear and uncertainty but not any circumstances of death".

(v)The admissibility of dying deposition based on the time it was made. In some instances, it was admitted after the cause of death arisen and in some case, it was admitted before the cause of death arisen. In Arunolis Perera case¹⁵ the deceased eloped in the previous night and later her dead body was found. Before her elopement, she made a statement to her daughter that she has planned to go to Rambukkana with the accused. The court did not admit that statement as a dying

¹⁰ (1972) 76 NLR 145

¹¹ (1946) 47 NLR 83

¹² (1985) I SLR 1

¹³ (1950) 51 NLR 272

¹⁴ (1953) 55 NLR 255

¹⁵ (1921) 23 NLR 225

deposition due to the distance between the statement and the death. Furthermore, the court held that "the cause and circumstances of death shall have a close relationship with the previous or subsequent transaction".

But in **Mudalihamys**' case¹⁶ the court interpreted section 32(1) flexibly and descriptively. In this case, the accused went to the jungle to collect bee honey and later deceased also followed him. Before going to the jungle, the deceased told his wife that he is going to the jungle as the accused asked his help for collecting honey. Few days later, deceased body was found and his statement made to his wife was admitted as a dying deposition. But in this case time gap does not concern with regard to the transaction.

(vi) To admit a dying depositing the death of the declarant shall be questionable. In **Livera V Abeywickrama** case¹⁷, a watcher was committed suicide inside a store and before the death, he addressed a letter to his master and stated, he was unable to protect the store from the theft. The court held that his letter is admissible as evidence for robbery but not for the death of watcher as he was committed suicide and his death was not questionable matter.

In **Aseervadan Nadar**¹⁸ case, the court held that "it is not compulsory to prove the dying deposition by independence evidence, but it is a duty of the judge to instruct and guide the jury on the poor evidential value of hearsay evidence."

Applicability of Dying Declaration in India

When considering the admissibility and relevancy of dying deposition in Indian Criminal law, they are adopting more logical and scientific way to testify the trustworthiness of the statement. Indian courts pay more attention to the declarant's mental condition at the time of the declaration had made. When the declarant makes the statement, his mind shall be in clear & fit condition. To testify his mental condition of the declarant, the doctor can supervise his condition & he may record the statement. A Magistrate also can record the statement or any other Public Servant who can testify the mental condition of the declarant while recording the statement. But Indian courts discourage Police Officer to record such statement, but in a difficult situation, the police officer can record the statement with the signatures of witnesses who present at that time.¹⁹ If the declarant is an imbecile, tender aged person the dying declaration is incompetent to testify.²⁰ The statement makes under any influence of the Police Officer or somebody else it became suspicious & should corroborate in the courthouse. In any case, more than one declaration had made by the same declarant, the credibility of the declaration becomes weaker.

Declaration of a burnt victim, must handle with care because the *compos mentis* (clear mind) of the victim may be affected by the burns or treatment. Therefore it is a

¹⁶ (1946) 47 NLR 139

¹⁷ (1923) 25 NLR 1

¹⁸ (1950) 51 NLR 322

¹⁹ *N Ram V State* Air 1988 Sc 912

²⁰ *R V Pike C& P* 1829,3;598

compulsory requirement to safely examine the mental condition of the declarant²¹.

A dying declaration must comprise of all the outcome from the declarant and it should be written in real words that used by the declarant. Question& answers should minimize, except in a difficult verbal condition of the patient.

First information cannot be treated as a dying declaration if the patient in the hospital for more than 8 days²². In a suicidal case, a letter or any statement recorded by the declarant treated as a dying declaration & it is admissible in courthouse²³. Dying declaration cannot be cross-examined hence the recorder should be more attentiveness regarding the mental condition of the declarant²⁴. The original declaration needs to be sent to court & certified copy must keep as a secondary document.

Comparison of Dying Deposition of India and Sri Lanka

In India, most of the time the courts pay more attention to the declarant's mental condition at the time of declaration has made to testify whether he made the declaration in a fit mind. Whenever any declarant who is hospitalized and ready to make a declaration regarding the cause of the death or any information regarding his death²⁵, the courts order to supervise the process by doctors or qualified person

except the police officers. But in Sri Lanka, there is no any legal provision to record such statement. In India, Police officers are discouraged because of the declarant should deliver his declaration in a free mind & free environment and the presence of such officer may indirectly influence the free mind of the declarant²⁶. In India, a special procedure has been maintained to categorize the declarants based on their mental condition & directing how to record a declaration²⁷. As said by Chandrashekhar, through the case law, it has introduced various developments in relation to dying declaration. For example, when there are two declarations from one declarant, it gives proper guidance to the court how to apply such declaration to the courthouse to examine the evidentiary value of such evidence, method of recording declarations, get rid of question & answer type statements etc.

When comparing the applicability of dying declaration in Sri Lanka & India, both jurisdictions try to protect the rights of the declarant. While studying the previous judgments it could be identified that Sri Lankan courts admit declarations without any arguments or fewer arguments. But at present, our courts apply various principles while admitting the declarations as there is no cross-examination process to measure the credibility of such evidence. For example in Darmawansa Silva V Republic of Sri Lanka CA 1981, the court held that

²¹ Gupta BD, Jani CB, State of Compos mentis in relation to dying declaration in burnt patients JIMFM 2004,25(4)133-136

²².State of Panjab V Kikar Singh 2002 (30 RCR)(criminal)568

²³State V Maregowda (2002)(1)RCR (Criminal)376

²⁴ State of Karnataka V Shariff 2003 CAR 219-229

²⁵ Gupta BD, Jani CB, State of Compos mentis in relation to dying declaration in burnt patients JIMFM 2004,25(4)133-136

²⁶ ibid

²⁷ ibid

"not inferior evidence but it is wrong to give it added sanctity.No cross-examination process for co-defendants". In **Ranjith V State** CA 98/96 -2000 court held that "ordinarily it is not safe to base a conviction for murder solely upon a dying declaration".

Through these recent judgments, it can be identified that the Sri Lankan courts reluctant to apply dying depositions solely and other circumstantial evidence also applied when necessary.

Admissibility of Dying Declaration of the United States of America

The USA is a country where the adversarial system is applied and the applicability of dying depositions also differs from state to state in the USA.

In the State of Louisiana, dying deposition applied in the courthouse for two reasons. The declarant be unavailable for testimony at the trial and public necessity to preventing the lives of the community by bringing manslaughter to the justice²⁸. In **State V Wilson**²⁹ case Louisiana Supreme Court held that "dying declaration was admissible even though it was not made by the victim whose death was the subject of the charge".

When considering the dying declaration in the courthouse, the trustworthiness of the statement is very important especially the actual physical condition and the mental condition of the declarant at the time of delivering the statement. In **State V**

²⁸McNamara T, Dying Declaration in Louisiana Law,

²⁹ 23 CA. ANN 558 (1870)

³⁰ 36 LA Ann 920 (1884)

³¹ 165 LA 163 (1928)

Molissee³⁰ case, the court held that "the declarant must believe that his death is immediate and impending" and in **State V Moore**³¹ it was held that "the dying deposition is excluded on the ground that the declarant thought he would survive for another few months. In other words, the declarant should believe that his death is immediate". Further Infancy³², Insanity³³, Irrationality³⁴also could be treated as the ground of exclusions at the time of declaration.

Section 90 of Evidence Code of Florida mentions the provisions in relation to hearsay rule and dying declaration. Section 90. 802 state that hearsay rule is inadmissible in the State of Florida. It states as follows "except as provided by statute hearsay evidence inadmissible". Furthermore, it denies the defendant an opportunity to cross-examine the declarant. In section 90.804 it stated that the dying declaration is an exception to hearsay. The statement under the belief of impending death is called "a dying declaration" in Florida. In **Malone V State**³⁵the Supreme Court of Florida stated that "the declarant must show the satisfaction to the court, it is not essential to consider the deceased in the gangrenous situation, but he must believe that he has not any hope of recovery, then the court determines the admissibility of the declaration". But the court never bound to admit the declaration after the death of the declarant.

In case **Bruton V US**³⁶ the court held that "dying declaration attack the right of cross-

³² State V Blount 124 LA 202 (1909)

³³ State V Rankins 211 LA (1947)

³⁴ ibid

³⁵ 72 SO 415 (1916)

³⁶ 391 US 123

examination of other co-defendants. It has a doubt on the reliability and constitutionality when admitting in the courthouse".

Professor Wigmore(Mc Namara,1962 pg 162) stated that "there is no third person who saw the incident to give evidence as an eye witness, the only person is deceased one and he tried to get rid of them, no cross-examination process going on".

In *Cummings V Villinois*³⁷ the court held that the dying declaration is a departure to the general rule of exclusion hearsay. In *Wright V Littler*³⁸ case Lord Mansfield admitted a dying declaration in an action of ejectment. Further Professor Wigmore (Mc Namara,1962 pg 162) mentioned that dying declaration could be admitted to wrongful death actions³⁹, negligence ⁴⁰, and actions to revoke the licence of a physician who performed a criminal abortion resulting death⁴¹.

In the state of Colorado and Oregon in the USA apply dying declaration for their both civil and criminal cases. According to Fordham Law Review (1970), the trustworthiness of dying declaration can argue based on some grounds. eg. Deceased memory may lose and weaken due to pain and agony of wounds, surrounded by his family and friends is apt to state only his side and his story of the affair, distracting and confusion about the witness to whom it is related and does not usually seek to elicit unfavourable factors to the declarant. According to USA scholars (Mc Namara,1962), a dying declaration has less

evidentiary value and weight, therefore while admitting it as an evidence, the judges have to be more skillful to strike a balance between victim's and accused rights.

Conclusion

Admissibility of dying deposition is varying from jurisdiction to jurisdiction. This practice comes from the facts of the case and evidence, presented in the courthouse. Countries like India and Sri Lanka, pay more attention to protect the victim's rights. While analyzing former judgments it could be identified that the courts admitted the declarations without any arguments or fewer arguments. But at the present, the courts are trying to apply the best evidence rule. Therefore the hearsay evidence such as dying declarations gain less value compared with direct evidence. While analyzing recent judgments in Sri Lanka such as *Dharmawansa Silva V Republic of Sri Lanka*⁴²and *Ranjith V State*⁴³,it could be identified that the Sri Lankan courts do not solely depend on dying declaration and try to strike a balance between both victim's and accused rights. Whereas the USA reluctant to admit the dying deposition as they are hearsay evidence and unable to corroborate by independent evidence and cross-examine. In the famous case of *State V Houser*⁴⁴ the court held that "is the dying man who is speaking through him whose evidence is to have weight and efficacy sufficient to take prisoner's life".

³⁷ R.R 364 (1954)

³⁸ 97 (Eng) KB 1761

³⁹ Willims V Randolph (1921)

⁴⁰ Stevens V Stevens (1959)

⁴¹ State ex rel Sorensen V Lake 121 NEB 331 (1931)

⁴² CA 1981

⁴³ CA 98/96-2000

⁴⁴ 26 MO 431(1858)

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PRIVACY AS A RIGHT: IS SRI LANKA THERE YET?

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Invasion of personal privacy became a more frequently and widely discussed topic in Sri Lanka, in the aftermath of the Easter Sunday attacks in 2019, as well as during the curfew lockdown and quarantine process that took place during the outbreak of the CoVid 19 pandemic in 2020. Officials and media entering into private premises, video recording the premises and the inhabitants and their private lives, and video recording persons in public, at times disregarding their protest, was harshly criticized by the general public as well as responsible professionals, claiming such acts to be unacceptable invasions of privacy. In this matter, legal professionals were consulted by the citizens with regard to the legal ramifications of acts of this nature, that are undoubtedly indicate *aprima facie* notion of breach of privacy. Hence, it is worthwhile to investigate how the breach of a person's privacy can be brought within the purview of the existing legal framework in Sri Lanka. This paper intends to review as well as discuss on the legal background in Sri Lanka regarding the privacy of an individual from the citizen's perspective, making necessary comparisons and references to the foreign and international jurisdictions in terms of privacy, proposing necessary reforms to the legal system in Sri Lanka.

What is privacy? Why is it important to the citizen?

Privacy, regardless of the difficulty to define specifically, is defined in terms of its lexical meaning as “the state of being alone and not watched or interrupted by other people” and “the state of being free from the attention of the public”². This meaning has also been agreed by the American Attorney Samuel D. Warren and Justice Louis.D. Brandies, in their famous Harvard Law Review article, “The Right to Privacy” in 1891; right to privacy is “the right to be let alone”³. Nevertheless, later, more pragmatic and broader definitions of privacy have been given by certain American academics. Professor Alan Westin, offering a wider definition, states that privacy is “the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behaviour to others”, which Westin simplifies in his later work as “the claim of an individual to determine what information about himself or herself should be known to others”⁴. Professor Charles Fried defines privacy as “the control we have over information about ourselves”⁵, whereas Professor Tom Gerety interprets privacy as the “control over or the autonomy of the intimacies of personal

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²Lea and Bradbery, 2020

³Warren, S. D. and Brandeis, L.D., 1890

⁴Westin, A.F., 1967; Westin A.F., 2003

⁵Fried, C., 1968

identity”⁶. A collective reading of the above definitions substantiate, although not perfect and holistic, a comprehensive and a workable definition as to what privacy is; an individual’s liberty to decide and select as to whom, as to what and as to what extent that particular individual’s personal information – which may include but not limited to views, ideas, opinions, feelings, behavior, practices, beliefs, attitudes, knowledge, likes and dislikes – should be made available to or accessible to another individual or many individuals.

The right to privacy is, in many ways, incontestably linked with personal freedom and liberty. Professor Edward Bloustein emphasizes that “intrusion into privacy has a close connection with personhood, individuality and human dignity”⁷. Hence, breach of a person’s right to privacy undeniably deprives the person of enjoying his liberty; for instance, tapping a person’s telephone or video recording a person’s behavior without the consent of the person may, in term of the fundamental rights, breach the person’s right to movement as well as his freedom of speech and expression, association as well as the freedom of thought or consciousness and many of his other rights as a human. Therefore, it is essential that an individual’s private information, such as beliefs, views, knowledge and feelings remain draped by the veil of privacy in order for an individual to maintain his dignity, reputation and conscience which constitutes essentials of individual freedom.

Privacy has been subdivided into seven types⁸ by Rachel L. Finn, Michael Friedewald, David Wright; i.e. a) privacy of the person, which is the right to keep body-functions and body characteristics private and disclosed, b) privacy of behaviour and action, which includes the right to sexual inclinations, beliefs, habits, religious and political views etc. disclosed, c) privacy of communication which covers the right to communications such as conversations, telephone conversations, mails and like communications without being intercepted, d) privacy of data and image, which focuses on the right to control accessibility and availability of to an individual’s data and information e) privacy of thoughts and feelings, which covers an individual’s right to keep his/her thoughts and feelings private, confidential and disclosed, f) privacy of location and space, which represents the right to move and stay in a public, semi-public or private space without being identified, tracked or monitored and g) privacy of association (including group privacy), which is the right to associate whoever a particular individual prefers without being monitored or tracked⁹. The types discussed in these subdivisions spotlight different stages and aspects of an individual’s life, emphasizing the fact that the right to all types of privacy is essential for a person to live a life with freedom and dignity. Hence, the importance of privacy being recognized as a right has been stressed in many instances.

⁶Gerety, T., 1977

⁷Bloustein, E. J., 1964

⁸ Rachel L. Finn, Michael Friedewald, David Wright extends the four types of privacy suggested by Roger Clarke,

which are Privacy of the person, privacy of personal behaviour, privacy of personal communications and privacy of personal data.

⁹Finn, R., Friedewald, M. and Wright, D., 2013

Recognition of privacy as a legal right in different jurisdictions

Accepting privacy as an individual's right, the *Universal Declaration of Human Rights* (UDHR) 1948, in Article 12 recognizes privacy, stating that;

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks"¹⁰. Many legal systems in the world have made necessary legislative advancements to recognize privacy as a right and legislatively buttress that right. In addition, judicial decisions have also made a significant contribution to establish fundamental rights,

and recognized the right of privacy in the international arena.

In the United States, although the constitution does not explicitly and expressly establish the right to privacy, several legislations, judicial decisions and constitutional interpretations have firmly established privacy as a right. In several matters, including National Association for the Advancement of Colored People v. Alabama¹¹, Griswold v. Connecticut¹² and Katz v. United States¹³, the Supreme Court

of the United States has recognized that Amendment I, Amendment III and Amendment IV to the United States Constitution, respectively, have implicitly recognized the right to privacy. In addition, legislation such as *US Privacy Act of 1974*, *Children's Online Privacy Protection Act 1988* and the *Federal Wiretap Act of 1968*¹⁴, *inter alia*, recognizes and safeguards the privacy of personal information, information relating to children and communications.

In terms of delictual actions, William Prosser identifies that under the invasion of privacy a) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs, b) public disclosure of embarrassing private facts about the plaintiff, c) publicity which places the plaintiff in a false light in the public eye and d) appropriation, for the defendant's advantage, of the plaintiff's name or likeness are the most common causes of action that can be maintained under the modern US tort law¹⁵. In Cason v. Baskin¹⁶, the Supreme Court of Florida recognized that an action can be maintained for the invasion of privacy (invasion of privacy of solitude and seclusion) as a result of the personal life of the plaintiff being portrayed in a book published by an author.

In the United Kingdom, *The Human Rights Act of 1998* incorporates the privacy rights set out in the Article 8(1) and 8 (2) of the

¹⁰Universal Declaration of Human Rights, Article 12, 1948

¹¹ 357 U.S. 449 (1958)

¹² 381 U.S. 479 (1965)

¹³389 U.S. 347 (1967)

¹⁴Originally passed as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, of which the capacity

and jurisdiction was later extended by The Electronic Communications Privacy Act of 1986

¹⁵Prosser, W., 1960

¹⁶ 20 So. 2d 243 (Fla. 1944)

European Convention on Human Rights, which recognizes everybody's right to private and family life, home and correspondence, and that such right cannot be interfered by any a public authority, except in accordance with the law. Provisions of this Act has been recognized in Campbell v. Mirror Group Newspapers Ltd¹⁷ and Venables and Thompson v. News Group Newspapers¹⁸ by the House of Lords and Queen's Bench Division, respectively, as safeguards to the rights of privacy.

As an Asian country, India has recently made significant advancements in the legal position of privacy. The Supreme Court of India, in 2017 in the matter of Justice K.S. Puttaswamy (Retd) v. Union of India¹⁹, through a unanimous decision of a nine-judge bench, recognized that "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21²⁰ and as a part of the freedoms guaranteed by Part III of the Constitution". This decision overruled the holdings of the previous case Kharak Singh v The State of Uttar Pradesh²¹, which held that the right to privacy is not protected by the Constitution of India. The holding of Justice K.S. Puttaswamy (Retd) v. Union of India was immediately applied in Navtej Singh Johar & Ors. v. Union of India²²(2018)in terms of preserving the privacy rights in terms of sexual preferences; a five-judge bench of the

Supreme Court of India delivered a unanimous judgment and pronounced that criminalizing consensual private sexual conduct between adults of the same sex is unconstitutional. In the same year, in Joseph Shine v. Union of India²³ a five-judge-bench a five-judge bench of the Supreme Court of India unanimously decided that Section 497 of the Penal Code of India, which pronounces adultery as an offense, is unconstitutional and a violation of the right to privacy recognized by the Constitution, as pronounced in Justice K.S. Puttaswamy case.

Moreover, *The Information Technology Act* of 2000 (India) amended by *The Information Technology (Amendment) Act* of 2008 ensures that reasonable security practices and measures are taken in terms of sensitive personal data or information²⁴, and an imprisonment of three years and/or a fine not more than Rs. 500,000 is imposed for 'wrongful loss or wrongful gain', by disclosing personal information of an individual during the services performed under the terms of lawful contract²⁵. In addition, the proposed *Personal Data Protection Bill of 2019*, as the preamble suggests, intends "to provide for the protection of the privacy of individuals relating to their personal data..., protect the rights of individuals whose personal data are processed..., lay down norms for social media intermediary..., [provide] remedies for unauthorized and harmful processing, and establish a Data Protection Authority of

¹⁷ (2002) EWCA Civ 1373

¹⁸ [2001] 1 All ER 908

¹⁹ Writ petition (Civil) No. 494 of 2012

²⁰ Article 21 of the Constitution of India: "Protection of life and personal liberty No person shall be deprived of his

life or personal liberty except according to procedure established by law"

²¹ AIR 1963 (SC) 1295

²² W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

²³ W.P(Criminal) No. 194 of 2017

²⁴ Section 43A of the Information Technology (Amendment) Act of 2008

²⁵ Section 72A of the Information Technology (Amendment) Act of 2008

India for the said purposes”²⁶. The most noticeable feature in privacy-related laws in India is the fact that, just as same as in the United States, the Supreme Court has played a decisive and pivotal role in being judicious, foresightedand innovative, without exceeding, disregarding or neglecting the limits of the Constitution.

Recognition of privacy as a legal right in Sri Lanka

The Right to Information Act No. 12 of 2016 provides some form of safeguard against the information of an individual being disclosed under the Act. Section 5 (1) (a) of the Act states that where;

the information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure,

access to such information under the Act can be denied. Furthermore, Section 5 (1) (e) enunciate that if;

the information could lead to the disclosure of any medical records relating to any person unless such person has consented in writing to such disclosure,

the request made under the provisions of the Act for such information can be denied. Moreover, Section 5 (1) (g) states that information related to a fiduciary

relationship can be denied. Compared to the pre-2016 legal position on the privacy of information,*the Right to Information Act No. 12 of 2016* is unquestionably a positive advancement towards recognizing the right of privacy, regardless of the fact that it applies to information related matters of public authorities²⁷.

The same version of the right to information, introduced to the Constitution of Sri Lanka by the *19th Amendment to the Constitution* in March 2015²⁸, inserting Article 14Ato the Constitution,recognizes that access to information can be denied in the light of, *inter alia*, “the reputation or the rights of others [and] privacy”, which read collectively with the *Right to Information Act* amounts to a safeguard to the right to privacy, as well as an instance, or probably the first instance, of recognizing privacy as a legally enforceable, even though within a limited capacity.

Furthermore, Article 13 of the Constitution, in a very limited capacity, safe-guards personal liberty but it is applicable only in the matters of attest. However, the Constitution of Sri Lanka does not contain any provisions that expressly recognize privacy as a right, except in the above-mentioned instances. Nevertheless, the Court of Appeal of Sri Lanka, in *Sinha Ratnatunga v. The State*²⁹, has recognized that freedom of expression, provided for by Article 14 (1) (a) of the Constitution, is not a license to violate the individual privacy. In this matter, the accused-appellant, the Editor of the SundayTimes Newspaper was indicted before the High Court of Colombo,

²⁶ Personal Data Protection Bill of 2019

²⁷ Section 3 of the Right to information Act No. 12 of 2016

²⁸ Section 2 of the 19th Amendment to the Constitution

²⁹ (2001) 2 SLR 172

under two counts, namely, violation of Section 479 and 480 of the *Penal Code*, i.e. defamation, read with Section 15 of the *Sri Lanka Press Council Law No 5 of 1973*, i.e. criminal publications, by publishing an article that defamed Her Excellency the President of Sri Lanka at that time. The accused-appellant, who was found guilty on both counts by the High Court of Colombo appealed against the particular decision. In this matter, dismissing the appeal, Hector Yapa J stressed on the fact that;

to invade his privacy is to assail [a person's] integrity as a human being and thereby deny him his right to remain in society as a human being with human dignity.

and stated that;

what the press must do is to make us wiser, fuller, surer, and sweeter than we are. The press should not think they are free to invade the privacy of individuals in the exercise of the constitutional right to freedom of speech and expression merely because the right to privacy is not declared a fundamental right of the individual

emphasizing the fact that;

The press should not seek under the cover of exercising its freedom of speech and expression make unwarranted incursions into the private domain of individuals and thereby destroy his right to privacy. Public figures are no exception.

Even a public figure is entitled to a reasonable measure of privacy

This decision of the Court of Appeal of Sri Lanka is significant, as the holding of this matter once again affirms that the right to privacy should be positioned as a right that is equivalent to fundamental rights. However, in the light of the Supreme Court's final appellate jurisdiction³⁰, sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution³¹ and constitutional matters³², and fundamental rights jurisdiction³³, whether the decision in *Sinha Ratnatunga case* will have a lasting and landmark effect on recognizing privacy as a right is questionable. Similarly, as the *Penal Code (Amendment) Act No 12 of 2002* and the *Press Council (Amendment) Act No 13 of 2002* repealed the provisions that made defamation a criminal offense, currently, only civil actions are available as a remedy for defamation. Nevertheless, the rationale and the argument of the judges of the Court of Appeal cannot be neglected, and they possess the potential for future decisions in furthering the rights of privacy.

In criminal law, trespass, as laid down in Section 427 states, *inter alia*, that

whoever enters into or upon property in the occupation of another with intent ... to intimidate, insult, or any person in occupation of such property, or having lawfully entered into or upon such property unlawfully remains there with intent

³⁰ Article 118 (c) of the Constitution of Sri Lanka

³¹ Article 125 of the Constitution of Sri Lanka

³² Article 118 (a) of the Constitution of Sri Lanka

³³ Article 118 (a), Article 126 (1) and Article 17 of the Constitution of Sri Lanka

thereby to intimidate, insult, or annoy any such person, ...is said to commit "criminal trespass".

It should be noted that the intention of insulting, annoying by entering premises, which clearly constitute a breach or invasion of privacy, has been recognized as an offense by the Penal Code of Sri Lanka; another potential legal provision that can be creatively and innovatively interpreted to broaden the recognition given to the right of privacy in Sri Lanka.

Moreover, in terms of civil law, defamation influenced by the Roman-Dutch Law concept of *actio injuriarum*, is also a remedy for the losses or damages to an individual's dignity and reputation. In a matter of defamation, the statement being defamatory, the statement being referred to the plaintiff, the statement being published and the *animus injuriandior* the wrongful intent of the defendant are essential elements that constitute defamation, as well as to build a strong and successful case of defamation. A remedy against a defamatory statement too can be regarded as a protection against the breach of privacy, since revealing personal information, views, beliefs, sexual orientations and much other private information can cause considerable harm to the image, profession, character, dignity, reputation and several other aspects of an individual's private life; an action against such a defamatory revelation or publication of such information to injure an individual's character may, at least to a certain extent, safeguard the right of privacy.

Discussion

In terms of recognizing privacy as a legally enforceable right, Sri Lanka is undoubtedly

lagging far behind many of the other contemporary jurisdictions, particularly those of the United States, United Kingdom and India, in which privacy is recognized, enforced and preserved both constitutionally and through numerous legislations. In comparison, the reach of Sri Lanka in safeguarding privacy rights has reached not beyond the *Right to Information Act* and the introduction of right to information as a fundamental right by the *19th Amendment to the Constitution*, (Article 14A of the Constitution) in terms of non-disclosure of information. Both the Act and the Article applies to public officials and therefore its applicability is limited. Moreover, in terms of collection, processing, storing and utilizing such information, both the above provisions are silent. Hence, although the Act and the Article serve their best in terms of the right to information and transparency of information, concerning the privacy, these two provisions do not make a significant impact.

Defamation, irrespective of it being reduced to a delictual offense from the pre-2002 state of criminal offense, is also a 'long shot arrow' to the right to privacy, as an action on defamation required, *inter alia*, the particular defamation being published and proving the *animus injuriandi* or the wrongful intent of the defendant; somewhat similar to *mens rea* in criminal law. If particular information is collected but not published or, even when such information is published cloaked by the concept of 'public interest' or 'social responsibility' – which are regarded as exceptions in Section 5 (1) (a) of the *Right to Information Act* – it is very likely that the component of *animus injuriandi* not being proved. Hence, the matter would have no substantial

grounds to continue under defamation. Similarly, as the need of the particular defamatory statement to be in published form hinders most of the defamation matter; if a statement is transmitted as ‘gossip’ or in any other verbal form, or even when the document is published and the publisher is unknown, in such scenarios, even if the victim of defamation identifies who was privy to such information or who held such information, maintaining a defamatory action is practically impossible. Moreover, defamation cannot be constituted against collecting or storing such personal data in a private and unpublished capacity; no action is available for collecting personal data using electronic devices such as audio and video recorders, CCTV cameras and social media with the intent of defaming the particular person in future or simply to annoy the person by invading privacy. Criminal trespass covers only a limited range of scenarios in which the offender is within the limits of the premises of the occupant. In terms of invading the privacy of an individual by a person or a non-state body, in or from a public place, the existing Sri Lankan legal provisions are insufficient to control or remedy such invasions of privacy, and to safeguard the individuals’ right to privacy.

Another critical invasion of privacy that is indirectly provided for by law, ironically, is the Sections 18 (1) (i), (ii) of the *Computer Crimes Act No 24 of 2007*, which allows an expert or a police officer to obtain any information in the possession of any service provider and intercept any wire or electronic communication including subscriber information and traffic data, at

any stage of such communication, for an investigation under the Act, under the authority of a warrant issued in that behalf by a Magistrate. On the contrary, Section 18 (2) provides that police officer may exercise all or any of the powers referred to in Sections 18 (1) (i) and (ii) without a warrant if the investigation needs to be conducted urgently³⁴, and in case of a likelihood of the evidence being lost, destroyed, modified or rendered inaccessible³⁵, and when there is a need to maintain confidentiality regarding the investigation. What is questionable about Section 18(2) of the Act is “who decides “urgency” and the need for a warrant, and under what circumstance should it take place?”, on which the Act is silent. In a matter under the Act, if the police obtain a warrant after the interruption of the communication, the individual whose privacy was invaded has no remedy or relief whatsoever regarding the invasion of privacy of communications. Hence, in a time and setting in which the right to privacy should actually be safeguarded and strengthened these sections of the Act, doing the contrary, tacitly provides for the invasion of privacy,

The intervention of the Courts in the matter of privacy is understood to be shackled and hindered by the gaps in the law with regard to the right to privacy. Although the Supreme Court of Sri Lanka has been thorough and farsighted in numerous instances in terms of innovatively interpreting and safeguarding the fundamental rights to preserve the sole purpose of the fundamental rights chapter, without being limited by linguistic and

³⁴Section 18 (2) (a) of the *Computer Crimes Act No 24 of 2007*

³⁵Section 18 (2) (b) of the *Computer Crimes Act No 24 of 2007*

legislative barriers, the lack of a constitutional provision equivalent to Article 21 of the Constitution of India³⁶ has been strongly felt in enforcing the right to privacy. Conversely, a victim taking a high risk of filing a fundamental rights action or civil action against the invasion of privacy, in the light of this considerable lack of legislations that recognizes the right to privacy, is highly unlikely. This in return will provide almost no opportunity for the Courts to interpret fundamental rights and/or legislations to substantiate, support and recognize the right to privacy, which will ultimately leave the individuals' right to privacy at stake.

Recommendations and conclusion

In the information age, with outstandingly advanced and complex technology in use, the most obvious strongly felt and highly recommended step to be taken in terms of enforcing and safeguarding the citizen's right to privacy is the legal recognition of fundamental rights. In this regard, constitutional protection, as well as legislations that specifically address the matters of privacy, is essential. In the light of legal provisions that safeguard privacy, although the right to privacy will not be completely and perfectly established in the country overnight, in the long run, the society will be adjusted to recognize and respect every individual's privacy, and this literacy on privacy will be helpful to fine-tune the rights of privacy and information.

Courts in the country also share an immensely crucial and decisive role in recognizing privacy, in terms of interpreting legislation and the Constitution; particularly the fundamental rights chapter. Innovative decisions of Courts, such as the Court of Appeal decision in *Sinha Ratnatunga v. The State*³⁷ in regarding privacy in the light of criminal defamation, may help fill gaps in legislations and interpret them. Furthermore, since the aggrieved persons always turn to courts for relief, Courts being actively involved in establishing the rights of privacy may increase the public trust in courts, resulting in more cases on privacy matters being filed, giving Courts the opportunity to broadly interpret the laws and the Constitution in order to support and recognize the right to privacy.

In addition, appointing a body as "a watchdog"³⁸ of information and communication that takes place through modern technology, and to identify the gaps and shortcomings in the systems as well as in law is also essential to safeguard the right to privacy. Media, social media, private persons and public and private bodies frequently collect, store, use and process information of the individuals and publish or share them for their purposes. Circulation of individuals' information should be monitored by a body, with necessary legal and technical capacity provided and delegated, so that the private information of the persons is preserved and not misused. The Sri Lanka Computer Emergency Readiness Team (CERT), Sri

³⁶ Article 21 of the Constitution of India: "Protection of life and personal liberty No person shall be deprived of his

life or personal liberty except according to procedure established by law"

³⁷ (2001) 2 SLR 172

³⁸Marsoof, A., 2008

Lanka Police Cyber Crimes Division and Telecommunications Regulations Commission of Sri Lanka (TRCSL) are some of the potential institutions that can be, with the required legal authority and technical expertise provided, developed to become such “watchdog” institutions that preserve information privacy

In summation, it should be noted that the right to privacy is as important as any other fundamental right to the citizen for the purpose of establishing individual liberty so that a person may live with dignity, reputation and freedom. The shortcomings and gaps in the legal framework have been clearly an impediment in recognizing privacy as a right. As a developing country that is treading its way through the information age, with technology rapidly and swiftly developing to be more complex and complicated, the right to privacy is important not only to the dignity and freedom of an individual but also for the security, peace and harmony of the country as well. In every aspect and under all circumstances, it is about time that the legislators make necessary decisions for recognizing the right to privacy, to stand resolute with other economies and jurisdictions in the world.

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ANALYZING THE ENFORCEMENT OF CAPITAL PUNISHMENT UNDER THE PERSPECTIVES OF NATURAL LAW THEORY, LEGAL POSITIVISM AND SOCIOLOGICAL SCHOOL OF LAW

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Introduction

Unlike the subjects of natural science, ‘law’, as a social science subject does not show one exact idea for its concepts. One single legal concept may have number of interpretations which are delivered by variety of jurists. Gradually, deferent philosophical ideas with regard to legal matters were presented and they developed as school of thoughts. Because of that nature, the area called jurisprudence has been developed over ages. In the reason of that, our statement, i.e. “Law is part of the structure of society, whether modern or primitive. Law both shapes and is shaped by society. Law impacts on every human activity undertaken within society” also can be analyzed as deferent ways.

Natural law school of thought and the school of legal positivism is two of such jurisprudential schools which are considered as the major two schools of thought. However, the Sociological Law School of Thought also bears a similar position as the aforementioned two legal schools of thought by not conking out to them. While the Positivist Theory tries to find out what is the law, the Natural Law Theory attempts to find out what the law should be. Sure enough, the Sociological Law School of Thought believes that the law is only one social control mechanism which regulates human behavior.

The capacity of imposing capital punishment has become the highest talkative topic in present Sri Lanka. By indicating the nature of social sciences, various arguments have been discussed for and against the capital punishment. Thus, I selected to analyze the aforementioned quoted statement by illustrating ‘executing of capital punishment’.

Legal Positivism

As a response to other jurisprudential schools, especially to natural law theory, legal positivism emerged in nineteenth century.¹ The contribution of Jeremy Bentham and John Austin colored this jurisprudential school.

Though a definition has been given for legal positivism for the purpose of this discussion, various kinds of legal positivism have made it difficult to give a certain definition.² However, according to legal positivism, laws are the commands of sovereignty which can be enforced through pain of punishments. It seems however that this recognition of law has also been varied from one thinker to another.

According to Jeremy Bentham, law must be derived from central powerful monolithic sovereignty having legislative power. For him, all laws and commands, prohibits or permit some conduct. Anyway, he admired rewards rather than sanctions in enforcing

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¹(Dies, 1985). P. 331

²(Eidlin, 2013). P. 1

law. His concept of utilitarianism measures the greatest happiness of the greatest number of people. Thus, law should seek to eradicate pain by maximizing pleasure for many. There, ignoring the pleasure of undergoes (minorities, marginalized peoples, subalterns, prisoners etc.) is not a problem.

John Austin is the major character in exclusive (hard) positivism. He is the person who provided the aforementioned positivist idea of law; laws are the commands of sovereignty which are enforced by pain of punishment. There, unlike utilitarianism, people should obey law even though it does not provide pleasure. So, he opposed especially to natural law thinkers who elevate moral principles or a higher law to a level where it can supersede the command of the state.³ According to him, sovereignty, which always acquires the obedience of majority, must be undivided and absolute. His all idea of positivism can be crystallized as,

“The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a deferent enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it very from the text, by which we regulate our approbation and disapprobation.”⁴

“According to Roger Catterwell, Austin sees law as a technical instrument of government or administrative which should however be efficient and aimed at the common hood as determined by utility. All laws, rights and duties are created by

positioning rules, the laying down of rules as an act of government.”⁵

Thus, “as a rule, positivism has focused on primarily on issues containing in to the concept of legality and authority. Central to positivism’s analysis of legality is the institutional nature of law; central to its analysis of authority is the idea of efficacy.”⁶

Natural Law Theory

Natural-Law school of thought which having extremely long history, always tries to find out the human-reason to justify the law. Accordingly, the priority should be given to find-out the purpose of the law. Justice, equality, human-dignity and human-wellbeing have been identified as the main achievement of law by natural-law thinkers regardless of their era. The fundamental right chapter of a Constitution of any state itself proves that the influence of this theory is very important for a democratic state.

Natural law provides the principles which determine the ends of action, as well as these practical ends are universal, i.e. natural law more concerns about the result of an action. The precepts revealing the mode of action / types of behavior which are came from the aforementioned principles tell us what type of action to take. These precepts can be applied under the rule of law according to the nature of each and every circumstance. Ultimately, a decision can be taken in accordance with the rule of law for a particular case.

Immanuel Kant too was a famous Natural Law thinker who combined the natural law

³(Weeramantry, 2009). P. 102

⁴(Austin, 1832). P. 157

⁵(Lionel Database. LB.III)

⁶(Patterson, 1996). P. 259

with morality. According to him, people have morality only if they have freedom. He assumes former laws always as moral. So, obeying the law is very important, because violating law means violating morality. He further states that there is a plan of nature to create perfect political constitutions which means a set of norms to enable people to develop themselves fully only if they approve the constitution. Thus, people do not have an obligation to obey immoral laws. His decisive thought was that the law should be in accordance with nature and the nature of human beings.

Ronald Dworkin can be identified as a present Natural Law thinker who still gives his natural law ideas by writing books. His 'Theory of Adjudication' gives judicial decision too a prominent place as legislations. According to him, a judge should be a Natural Law orient. When the legislations are not clear and suit, judge can apply precedents according to the facts and circumstance of the case. However, policies and principles should be used to hear hard cases that neither legislations nor precedents can be applied. While the policies represent the desire of the state, principles represent the rights and entitlements. Not restricting to legal rights, principle also emphasize natural rights also. Thus, according to Dworkin, principles are always trump over policies. He further says that the society interest should be concerned the same as individual interests.

Sociological School of Law

Sociological school of law can be taken as the largest jurisprudential theory. The areas of sociology of law and social engineering are major disciplines of it. According to them, law is only one social control mechanism among values, custom, religion

etc. because of the concept of universality, they reject Natural Law Theory, because for them, laws are specific for individuals and various societies. They care on belief of the Sociological relativist, as well as they recognize people's beliefs, but not recognize law as unique thing. However, they look at law as a part of in regulating human behavior.

Most attention of the Sociological Law School is paid on the preservation of the bond of relationships. they identify element of social regulation through practice rather than Acts and Case laws. Under their introduced process of reconciliation, there is a role to play by law, as well as it should be match with the society. For instance, a state ruling with a good constitution may be really bad if the state is on bad person's hands. And also, a ruling of a state may be really good even with a bad Constitution if the state is on good people's hands.

Eugene Erlick who colored legal jurisprudence in nineteenth and twentieth centuries can be identified as a major philosopher of Sociological School of Law. He divides law as formal law and living law which both laws are found in each and every society, because law operates in society, mainly because of social pressure and not because of state authority. His concept of living law is somewhat equal to practice and habits. Under his introduced concept of Social Control Method, state is only one institution and living law successfully regulate human behavior. That is why people accept those living law in their day-to-day life. There are several living laws in diverse societies for several communities. Law should be discovered not with analytical jurisprudence, but with empirical study. According to him, in

deciding cases, judges should harmonize both formal laws and living laws. Therefore, primary sources of laws are not so important according to his view.

Roscoe Pound (1870-1964) is an American philosopher who is concerned as the founder of sociology of law and social engineering. He criticized legal professionals and elites by saying that they are not concerning for people's wants. He examined what really ought to be in the role of law in society. However, his main focus was not that how society contributes to the law, but what the contribution of law to make the society. According to him, the end of law to assist people with claims, but meeting satisfaction of human wants⁷. Not merely meeting claims, lawyers and government should take legal and administrative actions to balance demand of the want.

Roscoe Pound defines Social Engineering as a role of law in society is to satisfy human needs in the least of sacrifice friction/waste. Accordingly, there are three

aims of human interests into which these wants fall into. They are:

1. Interest of Personality - Physical & spiritual existence of a person
2. Personal Interest – Privacy
3. Interest of substance – Food, Water, Health & infrastructure facilities

Capital punishment

Capital punishment can be defined as “punishment by execution”.⁸ There, one's life is taken by the state as a result of a decision of a fair trial as a punishment for particular severe crimes she/he has done. In Sri Lanka, it was exercised since the country was a monarchy.

The legal system of Sri Lanka has imposed capital punishment for murder⁹, rape not resulting in death¹⁰, robbery not resulting in death¹¹, kidnapping not resulting in death¹², drug trafficking not resulting in death¹³, drug possession more than 500 grams of a number of substances¹⁴, treason¹⁵ military offences not resulting in death¹⁶ and particular offences by the use of gun¹⁷.

⁷(Pound, 1922). P. 49

⁸(Oxford Dictionary of Law)

⁹(Penal Code 1885 (Chapter 19)) arts. 294-296, amended by (Penal Code (Amendment) Act No 16 of 2006)

¹⁰(Penal Code 1885 (Chapter 19)) arts. 294-296, amended by (Penal Code (Amendment) Act No 16 of 2006)

¹¹(Penal Code 1885 (Chapter 19))art. 44(A) & Schedule C, amended by (Penal Code (Amendment) Act No 22 of 1996). arts. 379-385, amended by (Penal Code (Amendment) Act No 16 of 2006)

¹²(Penal Code 1885 (Chapter 19))art. 44(A) & Schedule C, amended by (Penal Code (Amendment) Act No 22 of 1996). arts. 350-360(A), amended by (Penal Code (Amendment) Act No 16 of 2006)

¹³(Poisons, Opium and Dangerous Drugs Ordinance, 1936) ss 5. 14

¹⁴(Poisons, Opium and Dangerous Drugs (Amendment) Act) ss 5. 14

¹⁵(Penal Code 1885 (Chapter 19))arts. 294-296, amended by (Penal Code (Amendment) Act No 16 of 2006)

¹⁶(Penal Code 1885 (Chapter 19))arts. 128-137, amended by (Penal Code (Amendment) Act No 16 of 2006). (Air Force Act, 1949), arts. 95, 97, 98, 131(1-2), amended by (Air Force (Amendment) Act No 9 of 1993); (Army Act, 1949), arts. 95, 97, 98, 131(1-2), amended by (Army (Amendment) Act No 10 of 1993).(Navy Act, 1950), arts. 54, 55, 57, 58, 60, 63, 64, 65, 71, 83, 92, 118(1-2), amended by (Navy (Amendment) Act No 53 of 1993)

¹⁷(Firearms Ordinance, 1917) amended by (Firearms (Amendment) Act No 22 of 1996)

After imposing the capital punishment by a judgment, the signature of the president is needed to exercise it. Anyhow, since 1975, Sri Lankan Presidents did not give their consent to impose the penalty¹⁸. Though the former Sri Lankan President Mithripala Sirisena had signed the death warrants for four drug convicts, due to order of the Supreme Court to take any attempt by the President from ordering the execution¹⁹ and due to the huge objections made by number of international human right organizations²⁰ the execution could not be enforced. Thus, at present, no execution is practicing in Sri Lanka.

Analysis

Bentham thought human beings are keen to maximize their individual pleasure even by doing a greater harm to the whole community. Thus, according to him, it is the responsibility of the state to establish the greatest happiness to the greatest number of people of the state by restraining the aforementioned personal desire. Hence, punishment would be justified where it had the capacity to reduce "mischief"²¹. Bentham summarized his views as follows:

"But all punishment is mischief: all punishment is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."²²

It shows that Bentham did not justify punishment where it is groundless, ineffectual, unprofitable or needless. As Bentham was also a Positivist, he subscribed to the theory that the punishment should fit the criminal²³. For Bentham,

"The value of the punishment must not be less than what is sufficient to outweigh that of the profit of the offence."²⁴

Based on this reasoning Bentham did not advocate the death penalty, as

"Whether a given offence shall be prevented in a given degree by a given quantity of punishment, is never anything better than a chance, for the purchasing of which, whatever punishment is employed, is so much expended in advance."²⁵

As mentioned previously, the father of Legal Positivism, John Austin says laws as command of sovereignty which should be enforced through pain of punishment. In Sri Lanka, Parliament is the main institution which exercises people's sovereignty power, because it is the law-making authority which is consistent with people's representatives. It has a power to make laws including laws having retrospective effect.²⁶ The power has been strengthened more by not permitting the judiciary or any other authority to question its laws.²⁷ Thus, it points out that Penal Code and a few other

¹⁸(Capital Punishment in Sri Lanka, 2018)

¹⁹(Srinivasan, 2019)

²⁰(Sri Lankan Death Penalty Reinstatement 'Extremely Disturbing', 2019)

²¹(Kamardeen, 2001-2002). P. 77

²²(Bentham, 1823) Chapter 13

²³(Kamardeen, 2001-2002)P. 77

²⁴(Bentham, 1823)

²⁵(Bentham, 1823)

²⁶(Constitution of the Democratic Socialist Republic of Sri Lanka, 1978). Article. 75

²⁷(Constitution of the Democratic Socialist Republic of Sri Lanka, 1978). Article. 80(3)

legislations which have enforced capital punishment are commands of sovereignty.

Sure enough, according to Positivism, laws can be passed by the sovereignty, even if it is not accepted by its subjects. Accordingly, in this case, although there are thousands of arguments against imposing capital punishment, if it is the command of sovereignty, it can be enforced as a law.

Therefore, it proves that enforcing capital punishment is a clear reflection of legal positivism, because it can be taken as the commands of sovereignty which has been enforced through punishment. It proves the idea that “Austin’s thought still remains worthy of examination not only on account of his widespread influence, especially in common law countries, but also his reason of penetrating power of applying analysis to jurisprudence.”²⁸

Though it is really difficult to find out an exact natural law idea on imposing the capital punishment, the ideas of various Natural Law thinkers show that the theory is against to that.;

As mentioned in a previous chapter, Ronald Dworkin is another natural law thinker who mainly discussed about the system of adjudication. Recognizing that the provisions of the legislation and judicial precedents may not clear for a particular incident, he suggested referring policies and principles to hear hard cases. In there also, the principle which mainly concern about natural rights (not merely legal rights) should trump over policies which can be identified as the goals of the state.²⁹

²⁸(Freeman, 2008). P. 255

²⁹(Dworkin, 1977). PP. 155-160

³⁰(Dworkin, 1977). P. 123

According to him, the superior qualification of elected legislators in making political decision is weak in the case of decision of principles, because it can be a mere political conviction which reasonable men disagree.³⁰ It proves that whatever has been mentioned in legislations, in deciding a case, the principle should be protected though those are not guaranteed legally. Thus, in a case of imposing capital punishment, the natural rights of the guilty person too should be regarded and as mentioned by Immanuel Kant, people are not obliged to obey immoral rules. Thus, as Fuller argued in the famous Hart-Fuller debate, though the laws have been enacted by sovereign authority, people should not be subjected to any law if it is against these universal truths.

It also proves that imposing capital punishment is a clear violation of the concept of morality which was discussed by Immanuel Kant. Actually, it is an act of moral suicide, as well as “killing a human being in cold blood can only undermine the moral core of the state.”³¹

In addition to that, imposing capital punishment seems a real challenge to human reasoning which is a core concept of Natural Law Theory. “If it is wrong for an individual to kill, how can it be right for the State to kill?”³² Here, the words of Dag Hammarskjold, former Secretary General of the United Nations can be applied: “You cannot play with the animal in you without becoming wholly animal, play with falsehood without forfeiting your right to

³¹(Samaranayake, 2009) P. 7

³²(Samaranayake, 2009) P. 7

truth, play with cruelty without losing your sensitivity of mind.”

The aforementioned guidance provides an idea on making an effective law, because natural law theory always considers about the purpose and content of the law. In a democratic society, the sovereignty makes rules and imposes punishment to establish peace and human wellbeing. Thus, if the laws are not peaceful, a peaceful society cannot be established by only enforcing punishments. It also proves that “as in the past, so in the future, the problem of human freedom will continue its strong links with theories of natural law.”³³

Laws are created for society, as well as those are imposed on society. Thus, if the law does not suitable for the society, it cannot be properly implemented, because it would be rejected automatically by the society.

According to sociological school, law is an only one method of controlling society. There are various non-legal mechanisms to regulate it. For example, people have used to live without doing harm to others since their childhood even without knowing that there are laws and punishments against harming others, because their religion and the society have taught them not to do harm others. They scared to being rejected from the society. Likewise, the strong influence of the religion, customs and values has taken people away from doing murders rather than the influence of enforcing the capital punishment.

According to them, just the same like punishment, social recognition also influences for one’s behavior. Eugene

Erlick’s idea of living law too accepts it. According to him, social pressure can play a major role than state authority. In such a situation, primary sources of law, i.e. legislations and judgments would not be that important. In Sri Lanka, though and though the Penal Code has clearly legalized the capital punishment as a punishment and hundreds of judges has imposed the capital punishment via their judgments, since 1973, the capital punishment was not practically enforced. People’s reluctant to apply for the position of executioner also prove that the social pressure is more powerful than the state authority.

For Roscoe Pound, “law is social engineering which means a balance between the competing interests in society... Like an engineer’s formulae, laws represent experience, scientific formulations of experience and logical developments of the formulations, also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique.”³⁴ Thus, unlike command of the sovereignty that is enforced through pain of punishment, continues experiment and experience is necessary to create a law which is necessary for the society and fulfill all their needs.

Interest of personality is his first aim of his hierarchical ‘wants’ list. It shows physical and spiritual existence of human being. Accordingly, right to life, freedom from torture, cruel, inhuman and degrading punishment is come under that want. It shows that due to the cruel nature of the death penalty, imposing it is against with his theory.

³³(Weeramantry, 2009)

³⁴(Baruah). PP. 2-3

Moreover, imposing the capital punishment appears as a true challenge to human reasoning that is a pure idea of Sociological School of Law that was also believe by Natural Law thinkers. If it is wrong for a person to kill, how would it's right for the State to kill?³⁵ Here, the words of Dag Hammarskjold, former Secretary General of the United Nations can be applied. He states that you cannot play with the animal in you while not changing into entirely animal, play with falsehood while not forfeiting your right to truth, play with cruelty while not losing your sensitivity of mind.

Conclusion

This discussion clearly points out that the positive idea of legal positivism towards imposing capital punishment and the negative idea of Natural Law Theory and Sociological School of Law for the same. However, many instances were found that the idea of the jurist cannot exactly be categorized into the aforementioned two pillars, i.e. the given idea of a jurist sometimes shows that the jurist is in favor of imposing capital punishment while another statement of the same jurist shows that he/she is against with capital punishment. And also, there were some instances where we cannot exactly say the particular jurist is an associate of a particular school of thought. Accordingly, there are some thoughts of jurists which sometimes reflects natural law ideas while another time his/her thought reflects the idea of Legal Positivism, and also the ideas of Sociological School of Law. It again proves the uncertain nature of social science subjects.

³⁵ (Samaranayake) 7

Today, after few decades, discussion for enforcing the capital punishment has been come forward. In such a situation, this is high time to analyze scholars' ideas on that area. However, because of the severe nature of taking one's life, the public confidence towards the administration of justice system should be made strengthen³⁶. Otherwise, due to the weakness of the practical implementation of the law, the real purpose of the law of establishing the peace and human wellbeing in the state cannot be properly fulfilled.

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³⁶(Mansoor, 2009) P. 16

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THE LEGAL REGIME GOVERNING THE INFORMATION COMMUNICATION TECHNOLOGY IN SRI LANKA

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Introduction

ICT is made up of certain basic elements. The elements have all been present since the birth of the technology, but their relative significance and their visibility are still changing. The elements are automation, information, communication, integration, and sensation.¹The ICT sector includes computer hardware and software, tele communications, consumer electronics, and Internet-based contents, applications and services.²ICT stands for Information and Communication Technology, that is, technologies that store, transmit, and/or process information and communication. Although the term can be read literally to include all kinds of information-processing technologies, such as printing presses, Xerox machines, and abacuses, the term is generally used to indicate “modern” or “high” technology, electronic data-processing technologies.³The growth of Information Communication Technology (ICT) marks a revolutionary turn in the twentieth century. Compared to other

centuries, twentieth century is marked by rapid development in the areas of commerce, communication and globalization. The developments made in the ICT sector has had a profound impact on this rapid evolution from Alexander Graham Bell’s telephone to Sir Timothy John Berners-Lee’s World Wide Web.

This growth has brought dramatic changes by revolutionizing our customs and traditional methods of conducting business, communication and other activities which were based on paper methods. The days of analogy system with terrestrial transmitters are being rapidly overtaken by digital technology with satellite technology⁴.The ICT cluster of technologies emerged around the time of the Second World War and since then they have been the most important driver of global economic and social growth and change. Earlier clusters were based on textile machinery in the late 1700s, the steam engine (including railways and steam ships) in the early 1800s; electricity and steel in the late 1800s; and

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- 1P. Seipel, *Law and Information Technology: Swedish Views* (Swedish Government Official Reports, Stockholm 2002)
- 2M. Fransman, *The New ICT Ecosystem* (1st edn, Cambridge, CUP 2010), Preface
- 3J. Koops et al, *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-liners* (1st edn, T.M.C. Asser Press, 2006)²⁸
- 4A.J. Mambi, *ICT Law Book* (1st ed, Mkuki Na Nyota, Tanzania 2010), Preface.

the internal combustion engine, oil and petrochemicals in the early 1900s.

According to Mambi⁵ICT advances since the end of the 20th century have led to multiple convergences of content, computing, telecommunications and broadcasting. The development of ICT has led to significant social, economic and consequently legal changes. Technological change has one of its widest impacts on society and everyday life through ICT.⁶

The sheer impact of the new developments in the field of ICT necessitated for its proper regulation. ICT law can be identified as that branch of law which tries to regulate the ICT activities of a country. There are no fixed definitions for the term 'ICT Law'. According to Mambi, it can be briefly defined as, the legal subject that emanated from the development of technologies, the innovation of computers and other related devices, the use of Internet and Electronic Data Interchange (EDI), etc.

Law regulates technologies and solves conflicts and co-ordination problems related to those technologies. However, new technologies have had more powerful impacts on nature and on society and on our individual and organisational interrelationships with others. This means that there are also new risks, which must be managed. The new developments in Information and Communication Technologies have significantly affected the traditional legal concepts and brought about the necessity for the review and the reform of the law receptive to modern electronic dimensions. The role of the law is to recognise, regulate human conduct and

to enforce such regulation. Law is a method of technological risk management and plays a constantly increasing role in that regard. With the development of ICT, most of the traditional ways in which people used to engage in commerce and communication changed and with it came the instantaneous methods of doing things which would have otherwise taken much longer. However, with these advantages came many risks and disadvantages that needed to be managed as well. Today we speak of online transactions without paper money, and in the same time we also speak of cyber hacking and cyber theft almost like two sides of the same coin.

In considering the development of ICT in a Sri Lankan context, it can be said that we have been trend followers rather than trend creators in this arena. Sri Lanka has inherited many of its laws from the British and mainly in the areas of commercial law. Even after gaining its independence, Sri Lankan legislature was very reluctant to part ways with its British inheritance. Even regarding laws which have been enacted in the country regarding ICT have been influenced by the British tradition. Several enactments have been introduced to both take the advantages of the rapid growth in the ICT sector and to tackle the problems created with the boom of the same sector. Even though the ICT boom started to occur from the 1970's, Sri Lankan legislature did not take cognizance of the fact till the mid 1990's and it went on from there till the middle of the first decade of the new millennium.

⁵*Ibid*, Page 2

⁶T Pöysti, 'ICT and Legal Principles: Sources and Paradigm of Information Law' [2004] Scandinavian studies in law 560

International Legal Instruments Related to ICT

The development of information and communications technologies (ICTs) enables businesses and individuals to communicate and engage in transactions with other parties electronically, instantaneously and internationally. This gives rise to a variety of legal and regulatory issues for policymakers, from the validity of electronic methods of contracting and the security risks associated with them, to concerns over cybercrime and the ability to protect intellectual property rights online.⁷

There is a plethora of international legal instruments which have been implemented to regulate the ICT industry. Among them, and regarding electronic commerce, the United Nations Commission on International Trade Law (UNCITRAL) has made several initiations to develop conventions, model laws and guidelines related to the subject. UNCITRAL was established by the UN General Assembly by its Resolution 2205 (XXI) of 17 December 1966 with the ambition of promoting the progressive harmonization and unification of international trade law. The establishment of UNCITRAL was necessitated by the rapid increase in the volume of international trade which could no longer be managed with the domestic and regional laws which was capable of handling matters regarding international trade before this rapid expansion. UNCITRAL successfully adopted its Model Law on Electronic Commerce on

1996, Model Law on Electronic Signatures in 2001 and assisted to formulate UN Convention on Electronic Communications, adopted by the UN General Assembly in November 2005⁸.

Apart from commerce, there are other international legal instruments which focus on areas such as computer crimes and cybercrimes which could have serious implications on the national security of a country. The Budapest Convention on Cyber crime initiated by the European Union in 2001. The Convention is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. The preamble of the Convention declares that, its aim is to ‘pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation.’⁹

Regarding data protection, the European Union in 2018 has taken new steps to protect data and the privacy of individuals. The General Data Protection Regulation (GDPR) 2016/679 is a regulation in EU law on data protection and privacy for all individual citizens of the European Union and the European Economic Area. It also addresses the transfer of personal data outside the EU and EEA areas. GDPR has made some key changes to the existing EU law on the subject. The territorial applicability of the Directive is now expanded and whoever has personal data of

⁷United Nations, *Information and Communication Technology Policy and Legal Issues for Central Asia (Guide for ICT Policymakers)*, UN 2007)

⁸Available at:<https://uncitral.un.org/>

⁹Preamble, The Budapest Convention on Cybercrime 2001

people residing in the EU comes under the jurisdiction of the Directive irrespective of the location of the company or the firm that holds the data. Organizations in breach of GDPR can be fined up to 4% of annual global turnover or €20 Million (whichever is greater). The conditions for consent have been strengthened, and companies are no longer able to use long illegible terms and conditions full of legalese.

Sri Lankan Legal Framework on ICT

ICT is being developed at a tremendous speed and computer is the major invention or the result of the same. Law relating to ICT is not an isolated subject. Its involvement could be seen in any given area like criminal law, civil law, labour law, intellectual property law, taxation law and so on. However, as the subject is relatively new when compared to well established other branches of the private law such as Contract, Property and Trust, all of the parties need to come to a general consensus as to how they are going to work out and develop the advances in the ICT sector to both manage and regulate the same at both the international and domestic level.

ICT policymakers are constantly facing challenges in dealing with these issues. The promotion of harmonized law reforms, which would facilitate the sound development of e Commerce and related activities, that citizens have appropriate protection against harmful behaviour, is a way to address these challenges. An understanding of the legal issues involved remains of key importance to persons and organisations concerned with information and communications technology, and it is only armed with such understanding that they can satisfactorily address and cater for

the problems raised by the development and use of these technologies.

The Constitution of the Democratic Socialist Republic of Sri Lanka which was adopted in 1978 does not make any reference to the subject of Information Technology. Even under the directive principles it is difficult to find out any specific article which could be directly linked with the information technology of information communication technology in general. When one looks at the Nepalese Constitution of 2015 it makes direct reference to information technology under Article 51 of the Constitution which deals with state policy. Under Article 51 (F) dealing with the developmental policy, Article 51 (F) (5) states that, ‘developing and expanding information technology as required by the nation, and making its access easy and simple for the general public, while also making its maximum use for national development’ shall be a State policy.

When one considers the ICT legal regime in Sri Lanka, there is no single coherent Act which is passed by the legislature. Instead there are several pieces of legislations which deals with several areas which are related to ICT. These legislations include, Telecommunication Act No 25 of 1991, Evidence (Special Provisions) Act, No. 14 of 1995, Information and Communication Technology Act, No 27 of 2003, Intellectual Property Act, No. 36 of 2003, Payment and Settlements System Act, No. 28 of 2005, Electronic Transaction Act, No. 19 of 2006, Payment Devices Frauds Act, 30 of 2006, Computer Crimes Act, No. 24 of 2007, Right to Information Act, No. 12 of 2016.

The ICT legal regime in Sri Lanka consists of several legislations which have been

made with competencies of its own area of expertise. Much of these legislations have been influenced by foreign jurisdictions and United Kingdom has been often looked at. In order to understand the true value and effect of these legislations they must be evaluated on their own merit and afterwards the cumulative effect must be looked at.

Telecommunication Act No 25 of 1991

The Telecommunication Act No 25 of 1991 establishes the Telecommunications Regulatory Commission commonly known as the TRC. According to the section 04 of the Act, TRC have the main objectives of ensuring the provision of a reliable and efficient national and international telecommunication service in Sri Lanka, to protect and promote the interests of consumers, purchasers and other users and the public interest with respect to the charges for, and the quality and variety of telecommunication services, to maintain and; to promote effective competition between persons engaged in commercial activities connected with telecommunication, to promote the rapid and sustained development of telecommunication facilities both domestic and international, to ensure that operators are able to carry out their obligations for providing a reliable and efficient service, to promote research into and the development and use of new techniques in telecommunications and related fields, to promote the use of Sri Lanka for international transit services.

The objective of the TRC is a vital for establishing a good ICT infrastructure

regarding telecommunication. Country has seen a rapid increase in the use of telecommunication from 1991 to 2018. In 1991 there were only 125,834 fixed access telephone subscriptions and by December 2018 the number has risen to 2,484,616 nearly 20 times more compared to 1991. The alarming number is the cellular mobile subscription per 100 inhabitants which stands at 150 by December 2018 meaning that there are 1.5 mobile connections.¹⁰ The TRC uses a licensing system to control and regulate the telecommunication industry where it is made an offence under section 19 of the Act to operate a telecommunication system without a proper license. The relevant offences covered under the Act are included in part VI of the Act which deals with offences and punishments. Some of the offences include, fraudulent use of telecommunication service (sec 46), tendering false or fabricated messages (sec 48), wilful interception of telecommunication transmission (sec 53), transmission of unpaid message (sec 56) and tendering obscene or indecent or seditious message (sec 58).

In general, the Act can be appreciated for taking into consideration the ground realities of the early 1990's when the enactment was made. However, technology has developed rapidly and both the number of users and the devices have increased rapidly and in the contemporary world many telecommunication activities are not made through a telephone operator and are instead made using the internet through internet service providers. Therefore, the

10 Available at

http://www.trc.gov.lk/images/pdf/statis_q42_018.pdf

law needs to be updated taking this factor into consideration.

Evidence (Special Provisions) Act, No. 14 of 1995

Before the enactment of the Evidence (Special Provisions) Act, No. 14 of 1995 computer evidence was not admissible in a court of law. This was clearly stated in the case of *Benwell v. Republic of Sri Lanka*¹¹ where it was held that, ‘[c]omputer evidence is in a category of its own. It is neither original evidence nor derivative evidence. Under the law of Sri Lanka, computer evidence is not admissible under section 34 of the Evidence Ordinance nor under any other section of the Evidence Ordinance.¹² With the development of technology and with advances in the mediums used to store data, Sri Lanka had to come up with legislations to make them admissible in a court of law and for that purpose the Evidence (Special Provisions) Act, No. 14 of 1995 was enacted. According to section 05 of the Act computer evidence are admissible in a court of law and section 02 makes it clear that the provisions of this Act are to be applied irrespective of whatever is mentioned in other legislations. Admissibility of computer evidence is a very important aspect in the ICT arena as ICT is mainly based on the works done using a computer. A computer is defined as ‘any device the functions of which includes the storing and processing of information’,¹³ under section 12 of the act. However, this term has not been judicially interpreted yet and the loose

interpretation given to the term could be used to good effect by the judiciary.

It has nearly been 25 years since the enactment of this Act and some problems are still unresolved regarding computer evidence where the question as to whether things generated through modern communication tools and devices could be made admissible using the provisions of the Act. The question whether electronic messages could be used as evidence is still to be resolved by the apex Court of the country. Therefore, it can be said that admissibility of computer evidence under the Act in the modern context or in the world of internet is somewhat inadequate compared to the developments that have taken place since the enactment of the Evidence (Special Provisions) Act, No. 14 of 1995 nearly two and half decades ago.

Information and Communication Technology Act, No 27 of 2003

The Information and Communication Technology Act, No. 27 of 2003 is aimed establishing of an inter-ministerial committee on information and communication technology, providing for the formulation and approval of a national policy, providing for the establishment of the information communication technology agency of Sri Lanka with authority to develop and implement strategies and programmes on information and communication technology in both the public and private sector.

The Act does not have anything substantial and is mainly used as a policy generating

considered as a computer since it also has the capability of processing information

11(1978-79) 2 Sri. L. R 194

12 (1978-79) 2 Sri. L. R 194

13It can be argued that according to this definition, even a washing machine could be

instrument. It is also a comparatively small piece of legislation as well. Sri Lanka first recognized the need for the development of ICT through the National Computer Policy (COMPOL) of 1983. The acceptance of COMPOL by the government gave rise to the establishment of the Computer and Information Technology Council of Sri Lanka (CINTEC) to function directly under the then President. The Information and Communication Technology Agency of Sri Lanka (ICTA) was established in July 2003 and pursuant to Information and Communication Technology Act No. 27 of 2003, (ICT Act), ICTA was identified as the legal successor to CINTEC and became the apex ICT institution of the Government. Under the ICT Act No. 27 of 2003 ICTA is empowered to formulate and implement strategies and programmes in both the Government and the private sector and pursuant thereto ICTA prepared programmes and strategies on Information and Communication Technology.

Intellectual Property Act, No. 36 of 2003

The Intellectual Property Act, No. 36 of 2003 was enacted as Sri Lanka was under an obligation to harmonize its laws according to the WIPO¹⁴ standards. As regards the protection of intellectual property rights (IPR), the Intellectual Property Act no. 36 of 2003 replaced the Code of Intellectual Property Act no. 52 of 1979. The IP Act of 2003 contains several new features in relation to the protection of software, trade secrets and integrated circuits. In the age of the internet traditional protection afforded to the IP rights may not be enough to afford the requisite protection. Specially with regards to patents, industrial

designs and copyrights are some of the important intellectual creations which warrants adequate protection in the age of the internet.

Integrated circuits are given separate protection under part VII of the Act. However, the real question of software protection under the IP Act is still unclear. Whether software could be afforded with patent protection or whether it could be afforded with copyright protections has not been answered. As the law stands, either way does not seem to be a real possibility. In the age of internet, IP laws should be modified to afford the requisite protection that the respective IP rights.

Payment and Settlement System Act, No. 28 of 2005

Payment System is about how participants from individuals to banks, governments and international participants exchange monetary value within an economy and across national borders. It is the framework of laws, regulations, mechanisms, systems, procedures and agreements that governs payments. The Payment and Settlement Systems Act. No. 28 of 2005 (PSSA) provides for the regulation, supervision and monitoring of payments, clearing and settlement systems, the regulation of providers of money services and the electronic presentment of cheques in Sri Lanka. Payment Cards and Mobile Payment Systems Regulations No. 1 of 2013 (Regulation) provide Central Bank of Sri Lanka (CBSL) with the necessary authority to regulate service providers of payment cards and mobile payment systems in Sri Lanka. As per the provisions of the Regulation, no person can engage in the business or function as a service provider of

14World Intellectual Property Organization

payment cards or mobile payment systems except under the authority and in accordance with the terms and conditions of a license issued by the CBSL.

In the age of the Internet, credit cards and debit cards are more often used than paper money to make transactions and the 2013 regulation on payment cards and mobile payment systems have helped the ICT sector when it comes to both local and international commerce. Payment card refers only to debit cards, credit cards, charge cards and stored-value cards. Going further, regulation also makes provisions for mobile payment systems. The recent trend in international commerce has been to go with the mobile payment systems due to its convenience. Payment gateways such as Amazon and PayPal are two universally recognized service providers who contribute to billions of dollars' worth international transactions. Recently, the Central Bank of Sri Lanka formulated a mechanism for e-commerce payment providers to use multiple payment options for e-commerce/business transactions, within the current regulatory framework and they gave recent approval for 'Pay-Here', a payment gateway like PayPal.

For the most part, the above Act has helped the ICT sector in general when it comes to local and foreign trade and transactions. However, mechanism implemented under the Act does not allow individuals to make any claims to any institute in case where a service provider fails to satisfactorily treat a customer. This is an issue which would

need to be address if we are to really yield all the fruits of the Act.

Electronic Transaction Act, No. 19 of 2006

With the evolution of technology paper-based transaction soon started to fade away and it was replaced by electronic modes of exchange. Justice Saleem Marsoof states that '[t]he electronic evolution has transformed the way man does business and has brought about a great transformation in the law'.¹⁵ Kariyawasam¹⁶ states that, '[s]ignificant event in the legal regulation of e-commerce in Sri Lanka was the enactment of the Electronic Transactions Act in 2006'. She further states that, it is beyond dispute that Sri Lanka needs to embrace the enactment of the Electronic Transaction Act because this piece of legislation accords legal recognition to electronic commerce by ensuring the security and reliability of electronic communications. The world was brought closer together by the internet and it made vast changes in international trade which propelled 'globalization' through the expansion of the market and the reduction of the cost of access. The Act is a legal instrument which makes globalization a ground reality for Sri Lankans.

The Electronic Transactions Act, No. 19 of 2006 was enacted with the objective of facilitating domestic and international e-commerce and e-governance by eliminating legal barriers and establishing legal certainty, by encouraging the use of reliable forms of electronic commerce and promoting public confidence in the

15S. Marsoof, 'E-commerce & E-governance – Some Pertinent Issues' [2007] BALJ Vol. XIII 01

16K Kariyawasam, 'The growth and development of e-commerce: an analysis of

the electronic signature law of Sri Lanka'
[2008] ICT Law 51

authenticity, integrity and reliability of data messages, electronic documents, electronic records and other communications. Section 04 of the Act makes it clear that, '[n]o data message, electronic document, electronic record or other communication shall be denied legal recognition, effect, validity or enforceability on the ground that it is in electronic form'. This is in line with the Article 04 of the UNCITRAL Model Law on Electronic Commerce. The recognition of electronic signature is also a salient feature of the Act. Section 07 recognizes that, an electronic signature is valid where law requires a signature and this almost repeals the requirement made out in the Section 18 of the Prevention of Fraud Ordinance No. 07 of 1840.

Section 11 of the Act states that, '[a] contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form'. This is a vital impetus for the ICT sector as it opens a plethora of opportunities to engage in commerce at the international level. In 2017 an amendment was brought to the Act and it was aimed to further expand the applicability of the Act regarding electronic transactions. Electronic Transactions (Amendment) Act, No. 25 of 2017 has brought the Sri Lankan electronic transactions legislation fully in line with the UN Electronic Communication Convention (ECC). Sri Lanka became the first country in South Asia and second country in Asia (after Singapore) to adopt the UN ECC standards. Sri Lanka ratified the UN ECC in July 2015. The amendment ensures greater legal certainty for e-commerce and e-business

providers who wish to use the Sri Lankan law as the applicable law and ensure international validity for electronic contracts. It also ensures the legal validity for other international legal instruments as well as cross-border fund transfers, including enforceability of Foreign Arbitration Awards. The new legislation will improve trust and confidence and legal certainty for all types of business transactions using electronic means, thus improving competitiveness and ability to do business with greater efficiency.¹⁷ The new amendment strengthens the existing provisions to move government transaction to the digital era, through the use of stronger and more secure electronic-based authentication methods. Another unique feature of the amendment is that it facilitates electronic filing of any application, petition, plaint, answer, written submission or any other document in any courts.

Commenting on the Act, Ariyaratne¹⁸ As a developing country in Asian region, the Sri Lankan approach to the e-transaction is more progressive and closely reflects the international standards as well. Sri Lankan ETA has followed both UNCITRAL Model laws and ECC as well. Comparing to Indian approach, Sri Lanka has incorporated technology neutrality principle to more align with traditional contract law principles.

The Electronic Transaction Act, No. 19 of 2006 and its subsequent amendment can be appreciated for being timely and for incorporating the technology neutrality principle instead of a prescriptive approach.

¹⁷<http://www.dailymirror.lk/businessopinion/Major-boost-for-electronic-transactions-with-new-amendment/306-139137>

¹⁸B Ariyaratne, 'Contracting in Cyber Space: A Comparative Analysis of Electronic Transaction Law in Sri Lanka' [2012] KDU-IRC 39

However, there are some gaps can be found in Sri Lankan law in relating to right to privacy and consumer protection in e-contracts. The Act is silent in regarding the consumer protection and right to privacy. As, Kariyawasam¹⁹ rightly pointed out, ‘the Act recognizes that online transactions are valid but contains no specific provisions dealing with consumer protection’. Even though, the Consumer Affairs Authority Act No 9 of 2003 and Unfair Contract Terms Act No.26 of 1997 afford consumer protection for faced to faced contracts in some extent, those Acts also neglect to provide same protection for online contracts. Addressing this issue is of vital interest as even the latest amendment made to the Act has failed to address this issue.

Payment Devices Frauds Act, 30 of 2006

With the enactment of the Electronic Transactions Act, No. 19 of 2006 which made it possible to do electronic transactions, it then became potent to protect those who do engage in such transactions using electronic means and payment methods other than using printed money. With this objective in mind the Payment Devices Frauds Act, 30 of 2006 was enacted to, ‘prevent the possession and use of unauthorised or counterfeit payment devices, create offences connected with the possession or use of unauthorised payment devices, protect persons lawfully issuing and using such payment devices, make provision for the investigation, prosecution and punishment of offenders’.²⁰

Section 03 (1) of the Act lists out the respective acts which are deemed to be amounting to payment devices fraud. Some of them include, embossing, encoding or skimming, making or altering equipment, unlawful use of phone listening device, providing track data to unauthorised individual etc. Section 3(2) stipulates the punishments for persons convicted of above-mentioned offences and the punishments runs from a maximum of 10 years imprisonment and a maximum fine of five hundred thousand rupees. The High Court is vested with the jurisdiction in relation to offences committed under the Act under section 19 and section 20 stipulates that these offences are cognizable meaning that granting of bail cannot be done without showing special circumstances for those who are accused of an offence falling under the Act. Further, section 17 stipulates that, any person who has the possession, control or custody any unlawful articles as mentioned in the Act shall be presumed guilty and till the contrary is proved the presumption will remain valid. This shifts the burden of proof from the prosecutor to the accused. Going still further, section 22 of the act offences committed under the Act are made extraditable offences.

This piece of legislation helps to complement the new opportunities created under the Electronic Transaction Act, No. 19 of 2006 which helped to expand the scope of trade and commerce in a digitalized era. This is a supplementary piece of legislation to the Electronic Transaction Act, No. 19 of 2006 where the

19K Kariyawasam, ‘The growth and development of e-commerce: an analysis of the electronic signature law of Sri Lanka’ [2008] ICT Law 51

20Preamble, Payment Devices Frauds Act, 30 of 2006

Act supplements the electronic transactions by managing and regulating the modes of transactions used in electronic commerce.

Computer Crimes Act, No. 24 of 2007

Apart from providing a better way of life for society the rapid growth of ICT raises fundamental questions regarding storage of confidential information, privacy, data protection and crime. Computers are not only targeted for crime but are also important instruments used in the commission of other offences such as theft, fraud, forgery, damage, deletion of business information and sabotage of computer facilities, etc. The term “Computer Crime” is a generic term used to identify all crimes or frauds that relate to or related to computers and information technology.²¹The Computer Crimes Act No. 24 of 2007 provides for the identification of computer crimes and stipulates the procedure for the investigation and enforcement of such crimes. The Basis of the Computer Crimes Act No. 24 of 2007is to criminalise attempts at unauthorized access to a computer, computer programme, data or information. Section 02 of the Act is very special as it allows to prosecute persons accused under offences under the Act irrespective of the fact whether they reside in Sri Lankan territory or not. The Act recognizes several offences related to computers which include securing unauthorised access to a computer, doing any act to secure unauthorised access in order to commit an offence, causing a computer to perform a function without

lawful authority an offence, dealing with unlawfully obtained data, illegal interception of data, using illegal devices and unauthorised disclosure of information enabling access to a service. The High Court is vested with the jurisdiction regarding offences committed under the Act under section 25. It is made an extraditable offence under section 27. Another innovative feature of the Act is the appointment of an expertise panel under section 17 to help in the investigation process regarding a computer crime.

Right to Information Act No. 12 of 2016

The Right to Information Act No. 12 of 2016 (RTI) was enacted to give effect to the Right to Information which was recognized a fundamental right under the nineteenth amendment to the Constitution which brought about the Article 14A giving a specific right to, right to information. Regarding the ICT sector and the related legal regime, RTI recognizes the validity of information kept in electronic means and the rights of the individuals to access that information which are kept in electronic means. The RTI also encourages keeping of new information in electronic formats as it would make it possible to give access to a wider range of audience who are seeking that information.

Moving Forward with the ICT Legal Regime

Translating policy objective into workable laws and regulations can obviously be a

21Available at;

<http://www.sundaytimes.lk/070729/FinancialTimes/ft308.html>

difficult task in any area of human endeavour; technology however presents particular challenges to law-makers, primarily due to the pace of change that occurs in the subject matter itself, e.g. software, computers and networks, and the manner in which such technology is utilized.²²

The Internet is the most striking example of the ICT revolution and the process of globalisation. Its immense popularity is shown by its millions of users all over the world. Our present Information Society is heavily affected by the Internet and the impact of this medium on everyday life will probably very much increase over the years to come.²³ With the technological developments in the new millennium ICT has become the benchmark where all most everything could be managed using the internet. With these new developments there also come the challenges associated with managing and regulating the virtual world. Many countries foresaw the challenges which would be posed with these developments and developed laws and regulations to face up with these new challenges. Germany is considered as the first country to adopt legislation on ICT.²⁴

In considering all the laws which have been enacted regarding ICT in Sri Lanka are in their totality are comprehensive. However,

issues related to use and implementation of those statutes have not been well founded and most of the lay people are not aware about them when compared to other laws. Two most important aspects regarding ICT law implementation are the principles of technology neutrality and pro-competitiveness. Technological neutrality is based on an acceptance that the environment is moving too rapidly to try and tie legal rules to a technology or market model. The principle, and variants of it, has been used in two key senses: that which is regulated off-line should be regulated on-line; as well as the need to treat different technologies similarly to the extent that they have the same effect²⁵. Pro-competitive principle states that, competition in the marketplace is accepted as the primary regulator of market participants, with governments intervening where market failures arise and to maintain fair competition.

When one considers Legal framework in Sri Lanka related to ICT it can be observed that most of the legislations which have been passed by the parliament are technology neutral. Legislations do not use many technical jargons to make it tech savvy. The Computer Crimes Act No. 24 of 2007 is a good example where this principle of technology neutrality is well preserved.

²²United Nations, *Information and Communication Technology Policy and Legal Issues for Central Asia (Guide for ICT Policymakers)*, UN 2007)

²³Michiel Brand, 'The Internet and the Law: An Article Examining the Problems and Questions Concerning the Regulation of Cyberspace' (2001) 9 TILBURG FOREIGN L REV 259

²⁴ The German **Bundesdatenschutzgesetz** (BDSG) is a federal data protection Act, which

came as a bill in 1971 that together with the data protection acts of the German federal states and other area-specific regulations, governs the exposure of personal data, which are manually processed or stored in IT systems.

²⁵United Nations, *Information and Communication Technology Policy and Legal Issues for Central Asia (Guide for ICT Policymakers)*, UN 2007)

The flow of information and goods across borders gives rise to international concerns over the enforceability and protection of intellectual property rights (“IPRs”), including copyright and related rights, patents and trademarks. However, regarding the pro-competitiveness, the ICT legal regime is below par. For an example, the Intellectual Property Act No. 36 of 2003 though a recent enactment, it lacks behind in many aspects. Protection of software under Sri Lankan IP law is problematic as neither patent law nor copyrights law can provide adequate protection. The IP Act does not even mention abuts software. It can also be observed that there is a slight mismatch between IP law and ICT regulation as the IP Act is not able to cope with the new developments in the ICT sector where the legislature has not given an enough interest to update its laws and regulations.

The IP Act is well equipped to protect traditional trademarks. However, when it comes to domain names which use names of trademarks the implementing procedure regarding protection of trademarks are no so well equipped to handle the matter in an age of the internet. There is no serious voice raised concerning these matters which are present under the ICT legal regime of the country.

It can also be seen that legal protection afforded to trade secret and confidential information under the IP Act in the age of the internet is inadequate as the IP act is more suited for the paper-based world rather than the paper less one. Security of information is an area which has developed very quickly and continues to develop a result of technological advances. This issue has not been satisfactorily addressed by the legislature.

The use of the Internet and electronic communications, with the ability to process large quantities of data, gives rise to significant concerns over how that data will be used, by whom and for what purposes. The law relating to data protection and privacy is almost non-existent in the country and this poses a serious threat for those individuals when their valuable personal information is held by others to be sold for a profit. In the age of the internet the ICT legal regime must address the issues related to data protection and privacy. The existing consumer protection laws are not adequate for the protection of consumer rights in an internet era in the country as they are both outdated and ill-equipped to handle matter arising from the internet or ecommerce. Sale of Goods Ordinance No 11 of 1896 and the Consumer Affairs Authority Act No 09 of 2003 are not amended or drafted in a manner which is conducive for protecting the consumers in an age of the internet.

In addition to the above, the implementation of rights, duties and obligations imposed under the several statutes which compose the ICT legal regime in the country is not well equipped to handle matters which arise in a tech savvy world in an efficient and effective manner. Most of the changes that have been brought about to the system in order to manage and regulate the ICT sector are underutilized and this is evident from the lack of decided cases by the apex courts in the country regarding computer crimes, payment frauds and even electronic evidence. Further, even if they had to be implemented it would have to be implemented in a judicial system already overburdened with so many other matters and disputes and without the required expertise

knowledge of the subject it would not be possible to think of a good outcome.

Conclusion

The ICT legal regime in Sri Lanka did not develop in the 1970s like in the more developed western countries or its Asian counterparts. For the most part, laws ICT sector started to emerge in the mid-1990s with the enactment of the Evidence (Special Provisions) Act, No. 14 of 1995 and the other related legislations which followed pursuit. The ICT legal regime therefore, consist of all these legislations which have been enacted in the age of the internet to both manage and regulate the ICT sector in fields such as telecommunication, electronic contracts and computer crimes. However, these legislations when compared to legislations of other developed countries are not well equipped to combat the misfortunes of the internet and related issues as the technology is moving way too fast when compared to these legislative initiatives. It is sad to see that the legislature has failed to take conscience recognition of the fact and they have not endeavoured to pass new laws or to amend the existing once to combat the issues which are brought up in the ICT sector. For an example, in the age of the internet, social media has become a prominent source of news and media where news spreads all over the world faster than fire. When the Easter attacks took place in April of this year where social media was fast spreading the news and some of it been hate speech all the government could do was to shut down the service providers by denying access without having a system to monitor and regulate the process by bringing the abusers to justice and therefore, denying the people who were within their bounds the rights to freedom of expression.

The ICT legal regime in the country fails to adequately provide solutions for the protection of data and privacy. Further its laws related to intellectual property fails to adequately protect the copyrights, patent rights and trademarks in an age of the internet. Another issue related to the ICT sector is the non-availability of a proper mechanism to combat cyber-crimes where the existing legislation on computer crimes is not adequate to combat issues related to cyber-crimes. Though we live in a digital world where it is all about e-literacy instead of literacy, Sri Lanka has not done well in this sector. For an instance where Sri Lanka has almost reached 96% in the country, the e-literacy rate is only 208%. Therefore, it can be said that even if we are to develop the ICT legal regime, we would not be able to have proper utilization of those reforms unless and until we improve the e-literacy of the individuals who will be dealing with them. In this context where the world economy is being dictated by the digital world, in order to move with its pace Sri Lanka needs to be contemporary with its laws, rules and regulations related to ICT.

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MAKING RIGHTS REAL; EMPOWERING OPPRESSED CHILDREN THROUGH HUMAN RIGHTS EDUCATION IN SRI LANKA; A PATHWAY TO DIGNITY

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Abstract

Despite race, religion and color differences all children inherit equal access for Right to Education. Though it is a universally accepted human right, philosophers from cultural relativist schools criticize the concept of ‘universality,’ due to geo-political realities.

They are often deprived of their basic right to be educated due to various reasons like poverty, abuse or cultural discrimination. In numerous initiatives worldwide, Human Rights Education has proven successful in empowering those vulnerable children. Education *about, through and for* Human Rights, foster the oppressed groups to speak out and act in the face of injustices.

Sri Lanka is a signatory to a plethora of International Human Rights instruments including the United Nations Convention on the Rights of the Child (1989). Hence, is legally and morally obliged to protect, promote and fulfill these rights of its citizens. But Right to Education is not enshrined in the fundamental rights chapter of the 1978 Constitution and has only been recognized through Judicial Activism. Researches reveal that, there are children

who have been deprived of equal access to education in Sri Lanka even today.

In this article the author suggests Human Rights Education as an empowerment tool of those marginalized and recommends avenues for its inclusion in legislations and Policy making process. If the ultimate goal of human rights is to establish dignity of people, justice should be meted out to all innocent children to seek their social emancipation through Education in Sri Lanka.

Key Words: Human Rights Education, Right to Education, Empowerment, Sri Lanka

1. Introduction

“I raise up my voice – not so that I can shout, but so that those without a voice can be heard. Those who have fought for their rights: Their right to live in peace. Their right to be treated with dignity. Their right to equality of opportunity. Their right to be Educated. “Mala Yousafza.

The United Nations Convention on the Rights of the Child (UNCRC) defines the child as “every human being below the age of 18 years”². Despite the race, religion, gender and language all children inherit

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² Article 1

equal access for Right to education. Though it is a universally accepted human right, Philosophers from cultural relativist schools criticize the concept of “universality” (Palau-Wolffe, 2016) due to geo-political realities. For instance, in India “Dalits” and “Adivasi” (Indigenous) communities, or members of “scheduled castes” still face considerable discrimination in accessing resources and opportunities for social mobility (Bajaj, 2012).

Census reveal, today, almost 75 million children across the world are prevented from going to school each day (UNICEF, n.d.). The most recent figures show that 57 million children are currently not attending primary school (United Nations, 2013). In addition, 250 million of primary school aged children lack basic skills (Muedini, 2015).

Children are often deprived of their basic right to be educated due to various reasons like poverty, abuse or cultural discrimination. In numerous initiatives worldwide, Human Rights Education (HRE) has proven successful in empowering those vulnerable children. ***Education about, through and for Human Rights***, foster the oppressed groups to speak out and act in the face of injustices (Bajaj, 2012).

The literacy rate of Sri Lanka is 93.2% for males and 90.8% for females (Central Bank of Sri Lanka, 2012). Though Sri Lanka is gifted of free education along with a high literacy rate and had ratified a plethora of International Human rights instruments including the UNCRC (1989), Right to Education is not enshrined in the Fundamental Rights Chapter in the 1978 Constitution, and only had been recognized

through Judicial Activism. Researches reveal that, there are children who have been deprived of equal access to education up until today in Sri Lanka. Since Sri Lanka is a signatory to the UN is obliged to ***protect, promote and fulfill*** these rights of its citizens.

In this article the author addresses the vital role (Palau-Wolffe, 2016) of **Human Rights Education** as an empowerment tool to be applied to the marginalized children and suggest it to be included in Policies and legislations regarding Education. Institutional measures are also vital in this context. The ultimate goal of human rights is to establish dignity. Hence justice should be meted out to all innocent children to seek their social emancipation through education.

1.1. Methodology

This is a theoretical study. Primary and secondary sources are used in this study. It relies on a number of previous reports, publications, laws and policies. The information has been taken from many readings, articles, books, web sites, newspapers, case law, statutes and International Human Rights treaties and conventions.

1.2. Objective

The objective of this article is to identify particular marginalized groups of children who have been deprived from the right to education in Sri Lanka, (sexually exploited, displaced, refugees, orphans, working children etc.) and to suggest HRE as a tool to empower them. It also aims to identify the major loopholes in the existing laws and policies and suggest appropriate measures

to protect the right to education of the vulnerable children in Sri Lanka.

2. Discussion

Literature reveals that, the scriptural words “*Sa Vidya Ya Vimukthaye*” emphasize “Learning is in fact the real learning that becomes the cause of liberation” (Patel, 2008). According to Paulo Freire, “Education does not transform the world. Education changes people. People change the world” (1972). Hence, Education is intrinsically valuable as humankind’s most effective tool for personal empowerment (Claude, 2005).

2.1. Historical Background of Right to Education

All human rights documents give a prominent place to Education and stress the importance of education in promoting human rights (Patel, 2008). Prior to 1948, Neither the American Declaration of Independence (1776) nor the French Declaration of the Rights of Man (1789) articulated right to Education (Right to Education, n.d.). In its initial steps, it was only recognized as a “Second-generation right”³.

The Universal Declaration of Human Rights (UDHR) (1948) was the first document which stated in article 26, that “Everyone has the right to Education” and it is directed towards “the full development

³ Second-generation Human Rights are related to equality and began to be recognized by governments after World War II. They are fundamentally economic, social, and cultural in nature.

⁴ In the International Covenant on Economic, Social and Cultural Rights **ICESCR** (1966) article 13, In Convention on the Rights of the

of human personality”. Subsequently, it has been legally recognized in core human rights treaties.⁴

2.2. What is Human Rights Education and Empowerment?

Seth Kreisberg says, “Empowerment is a process through which people and/or communities increase their control or mastery of their own lives that affect their own lives and the decisions that affect their lives” (1992). According to Amnesty International “*Human Rights Education is a way to empower people so that they can create skills and behavior that would promote dignity and equality all over the world*” (Bajaj, 2012).

After the World Conference of Human Rights in Vienna (1993), the UN declared 1995-2004 as the International Decade for HRE. In 2011 under the United Nations Declaration of Human Rights Education and Training (HRET), HRE became a right in itself (Palau-Wolffe, 2016).

HRET Declaration (2011) defines that HRE as “*Education, training and information aimed at building a universal culture of Human Rights*”. It not only provides knowledge but mechanisms to protect them, develop skills needed to promote and apply human rights in daily life (World program for Human Rights Education, 2012).

Child (CRC) (1989) article 28-29. In the Convention on the Elimination of all Forms of Discrimination against Women **CEDAW** (1979) article 10, In International Convention on the Elimination of All Forms of Racial Discrimination 1969 (**ICERD**) article 7, also recognize the Right to Education of Children.

The three prepositions linking human rights and education is that “Education *about* Human rights, Education *through* Human Rights and Education *for* Human Rights” weaves together the process of HRE and their intended outcomes (Bajaj, 2012).

2.3. India and Human Rights Education

The Supreme Court (SC) of India, in *Unnikrishnan, J.P. vs. State of Andhra Pradesh*(1993) held that “right to Education is an inherent part of Right to Life under Article 21 of the Constitution”.

Thereafter, article 21(A) was inserted to Indian Constitution, making “Right to Education” a fundamental right for children between age group 6-14. (Gupta, 2018). Subsequently, Right to Education Act (RTE Act) was enacted by the Parliament of India in 2009, which describes the importance of free and compulsory education for children. (Provisions of the Constitution of India having a bearing on Education, 2010).

2.3.1. Real life experience of Empowerment; The story of Premalatha

“*A path to dignity*” is a film⁵ that demonstrates, Successful practices and projects in India, Australia, and Turkey which illustrate the power of human rights education in transforming people’s lives and empowering individuals to make a

⁵ "A Path to Dignity: The Power of Human Rights Education" is a 28-minute-long documentary. The film is a collaborative effort between Human Rights Education Associates, SokaGakkai International, and the Office of the United Nations High Commissioner for Human Rights.

difference in their communities (Bruno, 2012).

Premalatha a girl who lives in Madurai, India belongs to a Dalit caste family, she was often asked to engage in household chores while her brother enjoyed leisure. When she questioned her parents about why they value only boys not girls at all she was beaten. Premalatha, had thought to commit suicide. But she decided to discuss it with her human rights teacher hoping that she could help her solve the problem. She further stated that children have started to question these practices. Even boys have asked “why don’t you send my sister to a school?” (ibid).

3. Right to education in Sri Lanka

3.1. The Legal Regime

During 1658–1796, the Dutch colonial government introduced a free and compulsory education system in Sri Lanka (Rajapaksa, n.d.). In 1945, Dr. C.W.W. Kannangara, made education free for all the children (ibid). Sri Lanka is a signatory, UN member country which has signed plethora of International Human Rights instruments,⁶ also has ratified the UNCRC in 1991. (National Action Plan for the Protection and Promotion of Human Rights, 2017-2021). Since Sri Lanka is a dualist country as held in *Nallaratnam Singarasa V Attorney General* (2006), the application of international

⁶ The **UDHR** (1948); The International Covenant on Civil and Political Rights, 1966 (**ICCPR**), (**ICESCR**) 1966, 1979 (**CEDAW**), (**CRC**) 1989 , **ICERD** (1969), and Convention on the Rights of Persons with Disabilities, 2008 (**CRPD**)

covenants, treaties are not binding until it is domesticated under the municipal law.

In 1992, Sri Lanka introduced the **Children's Charter**, the first Policy Document relating to the protection of the rights, of the children in line with the standards acknowledged by the CRC (Niriella, 2018). The National Child Protection Authority (NCPA) was established by the Act No.50 of 1998 (National Child Protection Policy, 2013).

The Education Ordinance No. 31 of 1939 (as amended) is the only law regarding the right to education in Sri Lanka (Rajapaksa, n.d.). The Sri Lankan Education Policy (1948) mandates free education at the primary, secondary and tertiary levels (Muttiah, Drager, & O'Connor, 2016).

Though, “Right to Education” is not enshrined in the Bill of Rights in 1978 **Constitution** of Sri Lanka, it is stated in the Directive Principles of State Policy, in article 27(2) (h) that, “*State shall assure to all persons of the right to universal and equal access to education at all levels*” but, they do not confer any legal right.⁷ Even though, in **Palihawadananav. Attorney General**(1978-1980)the Honorable Apex Courtheld that, “*Article 12 of the Constitution denotes equality before the*

⁷ Article 29 of the Constitution of SL 1978

⁸**Chandani de SoyzaV Minister of Education,**
SC.FR. NO. 77/2016

⁹Kavirathne v Commissioner General of Examinations SC (FR) No 29/2012, SC Minutes of 25 June 2012, Seneviratne v. University Grants Commission, (1978-80), Perera v University Grants Commission [FRD] (1) 103, Ferdinand v Principal, VishakaVidyalaya SC(FR) 117/2011, SC Minutes 25 June 2012; Lokuge v Principal, Royal College SC(FR) 492/2011, SC Minutes

law and equal protection of law”. This case was the beginning of embracing the Equality doctrine in Fundamental Rights Jurisprudence which was developed by the United States SC under the reasonable classification principle.

In **Haputhantirige v. Attorney General** (2007)it was held that, “*any questions relating to admission of the students to Grade 1 in National and other schools fall under Article 12(1) of the 1978 Constitution of Sri Lanka*”.

In another SC case⁸, Honorable Chief Justice K. Sripavan stated that, “*Article 27(2) (h) of the Constitution is one of the directive principles of state policy which ensure the right to universal and equal access to education at all levels*”.

By all the above-mentioned cases it is crystal-clear that the human right to education is well protected by the judiciary in a sequence of cases⁹ by the way of Constitutional protection under the doctrine of Equality (Silva, 2009).

Human Rights Commission of Sri Lanka is alsoastate funded entity set up under HRCNL Act No. 21 of 1996 to protect and promote human rights (Gomez, 1998). To promote awareness of and provide

12 October 2012; Jayawardena v Principal, DS Sennanayake College SC(FR) 231/2012, SC Minutes 18 December 2013; Amavindi v Principal, Dharmashoka Vidyalaya SC(FR) 37/2013, SC Minutes 20 January 2014; Sampath v Principal, VishakaVidyalaya SC(FR) 31/2014, SC Minutes 26 March 2015; Sakir (on behalf of Minor Shammeha) v Principal, Holy Family Convent SC(FR) 39/2013, SC Minutes 23 March 2015.

education in relation to Human Rights article 10(f) are one of the primary functions of the HRCNL.

3.2. Issues in Sri Lanka in Right to Education

3.2.1. Vulnerable children

Sri Lanka experienced a civil war for more than two decades. Education has been significantly affected due to the conflict, leaving hundreds of thousands of **children displaced** and recruited as **child soldiers**¹⁰ in the Northern Province (Muttiah, Drager, & O'Connor, 2016).

In **child Sexual abuse** cases, young mothers are deprived from right to education. According to reports, in Sri Lanka, almost 5% of the pregnancies in 2016 were reported of teenage mothers (Suranga, 2019). **Child marriages** are also practiced in Sri Lanka. The marriageable age is eighteen years under the Registration of Marriage (Amendment) Act No 18 of 1995 (Niriella, 2018). But, Muslim Marriage and Divorce Act (MMDA) (1951) do not specify a minimum age for Muslim marriages. Section 23 of the MMDA states that, "a child below the age of 12 can be married with the authorization of a Quazi judge". (Rodrigo, 2019). Under article 12 of the 1978 Constitution, unequal treatment on the basis of sex, religion is a fundamental right violation. Hence, right to education, is obstructed by "de jure" regulations for the Muslim children in Sri Lanka.

Child Labor being cheap prevails in many parts of the world. Sri Lanka Department of

Census and statistics declare that the number of working children is around 150,000 (Weerasinghe, n.d.). They also carry the disadvantage of the opportunity for elementary education (ibid, pg.7). **Poverty** and right to education are also strongly interconnected. Out of a total of 3.5 million children in the age group 5-14 years, 391,461 (or 11.3%) are poor, of them 24,276 (or 6.2 %) are not attending school (Nanayakkara, 2017).

Imprisonment of parents also, causes many hardships especially to the **children of imprisoned mothers**. During 18 months from January 1999, 4089 women were imprisoned. 2416 were mothers. Of the 262 children, schooling was affected. Education was considered to have been adversely affected in 59 (23%) (Senanayake, Arachchi, & Wickremasinghe, 2001). **Children whose parents are ex-combatants** also were the Children "orphaned by justice", with the mother imprisoned, when the father is in active combat, may represent a serious denial of child rights (ibid).

According to Dissanayake & Sakalasooriya, the educational aspirations of the **Migrant family children** are significantly lower than non-migrant family children and motivation for higher education is fewer in-migrant families (2017). Results show that maternal migration negatively impact on the educational achievements (ibid). **Children with disabilities** were reported 10.6% as of school-aged children in Sri Lanka, and 10.2% do not attend school because of their disability, meaning only 0.4% of these

¹⁰ According to UNICEF, between November 1, 2006 and August 31, 2007, 262 children were recruited by the LTTE (Wikipedia)

children attend school (Muttiah, Drager, & O'Connor, 2016). The number of **Street children** in Sri Lanka is estimated to be 15,000 (Senaratna & Wijewardhana, 2013). Most children have no, or poor educational achievements and thereby are similar to street children in other countries (*ibid*).

Finally, it is evident by above information that, undoubtedly a substantial number of children are still out of school and are being denied their right to an adequate basic education in Sri Lanka. Since this study is about transforming the oppressed children's lives, a top-down level implementation as well as a bottom-up models (Bajaj, 2012) is vital to be implemented.

4. Recommendations

As mentioned above, 1978 Constitution does not include judicially enforceable Economic, Cultural and Social rights like basic Education Right. But through judicial activism under the "equality clause" "right to education" is recognized as a fundamental right in Sri Lanka. Since Sri Lanka is in the dawn of a new constitution (Gamage, 2017), there is a dire need of, right to education to be recognized in an advanced Bill of Rights.

Also, special legislations like the **RTE Act** in India should be enacted in Sri Lanka in order to impose regulations on compulsory education. This is not only a duty of the Central government also the provincial councils, local government bodies should give priority since Education is in the Concurrent list of the 1978 Constitution in Sri Lanka.

There should be a national policy on Education in Sri Lanka to Make HRE

compulsory to the school curriculum in (pedagogy and content) (Bajaj, 2012), University Education for students in order to develop responsible citizens.

According to the Human rights commission Act (article 10F) the HRC can recommend and provide guidelines in implementing laws and policies regarding HRE as well as community education programs (Bajaj, 2012) to educate both the marginalized children as well as their parents or guardians to acknowledge them that they have rights and also the Civil society should take measures as the privileged community in providing the underprivileged adequate knowledge on Human Rights.

Need to have databases and advanced researches to identify these groups, the NCPA and relevant ministries on child & women affairs should implement strategic plans to educate the oppressed groups about Human Rights and Education and its importance.

Government in collaboration with the NGOs and UN agencies should implement human rights friendly school projects like the Amnesty International initiatives, and Scholarship programs, must request to provide technical assistance, learning materials and publications etc. from the UN, OHCHR.

5. Conclusion

Kofi Annan stated, "Human rights education is much more than a lesson in schools or a theme for a day; it is a process to equip people with the tools they need to live lives of security and dignity" (2016).

It is crystal-clear by the above study, that in Sri Lanka a number of "untouchable"

groups of children to the equal access to right to education exist. Thus, to make their rights real and to transform their lives, “Human rights-based approach to Education” is vital. The state as the guardian of the rights of the citizens Sri Lanka has legal and moral obligations to take necessary measures to protect, promote and fulfill these rights. Children today are the future of tomorrow. Since “Dignity is our inherent value as human beings” (2013), Justice should be meted out to all vulnerable children in Sri Lanka under the best interest of the child doctrine, in an egalitarian basis to seek their social emancipation and their path to dignity through Education.

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Abbreviations

HRE - Human Rights Education

SC – Supreme Court

UDHR – Universal Declaration of Human Rights

UNCRC – United Nations Convention on the Rights of the Child

UN – United Nations

HRCSL – Human Rights Commission Sri Lanka

OHCHR – Office of the High Commissioner for Human Rights

REFLECTION ON THE CURRENT HIGHER EDUCATION POLICY OF SRI LANKA WHICH RECOGNIZES PUBLIC UNIVERSITIES AND ALSO THE RIGHT OF PRIVATE PARTIES TO ESTABLISH FEE-LEVYING UNIVERSITIES IN THE LIGHT OF THE ARISTOTALEAN AND RAWLSIAN CONCEPTS OF JUSTICE

M.M.F.Zihara*

Introduction

Jurisprudence is measured as the basis of all forms of law in the world. A lot of philosophers, political thinkers have contributed to the development of schools of thought related to a particular time period. We can't deny any of such thoughts because each school has its own validity and merit. Therefore, it is our responsibility to understand each and every school of thought with regard to the legal issues in the current situations.

Education is considered as one of the most important elements of human development. It became major establishment of social advance in Sri Lanka even before gained independence. In 1945, The Universal Free Education Policy was introduced in Sri Lanka. As a result, the Sri Lankan population has a literacy rate of 92 percent, higher than that expected for a developing country. (History of Education)

In Sri Lankan history, it is commonly known that higher education has been established through several prominent *Pirivenas* during the local Kingdoms. The University of Ceylon was established on 1

July 1942 by the *Ceylon University Ordinance No.20 of 1942*. After that separate universities and *University Grants Commission* were established after the *Universities Act No. 16 of 1978*. Furthermore, in 1980s, *Lalith Athulathmuthali* has contributed to the vast development of higher education by introducing *Mahapola Fund* for university students. (History of Education)

In addition to that there are number of higher education policies and amendments were introduced throughout the education history of Sri Lanka. It is important to note that the free education policy has lead to 100% primary and secondary education in Sri Lanka. Yet, there is no similar position in higher education regarding university education. The writer's aim is to analyse the current education policy in the light of jurisprudence. Accordingly, the writer is going to analyse the current education policy in relation to the Aristotalean and Rawlsian concept of justice in broad manner.

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I. The Aristotalean Concept of Justice

Treating ‘Equals’ equally and ‘Unequals’ unequally:

The law is commonly equated with justice. The very important concept of justice commonly started with the idea of justice by Aristotle. His claim is that justice includes in treating equals equally and “unequals” unequally, in part of their inequality. According to Aristotle, the man who takes too much is unfair to someone else; the man who takes too little is unfair to himself. In addition to that the just treatment of one man by another is a mean in the sense that there are two extremes to be avoided, unfair gain and unfair loss.

When the writer analyse about the Aristotalean concept of justice in relation to the current higher education policy, it is important to look at the previous education policies regarding public universities as well as private universities. The concept of justice is impossible without the clear understanding about equity.

Equity, Excellence and Efficiency are considered as the basic principles of education. When consider about the higher education in public universities, equity must be considered regarding the educational opportunity to all irrespective of their caste, class, ethnicity and location. For Aristotle, the doctrine of justice in the sense of law-abidingness is commonly called ‘universal justice’; justice in the sense of equality or fairness is called „particular justice”. According to Aristotalean concept of justice, every

student who has the capacity must get the equal opportunity to enroll the university, and then only the equity will be satisfied. It is important to note that while equity give equal access to higher education for all equals, excellence includes the objectives of higher education.

Admission and selection procedure of students for public universities play a significant role in higher education policy. In Sri Lanka, admission to universities is highly competitive by the result of G.C.E (A/L) examination. From 1942, the enrolment of students was increased to different disciplines. It is to be noted that during this thirty year period, student enrolment was not based on ethnic or religious division. In 1979, the number of university admissions was raised 17 fold increase during 37 years. However, the number of available places is limited. Every Year, about 200,000 students sit for the GCE (A/L) examination. While 4060% of students are qualify for university admissions, and only about 20,000 students are admitted to public universities (National Education Commission 2009).

Enrolment of students to universities is based on the policy drawn from time to time by the University Grants Commission with the guidance of Ministry of Higher Education. From 1974 the district quota system was practiced regarding privileges to students from rural areas in the issue of university admissions. According to the current higher education policy, there are different criteria followed by the UGC (National Education Commission 2009).

On the one hand, students are selected based on the all-island merit basis in the cases of Arts courses, Ayurveda, Unani and

Siddha medicine. On the other hand, the students are selected based on dual criteria all-island merit, and district-merit basis. According to these criteria, about 40% of available places are filled based on all-island merit basis. About 55% of places are allocated to 25 administrative districts based on the total population. The rest 5% of places in each course study are allocated to 16 educationally disadvantaged districts based on population (National Education Commission 2009).

The writer believes that treat someone unjustly will harm him/her voluntarily. No one wants to be treated unjustly in any circumstance. In Sri Lanka, higher education policy aims at maintaining the equal opportunity for all students in public universities. According to Aristotle, the lawless man and the grasping and unfair (unequal) man are thought to be unjust, where the law abiding and the fair (or equal) man will be just.

According to Aristotle, ***distributive justice*** is that seeks to give each person his due according to what he deserves. When we consider about the district quota system, students who are in different districts have different and unequal opportunities for their education. Students who study in developed area have more access to well-organized education system through their urban public schools, private institutions, other academic programmes and their educated family members. Even though there are free school text book, free uniform and *Navodaya programmes* are established to promote educational opportunities in rural areas, still the students of rural areas have very less opportunity than the urban areas of Sri Lanka. As a result, the writer's believes that higher education policy regarding public

university admission is the reflection of Aristotle's distributive justice where students get what they deserve.

Some argue that because of this quota system, students from urban areas loss their equal opportunity. Therefore, the current higher education policy creates inequality in the Sri Lankan community. But, the reality is that students with limited resources also need to take same marks with the students from well developed school. It is injustice for any reasons.

Here, the writer observes that students from urban areas are admitted to rural district schools which are educationally undeveloped and access all opportunities from their hometowns. Consequently, they entered universities based on district merit basis (quota). On the other hand, some may argue that students from rural areas also can access educational benefits from urban or developed districts in Sri Lanka.

Therefore, the criteria for university admission have many barriers. The writer's opinion is that the opportunities for the students of undeveloped districts to access educational benefits from developed areas of the country are less with regarding the total population. According to Aristotle, injustice relates to the extremes or boundaries. Therefore, we can't able to prove injustice in the public university admission criteria.

Aristotle made two assertions as follows; 1. They aim at producing or preserving happiness or the common interest either of all or of the best or of those who hold power. 2. They prescribe conduct in accordance with the virtues, courage and moderation. (Aristotle's Theory of Justice)

Accordingly, only 5% of available places are filled by educationally disadvantaged districts. Therefore, these quota systems preserve happiness or the common interest of educationally disadvantaged districts to achieve their justice in this country.

When consider about the academic staff, non academic staff and resources for higher education there must be just and fair treatment to all. According to Aristotle, distribution of public money or other divisible public commodity like payment of citizens for service as jurymen; distribution of land on the foundation of a colony, public assistance for people must be just. The writer observes that in the recent past university academic staffs were on the strike to seek higher salaries and to increase GDP for higher education. According to Aristotle, there is nothing to prevent the work of one being better than that of the other, and that they must therefore be equated. Therefore, the academic and non academic staffs of universities must be treated equally according to their merits.

The right of private parties to establish fee-levying universities

Some argue that the establishment of fee-levying university education is unjust on the basis that private universities would harm the present free education system in Sri Lanka. According to Aristotle, what is just in distribution must be according to merit in some sense, based on wealth or noble birth or excellence. Here, personally I believe that fee levying universities can't be unjust. Sri Lanka couldn't give equal opportunity for all students with qualification for university education. Therefore, this barrier creates a big social and economical gap in the society.

When compare to other countries, the lack of university education for majority students create many crisis in Sri Lanka. Even though the free education system provides 100% in primary and secondary education, it can't be successful in university education. In the current situation, with the expansion of international and private schools there is a need for fee levying universities to students who don't get opportunity in public universities. Aristotle state that conventional or legal justice is men made laws and all can changes. A rule of justice is merely conventional.

In addition to that the Sri Lankan government permitted private parties in hospitals, transportation and secondary education. Consequently, the right of private parties to establish fee-levying universities must be given to ensure justice in the community.

II. The Rawlsian concept of justice

John Rawl is the author of the well-known *A Theory of Justice* (1971) and the more recent work *Political Liberalism* (1996). John Rawls (1921-2002) rejects the very idea of inequality even if it secures maximum welfare. In addition to that equality and liberty are important elements of justice and he defined Justice as fairness.

According to Rawls, the principles of justice for assigning basic rights and duties and determining the division of social benefits in a society are the aim of original social agreement. These types of agreements determine the types of social cooperation and the forms of government.

Through analysing the higher education policy regarding public universities, the majority districts are considered as the educationally disadvantaged districts. Therefore, in order to achieve better political and social justice students must be given equal opportunity for their higher education.

Furthermore, the principles of justice can't be found through human rationality, nature, religion, intuition but in the '*original position*'. Each person seeks such principles which will give him or her greatest opportunity of accomplishing his or her chosen conception of the good life. He argues that the people, who are in the original position, may choose the following principle;

1. Each person is to have an equal right to the most extensive total system of *equal basic liberties* compatible with a similar system of liberty for all.
2. *Social and economic inequalities are to be arranged* so that they are both:
 - a) to the *greatest benefit of the least advantaged* consistent with the *just savings principle* and
 - b) Attached to *offices and positions open to all* under conditions of fair equality of opportunity. (A Theory of Justice, p.212)

Equality for all:

Accordingly, we can analyse every highlighted concept of justice one by one in relation to the current higher education policy of Sri Lanka. First of all we move to the first concept of equality for all. There must be equality in ensuring basic liberty of

social life like caste, class, gender differences. In addition to that there should not be discrimination on the basis of wealth or birth (social status). If we apply equal liberty principle to all without any district quota, educationally disadvantaged districts only developed, urban students can access to higher education in public universities.

Social and economic inequalities and maximization of liberty:

Rawls argue that when the natural liberty and fair equality of opportunity could not give them the prosperity, the people in the original position will select the „difference principle“. We can limit the liberty because of the maximization of liberty itself. Statistics shows that Sri Lanka needs additional universities and the university admissions of students must be increased. When we consider the number of student admission in other countries, we need to set up a number of new universities in Sri Lanka. With the development of other infrastructure like health, transport, electricity it is not an easy task to establish more public universities.

The students have the liberty to choice their higher education in relation to their interest courses according to their merits. However, as a developing country to achieve justice we have to limit the liberty for the maximization of liberty of the country through affirmative action or reverse discrimination. Therefore, the writer believes that the university admission based on quota basis is close to the John Rawls' idea of limitation for the liberty and inequalities for the greatest benefit of the society.

Greatest benefit of the least advantaged people:

It means that the worst anyone could be the „least advantaged“. It can be entirely based on reason rather than either total equality or some form of greater inequality. John Rawls“ second principle includes two important limitations like „*just savings principle*“ and availability of job to all. In other words, the people who are in the original position must ask themselves how much they would be willing to save at each level for their future generation.

Take for example, In India early generations of untouchables or low caste people got opportunity through quota system which was determined by scheduled caste. But, unfortunately nowadays third generation of the low caste students get such privileges. According to Rawls, this is unfair and unjust. The reason behind is that these low caste people became middle class by improving their educational opportunities. Therefore, they can't be considering as the least well off.

This situation is totally different in Sri Lanka. Because, state has listed majority districts as educationally disadvantaged districts. Rawls didn't look at personal justice but about political justice. In the USA, *Justice Harry A. Blackmun* stated that “....in order to treat some person equally we must treat them differently”. Accordingly, in Sri Lanka, without the district quota system, the students from underdeveloped districts can't secure a place in a good university due to the lack of resources while students from urban schools fill the place in such universities. Therefore, the quota system for university admission in public

universities is greatest benefits of least advantaged.

The right of private parties to establish fee-levying universities:

When consider about the idea of the greatest benefit of the least advantaged, the right of private parties to establish fee-levying universities must be ensured. The reason is that on the other hand students who get education from international and private schools loss their opportunities in public universities. Therefore, they became the category of least advantaged. Therefore, the establishment of fee-levying universities can create opportunities for those students. Then only all can achieve John Rawls“ justice with supporting just institutions, mutual respect, mutual aid without harm and be faithful in a broad manner.

Offices and positions open to all:

According to Rawls, institution should work for the maximization of liberty not for the individual. In Sri Lanka, the UGC supervise the public university system according to the national higher education policy. It should be accessed by all. Laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Therefore, the higher education policy of Sri Lanka must be reformed in accordance with the needs and changes of the society to ensure the maximization of liberty.

Conclusion

According to Aristotle, Sometimes Equality became injustice. In this situation equity is important. Special needs must be considered in every situation. Reasonable opportunity must be considered. Therefore,

state must consider about the social needs of the society and reform the policies to give right to the private parties to establish fee-levying universities. The writer argues that this is not against the Aristotle's theory of justice.

There are many critics on some features of Rawls' idea of justice like original position and distribution of social goods. However, for Rawls, justice as fairness is not to provide a universal standard of social justice. His idea of justice is a practical one, because it leads to modern constitutional democracies in a broad manner. But, the veil of ignorance is not practical in the current world. By analysing the current higher education policy, in a Sri Lankan pluralistic society with several different interests, John Rawl's theory of justice gives people to achieve their political and social position based on hypothetical forum.

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INVESTIGATION OF TITLE AND PARTITION LAW

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Volumes have been penned down, on the latter above, the partition law (procedure) and the celebrated, much sought after decided authorities delivered at times; by the Supreme Court and the Court of appeal as well are overwhelming as at the date .Therefore the present day practitioner and the student is not any more materially handicapped, as far as practicing and learning the partition law is concerned. But must me borne in mind that it is solely a procedural law(special) and that law alone cannot help partitioning a co-owned land come before court by way of a partition action, without having resort to most the land law (substantial law) for investigation of title.

Investigation of title to a land, whether co-owned or otherwise about is purely and distinctly a labour work coupled by the land law (substantial law) the law of inheritance (interstate succession) given in every different perspective that is to say of normal citizens, Kandyans, Jaffna Tamils, Muslims (Sunni, Shiya) each of them is governed by, without which a co-owned land cannot be and shall not be partitioned.

Assuming whether the learned trial judge or the practitioner is aware of the said "Substantial Law" at least to the purpose required upon: the following materials must

be equipped with, when to sailing in, in the waters of investigation of title; as the case maybe.

1. Title Deeds
2. Land Registry search notes
3. Land Registry "index" searches(extracts)
4. Land Registry book extracts (certified)
5. Existing Final decrees(Interlocutory Decrees as well) filed of record in the District Courts
6. Existing Final Partition Plans filed of record in the District courts.
7. Correct identification of corpus followed by the meets and bounds given in the title deeds or extracts.
8. Birth Certificate, marriage Certificate of parties and the other similar certificates connected there to.
9. Previous Testamentary proceedings if any.
10. Pedigrees proved in the previous actions in court.

Of the mentioned above, title deeds are top of importance for at present in our country, unlike in the good olden days, the Notary Publics authorized to execute the title deeds, and most of the practitioners of law as well do entertain in, it seems, a practice taken for granted, rather than wasting their, money and

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energy in searching for correct and valid title of someone's land; thus making haywire title to lands; just for a penny, and hope also it need not to mention here that all the title deeds written before a final decree or any interlocutory decree in an action in relation to a particular land or lands becomes invalid thereafter: and of no effect whatsoever.

Also it must be mentioned that the word title deed included the following as well in the land law;

- a. Crown Grants (either British or local)
- b. Fiscal's Conveyances (by court)
- c. Title Plans (T.P).Here no documentary deed is availed but the survey plan (survey general's) itself makes title to the land described therein as well.
- d. Sannas (old declarations given to people for services done)

Generally speaking the registration of deeds at Land Registries is satisfactorily being done, and also had been done, even without assistance of men whom have learnt the law for the purpose; the information required by for the purpose would be made available from, to a certain extent, but an irony of fate it was that the most number of old registration books the importance of which cannot be explained by any means, kept therein over the years have been become decomposed in the shelves itself as at the date; under the hand of the super authorities always ready to pass the bucks while living in cool rooms.

A trial judge or a general practitioner who is envisaged in, in investigation of title to a land given, having been fortified with the material required aforesaid, as for the case maybe,

apart from knowledge of the substantial land law, briefly aforesaid, shall know his basic mathematics as well; for simple reason that the right or correct entitlement of a party or parties to a land has to be mathematically certain; if the investigation of title in satisfactorily alone.

It must also be mentioned at this point, that the drawing of a pedigree chart beginning with the original owner (if any) or the original owners to the far the same could be traceable, is helped to cut-short everything in this endeavor to ascertain degree;; followed by the document material aforementioned beginning from the beginning; as the case maybe.

Also it is not to mention that, in the case of a co-ownership of a land, the shares of all the co-owners, after the investigation of the title if the calculation is done perfectly and mathematically correct, when totaled, the answer should become "one" (1) and, it cannot become by any means more or less "one".

Law Relating to Intestate Succession (Inheritance)

- a. Matrimonial Rights and Inheritance Ordinance No.-15 of 1876.
- b. Law of inheritance under the Kandyan Law Declaration and Amendment Ordinance No.39 of 1938.
- c. Inheritance under the Matrimonial Rights and Inheritance (Jaffna) Ordinance, No-1 of 1911.
- d. Muslim Intestate Succession – (Sections 1-63 of the code of

Mohomedans Law of 1806) and the Muslim Intestate Succession Ordinance in 1931 and the following text are the guidelines.

- The Muslim Law of Succession Inheritance and Waqt in Sri Lanka- M.S. Jaldeen
- Muslim Law of Succession- A guide – A.G.H. Ameen

Matrimonial Rights and Inheritance Ordinance's Sections – 21,22,24,25,26,28,29,30,31,32,33,34,35,36 primarily lay down the law as to how should devolve on a deceased person's immovable property, (to peoples other than Kandyans Muslims and Jaffna Tamils) intestate.

If somehow the aforesaid Ordinance is silent on a question, its section 36 says the Roman Dutch Law sit prevailed in North Holland shall be applicable.

The order of succession taken into account in the said law (sections) is that Descendants, Ascendants, Collaterals.

Ex;-If A dies leaving wife and children, wife and children are the closest descendants, and if A had no wife and children, then comes into being A's parents, who are the ascendants, if at that point A had neither descendants nor ascendants, the collaterals should be looked for.

A leaving property dies:-

A;s Descendants	A's Ascendents	A's Collaterals
I. Wife/Husband	I. Father	I. Brother
II. Children	II. Mother	II. Sister
III. Children's children	III. Surviving father	III. Full Brother
IV. If A is female, only A's children out of her wedlock if any.	IV. Surviving mother	IV. Full sister
	V. Grand Father	V. Half brother
	VI. Grand mother	VI. Half sister
		VII. Half-brother's child
		VIII. Half-sister's child
		IX. Uncle
		X. Aunt

When summed up the law given in all the said sections in the Matrimonial Rights and Inheritance Ordinance it will be like the following;–

- Deceased's wife inherits one half of his property
- Deceased's Descendants, Ascendants and Collaterals get to inherit the other half of the property in the following order.
- Deceased's children get equally "*per capita*" and his children's children if any at the time get "*per stripes*"
- Deceased's children or children's children failing to get, then his father and mother both are entitled to.
- If Deceased's one parent in surviving, that parent gets half only and the other half goes to Deceased's brothers and sisters.

6. When such brothers and sisters failing the said surviving parent gets the whole.
7. Deceased had no surviving parents estate goes to his brothers and sisters, and their children and also to their remoter children if any. (by representation)
8. Deceased's had no full brothers and sisters, and their children too, half of, succession passes to his half brothers and sisters and their children and also to remoter children on the father's side; and the half passes to half-brothers, half-sisters, and their children and remoter issue on the mother's side.
9. If Deceased had only half brothers and sisters on one side they take the whole provided that there in a grandfather or grandmother or higher ascendant yet not living.
10. If Deceased had such ascendants they get the other said half "*per capita*"
11. If all the aforesaid attempts are failed, then the inheritance passes to first to the nearest ascendants in line "*per capita*". Thereafter deceased's uncles and aunts, "*per capita*" and failing uncles and aunts then to their children and also great uncles and aunts with them *per capita*.
12. In the absence to find anyone aforesaid only the whole of the property passes to the surviving spouse.
13. Finally if there is no one to take inheritance such property will be of the state.

Law of Prescription

The term "prescription" has been acquired a major part in the partition law (substantive) and the land law as well. A usurper or a bona-fide possessor can acquire "prescriptive title" to a land provided he is well within the meaning of section 3 of the Prescription Ordinance; and also a bona-fide purchaser as well; as against the person or persons who is/are the rightful owner/ owners to the land.

Section 3 of prescription ordinance – No.22 of 1871

3. Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he

claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs: Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

In the case of ***Kirihami V. Dingiri Appu*** (6 NLR-200) it was stated in its judgment by Moncriff . J that,

It would appear that in order that a person may avail himself of section 3 of the prescription Ordinance No.22 of 1871,

1. Possession must be shown from which a right in another person cannot be fairly or naturally inferred;
2. Possession required by the section must be shown on the part of the party litigating or by those under whom he claims;
3. The possession of those under whom the party claims means possession by his predecessors in title.
4. Judgment must be for a person who is a party to the action, and not for one who sets up the possession of another person, who is neither his predecessor in title nor a party to the action.

Walter Perera's *The Laws of Ceylon*, Vol II at page 269,270

"The possession contemplated by the ordinance in that of a party to a suit and of his predecessors in title, but not that of a third party" and also

Possession must be possession *ut dominus*. It must be possession either in person or by

agent with the intention of holding the land as owner, and it must be exclusive.

So it is trite law that if a person forcibly and intentionally keeps the rightful owner out of possession of a land given, and if that owner had not taken action against within 10 years of time from the date of the said ouster him from the land, the former acquires prescriptive title as against the rightful owner, to the land; in the law suit.

There is a proviso to section 3 of the prescriptive ordinance. According to the proviso, the 10 years shall only begin to run against parties claiming estates in the remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

In ***Lesin. V. Karunaratne*** 61 NLR 138 it was held that where a person donates land reserving to himself a life interest, prescription does not begin to run against the donee, until the death of the donor. In such a case, the donee as a remainder is entitled to the benefit of the proviso to section 3 of the Prescription Ordinance, and "adverse possession" cannot come into being.

In ***Corea V. Iseris Appuhamy*** 15 NLR 65, the privy council held that one co-owner can acquire prescriptive title to the entirely or to apart of the land as against the other co-owner or co-owners, as the case maybe; and this law still remains unchanged, even though later on local judges have spoken of different thoughts at occasions.

In ***Majeed V. Zaneer*** 61 NLR 361, one co-owner let out a premises and appropriated himself the total proceeds (rents) for over 37

years. H.N.G. Fernando J (then, later C.J) held that it was not sufficient by itself, to bring the case within section 3 of the prescription Ordinance.

In the same case he observed that “Firstly Section 3 of the prescription ordinance imposes two requirements;

- i. Undisturbed and uninterrupted possession and
- ii. Possession by a title adverse or independent of.

Secondly the question whether the second of these requirements is fulfilled does not arise unless the first of them has been proved.

From the Privy Council judgment of the case of Corea V. Iseris Appuhamy, it is clear that a co-owner in possession can satisfy the 2nd requirement in any one of the following two different modes:

- a) By proving that his entry was not by virtue of his title as a co-owner, but rather of some other claim of title.
- b) By proving that although his entry was by virtue of his lawful title as a co-owner, nevertheless he had put an end to his possession in that capacity **by ouster or something equivalent to ouster**, and that therefore and thereafter his possession had been by an adverse or independent title”

Yet it is sad to note that the writer has been observed over the past three decades that, most of our judges, when dealing in partition suits often tend to ignore the fact that is plain as a pikestaff that “ouster” or “possession adverse to” must only be considered **only amongst co-owners to a land in an action**

only, thus making their judgment bad in the eye of the law.

Can say for an instance where A,B,C, being parties to a partition action who are co-owners while claiming their respective title to; D who is not a co-owner who claims either whole or a part of the corpus by prescriptive title, either of any one of two ways stated by H.N.G. Fernando .C.J above the judge hearing such case somehow takes into account or considers for “ouster” or a “possession adverse to” as far as D’s claim is concerned, there he has been astrayed into an issue (false) which does not exist; by any means.

Finally yet another important point in law must also be added here, that a co-owned land which land has been de-facto divided and being possessed undisturbed over the years by them the co-owners, thereby acquiring prescriptive possession to each of the part so divided, such land cannot be subject to a partition suit thereafter, simply for the operation of this prescriptive law, which comes into being inevitably.

P.S.: The inheritance law of Kandyans, Jaffna, Tamils and Muslims are not included in here for the passage had to be limited to words 3000 only.

PROTECTING TRADITIONAL KNOWLEDGE IN SRI LANKA: A FIGHT AGAINST BIORAPIRY

Idunil Kumari Ratanasinghe*

Introduction

The precise definition of traditional knowledge (hereinafter referred to as TK) is still a debate. The Convention on Biological Diversity (hereinafter referred to as CBD) reflects the diverse nature of TK when it refers to it as "...knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles..." It has been suggested by WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter referred to as IGC) that TK could be characterized as "...the content or substance of knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge that is embodying the traditional lifestyle of a community or people, or is contained in codified knowledge systems passed between generations..." It further states that TK is not limited to any technical field, and may encompass medicinal knowledge, agriculture, environmental knowledge and knowledge associate with genetic resources.

Bio piracy has become a crucial issue which desires a deep analysis. The Cambridge English Dictionary defines bio

piracy as "the act of taking living things, especially plants, from an area or taking the knowledge of local people about these living things, and using them or it to make money for a particular company or organization." Developed countries battle to gain free access to gain biological resources in developing countries with their advanced technologies and in return they have no willingness to pay compensation. The fact that developing countries are not in a position to afford protection for their biological resources is a miserable state indeed. This paper intends to focus on importance of protecting TK, different mechanisms in order to do protect and preserve TK and sufficiency of current Sri Lankan legislation in protecting TK in comparison with India.

Importance of Protecting TK

A community's innovative advancements in TK at times may meet the requirements to qualify as patentable which is one main way of protecting TK. This is because the existence of a relationship between a particular invention and its underlying TK. In such circumstances the holders should be asked whether they wish to obtain the advantage of patent protection and whether it is in their best interest to do so. If the answers are affirmative then they should be inquired whether they possess necessary

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resources to file, prosecute and enforce patent applications.

One can argue then how the link between TK and the patent system can be exploited. The answer can be found in the objective of the patent system says Professor Erstling (2008). Although the objective of patent law is affirmative on the other hand, there is also a defensive objective of the patent system which is to ensure the denial of rights to inventions that are already known or lack of sufficient level of inventiveness. Further, an informational objective of patent system is to guarantee the disclosure to third parties of all relevant information concerning the invention in order to grant exclusive rights to patent applicant. Therefore, countries wishing to protect TK through patents shall enforce legislative mechanisms to provide for defensive protection of TK, disclosure of TK, with consequent provision for benefit sharing and affirmative protection of qualified TK through granting patent rights.

According to Professor Erstling “communities should have the right to make use of their own TK pursuant to their own customs and policies, free from misappropriation or misuse by others.” Moreover, the holders of TK may be motivated by the economic, social and environmental interests derived from it. Accordingly, the TK holders opt to protect TK in moral, economic, social and environmental aspects. Professor Graham Dutfield (2004) has examined that “some indigenous and local communities depend on traditional knowledge for their livelihoods and well-being, as well as to sustainably manage and exploit their local ecosystems.” Therefore, protecting TK not only help indigenous and local community

to maintain livelihood security and physical well-being but also provides opportunities for economic development.

The International Framework

The Convention on Biological Diversity (CBD) constitutes the central global framework for the governance of access and benefit sharing. (ABS) The CBD and its Nagoya Protocol on Access and Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization regulate ABS and thereby address the issue of biopiracy. Article 8 (j) of the CBD mentions that the countries should respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities which are connected to the conservation and sustainable use of biological diversity. It also requires wider application with the prior consent of knowledge holders with additional provision to equitable benefit sharing for the utilization of genetic resources and associated knowledge.

On the other hand, Nagoya Protocol provides a “much better resolution on international rules and procedures for access and benefit sharing.”(Kumar, Lakshman 2014) Since the Protocol applies to genetic resources within the scope of Article 15 of the CBD and to the benefits arising from the utilization of such resources and to TK associated with genetic resources it indicates that the scope attempts to realize the contents of Article 15 and 8 (j) of the CBD. Nevertheless, critics argue that CBD was produced “at the behest of interests mostly from the North.” (Micheal, 2003) Vandana Shiva, an Indian environmentalist states that the US agenda was to have the CBD pave way for free access to the South’s biodiversity while

ensuring intellectual property rights to USA's own technology are protected. Critics have also pointed out that CBD is strong on patents but weak in protecting the rights of indigenous people to their biodiversity and knowledge. For example, Article 8 (j) merely calls for respect and protection of indigenous knowledge but does not mention any rights at all. Since the Convention has no mechanism to control outsider's access to biological resources and to determine equitable sharing of benefits critics argue that the Convention "lacks teeth."

The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of the Utilization (hereinafter referred to as the Bonn Guidelines) counsel contracting states to consider measures that would "encourage the disclosure of the country of origin... of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights..." The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) sets the "global minimum for patentability" (Lakshamn, 2014) since it sets the basic framework which protects the intellectual property rights of individuals and corporations across the member states of the World Trade Organization. Although it does not expressly cover patent protection for TK, it includes several provisions such as Article 7, 8, 27, 29, 32 and 62.1 which are especially relevant to the issue of disclosure of the source of TK in patent applications.

Different approaches to protect TK

TK may be protected not only through patents but also through several other alternative protection strategies. One such example would be using geographical indications (GI). This is because if local people register their products under GIs, their consumers may rely on the origin of the product, and purchase only them due to their authenticity. GI may be widely used to protect TK relating to agriculture productions for reasons such as they can be granted for a group of people and for perpetuity, they are aimed at particular characteristics of a good, they reward producers in a particular region and producer qualifies for the protection irrespective of whether he is an individual or a group. Another option to protect such products would be Trade Marks (TM). TM assures of authenticity and it required for registration if protection is needed. Protection lasts for perpetuity and may be granted for a class of people. Since TMs are meant to distinguish goods of a particular producer from another, the mark indigenous people use will serve as an indication to consumers that the product is manufacture by them.

While copyright protection can be used protect artistic manifestations of holders of TK which may include legends, myths, poems, theatrical works, musical works and textile compositions. Trade Secrets may also be used protect TK. However, one main limitation in protecting TK through an IPR regime is that the rights cannot be enforced outside the country and hence, fails to solve the problem of bio piracy since appropriation of TK is mostly committed by foreign entities. Therefore,

another considerable option would be a *sui generis* regime of IPR. The term refers to ‘of its own kind’ and it is based on this law several countries have designed their own distinct laws to deal with the rights of holders of TK.

Challenges faced when protecting TK

“Developing countries now understand that developed countries have not ended their rush for acquisition of spheres of influence in the Third World.” (Dountio, 2010) Developed countries battle to gain free access to gain biological resources in developing countries with their advanced technologies and in return they have no willingness to pay compensation. The fact that developing countries are not in a position to afford protection for their biological resources is a miserable state indeed. Therefore, in this part of the paper the reasons for powerless developing countries to be unable to afford protection will be discussed.

Firstly, developed countries being unwilling to participate in assisting to find a solution to this issue remain a huge challenge. For instance, United States has not ratified International Treaty on Plant Genetic Resources on Food and Agriculture. (ITPGRFA) Further, US patent law does not seem to support protection of traditional knowledge since it requires documentary proof when an objection is made to an application for patent rights. This is not advantageous for the holders of TK since a greater part of TK is undocumented. Secondly, the fact that bulk of TK is available in the public domain since greater part of TK is used by the members of the indigenous community and

as such is part of ‘prior art.’ TRIPS agreement provides that in order for an invention to be patented it must be ‘new’ (Article 27.1). Thirdly, TRIPS Agreement provides that an applicant for a patent shall disclose an invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date. This provision indicated the necessary of documentation and TK is often undocumented is yet another obstacle for protecting the same.

Fourthly, holder of TK often find it difficult to protect TK due to the high cost involved in it. This is often an unaffordable price for the indigenous and local communities. According to Hansen & Van Fleet (2003) the cost of obtaining a patent under US law is estimated to be \$5,000 to \$10,000 or even higher. Fifthly, Article 27.1 of the TRIPS Agreement provides that an invention to be patented it must be new, involve an inventive step and are capable of industrial application. The fact that TK is often held collectively and does not recognize individual ownership of it. A further challenge is absence of an international TK regulation regime. “A framework treaty is the first step in this process because it creates the contracting space for the evolution of more specific and enforceable obligations.” (Drahos, 2004) Since WTO seems to be the only international organization to provide a solution for this problem during the discussion sessions on the review at Doha, Qatar some developing countries such as India suggested for the amendment of IP laws to accommodate harmonization of the CBD and TRIPS developed countries like US opposed and

this led to the collapse of the negotiations. Finally, one of the ideal solutions for the protection of TK seems to be designing a *sui generis* law. However, the provision in TRIPS Agreement regarding this aspect is vague and thus, makes it difficult for the countries to design such a regime. It has not defined in the TRIPS Agreement a clear criterion when designing a *sui generis* scheme.

The Position in Sri Lanka

Although Sri Lanka has a rich source of traditional knowledge most of it is in the danger of disappearing (Wickramanayake, 2012) Many forms of traditional knowledge involve *inter alia* indigenous medicine which is a mixture of formalized systems of Ayurveda, Sidhha, Unani and the non-formalized system of Deshiya Chikitsa used for bone mending, snakebite, eye disease treatment and etc., architecture (Buddhist architecture of cave temples, stupas, meditation houses, vaulted roof shrines, places with ponds ad storied buildings) agriculture, water supply systems which are sustainable, environmental management, food preparation and preservation habits and martial arts (*angampora*), traditional local performances such as *tovil*, drumming, low-country dance, Kandyan dance and etc.

Sri Lanka is subject to a ‘serious threat of bio piracy’ says Marsoof (2010). Bengwayan mentions that global drug firms seek to exploit ancient Lankan wisdom, extracting chemicals from local plants and patenting them abroad. For instance, it is found that nineteen different drugs have been made using substances found in the *Keena* tree of Sri Lanka (Gracia,2007).Further, locally grown *Kothalahimbutu* plant (*Salacil reticulata*)

helps control diabetes when one drinks water left overnight in mugs or jugs carved out of *Kothalahimbutu*. A Japanese drug company has patented a product based on this plant through the American Chemical Society in 1997. The plant *Weniwelgata* has also been registered by Japanese, European and American manufacturers which is used by Sri Lankan to remedy fever, coughs and colds. However, unfortunately the current legal framework is greatly inadequate in addressing this issue of bio piracy. Intellectual Property Act No. 36 of 2003 and the Fauna and Flora Ordinance amendment Act No. 22 of 2009 play a supportive role in this aspect but with serious deficiencies. For instance, under the Sri Lanka IP Act protection is granted under Section 5 copyright protection only to oral traditional cultural expressions such as Kandyan dance, folk poetry and traditional craftsmanship. Traditional knowledge in Sri Lanka is not limited to expressions of folklore and seeking protection only to expressions of folklore is only a partial solution. According to Dutfield (2003) “protection of traditional knowledge must be broad enough to embrace traditional knowledge of plants and animals in medical treatment etc.”

Moreover, Section 6 limits folklore to performance related to stage performances. Economic rights guaranteed to the owner under Section 9 shall concern the works protected under Section 6 of the Act. Therefore, the limitation of protected expressions of folklore which are “apt for stage production” seriously narrows the scope of protection. Hence, traditional crafts objects due to the inability to perform on stage will not be able to be protected under Section 6. Another issue is the inability of incorporating copyright

protection with traditional expressions. Traditional which implied ancient existence may be traced back to centuries ago. Therefore, protection under copyrights will be futile since the duration of copyright protection is only for lifetime of the author and 70 years after death.(Section 13) Another problem arises here is the identity of ownership of indigenous knowledge since such knowledge is held by the community and they refuse to recognize individual ownership. A further issue arises as to the ‘originality.’ According to WIPO “Many traditional literary and artistic productions are not original.” But for copyright protection to be granted the work must be original. It is now desirable to examine several cases in this aspect. Although in *BulunBulun v. R & T Textiles (Pty) Ltd* (1998 41 IPR 513) ,*BulunBulun v Nejlam Investments* (11 10 EIPR 346) the court protected aboriginal artwork by enforcing copyright inadequacy of protecting the rights of holders of traditional expressions by copyrights was stressed in *Yumbulul v. Reserve Bank of Australia* (1991 21 IPR 482). In the latter case French J. noted that copyrights are insufficient to deal with such claims and emphasized on relying on customary laws in this regard.

Section 24 of the Act makes specific provisions relating to reproduction, communication to the public, adaptations, translations and other transformations of expressions of folklore. This gives rise to many issues for instance empowering a competent authority to authorize third parties to make use of folklore may not be in the best interest of local communities. Further, even though a fee paid by third parties will be collected in fund to be utilized for cultural development it does not

specifically address the need for benefit sharing with indigenous communities. Moreover, although Section 24 (6) states that those who deal with folklore without the requisite authorization will be liable for damages it is unclear as to whom the damages will be paid.

India

India is home to over 700 indigenous groups. They have taken many steps forward in protecting their indigenous knowledge in their country. For instance, the Biodiversity Act of 2002 in India which recognizes that India is rich in traditional knowledge and is responsible for regulating access to TK. It also provides for the establishment of the National Biodiversity Authority (NBA) (Section 8.1)which is required to *inter alia* ensure that foreigners, Indian non-residents, corporations, associations, organizations not registered in India or registered in India, but having shares held by or managed by foreigners do not have authorized access to biological resources occurring in India (Section 3.1) or knowledge associated thereto, for purposes of research, commerce, or biodiversity and bio-utilization.(Section 3.2)NBA together with State Biodiversity Board must consult local Biodiversity Management Committees before access is granted to anyone, even though there is no obligation to follow the latter’s recommendations. Further, it provides that no one shall without the approval of the NBA transfer results of any research to any biological resources occurring in or obtained in India for monetary compensation to a foreigner, an organization of a body corporate managed by foreigners, or having shares held by foreigners. It is stated in Chapter X that

every local authority shall constitute a biodiversity management committee within its area, the purpose of which shall be promote the conservation, sustainable use and documentation of biodiversity (Section 4.1)

Subsequent to fighting several high profile legal battles such as the Turmeric case (India forced USPTO to revoke patent granted to researchers in US for the use of turmeric powder (*curcuma longa*) for wound healing. India won the battle in 1997) where they argued that since Indian have for centuries used turmeric powder for wound healing thus, it lacked the ‘novelty’ criterion for granting patents. India recognized the need for safeguarding their TK through establishing a Digital Library. This is a thirty million page searchable database translated from Hindi, Sanskrit, Arabic, Persian, Urdu, and Tamil into English, German, French, Spanish and Japanese.

Conclusion and Recommendations

The most visible action a government can take is to create, modify and implement national laws on traditional knowledge in order to protect it. Usually, this law making is stimulated by pressure to meet international agreements. In Sri Lanka, the proposed legal framework of 2009 is important in this regard. This working piece of legislation has identified two categories of TK viz. public domain TK and non-public domain TK. The draft legislation not only provides for registration of TK which is not in the public domain but also it provides for creation of a database for public domain TK. Nevertheless, some issues pertaining to the draft legal document is ascertaining how to demarcate public domain TK from non-public domain

TK and unavailability of a mechanism how to penalize those who abuse public domain TK in an unauthorized manner.

Designing national laws also solve the issues of high cost involved in protecting TK and availability of patent protection only for inventions which are novel, innovative and useful since these requirements make it difficult to seek protection of TK based biological resources which have been transmitted orally from time immemorial rendering not novel and which are collectively held and not individually owned. However, designing a *sui generis* law for countries is also not an easy task because there is no guideline as to the criteria to be considered when designing such a law. It can be therefore, recommended to provide a series of guidelines for states when designing a *sui generis* model for protection of TK. This could lead to countries having a more uniform set of laws relating to protecting TK.

Next, creating a database and digital libraries can also be recommended with much legal protection because TK is in danger of being eroded and therefore, preventing from getting disappear is much more important than fear of misappropriation. In order to remedy misappropriating such knowledge stringent laws can be implemented. Rules and regulations must be provided for other practical issues like basis for users fees, valuation of the information collected, possible claims of intellectual property over the databases themselves and the recovery of operational costs of these database.

Moreover, active participation of indigenous people in protecting TK must be encouraged. It is much important that

indigenous people's organizations be informed of developments in the international arena and at the same time relating these developments to what is happening around. A more coherent approach can be designed through support given by the civil society involving churches, temples and other mechanisms.

Establishing an IPR Ombudsman attached to the national patent office will help investigating complaints of indigenous communities. This post should be filled in consultation with indigenous communities and organizations and he should provide an annual report on his activities. He also should possess the authority to delay patent approvals and to require the review of specific patents or patent applications. When indigenous community challenge the patent claim through the ombudsman a Tribunal should be established in order to solve the dispute.

One of the main difficulties that arise when seeking to protect TK is that certain developed countries are unwilling to participate in finding a solution to this issue. It can be recommended that TRIPS Agreement include in its requirements for grant of patent that application of patents shall not be granted where the invention is known or the applicants can be required to disclose the source of origin for patent applications based on biological resources. At this point, the challenge of TK falls within the sphere of prior art arises and it can solved by requiring in TRIPS Agreement disclosing the source of origin and proof of consent of TK holders as conditions for patent applications.

It is of utmost importance that Sri Lankan IP Act be amended to include specific concerns relating to TK. Guidance may be

sought from Indian Patent Amendment Act of 2005. Section 3 of the Act excludes a mere discovery of a known substance from patentability with an aim of protecting TK and biodiversity. Further, grounds of opposing patent applications include 'non-disclosure or wrongful disclosure mentioning incomplete specification, source and geographic origin of biological material used in the invention and anticipation of invention by the knowledge, oral or otherwise available within any local or indigenous community in India or elsewhere.' Moreover, Sri Lanka should refer instruments like United Nations Declaration on Rights of Indigenous People when drafting national legislations.

Scholars also point out that the 'Trust concept' can be of much use in protecting TK. Therefore, attention should be drawn to involve trust concept in this regard. TK in the public domain can be protected under public trust doctrine and TK privately owned can be protected under private trusts. For instance, San Hoodia Benefit Sharing Trust was created for the San Tribes and this can be done in Sri Lanka through benefit sharing as required in Chapter II of Trust Ordinance No. 9 of 1917.

Finally, it is of utmost importance to establish an international TK regulation regime in this aspect. Drahos (2004) has suggested "A framework treaty is the first critical step in this process because it creates the contracting space for the evolution of more specific and enforceable obligations." The need for such an international protection arises because national and regional laws only have a limited impact since they affect only in the countries in which they have been enacted.

Although this can be remedied by bilateral and plilateral agreements between countries the issue is only a few countries actually have these laws in place. Therefore, it is crucial to have an effective international TK regulation. An international regime needs to carefully define international policy objectives, particularly in terms of what and who needs to be protected. One major advantage of such a regime is that it provides for minimum acceptable standards for protection and thereby creates a greater legal certainty by harmonizing of national laws to a certain extent. Thus, it will ease the holders of TK to manage and trade their IP assets. However, international regime should not be too prescriptive in terms of how it will be implemented and thereby allowing each country to determine own provisions. The overall objective should be ensuring the stated objectives are achieved.

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HOW SRI LANKA SHOULD RESPOND TO THE THREAT OF “FAKE NEWS”

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1.0 Introduction

From the inception of Declarations to Treaty based mechanisms to protect human rights, Freedom of Expression (FOE) was considered as an inevitable international customary law among states, which was subsequently adopted by many other United Nations treaties, Regional Conventions, and to national legislations by many states. In terms of Universal Declaration of Human Rights (UDHR 1948), Article 19, the “Right to Freedom of Expression was safe guarded as “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*”.

This right is quite significant for proliferation of ideas and opinions for both individual and collective groups, and it is profoundly considered as a principal aspect of a democratic society. For the fulfilment of a state or even an individual being both positivity and negativity ought to be inculcated and balanced. As such, in order to reach a better destination variety of perspectives or in fact various expressions would be prudent to allow and utilize, even in a decision-making process.

Accordingly, every human being shall have his/her freedom to express his/her opinion. On the other hand, the Article 19 of UDHR includes right to seek, receive, and impart information. This portion of the Article elaborates that seek and receive information is a part of right to access information that are disseminated through different means.

Despite the fact that the UDHR has taken a holistic approach for this right the United Nations International Convention on Civil and Political Rights (ICCPR 1966) has imposed restrictions upon FOE under certain circumstances seeing the practical consequences of governing states. Accordingly, Article 19(3) mentioned that;

‘The exercise of the rights provided for in paragraph 2 of this article carries with its special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others, (b) For the protection of national security or of public order, or of public health or morals.

Therefore, it is legitimate to impose limitation to FOE under special instances.

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The breadth of this right demonstrates a system of disseminating and receiving information, which can be contributed and used by many parties and by numerous ways. Then, there arise a question with regarding its quality.

Notwithstanding the position where FOE could strengthen democratic values, any kind of misleading information can threaten democratic values. Thus, spread of false information on individuals or groups could be a threat and it could violate individual and collective rights, which emphasize the importance of having a regulation mechanism to oversee such dissemination of misinformation. For instance, suppose that a person publishes false facts on a public figure, an election candidate, a certain brand, and facts of a state etc. Objectively, that is a form of expression, which can be considered as an act of manipulation or abuse of FOE that shall be prevented, which will be discussed later in this article.

The purpose of this article is to examine the conflict between “FOE” and “Fake News”. While this attempt to understand the phenomenon of “Fake News” under variety of perspectives, as far as possible it also touches upon comparative jurisdictions in view of searching for a feasible solution for Sri Lanka to combat “Fake News”, while safeguarding “FOE”.

2.0 Understanding Fake News and the Importance of Regulation

With the development and usage of modern technology to distribute information to a wider audience, any information can be reached by millions, whereby the traditional channels of information have

dramatically focused on distributing information through Social Media Platforms (SMPs).

Broadcast media and printed media are the traditional ways of disseminating news and other information, which provided systems to correct any false information if broadcasted or published. On the other hand, prompt legal action can be taken against them due to easiness of tracing the source and ownership. Nevertheless, the proliferation of SMPs have made it complicated in taking prompt actions against misleading information and overseeing dissemination of “false information/fake news”.

Amidst the abovementioned context, there is no universally accepted definition given for the term “*Fake News*”, except certain definitions given by some countries like Russia and Malaysia in which Malaysia has defined fake news under Section 2 of its *Anti-fake news Actas*;

‘Any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or as any other form capable of suggesting words or ideas’ (The Law Library of Congress 2018).

whereas, the *Russian Federal Law on Information, Information Technologies and the Protection of Information* (Information Law) defines fake news under Article 15(3) as;

‘socially-significant false information distributed under the guise of truthful messages if they create a threat of endangering

people's lives, health, or property; create possibilities for mass violations of public order or public security; or may hinder the work of transportation and social infrastructure, credit institutions, lines of communications, industry, and energy enterprises'.

Moreover, according to Cambridge dictionary “fake news” is defined as “*false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke*”. The aforementioned definitions cover all types of media, where the Cambridge definition specially focuses on politics as the objective of making fake news, and further adds joke in to it, where it gives arise to a question whether sarcastic posts in social media will be removed. It is pertinent to note that the above definitions were demonstrated simply to give an idea on what “fake news” look alike, and how states have instilled their “objectives of making these laws” into their definitions, which will be looked into later.

Apart from the definitions given to fake news, Wardle (2017) has taken a widespread view of the problem. He says that to tackle the problem the entire information system should be looked into, and term “fake news” will not suffice when countering misleading information due to the complexity of types of information. He points out three elements of an information ecosystem as follows: (1) The different types of content that are being created and shared, (2) The motivations of those who create this content, and (3) The ways this content is being disseminated. Subsequently he introduces two other terms as “*misinformation*” and “*disinformation*”,

where misinformation is described as the unintentional sharing of false information, while disinformation is described as the Intentional creation and sharing of information known to be false.

Thereafter, he has introduced seven types of problematic information/content as follows; (1) No intention to cause harm but has potential to fool (*Satire and Parody*), (2) Misleading use of information to frame an issue or individual (*Misleading content*), (3) When genuine sources are impersonated (*Imposter content*), (4) News content is 100% false, designed to deceive and do harm (*Fabricated content*), (5) When headlines, visuals or captions don't support the content (*False connection*), (6) When genuine content is shared with false contextual information (*False content*), (7) When genuine information or imagery is manipulated to deceive (*Manipulated content*).

Therefore, tackling misleading information should be implemented under a wider perspective because of the variations of contents. Moreover, the above variations and terms indicate that there is a possibility of unintentional sharing of information, whether it be true or false, especially in SMPs. In such event penalizing someone under a single definition will cause complications, and it further indicates the level of gravity attach to each type of information. Thus, addressing these issues in counter attacking fake news will be essential (emphasis added).

From the “Facebook role in Myanmar crisis” (Human Rights Council 2018), to “Pizza gate Shooting incident” (The New York Times 2017), “Aftermath of April 2019 Bombings in Sri Lanka” (BBC 2019),

“Fake News dissemination websites of Hungary and India” (The Economic Times 2020), and “spread of false information in Sri Lanka during Covid-19 pandemic” (Ada Derana 2020) fake news have caused social, economic, political consequences, which is a clear threat to FOE.

The aforementioned incidents are few among hundreds of other similar stories indicate how information are misused by people. This also exemplifies different kinds of motivations, parties that are targeted, and also social behavioural patterns among the society. While SMPs worsen the situation it also demonstrates the level of responsibility of users and how much importance they have given to information in SMPs, which should be looked into because it is necessary to examine whether there is sufficient reliable information provided to the audience and in fact people may struggle to identify the credibility of information.

Additionally, the activity of “bots” in SMPs must be scrutinized as they are simple algorithms instructed to do specific tasks within SMPs, and it is kind of artificial intelligence (AI) that studies, interacts, and misleads users, where it can be a source to propagate fake news online (Centre for Information Technology & Society 2018). The issue of bots was widely discussed with related to twitter, where certain “bots” acted as influential users, and the emotional human beings, most of the times get trapped to interact and share information, which the bots are programmed to spread. While, this technical issue must be also addressed in regulating fake news, it is also relevant to emphasize the necessity of regulating

human behavioural patterns in social media.

Basically, the spread of misleading information is considered to be against world peace and order, and the few examples aforementioned demonstrate how bad it can affect to the society. Some were politically motivated towards adversaries, while some were directed towards communities to cause panic. The summarized story indicates about the manipulation of the online community that need to be examined for different reasons. Because misleading may be done by the governments as well as by other collective bodies who propagate their own ideologies. Accordingly, it is abundantly clear that FOE has been allowed to flourish through the internet in both ways. What alarms is the way people utilize it, which have attracted law enforcement agencies to take their chances against who violate the given freedom.

3.0 Sri Lankan Context, Legal Framework, and “Fake News”

The aftermath of April bombings in 2019 was the most critical point, where the government felt necessary to regulate and prevent “hate speech” and “fake news”. Consequently, they determined to bring laws, so that they consulted many parties, yet the work has not seen an outcome. Nevertheless, responses can be observed when fake news and hate speech are discovered in SMPs. The legal framework at the contemporary can be summarized as follows;

Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 15(2) restricts “Right to Freedom of speech and

expression including publication guaranteed through Article 14(1)(a)" as follows;

"The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence"

International Covenant on Civil and Political Rights Act No. 56 of 2007 provides the foundation to counter hate speech as follows;

Section 3:

- (1) *No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.*
- (2) *Every person who - (a) attempts to commit, (b) aids or abets in the commission of or (c) threatens to commit, an offence referred to in subsection (1), shall be guilty of an offence under this Act.*
- (3) *A person found guilty of committing an offence under subsection (1) or subsection (2) of this section shall on conviction*

by the High Court, be punished with rigorous imprisonment for a term not exceeding ten years.

The *Penal Code* does not accommodate any provision for fake news and is not defined, however, it speaks of preventing unwanted excitement among the public in terms of *Section 120*, which states as follows;

'Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the State, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such People, shall be punished with simple imprisonment for a term which may extend to two years.'

In 2007, *Computer Crimes Act No. 24 of 2007* came into being along with the aforementioned statutes penalized illegal computer activities that could have an impact on public order. Section 6 provides;

(1) Any person who intentionally causes a computer to perform any function, knowing or having reason to believe that such function will result in danger or

imminent danger to - (a) national security, (b) the national economy, or (c) public order, shall be guilty of an offence and shall on conviction be punishable with imprisonment of either description for a term not exceeding five years.

Additionally, beside the aforementioned, *Section 69 of the Sri Lanka Telecommunications Act, No. 25 of 1991, amended by Act No. 27 of 1996* (Which established the Telecommunication Regulatory Commission of Sri Lanka [TRCSL]), empowers the Government to prohibit or restrict the use of telecommunication during emergency situations. Moreover, *Information and Communication Technology Act, No. 27 of 2003* that created Information Communication Technology Agency (ICTA) obliges to enforce national policy on ICT through Computer Emergency Readiness Team (CERT) that focus on related issues.

As could be noted, there is no precise legislative provisions that could penalize fake news. Be that as it may, law enforcement agencies in terms of the above provisions attempts to counter fake news up to a certain extent.

The ICCPR Act particularly focuses on “hate speech” restricting FOE for the purpose of maintaining national security, while penal code focuses on hatred as well as unwanted excitement among the communities. Contrast to the aforementioned, Computer Crimes Act speaks of illegal computer activity, which is indeed an activity via internet. The usage of

“bots” and other “minor AI” in propagating types of news, through human instructions can be related to provisions of this Act, even though it may not have widely identified in Sri Lanka. Eventually, it shows an empty space in the legal framework with no interpretations, or any specific offence to take measures against misleading information.

However, it is pertinent to note that Criminal Investigation Department (CID) continues to arrest offenders for creating and spreading fake news, which pose a question on how they will be penalized. The section 6 of Computer Crimes Act advocates the use of computer to function a certain programme feeding disinformation, contrast to publishing a misleading content. The activity of “bots” or particular algorithmic code complies with expressions of section 6 that explicate the context as “*intentionally causes a computer to perform any function*”. Bot activity usually “cause” a computer to perform any function spontaneously compared to a human that spread messages, photos, videos, or word documents in SMPs by manual usage. Therefore, human contribution towards propagation is not enclosed by Computer Crimes Act, and most apparent provision that could curb disinformation would be Section 120 of the penal code that penalize unwanted excitement of public. Thus, it is abundantly clear that there exists a necessity towards addressing these glitches either through legislations or policy regulations, because the present counter measures by police is perceived to be modest performances of prevention rather than proceeding to penalize offenders.

4.0 Analysing with Comparative Jurisdictions to curtail “Fake News”

It is pertinent that the counter measures and the approach of legislators in crafting those laws differs according to countries and the capricious nature of these legislations is what most human rights activists criticize. After perusal of legislations this article intends to emphasize some salient features that other countries have executed.

Most states do not provide legislations, however, according to Poynter (2020) countries, for instance; *Belarus, Cambodia, China, France, Germany, Kenya, Malaysia, Myanmar, Russia, Singapore, Vietnam* etc. Contain legislations to counter fake news and misinformation, while other countries utilize *reporting mechanisms, arrests, stirring media literacy, and also internet shutdowns* to curtail the negative effects of fake news. What is more vital is the objective and the method of answering the threat in a manner that sustain “FOE” in a respectable form.

The facts unfolded in the previous sections revealed that, that there is no proper definition given to “Fake News”. Then, at the same time, it is pertinent to emphasize the variation of information that exist in traditional and electronic media. None of those variations are addressed by the states that have enacted laws, rather, they have given priority for the context in which they intent to prevent fake news, similar to France that give priority to curb fake news during elections(The Law Library of Congress 2019).

Then, the German legislators focus on Social media networks that consists two

million or more registered users (*Article 1, section 1 of the Network Enforcement Act*). This piece of legislation, which is the most recent one of all, requires social media networks to remove illegal content upon any complaints, where it could fine large amounts of fines against companies that intentionally disobey. Moreover, they have introduced a complain mechanism in which the SMPs are obliged to provide their users to lodge complaints, and specifically the companies will have to publish biannual reports under a prescribed manner, if they receive more than hundred complaints about unlawful content (*Article 1, section 2*), which is a reliable method of making the companies accountable for their services. Even though, this is identified as a feasible method for Sri Lanka, it is pertinent to highlight the fact that the veracity of the complaints should be also examined before making the companies liable.

Furthermore, *Protection from Online Falsehoods and Manipulation Act* (POFMA) recently (i.e. 2019) came into being in Singapore and encompassed most platforms that could be a source for proliferation of false statements under its Section 3. While it prioritize the grounds in which false statements are prohibited under Section 7, POFMA has explained “*statements of fact*”, defined as “*statements which a reasonable person seeing, hearing or otherwise perceiving them would consider as representations of fact*”, while “*false statement of fact*” is defined as a “*false or misleading statement which a reasonable person would consider to be a representation of fact*”, so they have not defined “fake news”, rather has taken a broader view on the matter. The amount of fine would differ at large for individuals and non-individuals, and specifically this

Act has acknowledged the usage of “bots” and fake accounts within Singaporean counter measures. Besides, the legislation grants power for the relevant Minister to issue ministerial orders and directions against violators, while it has also designed a complete mechanism including court proceedings, which means that, the Act has introduced an appealing system; first to the Minister against orders or directions issued by POFMA, and then to the High Court if not satisfied with the decision of the Minister. This remedy is more alike writ jurisdiction in Sri Lankan context, which could be a method that Sri Lanka should take cognizance in combating fake news. Although, this seems to create more burden under prevailing court system this method can be a sensible answer for criticisms of human right activist who oppose these sorts of legislations. Additionally, this Act has incorporated and addressed relevant agencies (i.e. In Singapore, Info-Communications Media Development Authority) to cater their services under orders that emanate under this Act, which indicates that the whole process is reinforced through relevant agencies (Singapore Statutes Online 2019).

In case of *People's Republic of China*, Chinese legislators through Article 291a (2) by 9th amendment to the Criminal Law recognized penal provisions against spreading fake news, however, a slight shortcoming would be, that they have limited only to dangerous situation, epidemic situation, disaster situation or alert situation, which is not catering the purpose of this article. Notwithstanding the above, China has made service providers on information publishing and messaging accountable at large, by different means. For instance, Article 24 of the Cyber

Security Law states that “when providing services of information publication or instant messaging, service providers must ask users to register their real names. The service providers must not provide relevant services to any users who do not perform the identity authentication steps”, and violations would be penalized. Additionally, provisions on the Administration of Internet News and Information services, under Article 5 has categorized news providers containing social media, websites, mobile apps, major blogs, and those who disseminate official news, and has required them to obtain license. And according to Article 6 these licenses will be issued to Chinese citizens (The Law Library of Congress 2019). It is quite debatable on how these features can be instilled on Sri Lanka due to numerous platforms of information. Apart from government and private media institutions, there are individuals and organizations that maintain websites, applications to disseminate news including personal views. These private platforms gather considerable number of followers and subscribers, which indicates the level of surveillance that the Sri Lankan government should consider.

Excluding laws, certain countries focus on *media literacy*, where countries such as Australia, Canada, Denmark, Netherland, Sweden, Singapore and United Stated of America have aimed at campaigns against fake news and promoting media literacy, which is also one of the best practices in combating fake news.

5.0 Conclusion

The above discussion substantiates the necessity of some form of regulation over acts that abuse “Right to Freedom of

Expression". The examination of laws in other countries was adopted to select suitable features for Sri Lankan context.

Considering in creating a piece of legislation, identifying the whole purpose of the law is mandatory, and the fascinating terms; "Fake News", "Misinformation", "Disinformation" shall be well interpreted along with the purpose. This article would define "Fake News" as follows;

'Any socially-significant news, information, data and reports, which is or are wholly or partly false, distributed under the guise of truthful messages via telecommunication system, information network or any other media, whether in the form of features, visuals or audio recordings or as any other form capable of suggesting words or ideas that create threat of people's lives, property, and possibilities for mass violations of public order or security at any time'.

This will subsequently make it easy to create the offence of spreading fake news. However, intentional and unintentional acts shall be distinguished. Then, the cognizance shall be made on methods of disseminating information covering printing media, electronic media, SMPs, and messaging platforms (i.e. WhatsApp, Viber, Imo etc.), which will encompass the applicable sphere including stakeholders that can be made accountable.

The present mechanism to counter fake news is implemented through the collaboration of CID, TRCSL, CERT, and relevant Internet Service Providers (ISP). The Singaporean POFMA have taken

relevant agencies under the purview of a single Act. Therefore, it is recommended to enact a single legislation interconnecting relevant agencies.

Moreover, an accurate user-friendly complaint mechanism is essential under a specific agency that is named as the "supervisory body", and it is prominent to adhere to the step taken by the German legislators as per *Article 1, section 1 of the Network Enforcement Act* to recommend the SMPs to provide complain system for its users. Nonetheless, it is doubtful whether huge companies like Facebook would attend to claims made by Sri Lanka. It is recommended to use diplomatic means to negotiate matters. The rationale of imposing such condition is to make the SMPs accountable in a situation, where there is already complains to the supervisory body. This would act as a double verification process.

Then, *Article 24 of Chinese Cyber Security Law* emphasizes the importance of registering real names of users when providing services of information publication or instant messaging. Specially, since the issue deals with information, it is quite an essential requirement in the present environment, and further, if it is possible to initiate requiring verification method of the user even in SMPs creation of fake accounts can be prevented, so that the illegal human activity can be controlled, while permitting time to combat the issue with both activities in internet (Which social networks presently do).

Considering the counter measures, it can be categorized as *immediate* and *long term*. Immediate remedy would be to stop spread of fake news, and the most appropriate

authority to order would be the Magistrate Court according to Sri Lanka. The collaboration of law and technology is clear at this juncture, and persons who intentionally manufactured, published fake news shall be distinguished from those who unintentionally shared. Therefore, if the authorities can prevent any likely danger to the society that would be a satisfying situation, and there will be a question as to the justifiability of penalizing such offenders. At that point it is wise worthy to inquire for any human rights-based approach to counter fake news.

According to Wingfield (2019), “*for policymakers considering developing a policy or law, one of the first steps should be making sure that their approach is in line with international human rights law and standards*”. It is significant to realize that “manufacturing, publishing, spreading fake news” are originated because of a “thought in mind”, and other financial reasons and authorities drive against a “thought” that was publicized to create panic. Thoughts cannot be stopped; however, it can only be prevented when thoughts are being publicized. Here, it is important to consider about the *long-term* counter measures, whereby it is vital to question ourselves whether a fine or an imprisonment would stop thoughts that are generated in our mind, although it prevents spreading. This is where *media literacy programmes, ethics, correct social media practices, technical monitoring systems* are significant. Most probably a “*rehabilitation and investigation process*” would be suitable to find root causes for the offence while understanding psychological basis, rather than penalization, which will satisfy the claims made by human rights activists. The more pressure authorities impose on

prevention of “Expressions”, the more it will find ways to disseminate, which shows the importance of considering *long term* counter measures along with *immediate steps*. Moreover, similar to Singaporean model, there shall be an appealing system as well.

As the foregoing discussion in this article has revealed, it is abundantly clear that there is a necessity to regulate “Fake News” as it would harm the “Right to FOE” and other Fundamental Rights enshrined in the Constitution. While doing so, upholding Human Rights are essential, and whatever the law shall cater to their satisfaction as emphasized in this article.

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MANURAWA 2020

EVALUATING THE “PUBLIC POLICY” WITH JUDICIAL INTERVENTION IN INTERNATIONAL COMMERCIAL ARBITRATION PROCESS IN SRI LANKA AND MECHANISMS TO DEVELOP SRI LANKA AS AN INTERNATIONAL COMMERCIAL HUB

Sashini Wijesinghe *

Introduction

Arbitration is perhaps the oldest form of dispute resolution, and it probably pre-dated litigation.¹ It has been used by ancient civilizations from time immemorial to resolve disputes and to preserve the peace. Evidence of its use as an institutionalized form of social control and dispute resolution can be found as early as about 3,000 B.C. in Egypt, Babel and Assyria.²

According to the historical evidences, Sri Lanka also a country which participated into international commercial transactions and international trade activities. As the immediate result of the liberalization of the Sri Lankan economy in 1977 the state has focused into many economic transactions such as improvement of foreign investments, transactional electronic commerce. Those may lead to many institutional commercial disputes and to overcome those disputes

there should be an effective international commercial dispute resolution mechanism in the country.

The main feature of arbitration is that it is consensual in nature and private in character. The concept of party autonomy associated with arbitration not only allows the parties to select their arbitrators,³ the seat of arbitration⁴ and the rules of procedure to be followed by the arbitrators,⁵ but even permits them to choose the “rules of law” to be applied in determining the substantive dispute before them. The Arbitration Act No. 11 of 1995 provides that “an arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute.”⁶ Thus Sri Lankan Act which is purely based on the United Nations Commission on International Trade Law (UNCITRAL)

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2 Christian Bühring-Uhle, *Traditional Mediation v. Modern Mediation*, Stockholm Arbitration Newsletter, 1-2001 1, available@ http://www.sccinstitute.com/_upload/shared_files/newsletter/newsletter_1_2001.pdf.

3 Sec 7(1) of the Arbitration Act No. 11 of 1995.

4 Art. 20 of the UNCITRAL Model Law(1985).

5 UNCITRAL Model Law on International Commercial Arbitration, 1985 – UN doc.A/40/17.

6 Art. 25(4) and Art.32(5) of the UNCITRAL Rules.

1 ICJ, *The International Court of Justice*, Chapter 1: History, available@ <http://www.icj-cij.org/icjwww /igeneralinformation /ibook/Bbookchapter1>.

Model Law on International Commercial Arbitration (1985).

The relationship between the arbitral tribunal and courts may be interpreted as one of the “partnership”. Each has a specific role to play at different times, but what is important is for both institutions to co-operate for the achievement of the justice in the end. That simplifies the effective and efficient, standardized judicial intervention is a basic requirement of the establishment of effective dispute resolution process. This article will examine the existing judicial intervention mechanism and hope to grant recommendations to develop the country as a commercial hub with regard to the comparative analysis with Singapore.

On the other hand, International Commercial Arbitration Centre in Sri Lanka was commenced on 7th of May 2015. But there are some reasons behind the screen for not being Sri Lanka as a famous and recognized venue for international arbitration. However with the establishment of mass projects like Port City the government is aimed to establish an International Financial Centre in the Port City. So Sri Lanka might be a hub for arbitration once the investors have visited here to commence their projects. In order to achieve that target there should be an effective international commercial arbitration process with minimal judicial intervention in the country. Basically this paper will illustrate judicial interfere into the public policy concept which directly connected with the recognition and enforcement of arbitral awards too.

UNCITRAL Model Law, New York Convention and Sri Lankan Arbitration Act

The Sri Lankan Act has been greatly inspired by the UNCITRAL Model Law (1985) and few provisions of the Act have been drafted on the Recognition and Enforcement of Foreign Arbitration Awards or New York Convention (1958). When parties choose arbitration as the mechanism for dispute resolution their intention is to exclude the court interference. But judicial interference in the process only as a supporter and a one who facilitates the arbitration process in the commercial arbitration process due to the frustrations occurred in clashing two different jurisdictions.⁷ However judicial intervention into Commercial Arbitration process in Sri Lanka can be identified in for situations.

01. for constituting the arbitral tribunal
02. for implementing the agreement to arbitrate
03. for the grant of interim measures
04. for the recognition or enforcement of the arbitral award

Article 5 of the UNCITRAL Model Law⁸, states as follows:

“In matters governed by this law, no court shall intervene except where so provided in this law.”

This is the most crucial area under this research because judicial intervention into international arbitration comes under this. Sri Lankan Act⁹ has also drafted several provisions to enhance the role of the court by

⁷UNCTAD, Dispute Settlement: International Commercial Arbitration.5.8 Court Measures,3(2005).

⁸ Art. 5 of UNCITRAL Model Law on International Commercial Arbitration(1985).

⁹Arbitration Act No.11 of 1995.

promoting international arbitration. Theoretically, Section 5 minimizes the intervention of court where there is a valid arbitration agreement while setting out provisions¹⁰,limiting the court's mandate to specific instances in support of arbitration; Sections 32 and 34 encourage the finality of the arbitration award through defining narrow grounds for court intervention. The Act further sets out provisions for parties to waive appeals to the Supreme Court through an exclusion agreement.¹¹

In order to the Section 26 of the Sri Lankan arbitration Act "an award made by the arbitral tribunal shall be final and binding on the parties to the arbitration agreement" and under part VII of the Act national court has powers to set aside or to refuse the recognition and enforcement of an arbitral award.¹²Then there are several grounds for refusing the enforcement and recognition of an arbitral award according to paragraph (a) and (b) of Article 36(1) of the UNCITRAL Model Law and Section 34 (1) of the Sri Lankan Arbitration Act and paragraph 1 and 2 of Article V of the New York Convention.

Before the enactment of the Arbitration Act, arbitral awards were enforced in terms of the provisions of the Civil Procedure Code¹³and the extent of enforceability of foreign awards

were according to the Reciprocal Enforcement of Judgements Ordinance.¹⁴However New York Convention has tried to reduce the above difficulties in the enforcement process. Sri Lanka ratified the New York Convention without any "territoriality" or "commercial" reservations ¹⁵ and the Sri Lankan Act states as follows;

*"A foreign arbitral award irrespective of the country to which it was made, shall subject to the provisions of section 34 be recognised as binding and, upon application by a party under section 31 to the High Court, be enforced by filing the award in accordance with the provisions of that section."*¹⁶

Thus section 50 which is the definition part of the Arbitration Act has clarified a foreign arbitration award as "an award made in an arbitration conducted outside Sri Lanka."Part VII of the Sri Lankan Arbitration Act explains the provisions which are related to set aside an award made within the country¹⁷ and section 31¹⁸ explains the enforcement of domestic arbitral award and section 34¹⁹ describes the foreign arbitral awards. Then the applicant has to go to the High Court to enforce such an award as mentioned in the Act.²⁰It is noteworthy that the Sri Lankan Arbitration Act does not

¹⁰ Sec 7,10,11,13,20,21 and 39, Arbitration Act No 11 of 1995.

¹¹ Sec 38 of Arbitration Act No 11 of 1995.

¹² Sri Lankan Arbitration Act No 11 of 1995.

¹³ Civil Procedure Code,Ordinace No 2 of 1889,Sec 676-698.

¹⁴Reciprocal Enforcement of Judgements Ordinance No 41 of 1921.

¹⁵Marsoof,Recognition and Enforcement of Foreign Arbitral Awards ;Some Salient Points (2005) LCLR 27.

¹⁶Sec 33, Sri Lankan Arbitration Act No 11 of 1995.

¹⁷Sec 32, Sri Lankan Arbitration Act No 11 of 1995.

¹⁸Sec 31, Sri Lankan Arbitration Act No 11 of 1995.

¹⁹Sec 34, Sri Lankan Arbitration Act No 11 of 1995.

²⁰Sec 50, Sri Lankan Arbitration Act No 11 of 1995,This Court is not the same as the Commercial High Court established by virtue of an order made in terms of sec 2(1) of the High

permit to appeal against an arbitral award on its merits and in facts reveals that, under the provisions of part VII of the Act, it emphasise the finality of the award made by the tribunal.²¹

According to section 34 of the Sri Lankan Arbitration Act seven grounds are recognised to consider in an application regarding to the recognition or enforcement of a foreign arbitral award can be refused or rejected. These grounds are drafted in accordance with the New York Convention²² and the UNCITRAL Model Law.²³ Thus the grounds are comprehensive and it is overdone and no need to supplicate more other grounds. Out of those public policy is the crucial point in here.

Public Policy

Articles 36(1)(b)(ii) and 34(2)(b)(ii) of the UNCITRAL Model Law²⁴ restrict the enforcement of an award if that arbitral award contradicts with the public policy. This provision will come to effect when the enforcement could contravene the fundamental principles of justice and morality. The significant finding of this research is there is not any case in Sri Lanka where an arbitral award or an arbitration agreement was set aside or reject the

recognition or enforcement on the basis of contradiction with public policy.

In *Light Weight Body Armour Ltd V Sri Lanka Army*²⁵ the Supreme Court of Sri Lanka identified and Justice Tilakawardene stated that the concept of “public policy” encircled the procedural and as well as substantive fundamental principles of law and justice.²⁶ When the award would be contradicted with the public policy of Sri Lanka the recognition or enforcement of such award may be set aside.²⁷ Further Tilakawardene J stated that excepting the first five grounds (invalidity of arbitration agreement, breaches of natural justice, outside the scope of submission, improper composition of tribunal or arbitral proceedings) the sixth and the seventh grounds in the Arbitration Act permits High Court to find whether the subject matter to dispute was arbitrability or not or whether the award is conflicting with the public policy of Sri Lanka. Thus in this case held that public policy concept confines and held that “court had powers to bother the parties a just and equitable settlement”. Here the judiciary has clearly refused to expand the scope of the public policy.

In the cases such as *Hatton National Bank V KiranAtapattu and Another*²⁸ and *KiranAtapattu V JanashakthiGeneal*

Court of the Provinces (Special Provisions) Act, No 10 of 1996.

²¹ Sec 23, Sri Lankan Arbitration Act No 11 of 1995.

²² Para 1 and 2 of Art.V of the New York Convention(1958).

²³ Art 36(1)UNCITRAL Model Law on International Commercial Arbitration Art 36(1).

²⁴ Art.36(1)(b)(ii) and 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (1985).

²⁵ *Light Weight Body Armour Ltd V Sri Lanka Army*(2007) BALR 10.

²⁶ *Light Weight Body Armour Ltd V Sri Lanka Army*(2007) BALR 10, page 13.

²⁷ Sec 34(1)(b)(ii) compares with Sec 32(1)(b)(ii) Sri Lankan Arbitration Act No 11 of 1995.

²⁸ *Hatton National Bank V KiranAtapattu and Another* (2013) XX BALR 45 .

Insurance Co.Ltd²⁹ the Supreme Court clearly diminished to depend on its decision on public policy when other paths were disclosed and remarked. Justice Marsoof in his judgement stated that, the concept of public policy cannot be repudiated and there should be an utmost consideration for that concept.

Theoretically aspect of the above cases and the final observation is a court can decide on an issue of public policy without examining the factual matrix of a dispute, the two contrasting approaches discussed above in the KiranAtapattu case and the Body Armour case are clearly established.

Singapore Legal Regime In Order to Public Policy

According to UNCITRAL Model Law a court may entitle to set aside an award when it is contradicted with the public policy. As similarly The New York Convention also permits to refuse the recognition and enforcement of an award on the same ground. However the main issue is the public policies may be vary from jurisdiction to jurisdiction. But that inconsistence unavoidable in the international context and the pro arbitration jurisdictions can abstain from acquiring such narrow-minded approaches when drafting the outlines of its public policies. When challenging an award on a public policy should have to show that which part of the award is contradicted with that policy. Normal statement is insufficient to prove it.

In AJT v AJU³⁰ Singapore High Court set aside an award which permits a settlement

agreement that necessitate the constraining of the prosecution of amalgamated and non-amalgamated criminal offences under Thai Law. However court has a role to uphold the integrity of the arbitration process while maintaining the finality of an award. Thus courts have to protect the public interest and should not have to encourage the litigants to violate those. In the case the judiciary found that when one party withdraw his police complaint on fraud and forgery in order to uphold the settlement agreement, was contrary to public policy.

In this juncture when permitting a guilty person to escape from punishment would fail to achieve the primary objective of criminal justice. Thus in the case the settlement agreement was also identified to be illegal. In this case court held that “an award can be set aside on basis of public policy, where exceptional circumstances would lead the court to justify the rejection of the enforcement of the award”.

Analysis

When comparing the Sri Lankan Legal framework regarding to the judicial intervention into the commercial arbitration process with Singapore, in Singapore there are two Acts as International Arbitration Act / IAA(Cap 134A) and Arbitration Act / AA(Cap 10). According to differences between domestic and international commercial arbitration, according to the choice of the parties and their intention regarding the degree of the court supervision, parties can select the process. But in Sri Lankan context even there is not any distinguish of powers of the arbitrators

²⁹*KiranAtapattu V JanashakthiGeneal Insurance Co.Ltd* SC Appeal 30-31-2005 decided on 22-02-2013.

³⁰*AJT v AJU* [2010] 4 SLR 649.

between the domestic and international arbitration. Thus According to IAA Singapore arbitral tribunal has more power than the powers which are provided in Sri Lankan Arbitration Act.

On the other hand, as discussed in the above UNCITRAL Model Law allows for court intervention in four broader situations and Sri Lankan Arbitration Act greatly inspired by it. However Model Law does not provide powers to courts to review the merits of an arbitral decision, but contains requirement for the recognition and enforcement of foreign arbitral awards as in the New York Convention. This is the most significant part of this research and public policy is a crucial factor to set aside a foreign arbitral award out of the all the other grounds provided in UNCITRAL Model Law.

In order to Light Weight Body Armor case³¹ in Sri Lanka the court has clearly refused to expand the concept of public policy while Singapore and other countries in the world have expanded the scope where an award itself was clearly harmful to public safety and morality. However in the above case and KiranAttappattu case³², the approach of judiciary was that an arbitration award should not be lightly set aside and that a court can only look into the matter, in the context of violation of public policy only if there is some illegality or immorality that is more than a mere misstatement of the law.

Therefore a wider meaning to term “public policy” should be introduced in the context of Sri Lankan law, the policy of the Sri Lankan law and not on considerations adopted by the courts of Singapore in the

domestic legal policy. This contention has been upheld by the High Court.³³The public policy concept in Sri Lanka weighs regarding the finality of an arbitration award and that upset the same on mere misstatement of the law would not be in keeping with the public policy of Sri Lanka.

In additionally national courts have powers to interfere into the arbitration issues linked to their territory. However that intervention may be taken place before constituting the arbitral tribunal, during the on-going process of the arbitration process and after making the award. This level of intervention by national courts may be needed to assist and support the arbitration procedure. At the initiating of the arbitration, during the process and at the enforcement stage national courts provide assistance and therefore the provisions of UNCITRAL Model Law constitute the circumstances to the national courts to positively intervene into the arbitration process. That assistance is generally for support for the arbitration process.

When analysing the practical aspect in judicial intervention process in Sri Lanka there is an issue relating to the effectiveness of the process of judicial intervention into the arbitration process even after the establishment of commercial High Courts. To resolve commercial disputes take number of years. Even though the Sri Lanka is a party to the New York Convention, UNCITRAL Model Law there is no any efficient administrative institution to manage or administrate the commercial arbitration process. Thus due to the lack of facilities to

³¹Supra 25.

³²Supra 28.

³³Southern Group Civil Constructions V.Ocean Lanka (PVT) HC/ARB/38&39/1997 minutes of 15.02.2012.

hear international arbitration matters in courts such as cases related to appeals, challenges to recognition and enforcement of awards there are long delays. So Sri Lanka is not an arbitration friendly jurisdiction. But in Singapore conclude an arbitration matter referred to judiciary within 18 months after the commencement.³⁴

Even the Sri Lanka law has been adopted the provisions of UNCITRAL Model Law and New York Convention as Singapore; Singapore has developed and upheld the law according to their context. However in the Arbitration Act of Sri Lanka, there are some poorly drafted provisions. In this juncture Section 11 of the Act is an ideal example and it grants parallel jurisdiction empowering both the arbitral tribunals and the courts to consider the matters related to jurisdictional issues. This defeats the globally accepted principle of “competence-competence” which gives the sole authority to arbitral tribunal on its own jurisdiction.

On perusal Singapore is identified as high-tech, customized for international commercial arbitration and the reason for selecting Singapore as one of the most favoured seat for arbitration is the effective, efficient and transparent dispute resolution mechanism. In order to the above mentioned legal framework and the positive approaches of judiciary which indicates the minimum judicial intervention into the arbitration process in Singapore, it owns excellent and efficient Singapore International Commercial Court (SICC) which was launched in 2015. The aim of this court is to resolve international commercial disputes.

Normally Singapore High Court tenders to transfer the cross boarder issues such as international commercial arbitration disputes into SIAC. Therefore Unlike the delays in the Sri Lankan court procedure, Singapore courts give decisions specially the matters in appeals and, matters in review the merits of the arbitral awards and challenges in set aside a foreign arbitral award. On other hand Singapore has an International Arbitration Centre (SIAC) to govern and support the arbitration process.

In their commercial arbitration scenario Singapore has adopted the TPF mechanism which encourages the parties for arbitration by providing financial support and establishing the legal validity of their contracts. This is also a significant factor to enhance the view of Singapore as a preferred venue for international commercial arbitration. Sri Lanka should adopt those lessons from Asian Countries like Singapore.

Theoretically, there is an observation through this research that the both jurisdictions try to assist the arbitration process through judicial intervention instead of overruling the powers of the arbitral tribunal. However the degree of court intervention in Singapore than Sri Lanka is at a restrictive stage and court is not entitled to interfere unless provided in the law. Singapore Court does not simply set aside or challenge an arbitral award which is not fallen within the scope of the provisions of the governing law. Thus judiciary of Singapore takes pro-arbitration approach as discussed in the above to prevent challenges

³⁴ Ho May Kim, Singapore-Developing a Hub for International Arbitration (2016)1 National Law Conference Report, Sri Lanka.

of the recognition or enforcement of international arbitral awards.

Mr. K. Kanag-Isvaran, P.C. observed that Sri Lanka has not faired “*too well at all*”³⁵ in its endeavor to introduce arbitration as the preferred mode of dispute resolution. Justice Saleem Marsoof in his works “the Judiciary and the arbitration process” investigates that judicial intervention has resulted in the deterioration of the fundamental concepts of arbitration of “being consensual in nature and being private in character”³⁶ At the same time Dr. Harsha Cabral states that the “delays and snags” of the judiciary has caused serious impediments to the growth of international arbitration.³⁷ Throughout the facts found in the research those statements have been proved and the researcher is going to grant recommendations to enhance the effectiveness of the judicial intervention process.

However in light of the findings of the research and the statements of the scholars as mentioned in the above ,the supportive role of the judiciary should be there and the level of intervention should be at a minimum stage. On the other hand the reality and the observation through the research is without the court support the arbitration process cannot be effective. As mentioned in the introduction part in order to the development of the Port City it may be a rapid increase in international trade and investments. Therefore effective arbitration mechanism should be there to settle the disputes.

Recommendations

- Establish two different legislations as AA and IAA for international and domestic commercial arbitration process as Singapore to clearly distinguish the provisions and applicable laws.
- Introduce attractive adjudicating mechanism to Sri Lankan International Arbitration Centre to promote it as SIAC.

As discussed SIAC has introduced well reputed arbitration rules and such kind of rules may be needed in appointing arbitrators and instituting the arbitral tribunal in Institutional arbitration process. International Commercial Arbitration Centre in Sri Lanka is commenced in 2015. But it is not populated .To promote Sri Lanka as a famous seat for arbitration as Singapore, has to implement such kind of attractive adjudicating mechanism and rules.

- Establishing a separate special court as Singapore International Commercial Court which can specially deals with recognition or enforcement of foreign arbitral awards.

In Sri Lanka especially the issues relating to the recognition and enforcement of the awards are hearing at the Commercial High Court. Even there are three court houses in Colombo, arbitration matters are calling in only one court house. Then so many delays can be seen. Due to that delays the process of enforcement or recognition of foreign

³⁵ K. Kanag-Isvaran, 'A Comment on the Operation of the Arbitration Act – Has it Worked?' in K. Kanag-Isvaran and S.S. Wijeratne (eds). *Arbitration Law in Sri Lanka* (ICLP 2006).

³⁶S Marsoof , 'The Judiciary and The Arbitral Process' [2011] ICLP 73 .

³⁷ Dr. Harsha Cabral, "Bottlenecks in Arbitration' [2016] National Law Conference Report,[BASL] working paper.

arbitral awards are not effective or efficient. As a reason of practical delays in Commercial High Courts due to the number of litigations, separate court as SICC should be established. However for such implementation, an amendment to the Judicature Act 1950 should be required as Sri Lanka's Courts of First Instance are established under the Judicature Act and it sets out the rules and procedures for establishing new courts.

The judiciary of such court should be consisted with expertise in commercial law field and that court should only for commercial matters and arbitration matters with regard to recognition or enforcement of foreign arbitral awards. This might lead the effectiveness of the judicial intervention process.

➤ Developing the virtual evidence leading facilities in litigation process

Implementing the virtual evidence leading process in those commercial arbitration matters is a significant fact and this can be done through Skype, whatsapp, viber or any other social media. Such evidence is admissible according to Act No 10 of 2006 Electronic Transaction Act in Sri Lanka. According to the prevailing, worldwide pandemic situation it may help to prevent the spread of Covid 19 too. So without visiting to Sri Lanka investors can participate into the litigation process and this might be a cost effective mechanism. Such infrastructure developments may enhance the attractiveness of Sri Lanka as a preferred seat for international commercial arbitration and further this may enhance the effectiveness of the judicial intervention into international commercial arbitration process.

➤ Implement TPF mechanism

To promote Sri Lanka as a preferred seat for arbitration, this is an ideal fact. When a third part can fund on behalf of the party to arbitrate that will encourage the parties because arbitration is a very expensive process.

Conclusion

Throughout the findings it is a crystal clear fact that the court should support the commercial arbitration process and assist that. Sri Lankan legal framework provides sufficient approach to do so. However practical circumstances as well as the efficacy and the effectiveness of the judicial intervention cannot be expected through the existing scenario. In order to the development of Colombo Port City as an International Trade City the importance of the international commercial arbitration will be increased. Therefore to promote Sri Lanka as a famous venue for arbitration and to uphold the effectiveness of the judicial intervention process the above recommendations should be implemented.

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“THE MYTH OF INTERNATIONAL HUMANITARIAN LAW FROM AN EARLY STAGE TO CONTEMPORARY CHALLENGES”

Uditha Sampath Gunathilaka*

1. Introduction

“International humanitarian law is a part of the body of international law that governs relations between states. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities¹. When considering the relevancy of the law, it is important to control and minimize the damage which is caused by the current and future armed conflicts.

The Humanitarian law has developed from a law of war up to a law with a humanitarian touch. This is a historical development and there are many factors which assisted the progress. This paper’s expectation is to identify the ancient concept of a Law of War and how much the present situations and the Contemporary International Humanitarian Law reflects these principal.

2. History of law of war

When considering at historical conflicts anyone can identify the primary methods used to control the unnecessary effects of the hostilities and the means and methods of warfare. These can mostly be customs and the Treaties between the States. When looking closely it is clear that these Customs and treaties have been applied by different parts of the world in different situations and to guide the States to control the effects of wars at all times¹.

Sassoli and Bouvier articulate that this global phenomenon proves two things: a) a common understanding of the necessity to have some kind of regulations even during wars; b) the existence of the feeling that under certain circumstances, human beings, *friend or foe*, deserve some protection.² International Humanitarian Law, as the *jus in bello* is currently described, is imbued with a particular sense of its history. The orthodox history of international humanitarian law tells the following story.

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¹ Sandoz Y, 1998 ‘The International Committee of the Red Cross as Guardian of International Humanitarian Law’ available at www.icrc.org/eng/resources/documents/misc/abo_ut-the-icrc-311298.htm

<Accessed on visited 30 November 2019>

² *Ibid*

Laws of war have always existed to limit the destruction of war.³

The founders of the IHL considered the effect of imperialism undergone by many nations, humanitarian concerns and the military requirements of the State when they regulations to govern the evolving means and methods of warfare. Somehow when considering the reason for a law to exist to control the destruction and ensure safety and dignity for the people who are effected by the consequences of the war. In ancient days armed conflicts created great destruction and dangerous, unkind impact to the mankind. This itself lead the laws of war to develop and to govern situation with an humanitarian effect.

Addressing the main notions of Humanitarian aspect, Kings of Babylonia (1728 – 1686 BC) which was a the era of the Sumerian Civilization were the creators of civilization. In fact, the prologue captures these concerns of justice and public order aptly. It highlights that *Code of Hammurabi* was “*to make justice prevail in the land, to abolish the wicked and the evil, to prevent the strong from oppressing the weak*”⁴

Indian History clearly shows that Indian civilization was the first to identify means and laws of law. During the early wars of India showed a humanitarian approach in greater extend. *Mahabharathaya, Ramayanaya* are such examples where it is shown that parties should always keep the concerns for the war under correct controlled levels until an armed conflict begins and the only solution identified was to act as per the religion and to follow the universally applicable principles of *Dhamma*.⁵ Dhamma with the influence of Philosophy of Hinduism was one identified as a code of righteous conduct. And these religious books confirm that what India has followed was similar to what the other countries have used during the same era.⁶

According to the *Code of Manu* Non-combatants and combatants were very well distinguished during these ancient Indian wars and all were to be protected and treated humanely under any circumstances. Also establishing a set of rules for the conduct of rulers toward their people and the obligations to treat all parties humanely and the prohibition of poisoned weapons were highly emphasized.⁷

³ Alexander, A “A Short History of International Humanitarian Law” *The European Journal of International Law* Vol. 26 no. 1p.109

⁴ H.E. Judge Peter Tomka, President Of The International Court Of Justice, On The Occasion Of The Unveiling Of The Stele Of Hammurabi On 28 April 2014 <https://www.icj-cij.org/files/press-releases/2/18312.pdf> <Accessed on 30.11.2019>

⁵ Dharma or the code of righteous conduct was evolved with the object of enabling an individual to establish control over his desires and senses and to be contended. The rules so formulated or

evolved over a long period were meant to ensure peace and happiness to the individuals and the human society as well. They covered every sphere of human activity

⁶ Modh, Bhumika Mukesh, “International Humanitarian Law: An Ancient Indian Perspective.” Available at SSRN: <https://ssrn.com/abstract=1738806orhttp://dx.doi.org/10.2139/ssrn.1738806> <Accessed on 20 November 2019>

⁷ *Ibid*

It is to be pertinent to note that there is a significant historical strand in Hindu ethics that suggested that the only truly ethical behavior is that which moves beyond considerations of good and evil, pure and impure.⁸ Professor H. H. Wilson calls the ancient Indian laws of war are very chivalrous and humane, and prohibit the slaying of the unarmed, of women, of the old, and of the conquered⁹

Emperor Ashoka was the one among the greatest who was expanding his empire using with high military strength. During his expansion of the Mauryan Empire the war led by the Ashoka was one of the most brutal wars in history. But with the influence of Buddhism he was transformed and his concerns were more focused on morals, social concerns and religious tolerance. Ashoka represents the earliest incarnation of the principle of non-use of force in international relations that is now enshrined in Article 2, paragraph 4, of the United Nations Charter¹⁰

In “Buddhism and Humanitarian Law” (Handbook of International Humanitarian Law in South Asia 3, 2007), the Sri Lankan jurist Christopher Gregory Weeramantry¹¹ (1926–2017) comments regarding Buddhism:

“In a system where the institution of war is not recognized [as truly valid]

⁸ *Ibid*

⁹ *Ibid* H. H. Wilson, Essays and Lectures on the Religions of the Hindus, Vol. II, Trubner & Co., London, 1861, p.

¹⁰ *Ibid*

¹¹ Professor C.J Weeramantry was Judge of the ICJ from 1991 to 2000, and Vice-President of the Court from 1997 to 2000

there will naturally be little or no discussion of actual conduct in warfare. The applicable principles will need to be worked out with reference to its general principles regarding the dignity and sanctity of human life, its general principles relating to the treatment of and attitudes towards other human beings, its respect for nature and life-support systems and its concepts on proper behaviour in general.”¹²

A host of Buddhist ethical principles concerning minimizing suffering and loss of life in armed conflict between states can be gleaned from the *Jātaka* stories, which mentions kings who were very skilled in warfare, thereby defeating the enemy with little loss of life. These stories demonstrate that power should be used in the most skilled manner so that injury done to life can be minimized.¹³

Even in Sri Lanka there are fascinating facts revealed about the application of The Humanitarian law. Even though the word Humanitarian law was not used the influence was identified and practiced from long time back when ancient Kings used armed conflicts to control the parties. Buddhist philosophy again has played a main role in directing the nation to treat all mankind same and righteously. Sri Lanka has depended on the principles of the IHL

¹² The First Circular Announcement “Reducing suffering during conflict: the interface between Buddhism and International Humanitarian Law (IHL)” International Conference: Dambulla, Sri Lanka, 4–6 September 2019. https://www.icrc.org/en/download/file/89892/exploratory_position_paper_on_buddhism_ihl.pdf

¹³ *Ibid*

and ancient texts like *Mahawanshay*, *Chulawanshaya* and other ancient texts prove the same. War between the King *Dutugemunu* and *Elara* was a good example where the parties have used the concepts, to limit the destruction and suffering caused by armed conflict.

Islam, has made an immense contribution to the development of international humanitarian law. The rules formulated by Islam to make the conduct of war more humane are binding injunctions of God and His Prophet which have to be followed by Muslims in all circumstances, irrespective of the behaviour of the enemy.¹⁴ In the *Holy Quran* and *Hadith* many provisions of modern IHL have elaborately been discussed and these rules were practiced by the Muslims in many wars. Islamic laws of war sought to humanize armed conflict by protecting the lives of noncombatants, respecting the dignity of enemy combatants, and forbidding deliberate damage to an adversary's property except when absolutely required by military necessity.¹⁵ Islam provided many of the chivalric ideal that permeated Christian Europe, and a core source of those concepts was the Koran¹⁶

The Catholic Philosophy also is another vital religious directive toward the growth of the Humanitarian law. The ethics driven through Biblical phrases like "*Love Thy Neighbour*" itself prove the religious belief in the IHL. Individual rights to live peacefully is highly supported within the Catholic religion and many moral principles have been led in directing any State which is a party or effected by an armed conflict. War was not recommended for gaining commercial advantages or to maintain the "balance of power" or to prevent the difficulties faced by a country¹⁷

Historical chivalry's origins are intertwined with the rise of Christianity and Islam. Durant nicely describes the theory and reality of knightly conduct¹⁸ Core medieval chivalric virtues included loyalty, courage, skill, mercy, trustworthiness, courtesy, justice, and generosity.¹⁹ According to medieval scholars, the ideal knight embodied all of these virtues.¹⁹

What has evolved from the past into current elements of chivalry are five elements, some of which overlap with international humanitarian law, and all of which squarely reflect their noble forbearers.²⁰ As one of

¹⁴ Marsoof, S. (2003) "ISLAM AND INTERNATIONAL HUMANITARIAN LAW" (2003) 15 Sri Lanka JIL 23 Hyder Gulam "Islamic War And Law" https://www.academia.edu/32579701/Islam_law_and_war and Vijapur, A.P. (1989) "The Islamic concept of Human Rights and the International Bill of Human right, The dilemma of Muslim states" https://www.academia.edu/6711619/Abdulrahim_P._VUAPUR_THE_ISLAMIC_CONCEPT_OF_HUMAN_RIGHTS_AND_THE_INTERNATIONAL_BILL_OF_RIGHTS_THE_DILEMMA_OF_MUSLIM_STATES_INTRODUCTION

¹⁵ Islamic Law and International Humanitarian Law <https://www.icrc.org/en/document/islamic-law-and-international-humanitarian-law> <Accessed on 21.11.2019>

¹⁶ Evan J. Wallach Pray Fire First Gentlemen of France': Has 21st Century Chivalry Been Subsumed by Humanitarian Law? <https://harvardnsj.org/wp-content/uploads/sites/13/2012/01/Vol-3-Wallach.pdf> <Accessed on 21.11.2019>

¹⁷ Barrick,W.D. THE CHRISTIAN AND WAR <https://www.tms.edu/m/tmsj11k.pdf>

¹⁸ Supra n21

¹⁹ *Ibid*

²⁰ *Ibid*

the basic chivalric elements Mercy was at the core of modern attempts to regulate the battlefield²¹ and evolved into much of what has become modern IHL²² in the context of limitations on means and methods of warfare,²³ proportionality²⁴ and military necessity,²⁵

As Meron has argued, the legal rules of IHL are undergoing a process of humanization. While traditional concepts of reciprocity continue to play an important role in some conflicts, they are of far less relevance in others, particularly when non-state actors who believe that they have little to gain from reciprocity are involved.²⁶ Furthermore he has identified a fusion of law of war and human rights law into IHL but recognizes that "it must be noted that neither regime will entirely subsume the other to some extent different rules will always apply to war and peace."²⁷

The law of war has always contained rules based on chivalry, religion, and humanity designed for the protection of non-combatants, and especially women, children and old men, presumed incapable

of bearing arms and committing acts of hostility. It also contained rules protecting combatants (in matters such as quarter, perfidy, unnecessary suffering).²⁸

3. Geneva Conventions & Development of Modern IHL

The book written by Henri Dunant in the year 1859, *A Memory of Solferino*²⁹ which was relating to the highly devastating experience of a Battle which took place in the middle of the 19th century and the *Lieber Code*³⁰ (1863) which was established as a result of the American Civil War, were the first steps and shed more light to the exact principles of modern concepts of IHL it instigated the adoption in 1864 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.

After several considerable attempts the Geneva Conventions, which came to be known as 'Geneva law'. Certain protections in wartime were expressly extended to

²¹ Kearns P, (2001) 'Bloody Constraint: War and Chivalry in Shakespeare', *Journal of Conflict and Security Law*, Volume 6, Issue 2, Pages 293–294, <https://doi.org/10.1093/jcls/6.2.293>

²² Supra n 23

²³ *Ibid*

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ Clapham, A (2006) 'Human rights obligations of non-state actors in conflict situations' International Review of the Red Cross Volume 88 Number 863 September 2006 https://www.icrc.org/en/doc/assets/files/other/irc_863_clapham.pdf

²⁷ Theodor Meron, Fo Meron, T. (2011-07-01). Human Rights Law Marches into New Territory: The Enforcement of International Human Rights in International Criminal

Tribunals (Marek Nowicki Memorial Lecture). In The Making of International Criminal Justice: The View from the Bench: Selected Speeches. : Oxford University Press. <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199608935.001.0001/acprof-9780199608935-chapter-17> <Accessed on 30.11.2019>

²⁸ Supra n.26

²⁹ See D. Schindler, "International humanitarian law: Its remarkable development and its persistent violation", Journal of the History of International Law, Vol. 5 (2003), pp. 165 et seq

³⁰ The Lieber Code promulgated as General Orders No. 100 by President Lincoln. The Code (1863) provides detailed rules on the entire range of warfare.

civilian populations and objects by Geneva Convention IV of 1949, as indicated by its full title came into operation and the *the Lieber Code* provided the foundation for the 1899 and 1907 Hague Conventions dealing with methods and means of warfare.

This second body of law came to be known as ‘Hague law. Dealing with topics such as the opening of hostilities,³¹ the laws and customs of war on land,³² bombardment by naval forces in time of war,³³ and the rights and duties of neutral powers in naval war,³⁴ Hague law focused on the conduct of armed hostilities and their regulation.³⁵ The treaties of IHL protect particularly vulnerable categories of persons from abuse of State power as well. However, unlike human rights agreements, which contain general rules applicable at all times, the protective rules and mechanisms of IHL are applicable only in time of war,³⁶

The issue of the protection of civilians in an armed conflict was one of the fundamental concept in both the 1907 Hague Regulations and the 1949 Third Geneva Convention and Additional Protocols. The concept of protection of civilians and civilian objects is reflected in the principle of distinction, which prohibits directly

targeting civilians and civilian objects but the obligation to protect extends beyond the conduct of hostilities.

With the establishment by the Security Council of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), the entry into force of the International Criminal Court ('ICC') and the development of 'hybrid' tribunals, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, which have had a tremendous impact both on the development of international humanitarian law and on its humanization.

Extending the principles of IHL enshrined in Common Article III to the Geneva Conventions, which relates to armed conflicts not of an international character, stipulates that all parties to an armed conflict must distinguish between persons engaging in hostilities and persons who are not, or no longer, taking part in them. The latter must be dealt with humanely and, in particular, they must not be maltreated, taken hostage or summarily sentenced or executed. The sick and wounded must be cared for.³⁷

³¹ Convention Relative to the Opening of Hostilities (Hague III), 1907, http://avalon.law.yale.edu/20th_century/hague03.asp.

³² Convention Respecting the Laws and Customs of War on Land (Hague IV), 1907, http://avalon.law.yale.edu/20th_century/hague04.asp.

³³ Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX), 1907, http://avalon.law.yale.edu/20th_century/hague09.asp.

³⁴ Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII),

1907, http://avalon.law.yale.edu/20th_century/hague13.asp.

³⁵ Wilson, P, (2017) The myth of international humanitarian law, *International Affairs*, Volume 93, Issue 3, May 2017, Pages 563–579, <https://doi.org/10.1093/ia/iix008>

³⁶ Gasser, H.P. 'International Humanitarian Law' <http://icrcndresourcecentre.org/wp-content/uploads/2016/03/EnglishTotal.pdf>

³⁷ Fanner, T.P, (2005) Asymmetrical warfare from the perspective of humanitarian law and
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Meron came to the conclusion that a range of factors was moving international humanitarian law away from its roots in strict reciprocity and towards a system based more on humane values and human rights law.³⁸ He finishes his article with a warning, however, that law alone can only take this project so far. While humanitarianism has gained the upper hand in rhetorical and legal terms, the reality of warfare on the ground is still cruel and often involves serious atrocities.³⁹

During the first era the above discussed aspects such as heart consciousness, patience, compassion, humanity and chivalry was considered while the modern developments are based on practical realities in the battle field.

4. Modern application of contemporary IHL rules & challenges

As discussed above the basic concepts relating to law of war in history such as Chivalry and principles of humanity have now being excluded when identifying new laws. Nevertheless, in recent conflicts where wars are increasingly fought against civilians, chivalry is often ignored. Tension between military necessity and restraint on the conduct of belligerents is the hallmark of the law of armed conflict.⁴⁰

However, the weight assigned to these two conflicting factors has been shifting. The principle of humanitarian restraints has

humanitarian action Volume 87 Number 857 March 2005 International Review of the Red Cross

https://internationalreview.icrc.org/sites/default/files/irc_857_8.pdf

³⁸ Meron, T, (2000) ‘The Humanization of Humanitarian Law’ Vol 94 American Journal of

been of growing importance, especially in normative developments and in the elaboration of new standards, but, regrettably, less in the actual practice in the field, which remains cruel and bloody, especially in internal conflicts.⁴¹

4.1 .The new war

“The new wars”⁴² are main challenge in implementing IHL concepts. The traditional mood of war was a battle between certain parties within a certain territory and aiming certain expectations and victories. But in an asymmetric war there is no same level of military power or the techniques are not of the same level. The less powerful tend to use the illegal weapons or unauthorized weapons to defeat the powerful. As a result even the stronger party tend adapt according to the opponent and act against the general rules to defeat the party with an unlimited choice of methods and means of warfare.

Since in history the parties who are not participating in hostilities were protected as the combatants were within a certain area and the respective measure were easily taken against the non-combatants. But in present the target areas are not specified and to improve the gravity of the conflict the less powerful party tend to use human shields. Therefore the civilians who are directly affected or are not even within the same territory are not secured against an existing armed conflict.

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³⁹ Supra n.25

⁴⁰ Supra n.44

⁴¹ Supra n.34

⁴² Supra n.43

The protection measures for the civilians are at a risk and there is no distinguishable margin between the combatants and non-combatants. Even though the principle in IHL was to place the attack solely against the legitimate military target, it does not happen in present war affairs. One of the best example for this is the incident which occurred on 21st of April in Sri Lanka. The origin and the reason were international but the target was outside the respective State which gives limited opportunity to protect the civilians. Purely around 260 general civilians were directly killed while the whole country shook with unproductiveness as the civilians had no idea or any expectation on a day they were celebrating religiously.

However, it is true that in an asymmetric conflict respect for IHL is endangered to a certain degree. If in a symmetric conflict there is a greater chance that humanitarian law is respected, this is at least partly out of the fear that the adversary may retaliate in kind to any violations of the law. Some observers go so far as to say that in asymmetrical wars, “the expectation of reciprocity is basically betrayed and the chivalrous ethos is frequently replaced by treachery”⁴³.

It is also pertinent to note that the concomitant chivalry in battle is in fact still demanded by many provisions of international humanitarian law. In asymmetrical wars, the expectation of reciprocity is basically betrayed and the chivalrous ethos is frequently replaced by treachery.⁴⁴ Also in “Asymmetric warfare” it is easy to use force against the weaker party by the powerful, therefore the general civilians are used and they even not being part of the situation becomes the victims of the armed conflict. They are used as Human shields against their will to deter attacks of military and this is highly forbidden through the concepts of IHL.⁴⁵

4.3 Terrorism

The question of the relationship with IHL remains one of the obstacles for the adoption of a comprehensive convention on international terrorism. This begs the question of how the main treaties deal with this issue. Many of the earlier treaties remain silent in this respect, presumably because they prohibit activities that do not regularly occur during an armed conflict, such as, for example, the hijacking of an aircraft. Those who do, including the three most recent conventions⁴⁶, tend to exclude

⁴³ Reisman, W. M. (2003) “Aftershocks: Reflections on the Implications of September 11”, *Yale Human Rights and Development Law Journal*, Vol. 6 (2003), p. 81

⁴⁴ Supra n.43

⁴⁵ Sassoli., M (2007) ‘The Implementation of International Humanitarian Law : Current and Inherent Challenges’. *Yearbook of International Humanitarian Law*, vol. 10, pp. 45-73

⁴⁶ **The 1979 Hostage Convention** specifies that it does not apply during times of armed conflict as defined in the Geneva Conventions and its

Additional Protocols insofar as these are applicable to a particular act of hostage taking, and in so far as State parties are bound under these conventions to prosecute or extradite the hostage take **the 1997 Terrorist Bombing Convention and the 2004 Nuclear Terrorism Convention** both exclude ‘the activities of armed forces during an armed conflict, as those terms are understood under International Humanitarian Law, which are governed by that law. The **1999 Convention on**

acts governed by IHL.⁴⁷ Most terrorist acts are committed against civilians who are not in the hands of the terrorists or indiscriminately against civilians and combatants. In both international and non-international armed conflicts, '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited⁴⁸

When considering the practical application of the Humanitarian Law there are many debatable challenges faced and the development of the technology and the modern changes to the characteristics of armed conflicts has slowed the process of applicability of the rules of the IHL. Therefore the need to identify a correct approach for the modernized need of a better law with a humanity aspect is essential. It has to be strong and a law which can assist all aspects identified for the breaches under the Humanitarian Law. Also identifying an international approach is a must as a severe damage is done to the world through interstate armed conflicts.

In order for the principle of distinction to be upheld, it is essential that we are able to define who is a legitimate target and who is not. The concepts of civilian and combatant have become more blurred as warfare evolves, and therefore the desired approach is not to blur it further by introducing a third category of combatants, but instead to clarify the concepts of civilians who

Terrorism Financing includes the same safeguard clause

⁴⁷ *Ibid*

directly participate in hostilities and the role of OAGs in NIACs. I believe that my proposals go some way to help in this regard.

In the light of the arguments outlined above is that the world is faced with a new kind of violence to which the laws of armed conflict should be applicable. According to this view, transnational violence does not fit the definition of international armed conflict because it is not waged among states, and does not correspond to the traditional understanding of non-international armed conflict, because it takes places across a wide geographic area. Thus, the law of armed conflict needs to be adapted to become the main legal tool in dealing with acts of transnational terrorism. The main concept of IHL is to address the rights of all the parties who are involved in an armed conflict similarly and protecting the rights of civilians who are not participating in the war. Presently the challenge is to apply the Humanitarian law effectively and therefore respected. So as rapid advances continue to be made in new and emerging technologies of warfare it is important to ensure of the Humanitarian Law application in such situation.

The main challenge faced is the fact that the no body shows much interest or they act sheepishly when applying Humanitarian law for the violating the same. At an armed conflict the parties are more concerned about defeating the opposing party and they do not value the expectations under the Humanitarian Law. For this parties break

⁴⁸ Art. 51(2) of Protocol I, Art. 13(2) of Protocol II, and a corresponding rule of customary IHL (See Rules 1 and 2 of the ICRC Study, , Vol. I at p11.).

rules, act according to their own wishes and use Humanitarian Law in favour of them. That is in certain legal standards which are supportive to the parties are addressed favorably, and in rules that are disadvantaging the parties do not agree to abide. Sassoli, shows that “the situation they are confronted with is so new that the ‘old’ law cannot be applied; and to those who think that in exceptional circumstances the rules do not have to be complied with. All those people will not respect the rules. This is why relentless dissemination efforts are crucial⁴⁹

The basic problem about all such ideas is that they would only be accepted by states and could only actually function if states were willing to accept the rule of international law, including efficient third-party enforcement, in international society, which is as we all know not the case. If, however, it were the case, we would not need new mechanisms of implementation, because the existing ones could do the job perfectly.⁵⁰.

5. Conclusion

When considering all these aspects it is very clear that the religious believes played a immense role in the development of Humanitarian Law. When identifying the rule of justice and human right concepts “Paul Gordon Lauren” states that “Ideas of

justice and human rights possess a long and rich history.⁵¹ They did not originate exclusively in any single geographical region of the world, any single country, any single century, any single manner, or even any single political form of government or legal system. They emerged instead in many ways from many places, societies, religious and secular traditions, cultures, and different means of expression, over thousands of years”⁵²

As discovered in the above discussion the religious believes were identified as the guiding principles for the war rules in history. Also the bad memories left over by the II World War directed the international law makers and scholars to consider human needs more than the victory of the war. This helped the law to focus more on humanity than face the consequences of war. It leads International Armed Conflicts and Non International Armed Conflicts to stick to the principles of Humanitarian concepts.

The history of IHL, both its actual development and the symbiotic narratives about its development, was shaped by a range of actors. Some of these actors were conventional practitioners of International Law, others less so. Some were particularly interested in the development of the law, others had more complex goals. Their propositions about IHL were accepted or dismissed for a range of reasons, including both their compliance with clear legal

⁴⁹ Sassoli, M (2007) ‘The Implementation of International Humanitarian Law : Current and Inherent Challenges.’ *Yearbook of International Humanitarian Law*, vol. 10, p. 45-73 Available at: <http://archive-ouverte.unige.ch/unige:864>

⁵⁰ Shelton, D, & Lauren, P.G, (2013). The Foundations of Justice and Human Rights in Early

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⁵¹ Ibid

⁵² Ibid

forms and more nebulous disciplinary commitments. Through their work, they were able to introduce, define, change and confirm international humanitarian law.

MANURAWA 2020

THE APPLICATION OF ELLENBOROUGH DICTUM IN THE CRIMINAL JURISPRUDENCE OF SRI LANKA

A.S.Hibathulla*

Introduction

There are many areas of Substantive law and Adjective law. Substantive law mostly concern with rights, duties, and liabilities of persons. Criminal Law, Family law, International Law are included in this category. On the other hand, the law of procedure and the law of evidence are included under Adjective Law. These laws defined pleadings and procedures through which these substantive laws are implemented. Therefore, the Law of Evidence is considered as an important element in Criminal Law.

When we consider about *the law of evidence*, it means that contains an exposition of the facts which may be proved in a judicial proceeding, the mode by which these facts may be established, and the persons who are competent to offer testimony in regard to material facts. (Peiris 1998, p.2) It is identified that there are three elements of the law of evidence as follows:

- It determines what facts are relevant
- It states how relevant facts may be proved in a judicial proceeding

- It governs the production and effect of different types of evidence. (Peiris 1998, p.3)

The Evidence Ordinance, No.14 of 1895 focused on each of these elements of the law of evidence. There are different types of methods to give evidence. They are Oral evidence, documentary evidence and public documents. There are some other classifications of evidence which are relevant to Sri Lankan Law as follows:

- I) Best Evidence and Inferior Evidence
- II) Original Evidence and Hearsay Evidence
- III) Direct Evidence and Circumstantial Evidence
- IV) Prima facie evidence and Conclusive evidence
- V) Primary and Secondary evidence.

Direct Evidence consists of the testimony of the witness who perceive the fact or the production of the document which constitute the fact. Circumstantial Evidence is evidence of facts from which a disputed fact can be inferred. Circumstantial evidence may be very useful to the following issues:

- To establish the fact in issue when there is no direct evidence
- To corroborate or to supplement direct evidence when there is a

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doubt or when the effect of direct evidence is too difficult to proof of the facts in issue. (Peiris 1998, p.26)

The writer can observe that the Circumstantial evidence has advantages and limitations when comparing with direct evidence. Risk of perjury is minimized and less capable of fabricated. In the case of direct evidence, the judge has to be depending on the particular witness. Therefore, we should focus on many things such as the power of observation, their memory, and their truthfulness. It cannot be guaranteed the accuracy of the witnesses' original observation. There is a risk of forgetfulness of the witnesses. Because we don't know whether he is interested witness or belongs to conspiracy. However, the direct evidence is generally simple in effect, but the circumstantial evidence may have the complex processes in some cases.

When analyse more on the subject we can understand the value of the circumstantial evidence. Take for example, in a case circumstantial evidence may be taken to be sufficient to rebut the presumption of innocence. When there are gaps and deficiencies in the circumstantial evidence, presented in the court does not meant the less value of prove. Therefore, the judge has to be depending on the consistency of each circumstance in the evidence of the rest of the chain of evidence and they have logical accuracy of the inference drawn by the judge.

It is important that the trial Judge should explain clearly to the jury. It must be altogether inconsistent with the accused's innocence. It was held that there is no direct evidence, but the Crown established circumstantial evidence to prove the guilty of the accused. But the *Dias S.P.J.* said that

the Crown was not entitled to succeed, since the circumstantial evidence did not meet the hypothesis of innocence of the accused *Podisingho* (1951) 53 N.L.R.49. Furthermore, in circumstantial evidence, there are several possible hypotheses. If it gives position to two hypothetical possibilities, we have to wipe out the other alternative.

Analysis

In addition to that there is a significant value that the accused person must explain each and every circumstance relied on by the prosecution. There is statement dictum pronounced by *Lord Ellenborough* in *Rex v. Lord Cochrane and others Gurney*'s reports (1814) 479as follows:

"No person accused of crime is bound to offer any explanation of his conduct, or of circumstances of suspicion which attach to him; but nevertheless, if he refused to do so, where a strong *prima facie* case has been made out, and when it is in his power to offer evidence, if such exists, in explanation of such suspicious appearances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence, so suppressed or not adduced would operate adversely to his interest."

In other words, prosecution has to bring very strong case against accused using circumstantial evidence. Accused in his own knowledge should be given reasonable explanation. But, if he fails, there may be

many consequences. Court can draw an adverse inference and it can be taken into account to convict the guilty party. In addition to that it won't be favourable to him and the State prosecution may get prefer.

According to this view, the burden shift to accused to offer reasonable explanation. Take for example; the prosecution established that the accused came with the blood stained knife. But the accused has to say I saw the knife in the body and removed it. It is reasonable to the accused to disprove his burden.

When analyse the application of aforementioned dictum in the criminal jurisprudence of Sri Lanka with recent cases, we can observe that the court applied this dictum in some cases. On the other hand the court refused to adopt this dictum.

The dictum of *Lord Ellenborough* was firstly applied in Sri Lanka in *Inspector Aroundstz v. Peiris* (1938) 10 CLW 122 which depended on circumstantial evidence. Subsequently this dictum was applied in *Queen v. Sumanasena* (1963) 66 NLR 350. The learned Judge's opinion was that this dictum was pronounced by *Lord Ellenborough* in 1814 before the *Criminal Evidence Act*. And also, at that time the accused did not have the right to give evidence on his behalf. The dictum of *Lord Ellenborough* has no value in our criminal law.

Basnayake C.J. stated as follows:

"The learned Judge's direction is wrong. Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the

prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. Finally the conviction was quashed." (1963) 66 NLR 351

This dictum was applied in *King v. Seeder de Silva* (1940) 41 N.L.R.337 in the Court of Criminal Appeal. A strong *prima facie* case was made against the appellant based on evidence which was sufficient to prove the reasonable possibility of someone else having committed the crime. There was no explanation by the appellant. Therefore, the appellant was identified as guilty.

Howard C.J stated as follows:

"Perusal of the charge indicates that the passages with regard to the arrangement of the body, the lighting of the candle, the closing of the door and the supplying of information to the Police without a word to anyone invite the jury to find an innocent as well as a guilty explanation of such circumstances.....recognized that there might be an innocent interpretation in regard to those circumstances that incriminated the appellant." (1940) 41 N.L.R.344

Here we can understand that the trial judge should explain to the jury about the main principles to be followed in circumstantial evidence. Through analyzing each circumstance the judge can identify the innocent or the guilty person.

This opinion was stated in *The Queen v. Santin Singho* (1962) 65N.L.R.445. The accused person must explain each and every circumstance established by the

prosecution is wrong and would completely negative a direction given earlier by him. The circumstances must not only be consistent with the accused person's guilt but should also be inconsistent with his innocence. In other words, the direction that if a *prima facie* case is made out the accused is bound to explain is wrong and misleading. (1962) 65 N.L.R.450

In cases of *Prematilake v. the Republic of Sri Lanka* (1972) 75 N.L.R.506 and *Illangatilaka v. Republic of Sri Lanka* (1984) 2 SLR 38 the Courts did not follow the opinion of *Basnayake C.J. in Queen v. Sumanasena* (1963) 66 NLR 350.

In *Sumanasena v. A.G* (1999) N.L.R.137 it was held that the learned Judge, in these circumstances, was entitled to draw the necessary inferences and compelling inferences from the circumstance. It is from the failure of the accused to offer an explanation of the highly incriminating circumstances established and in the face of the strong case established against him by the prosecution. In addition to that the dictum of *Lord Ellenborough* is equally applicable to the facts of the instant case *Sumanasena v. A.G* (1999) N.L.R.143.

In a case of circumstantial evidence, there is an obvious danger in an attempt by the trial judge to prefer one hypothesis. The jury would only be too strongly to follow the one accepted by the trial Judge. In *Queen v. Kularatne* (1968) 71 N.L.R.529 it was held that when the case entirely based on circumstantial evidence, it is necessary to examine evidence. It for the purpose of considering that evidence made for the appellants, whether there has been misdirection on the evidence. In addition to that it is important to identify whether the

verdict is unreasonable or cannot be supported having regard to the evidence. *Queen v. Kularatne* (1968) 71 N.L.R.532

When analyse the case laws further, there are some cases where the trial judge gives a wrong statement. Therefore, the evidence was incriminated against the accused and was convicted. In *The King v. Haramanisa* (1944) 45 N.L.R.532, the accused was charged with murder. The evidence against the accused was of purely circumstantial evidence. The trial judge made an erroneous statement of fact with regard to finger impressions of the accused were proved to have been discovered on a glass chimney found near the dead body of the deceased. Here *Howard C.J.* stated in the Court of Criminal Appeal, the accused had been prejudiced in his defence and the conviction set aside.

The murder case of the High Court Judge *Sarath Ambeptiya* was considered as an important evidence case with regard to the Ellenborough dictum in Sri Lanka. It is cited as *Mohamed Niyas Naufar and others v. The Attorney General*. (2007) 2 SLR 144 The leaned President's counsel for the first accused appellant submitted as follows:

- There was no case called *Lord Cochrane and others*
- Gurney's shorthand report of the case does not contain the words attributed to *Lord Ellenborough* by *Wills* in his work on *Circumstantial Evidence*.
- The words attributed to *Lord Ellenborough* appear to be a "creation of Wills" and that it

“appears to be a fabrication of Wills.”

Further he submitted that there was no dictum called „*Ellenborough dictum*’ It is not considered as a part of the Sri Lankan law in particular cases. *Gamini Amaratunga J.* stated that the President’s Counsel omitted to refer to the judgment of T.S. Fernando J. in the case of *The Queen v. Seetin* (1968) N.L.R.316 with referred to the passage of *Basnayake CJ* in *Queen v. Sumanasena* as follows;

“.....Even in 1814, an accused, although not competent to give evidence himself, was not denied the right to call witnesses and to make an unsworn statement from the dock. What has been referred to above as the dictum of *Lord Ellenborough* is, if I may say so, not a principle of evidence but a rule of logic. Therefore, it is not surprising that this dictum is not ordinary to be met with in books on Evidence.”

It is also submitted that “ It is no longer good law even in England”. But the judge said that it is good law there even as it is here in Ceylon.....If *Lord Ellenborough’s* dictum was bad law, the words of *Chief Justice Shaw* should also have been held to be bad. It is important to note that Justice Shaw’s opinion was adopted in *Santin Singho’s* (1962) 65 N.L.R.445 case in Sri Lanka. There are other judicial dicta in England which are similar in effect of the dictum of *Lord Ellenborough*.

E.R.S.R. Coomaraswamy has commented on the present legal position of Sri Lanka as follows;

“The recent tendency of the Supreme Court of Sri Lanka also appears to be to expect an explanation of telling circumstances.....A party’s failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive....” (The Law of Evidence, p.21)

Shirani Bandaranayake J. said to state as follows;“there is no principle in the law of evidence which precludes a conviction in a criminal cases being based entirely based on circumstantial evidence. And the fact that the appellants, decided not to offer any explanations regarding the vital items of circumstantial evidence led to establish the serious charges against them.

Therefore, due to the absence of an explanation from the first accused the learned trial judges adopted the rule of logic of *Lord Ellenborough* to decide the first accused appellant as guilty.

Finally, *Gamini Amaratunga J.* refused the submission of the President’s Counsel which said that the dictum of *Lord Ellenborough* in not a part of Sri Lankan Law.

When analyse the dictum of *Ellenborough* it is important to concern on the very recent case *Badrudeen v. Hon.Attorney-General*. (Bar Association law Reports, 2011 p.116) The case for the prosecution rested solely on circumstantial evidence. It was absolutely unsatisfactory to warrant a conviction. The learned counsel for the accused submitted that the judge of the High Court has misdirected with regard to the application of the law relating to the

burden of proof beyond reasonable doubt and comparing the version of the prosecution with the dock statement.

It is also identified that the learned High Court Judge has unnecessarily much reliance on *the Ellenborough* dictum. The accused-appellant gave an explanation but the learned trial judge has drawn adverse inferences. He fails to concern about the applicability of *Ellenborough* dictum. There is only a limitation that when the prosecution establishes a *prima facie* case against the accused and the accused fail to explain, then the court can form an adverse inference against the accused. The misapplication of *the Ellenborough* theory has caused serious prejudice to the accused-appellant. Therefore, A.W.A. Salam J. stated that finally the conviction and sentence cannot be allowed in this case.

Conclusion

Through analysing case laws, the writer's conclusion is that *the Ellenborough dictum* has been cited with approval in many cases in Sri Lanka where a strong *prima facie* case has been made out against the accused.

As discussed earlier, *the Ellenborough dictum* was firstly applied in Sri Lanka in *Arendtz v. Wilfred Pieris* (1938) 10 CLW 122. Some have argued that there is no single decision in Common Law which had followed the Lord Cochrane decision to support any particular area of law. They also criticize that even there are many weaknesses, the Supreme Court of Sri Lanka had adopted this dictum and had quashed the conviction and sentences even the Death sentence.

Therefore, it is observed that the last decision before this *Arendtz case* was *The King v. Elliyatamby* (1937) 39 N.L.R. 53. In this case Abraham C.J, applied *the Woolmington rule* *Woolmington v Director of Public Prosecution*, (1935) A.C.256 and allowed the appeal. Mr.Lakshman Marasinghe has argued that it is noted that any of the subsequent cases didn't follow *the Woolmington rule* even just after one year. However, the authority of *the Ellenborough dictum* continued until today. In 2006, the Learned Judge believe that this dictum must be somewhere in the judgement of *Sarath Ambeptiya* murder case.

However, *Article 13(5)* of the Constitution guaranteed that "Every person shall be presumed innocent until he is proven guilty." The burden of proof regarding particular facts is placed on an accused person. But, *Article 15(1)* makes restrictions on Article 13(5) and 13(6), in the interests of national security and emergency regulations. Therefore, in terrorist crimes, often evidence can't be met. The prosecution based on solely on confessions made by the accused person.

The writer believes that even there are many laws in the Sri Lankan Criminal Law and the Law of Evidence, the laws of the country are not quite adequate deal with the rise in crime. However, the writer states that everyone has to bear in mind the Cardinal principle;

"In justice is done not only where an innocent accused is convicted, but also when a guilty accused is acquitted. The desirable object in devising a system of criminal

procedure is therefore to avoid either situation.”

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THE LEGAL REGIME OF CYBER CRIMES IN SRI LANKA

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Today, you and I live in an age where electronic devices and computers play a significant role in the advancement of our lives. While having an impact on the various aspects of our daily practices, information technology has made a difference in the fields of education, commerce, business, communications, governance and banking. However, the use of computers and electronic devices has not been very healthy in the recent past and present. These equipmentS are very often used by criminals to commit offences and therefore, the need for a strong framework of laws was identified by the legislature in order to regulate cyber discipline. This legal article will first focus on how the law relating to information and communication technology has been developed and amended to suit the nature of present day cybercrime offences. Next, apart from its development, this article will examine the procedural law related to submission of electronic and computer evidence within the jurisdiction of Sri Lanka. Finally, an insight to the recently developed legislature and challenges posed in implementing such legislature will be discussed in order to bring to the reader's attention that the legal framework of ICT Law in Sri Lanka requires a fundamental update.

Cyber-Crimes and Cyber Law

Various approaches have been adopted in recent times to develop an accurate definition for both terms cyber-crimes and computer crimes (Australian Institute for Criminology; 2005). At the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, two definitions were developed (10th UN Congress on the Prevention of Crime and the Treatment of Offenders; 2000). Cybercrime (computer crime) in a narrow sense covers any illegal behaviour directed by means of electronic operations that target the security of computer systems and the data processed by them. Cybercrimes in a broader sense (computer-related crimes) cover any illegal behaviour committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession and offering or distributing information by means of a computer system or network (Kumar; 2009). Cyber law can be defined as any law that applies to the internet and internet-related technologies and is one of the latest areas of the legal systems. It still seen to be expanding pertaining to the reason that internet technology develops at a very rapid rate and it is important to provide legal protection to those using the internet. Although Sri Lanka is still at a tender age with the advancement in technology, digital technologies have long evolved into

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fundamental social infrastructure in Sri Lanka. This wide scope of cyber-crimes include email spoofing, forgery, cyber defamation, cyber stalking and phishing, identity theft, hacking, spreading hate and inciting terrorism, distributing child pornography and grooming: making sexual advances to minors (Journal in Computer Virology; 2006).

Sri Lanka's Position prior to 1995

The absence of distinct legal provisions to deal with computer and electronic evidence created difficulties with regard to the reception of such evidence in Sri Lanka. In the case of Benwell vs. Republic of Sri Lanka (1978-79) 2 SLR 194, which related to the extradition of an Australian citizen, it was decided that "*Computer Evidence is a category in its own; it is neither direct evidence nor derivative evidence. And such evidence is not admissible under Section 34 of the Evidence Ordinance or any other provision of the Ordinance*". This case identified that computer evidence was a unique category which required special statutory provisions for the reception of computer related evidence.

Similarly, the Hearsay Rule which is accepted under the Evidence Ordinance was also a hindrance to the reception of computer evidence. In accordance with the ratio decidendi of the case Regina v Wood (1982) 76 Cr App R 23, the said rule required that each and every person who contributed to their creation must testify. However, as computer generated documents are programs designed and based on data entered by one or more persons, the above requirement was

impractical to fulfill. Therefore, the absence of necessary provisions in the Evidence Ordinance with regard to the reception of electronic and computer evidence was an issue problematic in nature.

Legislative Enactments related to ICT in Sri Lanka

The matter discussed above was then successfully addressed with the introduction of legal provisions from 1995, which catered to the needs of the reception of electronic and computer evidence in Sri Lanka. The Acts which have been enacted are The Evidence (Special Provisions) Act No. 14 of 1995, the Information and Communication Technology Act No. 27 of 2003, the Payment and Settlement Systems Act No. 28 of 2005, the Electronic Transactions Act No. 19 of 2006, the Payment Devices Fraud Act No. 30 of 2006 and the Computer Crime Act No. 24 of 2007. Furthermore, the Telecommunications Act No. 25 of 1991 and Act No. 27 of 1996 were enacted introducing the Telecommunications Regulatory Commission of Sri Lanka (TRCSL).

"As a result of the enactment of the Information Technology Act No. 27 of 2003, the Information and Communication Technology Agency (ICTA) of Sri Lanka was set up by the Government of Sri Lanka to meet the objectives of the Act. The main objective of the Evidence (Special Provisions) Act No. 14 of 1995 was to provide for the admissibility of electronic and computer evidence in civil and criminal proceedings. One of the objectives of the Payment and Settlement Systems Act No. 28 of 2005 was to facilitate electronic

presentment of cheques. The purpose of the Electronic Transactions Act No. 19 of 2006 was to recognize and facilitate the formation of contracts, the creation and exchange of data, messages, electronic documents and other forms of electronic communications in Sri Lanka. The Computer Crimes Act No. 24 of 2007 was enacted to provide for the identification of computer crimes and to provide procedures to prevent such crimes.”

(Abeyratne; 2008)

Key Legal Provisions under the Computer Crimes Act No. 24 of 2007

Since the Penal Code of Sri Lanka deals with traditional offences, a new system of regulations was required for the governance of crimes related to computers. This resulted in the enacting of the Computer Crimes Bill (LD-O72/2000) on 8th May 2007 and its operation was effective from the 15th July 2008 as the Computer Crimes Act No. 24 of 2007 (Fernando; 2016). This legislation is the result of contributions from CINTEC Committee on Law & Computers which lasted from 1995 to 2000. It furnished for the loopholes that the Penal Code faced when dealing with computer and electronic evidence. The Computer Crimes Act has laid down the procedure to identify computer crimes, the method of investigating them and the prevention of such crimes.

Part I of the Computer Crimes Act explains the offences relating to cyber-crimes and the salient features of the Act are discussed from Section 2 to Section 10.

Section 2 stipulates the scope of this Act and it applies to a person who, while outside or inside Sri Lanka, commits an offence (loss or damage to the State or person resident in or outside Sri Lanka) affecting a computer, computer system, information or data storage system which was inside or outside of Sri Lanka at the material time.

Above mentioned offences may be of a wide range and the Computer Crimes Act of Sri Lanka narrows down these offences to the following categories(Abeyratne; 2008):

1. Computer related offences – where the accused uses a computer or network as a tool to commit the offence.
2. Computer integrated offences – where the accused commits offences through a computer or computer system or programs such as hacking and modification by viruses.

Section 3 criminalises unauthorised access to a computer or any information held in a computer where the accused intentionally secures any programme or data with the knowledge that his conduct was unlawful. This offence is known as Computer Hacking which is done through viruses, cookies and web bugs, web linking, web framing and spamming. Section 4 constitutes the same ingredients as in Section 3 with the additional element that such unauthorised access was gained with the intention to commit an offence. This offence is known as Computer Cracking and extends to sniffing and phishing. Section 5 criminalises the offences of causing a computer to perform a function without lawful authority. Prosecution has to satisfy that the accused caused a computer to

perform a function, intentionally and without lawful authority and that he had knowledge to believe that such function would cause unauthorised modification or damage to any computer, computer system or computer programme. This offence is known an unauthorised modification and may be caused by impairing the operation of a computer, destroying, deleting, corrupting, adding or altering data or information held in a computer and introducing a computer programme to cause malfunction a computer.

Section 6 deals with offences intentionally committed by an accused, by causing a computer to perform a function, which eventually results in danger or imminent danger to the national security, national economy or public order of the country. Section 7 penalizes buying, receiving, retaining, selling, downloading, uploading, copying or acquiring of unlawfully obtained information. Section 8 deals with the offence of illegal interception of any subscriber information or traffic data to or from or within a computer, knowingly or without lawful authority. Section 9 deals with the offence of producing, selling, processing, importing, exporting, distributing or making available any computer or computer programme, a password, access code that is capable of being accessed with the intent that such information be used for the committing of an offence. Finally, Section 10 deals with the offence of unauthorised disclosure of information where a person who is entrusted with information which enables him to gain access to any service provided by the computer, discloses such information without expressed authority to do so.

The offences discussed above can be found compatible with those offences set in the Council of Europe Convection on Cyber Crime and these prove to be common offences identified and recognized internationally as well.

Investigation and Security Strategy in Sri Lanka

Part II of the Computer Crimes Act provides legal provisions for the purpose of investigations related to the offences discussed in Part I of the Act. Pursuant to Section 16 of the Computer Crimes Act 2007, all offences under this Act are cognizable. Therefore, according to Section 15 of the Act, such offences shall be investigated, tried or dealt with the legal provisions set out in the Code of Criminal Procedure Act No. 19 of 1979 unless otherwise provided under the Computer Crimes Act.

As provided by Section 17, the Minister in charge of the subject of Science and Technology shall appoint a team of experts in accordance with the qualifications, experience and remuneration set out in the Computer Crimes Act. This panel of experts called upon to assist police officers shall have the power under Section 17(4) of the Act to enter any premise along with any police officer not below the rank of a sub inspector, to access any information system, computer or computer system, perform any function, require any person to disclose any traffic data, orally examine a person and do any such other things that may be reasonably required for the purpose of this Act. Further, these officials are vested with power under Section 18 of the Act to search and seize any

subscriber information and/or traffic data, intercept any wire or electronic communication with a warrant. Furthermore, if preservation of information requires the purposes of investigation, the experts or police officers have power under Section 21 to arrest, search and seize any information within any premises without a warrant in the course of investigation.

These legal provisions provide the necessary steps to be taken to accelerate the investigations of computer crimes in the interest of justice.

The Evidence (Special Provisions) Act No. 14 of 1995 provides for the admission of two types of evidence namely, Contemporaneous Recordings and Computer Evidence contained in statements produced by computers in civil and criminal proceedings. Some of the main concerns that parties to such a case would have can be summarized to the following:

1. Will it be permissible to adduce that evidence at the trial?
2. What procedural steps should be followed for adducing such evidence?
3. To what extent and by what methods may such evidence be open to challenge?
4. How cogent will that evidence be?

In addressing the above questions, the Evidence (Special Provisions) Act No. 14 of 1995 enables a party to produce “in any proceeding where direct oral evidence of a fact would be admissible, any statement produced by a computer and tending to establish that fact” provided it is shown that

- a. The statement in the form that it was produced is capable of being perceived by the senses;
- b. At all material times the computer producing the statement was operating properly; and
- c. The information supplied to the computer was accurate.

As decided in the case of *Abu Bakr v The Queen* 54 NLR 566 the precondition that the statement produced by the computer must be perceived by senses is however, not an absolute one. In *Kularatne and Another v Rajapakse* (1985) 1 SLR 24, it held that a transcript, translation, conversion or transformation which is intelligible and is capable of being perceived by the senses may be admitted in evidence where the statement made by a computer cannot be played, displayed or reproduced in its original form. As identified by Section 69 of Police and Criminal Evidence Act 1984 of United Kingdom, another vital element is to ensure that the information supplied to the computer was accurate because in some cases, failure to adopt procedures for safeguarding the accuracy and integrity of computerized records may result in court or judge refusing to recognize the authenticity or admissibility of data derived from them.

Legality on Electronic Transactions

While traditional commercial transactions take the format of paper-based medium, electronic commerce or e-commerce involves transactions that take place over the internet. Under E-commerce, parties have the ability of entering into contracts from any part of the world, even in the absence of a

meeting or a simple telephone conversation. In order to legalize the validity of such electronic transactions, the Electronic Transactions Act No. 19 of 2006 was introduced to the Sri Lankan legal framework on ICT. This Act facilitates domestic and international e-commerce by eliminating legal barriers and establishing legal certainty; it encourages the use of reliable forms of electronic commerce; it provides for the electronic filling of documents and services and communications with the Government and Private sector; and this Act also promotes public confidence in the authenticity, integrity and reliability of data messages, documents and other types of communications generated electronically. Furthermore, Section 7 of the Electronic Transactions Act of 2006 has enabled the legal recognition of an electronic signature where the following extensions can be interpreted as enforceable electronic signatures: agreements made by e-mails, entering of a Personal Identification Number (PIN) into a bank Automated Teller Machine (ATM), signing of credit or debit slips with a digital pen pad device at the point of sale and signing electronic documents online.

Under the Evidence Ordinance, documents to be produced in court are subject to proof and such proof is achieved where the originals of relevant documents are made available. However, overtaking this requirement under the Evidence Ordinance, the Electronic Transactions Act allows for a strong presumption under Section 21 that the information contained in an electronic data message, document, record or any other type of electronic communication is firstly truthful, secondly made by the person who is

purported to have made it and thirdly that the electronic signature or the distinctive identification mark is genuine.

While appreciating the fact that this Act has brought an insight to electronic transactions with validation to online communications; a different dynamic to contracts and freedom to e-transactions, it is also important to note that there are certain restrictions that prevent the application of this Act. According to Section 23, the creation or execution of a will or any testamentary disposition, a license for a telecommunication system issued under Section 17(6) of the Telecommunication Act; a Bill of Exchange defined under Section 3(1) of the Bill of Exchange Ordinance; a Power of Attorney defined under Section 2 of the Power of Attorney Ordinance; a Trust defined in the Trust Ordinance excluding constructive, implied and resulting trust; a contract for the sale or conveyance of immovable property and any document, Act or transaction upon the Minister's regulation are excluded from the applicability of the Electronic Transactions Act. A reasonable explanation to such exclusion would be that, for example, the execution of a will or a signing of a Deed of Sale will require the presence of a Notary Public and two witnesses to be present at such time of signing, in accordance with the Prevention of Frauds Ordinance. This requirement would prove to be impractical in the context of an online transaction as the law does not provide for presence of Notary Public and witnesses in an online mode or through any form of communication within the medium of internet. As this situation has posed a challenge on such restrictions, it is also important to note that Sri Lanka is still

experiencing the basic stage of the Electronic Transactions Act and that there has been no legal development for the past 14 years since its origination.

Challenges faced outside the legal framework

Despite the availability of a well-structured legal framework for the governance on offences of cybercrimes, Sri Lanka faces certain challenges and practical issues that remain unsolved up-to-date. These encounters may include the following:

1. Shortage of experts within the country as many professionals lack the required qualifications and experience in the ICT industry.
2. Reluctance of available experts to investigate and give evidence in a court of law as they would be thoroughly cross-examined by the learned opposing counsel.
3. Even though the existing laws provide for the admissibility of computer generated records, such admissibility is subject to several strict criteria, ex: Certificate to prove that the computer was working properly.
4. Shortcomings of the administration of the country such as public awareness of the existence of the Acts and the uses that general public can gain in the event of an offence or infringement of an individual's right.
5. High expenses are to be incurred when training experts and police officers to investigate into ICT related matters.
6. Non-availability or insufficiency of computer forensic laboratories in the country.

Conclusion

Sri Lanka cannot look forward to becoming a developed nation without its citizens being able to use ICT for their personal advantage. While the use of electronic equipment for efficiency is important, protection from cybercrimes has proved to be even more significant as the entire purpose of such commitments would be defeated if cybercrimes could dominate over public confidence. The purpose of enacting the main Acts was to raise the confidence that the general public have in Information Technology services and products and also to govern the admission of electronic and computer evidence in judicial proceedings. While appreciating the prevailing laws, it is equally important to develop and improve certain aspects of the existing law in order to meet the present day challenges, while being based on the fundamental principles of Law of Evidence.

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GREENING THE CHAPTER III OF THE CONSTITUTION OF SRI LANKA: A LEGAL PERSPECTIVE IN THE LIGHT OF RIGHT TO HEALTH

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Abstract

'Right to a clean and healthy environment' is a predominant legal entitlement of the world nation and the protector of basic human rights including 'Right to health.' This is basically due to the fact that, there is interdependence between the rights. The paper emphasizes the importance of incorporating the 'Right to clean and healthy environment' as a fundamental right in the constitution of Sri Lanka. The recognition as a fundamental right gives the specific right an enforceability. This is an advantage to the public as they are granted with an opportunity to have access to the apex court of the country, at an infringement or an imminent infringement of their environmental rights. The methodology adopted in the paper is normative in nature which involves with a discussion of different jurisdictions in the world including India and European countries. The discussion further extends to the regional and international conventions in the world which emphasize the right to health and the necessity of protecting right to clean and healthy environment. The author has focussed on the international legal regime namely, the Stockholm declaration on the United Nations, Rio Declaration, International

Covenant on Social, Cultural and Economic Rights 1966, Convention of the Rights of the Child to analyse how the interdependency between the right to clean and healthy environment and right to health is internationally recognized.

Key Words: Constitution, Environment, Health, International Conventions, Right,

Introduction

Inclusion of a specific right in a Constitution of a country as a fundamental right is important owing to the reason that, such an inclusion gives that right a nature of enforceability. A specific right being granted with enforceability demarcates that, the right deserves the obedience of the community and at a violation the intervention of the judiciary is predominant. The chapter III of the Constitution of Sri Lanka is the place where the fundamental rights have been given protection. As per the Article 126 of the Constitution of Sri Lanka, Every citizen has an access to the Supreme Court and has a right to petition the court about an infringement or an imminent infringement of a fundamental right.

'Right to a clean and healthy environment' is generally recognized as a social right which is not enforceable in nature. Sri Lanka with its advancements in technology and industries currently confront the dilemma of environmental degradation, and the trends of

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development have been given the prominence over the matters of environmental protection. This paper predominantly focuses on the importance of incorporating the ‘Right to clean and healthy environment’ in the constitution of Sri Lanka as a fundamental right which is enforceable nature and further a deep emphasis has been positioned on the significance of the Right to health. ‘Right to health’ is protected through the protection which is given to the ‘Right to clean and healthy environment’. There is interdependence between these two rights. The paper justifies the recognition of right to clean and healthy environment as an enforceable right which facilitates people to vindicate their right related to health.

Methodology

Methodology is normative in nature and involved with a documentary analysis. The paper further involved with a case study. The data has been gathered from texts, journal papers, International and regional instruments of law namely International Covenant on Social and Economic Rights 1966, International Covenant on civil and political Rights 1966, Convention on the Rights of the child, African Charter of Human Rights and American Convention on the rights of the people dealing with human rights and environmental rights.

Results and Discussion

Constitutionalizing the ‘Right to a Clean and Healthy Environment’

‘Constitution of the Democratic Socialist Republic of Sri Lanka 1978’ is the parent law of the country and the fountain of rights entitled to by the citizens. Chapter III

of the constitution has recognized the civil and political liberties of the people which are enforceable in nature. Chapter VI of the constitution is enshrined with the ‘principles of state policy’ which provide the government with proper guidance. If a fundamental right included in the chapter III of the constitution is breached, the citizens have an access to the judiciary to vindicate the right. ‘Right to environment’ has not been accepted as an enforceable legal entitlement of the citizens of Sri Lanka. It is evident that, right to environment is a constitutionalized fundamental right in majority of jurisdictions in the world. The importance of incorporating Right to environment as a fundamental right is felt to the developing countries as they have faced the challenge of ‘Sustainable Development’.

‘Sustainable Development’ balances the aspects of development and industrialization with the environmental concerns. Thus, Sustainable Development and Right to environment are depicted as two sides of the same coin.

‘Right to environment’ does not totally stand to a surrounding to live in. People need a ‘clean and healthy’ environment to live. As per the contention of the Stockholm Declaration ‘All humans are in need of a quality environment to live in’. South Asian countries namely India, Pakistan and Bangladesh have recognized ‘Right to a clean and healthy environment’ as a component of Right to life, which implies the fact that, Humans are incapable of surviving, without the support of the quality environment. ‘Right to clean and healthy environment’ gives birth to basic human rights. ‘Right to a clean and healthy environment’ is interconnected with the human life and incorporating as a fundamental right to the constitution

protects a bundle of rights which is naturally entitled by humans.

Right to a clean and Healthy Environment protects the Right to Health

Article 12 of the International Covenant on Social and Economic Rights 1966 and Article 24 of the Convention on the Rights of the Child 1989; have given

International recognition to Right to health. Right to health is a basic human right. In Buddhism, 'Health' is considered as the 'great profit' in human life; '*arogya parama laabha*'. 'Healthiness' is of a significant purview. It includes disease resistance and wellbeing of humans physically and mentally. Man interacts with the environment, and human health is basically determined by the environment he/ she lives in. A quality environment provides a good health. The physical, chemical and biological changes in the environment bring repercussions on human health. Improvement of health in a community is effected by both natural and man-made environments. It is evident, that positivity in an environment affects the human health in an optimistic manner. When the environment degrades, human health is at a stake.

An international Case study: Indian and European Perspectives.

Decisions of the cases before Indian judiciary and the European Court of Human Rights clearly depict the judicial perspective on the Right to a clean and healthy environment and Right to health. India has asserted the fact; Industrial Pollution results in the water, soil and air pollution. The industrial pollution in India has aggravated to the extent that,

agricultural chemicals in the environment affected the safest food for infants; breast milk. Breast milk contents have shown high concentration of DDT contamination. Female workforce in India is under the threat of reproductive incapacity (infertility) and foetal damage, as consequences of industrial pollution. Female workers in asbestos sheets and balloon making industries expose to the threat of infertility due to the fumes such as chromium, and mercury which are emitted. In Ajith Mehta v. State of Rajasthan (1990), Rajasthan court confirmed the order of removing a fodder business due to the health hazards. As per the contention of the Indian Judiciary, the environment is contaminated with chemicals which cause diseases such as allergies, and damages to the vital organs such as eye, brain, liver, kidneys, genetic disorders and carcinogenic diseases.

Water pollution is a violation of 'Right to a clean and healthy environment'. It has caused mercury poisoning, chronic accumulation in the human brain and nervous system. In Tartar v. Romania (2009), the European court of Human Rights held that the release of cyanide contaminated water by the gold mines as gravely affecting the human health. Skin damages, liver damages are caused by the arsenic poisoning. In Guerra and Others v. Italy (1998), European Court of Human Rights confronted a case in which hundreds of people were hospitalized due to the arsenic poisoning by fertilizer producing chemical factories.

The diseases affecting lungs, eyes, throat including cancers and respiratory disorders are caused due to the polluted air in the environment. In Madhavi v. Thilakan (1989), Indian judiciary identified the impact of automobile workshops which

result in health hazards. The European Court of Human Rights held in *Giacomelli v. Italy(2006)*, that harmful emissions from the plants which have been established for the treatment of hazardous wastes are gravely affecting the human health. *Union Carbide Corporation v. Union of India (1992)*, it was discovered that, gas emissions affect the generations of humans and the impacts are long lasting. The repercussions of gas emissions are severe in nature. There are damages to the genetic intelligence, foetal damages, gas related ailments of the children and lacking immunization to fight against infections, bacteria, and viruses. *Lopez Ostra v. Spain (1994)*, it was the opinion of the European Court, that the plants treating leather industrial wastes emit gases which create grave health problems such as nausea, vomiting, anorexia. Thus, both the Indian and European legal perspective is that, violation of Right to clean and healthy environment amounts to the violation of Right to health of humans.

The context in Sri Lanka

The context in Sri Lanka is the same as India and Europe. Sri Lanka does not have a large land mass as in India and not reached the zenith of development as the European countries, but confront the dilemma of environmental issues. There is industrial pollution in Sri Lanka which has not remedied.

In Sri Lanka, Air pollution has caused numerous health problems to the people in urban areas and suburbs. The particle pollution is of imperative concern among the scientists. The air pollutants Carbon monoxides, Sulphur Oxides, Nitrogen Oxides, lead contain in air cause serious health problems. The health problems which are caused by the air pollutants depend on the factors such as the amount

of the pollutant exposed to, duration and the frequency of exposure, toxicity of the specific pollutant. The air pollution Sri Lanka is coexisted with the health problems such as communicable diseases, vector borne diseases, malnutrition and poor sanitation. In Sri Lanka, the air pollution is mainly caused by the vehicle emissions. As the vehicle emissions result in a higher degree of outdoor air pollution, the National Policy on urban air quality management was adopted in year 2000. The indoor air pollution is an environmental issue which creates serious health problems. The indoor air pollutants are predominantly seen in the urban areas. The substances such as varnish, paints, polymers, incense sticks, and mosquito coils mainly cause the indoor air pollution. The disease conditions such as nausea, vomiting, dizziness, and respiratory disorders are caused by the indoor air pollutants. In *Keanagama Enterprises Ltd v. E.A.Abeysinghe and eleven others (1994)*, it was held that, the quarry blasting with dust pollute the air in a great deal, resulting cancer and respiratory disorders.

‘Water pollution’ is another severe problem in Sri Lanka. Pollutants in the water cause changes in the water quality. In Sri Lanka, majority of complaints have been lodged by the victims of chronic kidney disease and diarrhoea. The water sources in Sri Lanka are contaminated with the pollutants and metals. Arsenic and cadmium concentrations in the water involve in the creation of victims of chronic kidney disease which is fatal in nature.

The cases in relation to ‘Public nuisance’ are reported from the urban areas of the island. The main problem which is confronted by the urban people is the dumping of garbage. In *M.M. Khalid and*

three others v. Chairman, Sri Jayawardenapura kotte urban council (1996), it was held that, the disposal of waste in residential areas resulted in the aftermath of unhygiene, mosquito and insect breeding with vector borne diseases. ‘Soil pollution’ is one of the repercussions of the disposal of waste. The materials containing polythene, plastics and the fertilizers intermixed with Benzene, Chromium pollute the soil resources in Sri Lanka with serious health problems such as Cholera, skin infections, Dysentery. Noise pollution in urban areas has caused severe health issues such as brain inactivity.

International Law on Right to Health and Environment

Stockholm Declaration of the United Nations Conference on the Environment, 1972, in Principle 1 specifies that,

‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing’.

The Stockholm Declaration is apparently an important international instrument as it depicts the product of the first International Conference on human environment in 1972. In this event, the ‘health’ was given an epithet as a ‘bridge’ between environmental protection and human rights. The resolution 45/94, of the general assembly stated that ‘all individuals are entitled to live in an environment adequate for health and wellbeing. In an essence, the Stockholm declaration and the related instruments emphasized that the environmental protection is prerequisite to the protection of internationally recognized and guaranteed human rights. In addition to

the Stockholm declaration adopted in 1972, the Rio Declaration on Environment and Development adopted by the Conference of Rio de Janerio on Environment and Development in 1992 has participated in the protection of environmental and human rights.

Rio Declaration has contributed in the development of environmental and human rights in a different way. The approach adopted was procedural in nature. The principle 10 of the declaration states, that ‘access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because environmental issues are best handled with the participation of all concerned citizens, at the relevant level’. The procedural advancements are directed towards the environmental decision making and enforcement. What is believed in this international instrument is that, the handling of environmental issues can be handled with the participation of all citizens. The principle 14 of the Rio Convention stipulates that, ‘the corporation among the states is essential to discourage or prevent the relocation or transfer to other states of any activities and substances which are harmful to human health’.

Current international, regional and domestic legislations have adopted the Right to environment as a fundamental component of law and recognized that the basic human rights including right to life and right to health. The link which has been created between the environmental protection and right to health is not completely based on human rights jurisprudence. The link is further explained by the theories of criminal justice, and civil justice which keeps a considerable

importance on the private liability of the people.

Majority of the international instruments are dealt with the protection of the right to health and emphasized the importance of the environment to humans. International Covenant on Economic, Social and Cultural Rights (1966), in Article 7b states that, every person has a right to safe and healthy working conditions. Further the Article 10 specifically states the right of children and young persons to have freedom from work which are harmful in nature. Article 12 of the covenant emphatically states the right to health as an essential entitlement to a human and also it encompasses the necessity for the governments to pay attention to the ‘environmental and industrial hygiene’. The environmental and industrial hygiene is extended to the steps for prevention of epidemic, endemic and occupational diseases. This impliedly denotes the fact that, Right to environment is a precondition to assert the health rights of the people.

The universal rights which are entitled by the children are enshrined in the Convention of the rights of the child 1989. ‘Right to health’ is prominent among the rights which have been recognized by the Convention of the rights of the children. Article 24 of the convention is predominantly dealt with the combating against diseases and malnutrition, and further insisted that it includes the provision of adequate food and drinking water while concerning about the dangers and risks of the environmental pollution. Article 24 addresses the importance of educating the segments of the society on environmental hygiene. The articles which are enshrined in the Convention of the Rights of the children clearly depict that, there is a link between the environmental

hygiene and the rights of children which have been universally recognized. The Children are capable of enjoying their rights only if the government authorities ensure that they are gifted with an environment which is clean and safe.

ILO Convention No: 169 concerning Indigenous and Tribal Peoples in Independent Countries 1989 is an international instrument which asserts the environmental rights of the indigenous people. The principles which have been declared by the ILO Convention have a valuable application to the Sri Lankan context as Sri Lanka is blessed with indigenous communities. The convention specifically addresses land issues which related to the natural resources.

As a regional instrument on human rights, African Charter on Human and People’s rights 1991 guarantees the right to health and right to environment. Article 16 of the African Charter states that, ‘every individual has a right to enjoy the best attainable state of physical and mental health’. Simultaneously, Article 24 upholds that, the ‘people have a right to a general satisfactory environment which is favourable to their development’. This clearness is further adopted by the American Convention on Human Rights (additional protocol). There is a clear recognition to both rights pertaining to health and environment. As per the article 10 of the convention, every person is entitled to the right to health, encompassing the mental, physical and social wellbeing. According to the American Convention, the right to health is a public good. Under the right, the convention has recognized criteria such as primary health care, extension of the benefits of health services to all who subjected to the state jurisdiction,

immunization against infectious diseases, prevention and the treatment of endemic, occupational and other diseases, educating the people on prevention and treatment of health problems and satisfying the health needs of the vulnerable groups. Article 11 deals with the right of the people to environment.

Conclusion

The concepts of environmental protection and development resemble the two sides of a coin. There must be a balance between the environmental protection and trends of development which finally leads to the ‘sustainable development’. In Sri Lanka, the trends of development have been given prominence than keeping a weight age on the environmental issues. This has caused negative impacts on the basic human rights of the people such as right to life, right to health, right to water etc. There is a direct and clear relationship between the right to a clean and healthy environment and right to health. ‘Right to health’ is dependent on the Right to a

clean and healthy environment. That implies the fact that, it is essential to give a value to ‘Right to a clean and healthy environment’ in the constitution of the country. The Republican Constitution of Sri Lanka is the parent law of the country and chapter III of the Constitution is endowed with the fundamental rights. The recognition of right to a clean and healthy environment as a fundamental right gives the former an enforceability. Thus, the people whose basic rights have been violated due to the improper environment have the access to the apex court of the country. The problem of environmental degradation is not an issue pertaining to the Sri Lankan context only. The issue is common to all the people around the world.

The Indian judiciary and the European court of justice have clearly elaborated the pollution centred issues in relation to the environment. In Sri Lanka, air, and water pollution is at the zenith and seriously causing hazards to the health of human beings. The international conventions related to the environment namely the Stockholm Declaration and Rio Convention have prioritized the link between the man and environment. The international instruments such as International Covenant on Social, Economic and Cultural Rights 1966, and the Convention of the Rights of the child 1989 have specified the link which exists between the right to health and right to a clean and healthy environment. The regional legal regimes namely the African Charter on Human and People’s rights and American Convention on Human Rights give separate, individualistic recognitions to the right to health and right to a clean and healthy environment. The American Convention identifies right to health as a ‘public good’.

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LAW RELATING TO AMENDMENT OF PLEADINGS

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In a civil action, pleadings include plaint, answer and, in the event, answer contains a claim in reconvention, replication. Law permits to amend these pleadings in limited circumstances, within a specific period. The law relating to amendment of pleadings is set out in Section 93 of the Civil Procedure Code. Section 93 has been replaced by Act No 79 of 1988 and Act No 09 of 1991. Thus, the replacement brought to Section 93 by the Act no 9 of 1991 is now in force.

Section 93 as repealed by the Act no 9 of 1991 reads as follows.

93(1) "Upon application, made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the parties to the action, the court shall have full power of amending in its discretion, all pleadings in the action, by way of addition or alteration or of omission.

(2) On or after the day first fixed for the trial of the action and before final judgment, no application for the amendment of any pleadings shall be allowed unless the court is satisfied, for reasons to be recorded by the court, that grave and irremediable injustice will be caused if such amendment is not permitted, and no on other ground,

and that the party so applying has not been guilty of laches.

(3) Any application for amendment of pleadings which may be allowed by the court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the court may think fit.

(4) The additions or alterations or omissions shall be clearly made on the face of the pleading affected by the order; or if this cannot conveniently be done, a fair copy of the pleading as altered shall be appended in the record of the action to the pleading amended. Every such addition, or alteration or omission shall be signed by the judge."¹

Purpose of the amendment brought to section 93

One of main objectives of the amendment brought to section 93 by Act No 9 of 1991 is to avoid unnecessary postponement of trials. The amendment clearly set out a bar against the power of amendment of pleadings on the day of trial and allows such amendments only on the ground specified in section 93 (2). This has been discussed in Kuruppuarachchi V Anderas². There the court held that, the

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¹ Section 93 of the Civil Procedure Code as amended by Act No 9 of 1991

² 1996 2 SLR 11

amendment was clearly intended to prevent undue postponement of trials by placing a significant restriction on the power of the Court to permit amendment of pleadings on or after the day first fixed for Trial. Further, in Vipassi Nayaka Thero V Jinaratne Thero³ the court held that the object of the rules governing amendments is to obtain a correct issue between the parties. If a mistake has been made in an original pleading, there is no objection to a correction, provided no injustice is done to the other party. In Ratwatte V Owen⁴ Lawrie J expressed a similar view. In Mackinnons v Grindlays Bank⁵ Sharvananda CJ held that the object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings.

Accordingly, the purpose of Section 93 is to avoid undue delay in trial and to identify the real dispute between the parties. However, court should not permit any amendments which cause an injustice to the opposite party as held in Darayani V eastern Silk Emporium Ltd⁶ and Senanayaka V Anthoniez⁷.

Amendment is allowed only upon an application made by a party to the action

As per the amendment by Act No 9 of 1991, an amendment to a pleading is only allowed upon an application by a party to the action. The courts are of the view that, the amendment by Act No. 9 of 1991 to section 93 of the Civil Procedure Code has for the

first time taken away the power of court *ex mere motu* to amend pleadings (Gunasekera and another V. Abdul Latiff⁸ and Maseena V Sahud and another⁹).

Accordingly, the new amendment precludes court from exercising its power to amend pleadings in its discretion as vested to it, by repealing the words "the Court shall have full power of amending in its discretion" in the original section and by repealing the words "Court may.....amend all pleadings" in the amendment made to Section 93 of the CPC by act No 79 of 1988.

When can a party apply for amendment of pleadings?

Section 93 provides two instances where a party can apply for amendment of pleadings, i.e. before the first date fixed for trial and on or after the first date fixed for trial and before judgment.

Before the first date fixed for trial

Section 93 (1) as Amended by Act No 9 of 1991 provides that, "Upon application, made to it *before the day first fixed for trial of the action*, in the presence of, or after reasonable notice to all the parties to the action, the court shall have full power of amending in its discretion, all pleadings in the action, by way of addition or alteration or of omission".¹⁰ Thus it is important to examine what is meant by "the day first

³ 66 CLW 43

⁴ 2 NLR 141

⁵ 1986 2 SLR 272

⁶ 64 NLR 529

⁷ 69 NLR 225

⁸ 1995 1 SLR 225

⁹ 2003 3 SLR 109

¹⁰ Section 93 (1) of the Civil Procedure Code as replaced by Act No 9 of 1991

fixed for trial". Section 80 of the Civil Procedure Code provides for fixing the date of trial.

In Ceylon Insurance Co. Ltd. V. Nanayakkara And Another¹¹ it was held that, the order made fixing the date of trial in terms of section 80, becomes the "day first fixed for trial" within the meaning of section 93 (2) of the Civil Procedure Code.

Court is of the view that the day first fixed for trial could mean the day the trial began. In Karunaratne V Alwis¹² the court held that, "It is clear that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed". The same position has been taken in Siripura Hewawasam Pushpa v Leelawathie Bandaranayake and three others¹³ where the court held that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed.

Accordingly, it is clear that the first date of trial means the day which the trial actually begun, and any amendment made prior to the date the trial was begun comes under Section 93(1).

On or after the first date fixed for trial and before judgment

However, section 93 (2) provides that, an amendment can be done on or after the day first fixed for trial and before final judgment. In fact,

Section 93 (2) itself provides two restrictions for such amendment. Hence, in order to amend the pleadings after the first day of trial, the party applying so must satisfy the court that a grave and irremediable injustice would cause if such amendment is not permitted and that the party is not guilty of laches. Further, the court is obliged to record reasons that above two conditions have been satisfied. Section 93 (2) read as follows.

"On or after the day first fixed for the trial of the action and before final judgment, no application for the amendment of any pleadings shall be allowed unless the court is satisfied, for reasons to be recorded by the court, that grave and irremediable injustice will be caused if such amendment is not permitted, and no on other ground, and that the party so applying has not been guilty of laches."¹⁴

In Kuruppuaracchci V Andreas¹⁵ G. P. S. De Silva CJ held that, while the Court earlier 'discouraged' amendment of pleadings on the date of trial, now the court is precluded from allowing such amendments save on the ground postulated in the sub-section. Furthermore, it should be noted that the amendments permitted by section 93 (2) are the amendments required due to unforeseen circumstances which could not have been foreseen with reasonable diligence. In Avudiappan V. Indian Overseas Bank¹⁶ and Ceylon Insurance Co., Ltd. V. Nanayakkara and Another¹⁷, the court has taken up the same position. Furthermore, in the latter case the court specifically held that the application to amend pleadings by mistake or inadvertence

¹¹ 1999 3 SLR 50

¹² 2007 1SLR 214

¹³ 2004 3 SLR 162

¹⁴ Section 93 (2) of the Civil procedure Code as replaced by Act No 9 of 1991

¹⁵ 1996 2 SLR 11

¹⁶ 1995 2 SLR 131

¹⁷ 1999 3 SLR 50

can in no sense be regarded as necessitated by unforeseen circumstances.

The court is also in concern with the irremediable prejudice that can be cause to the other party by allowing an amendment. One of a good example is where the court held in **Gunasekera and Another V Abdul Latiff**¹⁸ that, “Once the two conditions are satisfied, the party making the application is required to satisfy the court that circumstances that warrant an amendment to pleadings under section 93 (1) also exist, namely, *that no irremediable prejudice will be caused to the respondents*, such an amendment will avoid a multiplicity of actions and facilitate the task of administration of justice. An obvious example of prejudice being caused to the opposing side is when the amendment would deprive the opposing party of the plea of prescription”.

Grave and irremediable injustice

The first ground enumerate in section 93 (2) permitting amendments on or after the day first fixed for trial is that the party so applying should satisfy the court that grave and irremediable injustice would be caused if the amendment is not permitted (**Ranaraja J in Colombo Shipping Co. Ltd V Chiraty Clothing Pvt. Ltd**¹⁹). The same dictum has been followed in **Ceylon Insurance Co. Ltd. V Nanayakkara**²⁰ and **Avudiappan v Indian Overseas Bank**²¹

Party applying should not be guilty of laches

The second condition of permitting an amendment after the first day fixed for trial is that the part applying should not be guilty of laches. Ranaraja J in **Gunasekera and another V Abdul Latiff**²² had analyzed broadly the word “Lashes” by citing judicial dictionaries. Accordingly, it was held that, “The word "laches" is a derivative of the French verb Lacher, which means to loosen. Laches itself means slackness or negligence or neglect to do something which by law a man is obliged to do. (Stroud's Judicial Dictionary 5th Ed Pg 1403) It also means unreasonable delay in pursuing a legal remedy whereby a party forfeits the benefit upon the principle *vigilantibus non dormientibus jura subveniunt*. The neglect to assert one's rights or the acquiescence in the assertion 'or adverse' rights will have the effect of barring a person from the 'remedy which he' might have had if he resorted to it in proper time (Mozley&Whiteley's Law Dictionary 10th Ed pg 260)”. Furthermore, it was held that, Laches means an unreasonable delay in pursuing a legal remedy whereby a party forfeits the benefit upon. However, the delay that can be explained does not spell laches.

In **Avudiappan V. Indian Overseas Bank**²³ it was held that Laches does not mean "deliberate delay" and it means "delay which cannot be reasonably explained". A similar position has been taken up by Fernando J in **Lulu Balakumar v.**

¹⁸ 1995 1 SLR 225

¹⁹ 1995 2 SLR 97

²⁰ 1999 3 SLR 50

²¹ 1995 2 SLR 131

²² 1995 1 SLR 225

²³ 1995 2 SLR 131

BalasinghamBalakumar²⁴. What is reasonable time and what will constitute delay will depend upon the facts of each case. The circumstances of the case such as the number of trial dates and the period which has been elapsed can be taken into account by courts in determining the reasonable time. However, the court must notice the impact of the delay on the other party.

However, Sharvananda J (as he was then) in **BisoMenika v Cyril de Alwis**²⁵ held that If the delay can be reasonably explained the court will not decline to interfere. Thus, the courts are of the view that delay alone will not bar a person from obtaining relief which he may be entitled to. But the court will grant relief only if the delay can be reasonably explained.

Accordingly, there are two equitable principles which the courts are in concern when it refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent **Paramalingam V. Sirisena and Another**²⁶

However, in one unreported case²⁷ Edussuriya J held that negligence and lack of vigilance on the part of the Lawyers for a party would not be covered by the provisions of Section 93(2) of the CPC.

Pleadings can be amended by way of addition, alteration, or omission

Section 93 (1) empowers the amendment of all pleadings in the action, by way of addition or alteration or of omission. However, it does not permit to change the character of the original cause of action. In **Gunasekera and another V Abdul Latiff**²⁸ the court discussed whether correction of a clerical or typographical error is comes within the meaning of an amendment under section 93.

Although the law permits the amendments of pleadings by way of additions, alterations and omissions, the court should not in any event allow the plaintiff to file a new plaint instead of an amended plaint. In **Lokkumarakkala V Sri Lanka Telecom**²⁹ the court of Appeal held that the District Court erred in allowing the plaintiff to file an amended plaint consists of 13 paragraphs instead of the original plaint consists with 19 paragraphs.

Further, in several instances, it was held that the court allows amending the caption of the plaint. The underlying principle of this rule is that the right of a party must not be refused merely based on mistakes. Thus, in **Velupillai V the Chairman, Urban Council Jaffna**³⁰ the court permits to amend the Caption. In **Perera V Geekiyana**³¹ the court permits the plaintiff to cut off the word “Mt. Lavinia” and enter the Word “Colombo” instead. Furthermore,

²⁴ SC 125/94 SCM 11.9.95

²⁵ 1982 1 SLR 368 at 378

²⁶ 2001 2 SLR 239

²⁷ CALA 55/2000 (D.C. Colombo Case No. 8975/ RE) decided on 08.09.2000

²⁸ 1995 1 SLR 225

²⁹ 2008 BLR Vol. XIV P. 237

³⁰ 39 NLR 464

³¹ 2007 1 SLR 202

in *Parsons V Abdul Cader*³² it was held that the court has the power to substitute the right name of a person even after the decree, in the event where a judgment has been entered under a wrong name.

No amendment to convert the cause of action or change one character to an inconsistent character

Although section 93 permits to amend the pleadings by way of addition, omission, or alteration, it does not in any event allow a party to convert an action of one character into an inconsistent character. Regarding this situation, it is important to pay attention to proviso of Section 46 (2) of the Civil Procedure Code which reads as follows.

"Provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another inconsistent character"³³

The above rule is well established in *Wijewardene v. Lenora*³⁴ where the court held that "An examination of the provisions of Chapter VII of the Civil Procedure Code discloses that the power conferred by section 93 is subject to one limitation. Section 46 (2) provides that before a plaint is allowed to be filed, the Court may refuse to entertain it for any of the reasons specified therein and return it for amendment provided that no amendment shall be allowed which would have the effect

of converting an action of one character into an action of another or inconsistent character. If before a plaint is allowed to be filed an amendment which would have the effect of converting an action of one character into an action of another or inconsistent character is not permitted, the power conferred on the Court by section 93 for amending the plaint after it is filed cannot be greater."

Same view had been taken by the court in *Ekanayaka V Ekanayaka*³⁵ and it was held that a plaint filed in an action for definition of boundaries cannot be amended so as to convert the action of declaration of title to land. Thus, one must be mindful of the bar set out in proviso to section 46 of the Civil Procedure Code against amendments which would have the effect of converting an action of one character into an action of inconsistent character.

Furthermore, Section 93 does not permit a party to convert the cause of action of the first plaint into another fresh cause of action. In *Hatton National Bank V Silva and Another*³⁶ where the plaintiff brought a new cause of action against both defendants for damages and alters the scope and nature of the action, the court held that the plaintiff cannot amend the plaint to include a fresh cause of action which arose after the institution of the action. The court expressed a similar view in *Thirumany and another v. Kulandavelu*³⁷ and *Lakdawalle v. Muriyah*³⁸. In *Kuruppuarachchi V Andreas*³⁹ the court does not permitted the

³² 42 NLR 383

³³ Proviso to Section 46 (2) of Civil Procedure Code

³⁴ 1958 60 N.L.R. 457 at 483

³⁵ 63 NLR 188

³⁶ 1999 3 SLR 113

³⁷ 66 NLR 285

³⁸ 67 NLR 47

³⁹ 1996 2 SLR 11

defendant to take up the defense of adultery by amending the answer in the second day of trial stating that the amendments as per section 93 of the CPC does not in any event conferred the power to introduce a new cause of action instead of the original.

Further, in *Uberis V Jayawardne*⁴⁰ the court held that the subject matter of the case must be the same. It was further held that matter of one land cannot be change into another land by amending the plaint.

Plaint must be amended after a party added as per Section 18 (1) of the CPC

Section 18 (1) of the Civil Procedure Code permits the addition of parties whose presence is necessary for adjudication process. When a defendant is added in such manner, the provisions set out in Section 21 of the Civil Procedure Code to be read with Section 93 of the Civil Procedure Code should be applied. It states as “Where a defendant is added, the plaint shall, unless the court direct otherwise, be amended in such manner as may be necessary and a copy of amended plaint shall be served on the new defendant and on the original defendants”⁴¹

Accordingly, when a defendant is added, then the plaintiff must amend the plaint stating the reasons for such addition and, if there are any rights or interests of the added party to the subject matter, then describing such rights and interests. In requires the judge to sign all additions, omissions and alterations done in

*Atalugamage Herath Prasanna Silva v John Arul Rajah*⁴² the court held that, once a party is added, the next inevitable and logical step would be an amended plaint.

Section 93 (3) and 94 (4) of the CPC

Section 93 (3) Civil Procedure Code reads as “Any application for amendment of pleadings which may be allowed by the court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the court may think fit”.⁴³ Hence, when an application made for amendment of pleadings, the court has power to make an order for payments of costs and for postponement of trial.

Section 93 (4) of the Civil Procedure Code states that “The additions or alterations or omissions shall be clearly made on the face of the pleading affected by the order; or if this cannot conveniently be done, a fair copy of the pleading as altered shall be appended in the record of the action to the pleading amended. Every such addition, or alteration or omission shall be signed by the judge.”⁴⁴

Accordingly, the court can make the amendments after they are permitted on the plaint, answer or replication and continue the proceedings without delay. If the court is not convenient is making such immediate amendments, then the court can give a further date for filing of a copy of the pleadings as amended. The section

pleadings. However, the court should not in any event permit more than one

⁴⁰ 62 NLR 217

⁴¹Section 21 of the Civil Procedure Code

⁴² C. A. L. A. 41/ 2001- DC Colombo 17771- CA Minutes 27. 96. 2002

⁴³ Section 93 (3) of Civil Procedure Code as repealed by Act No 9 of 1991

⁴⁴ Section 93 (4) of Civil Procedure Code as repealed by Act No 9 of 1991

application for amendment of pleadings in
a case as held in ***Gunasekara and another***
V Abdul Latiff⁴⁵

MANURAWA 2020

⁴⁵ 1995 1 SLR 225

THE NEED FOR RETHINKING ABOUT ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS

W.K.M. Singhadewa*

Abstract

There is a mutual connection between Environmental rights and human rights. A safe, clean and healthy environment is essential to the enjoyment of human rights, including the right to life, right to healthy environment and right to health. The linkage between these two approaches has recognized in various international and regional instruments including United Nations Human Rights Council's resolutions. Climate change affects to human rights in different ways. With the process of development there would be a large damage for the sustainability of the environment. While granting the right to development the states must rethink about sustainable development. Accordingly Sri Lankan National Action Plan for the Protection and Promotion of Human Rights 2017 -2021 the contribution made by Sri Lankan government in this regard is creditable. However the progress will be measured under practical

use. This article is intends to describe the interlink between environmental protection and human rights by analyzing instruments taken by environmental and human rights bodies. Further it also examines the connection of climate change and human rights. Finally suggest a mechanism to better protection of human rights.

Keywords: Environment, Human rights, Sustainable development, climate change, development

1. Introduction

"Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."¹ Every person is entitled to certain fundamental rights, simply by the fact of being human. These are called " human rights" rather than a privilege.² To enjoy these human rights we must have a clean, healthy environment. There is a mutual connection between Environmental rights

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¹ Principle 1 of the Rio Declaration on Environment and Development 1992

² "What Are Human Rights? Human Rights Defined" by Youth for Human Rights Organization Making Human Rights a Global Reality,

<https://www.youthforhumanrights.org/what->

[are-human-rights/](#) Accessed on 15th March 2020³ "Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment" prepared by John H. Knox Special Rapporteur ,Human Rights Council resolution 37/8 , 2018.07.19, p- 6
<http://srenvironment.org/sites/default/files/Report/2018/Boyd%20Knox%20UNGA%20...> Accessed on 16th March 2020

and human rights. A safe, clean, healthy environment is essential to the enjoyment of human rights, including the right to life, right to healthy environment, right to health. Therefore without healthy environment Human Rights are meaningless. Hence Human rights and Environmental rights are inter-related.

2. Interrelation between Environmental Law and Human Rights

In recent decades, human rights bodies have elaborated on the understanding that a healthy environment is fundamental to the full enjoyment of a vast range of human rights. Treaty bodies, regional tribunals, special rapporteurs and other international human rights bodies have described how environmental degradation interferes with specific rights, including the rights to life, health, food, water, housing, culture, development, property and home and private life.³ 1972 Stockholm Declaration proclaims that, though the man is both creature and moulder of his environment, both natural and manmade environment are essential to his well-being and to the enjoyment of basic human rights to life itself.³ Principle 1 of this Stockholm Declaration declared that,

*"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations"*⁴

This statement corroborates the interconnection of environmental protection and Human Rights. It proves that safe, clean environment is a precondition for the enjoyment of these fundamental Human Rights.

Since 1972, the right to a healthy environment has gained widespread public and legal recognition across the world. Governments have incorporated it into constitutions and environmental legislation. The right to a healthy environment has also been incorporated into regional human rights agreements and regional environmental treaties. Governments have made genuine efforts, with varying degrees of success, to respect, protect, fulfill and promote this right. Over the past forty years, national courts, regional tribunals, treaty bodies, special procedures and many international institutions have contributed to defining the content, scope and parameters of right to a healthy environment, as well as its relationship with other human rights.⁵

However these legal instruments couldn't provide a sufficient coverage for proper environmental protection. Many human centric activities led to serious environmental threats. Such as global warming, Ozone depletion, flood, droughts and bush fire. Due to these ecological alterations the world has to create an effective platform to discuss those issues.

³ Preamble of 1972 Stockholm Declaration, first paragraph

⁴ Principle 1 of 1972 Stockholm Declaration

⁵ Supra Note 3 p- 11

3. Link between Climate Change and Human Rights

Climate Change is a reality that now affects every region of the world. The human implications of current projected levels of global heating are catastrophic. Storms are rising and tides could submerge entire island nations and coastal cities. Fires rage through our forests and the ice is melting. We are burning up our future literally.⁶ Climate change threatens the effective enjoyment of a range of human rights including those to life, water and sanitation, food, health, housing, self-determination, culture and development. States have a human rights obligation to prevent the foreseeable adverse effects of climate change and ensure that those affected by it, particularly those in vulnerable situations, have access to effective remedies and means of adaptation to enjoy lives of human dignity.⁷ In each and every year world leaders get together and take many decisions on environmental matters to ensure a better enjoyment of human life.

When considering the Kyoto Protocol, which was adopted in 1997 operationalizes the United Nations Framework Convention on Climate Change by committing industrialized countries to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets. It only binds developed countries, and places a heavier burden on them under the principle of

" common but differentiated responsibility and respective capabilities ", because it recognizes that they are largely responsible for the current high levels of GHG emissions in the atmosphere. The Kyoto Protocol sets binding emission reduction targets for 36 industrialized countries and the European Union. Overall, these targets add up to an average 5 per cent against reduction compared to 1990 levels over the five year period 2008 - 2012 (the first commitment period)⁸ This Protocol gives much prominence to retain the activities of developed countries which effect the degradation of the environment.

When it comes to the Paris Agreement the preamble of the Agreement recognizes the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge. Also acknowledges that climate change is a common concern of humankind, and parties should take action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and

⁶ Michelle Bachelet, United Nations High Commissioner for Human Rights September 9 2019, Opening Statement to the 42nd session of the Human Rights Council, Human rights and climate change,

⁷ Human rights and climate change,<https://www.ohchr.org/EN/Issues/HRA/ndClimateChange/Pages/HRClimateC..>
Accessed on 18th March 2020

⁸ What is the Kyoto Protocol?
<http://unfccc.int/resource/docs/convkp/kpeng.pdf>
Accessed on 22nd March 2020

intergenerational equity.⁹ The Paris Agreement's central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. Additionally, the agreement aims to strengthen the ability of countries to deal with the impacts of climate change.¹⁰

Not only these foremost agreements but the office of the United Nations High Commissioner

(OHCHR) for Human Rights also carry out many projects. OHCHR's 2018 -2021 office Management plan aims at ensuring that "International and national environmental and climate policies and plans increasingly are implemented in accordance with international human rights standards. OHCHR also aims, in line with the 2030 Agenda and the Paris Agreement on climate change, to promote a human rights-based approach to climate action. This requires that states take ambitious adaptation and mitigation measures that are inclusive and respectful of communities affected by climate change. They expect to activate some procedures to achieve these goals.¹¹

They are collaboration with partners to integrate human rights in environmental laws and policies; support for the inclusion of civil society in environmental decision-making

process, access to information and effective remedies for victims; assisting human rights mechanisms to address environmental issues, including climate change; advocacy on behalf of environmental human rights defenders and supporting efforts by the UN system to protect them and research and advocacy to address human rights harms caused by environmental degradation, particularly to groups in vulnerable situations.¹²

Hence it's clear that human rights are violated when man pollute the environment. If we want to protect human rights we must consider more about environmental protection. Without environmental protection ensuring human rights are meaningless.

4. Right to Development vs Right to Environment

When considering right to development and environmental rights someone can argue that they are fully incompatible. Because the development process frequently harm the ecological balance. But in my opinion both right to development and environmental rights help to improve the well being of the society. Safe and healthy environment is an essential part of enjoyment of fundamental human rights. So it's clear the connection of right to development and environmental rights. The right to development is about promoting and protecting the individual's

⁹ Paris Agreement ,
<https://unfccc.int/sites/default/files/english-paris-agreement.pdf> Accessed on 25th March 2020

¹⁰ The Paris Agreement,
<https://unfccc.int/process-and-meetings/the->

[paris-agreement/the-paris-agreement](#) Accessed on 31st March 2020

¹¹ Supra Note 8

¹² Ibid

ability to participate in, contribute to and enjoy development, including economic, social, cultural or political. It envisions that "the human person" should be the central subject, participant and beneficiary in the process of development.

Therefore, the right to development is not only a human right in itself, but also necessary for the full realization of all other human rights. It also calls for the fair distribution of benefits that result from development. The right to development is deeply entwined with the right of peoples' to self-determination, and their right to exercise full sovereignty over all their natural wealth and resources.¹³ Introducing 12th annual Trygve Lie Symposium on Fundamental Freedom, the Norwegian Foreign Minister Ine Eriksen SØreide said that, " we see the promotion of human rights and development not as separate goals but as mutually enforcing objectives"¹⁴ Accordingly it's clear the connection of human rights and right to development.

Right to development is reflected in many international instruments. The right to development was proclaimed in the Declaration on the Right to Development,

¹³ United Nations Special Rapporteur on the RIGHT TO DEVELOPMENT An introduction to the mandate, p-4, <https://www.ohchr.org/Documents/Issues/Development/SR/SRRightDevelopment-Intro...> Accessed on 18th April 2020

¹⁴ Human Rights and the 2030 Agenda for Sustainable Development, September 26,2019, <https://www.ipinst.org/2019/09/human-rights-and-the-2030-agenda#3> Accessed on 16th April 2020

adopted in 1986 by the United Nations General Assembly resolution 41/128. This right is also recognized in the African Charter on Human and peoples' Rights and the Arab Charter on Human Rights and re-affirmed in several instruments including the 1992 Rio Declaration on Environment and Development, the 1993 Vienna Declaration and Programme of Action, the Millennium Declaration, the 2002 Monterrey Consensus, the 2005 World Summit Outcome Document and the 2007 Declaration on the Rights of Indigenous peoples.¹⁵

The Declaration on the Right to Development recognize that, development is a comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.¹⁶ The first Article of the Declaration stipulates like this.

"The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy

¹⁵ The Right to Development at a glance, <https://www.un.org/en/events/righttodevelopment/pdf/rtd-at-a-glance.pdf> Accessed on 18th April 2020

¹⁶ Preamble of the Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 December 1986

economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

*"The human right to development also implies the full realization of the right of peoples to selfdetermination, which includes subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resource"*¹⁷¹⁸

This statement explicated that, right to development is an inalienable human right and all human rights and fundamental freedoms must be ensured through this right. However there are some criticizes on this Declaration. More than 30 years after the adoption of the Declaration on the Right to Development, States are still divided in interpreting the right. Further the general level of understanding as to what the right of development really means and engagement in its implementation are low. The implementation of the right to development faces numerous other challenges related to the state of our world today. Some of them are global financial and economic crisis, energy and climate crisis, increasing number of natural disasters and new global pandemics. The United Nations Council also noted a need for the international community

¹⁷ Article 1.1 and 1.2 of the Declaration on the Right to Development, adopted by General Assembly resolution

¹⁸ /128 of 4 December 1986

¹⁹ Supra Note 26 p - 8

²⁰Human Rights and the 2030 Agenda, Speech at The 2019 Annual Trygve Lie Symposium on

to strive for greater acceptance of the right to development as an integral part of the international human rights framework. This is particularly important in the context of implementing the United Nations' major development plans over the next decade and beyond, including the 2030 Agenda for Sustainable Development, the Sendai Framework for Disaster Risk Reduction, the Addis Ababa Action Agenda and the Paris Agreement on climate change.¹⁹

The linkage of 2030 Agenda and right to development is proven by this statement. "We also know that human rights approaches are essential to the 2030 Agenda's central pledge to leave no one behind to provide more sustainable and effective development outcomes through the promotion of empowerment, inclusiveness and equal opportunity.

Development that places human rights at its core is the only way that we can truly achieve a sustainable future and without addressing some of the fundamental challenges we face in terms of sustainable development, human rights cannot be fulfilled."²⁰ Hence it's apparent the connection between right to development and environmental rights. Though these two concepts are separated, the object is ensuring full enjoyment of life.

Fundamental Freedoms on Human Rights and the 2030 Agenda by Minister of Foreign Affairs of Norway,Ms.Ine Eriksen SØreide

<https://www.undp.org/content/undp/en/home/news-centre/speeches/2019/human...>Accessed on 20th April 2020

5. Sustainable Development

Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within its two key concepts. The concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.²¹ The world's vision and commitment regarding sustainable development have been changing throughout the time. Science has been developing and helping to build the foundations what are the causes and consequences of climate change. Simultaneously, world leaders have been changing their commitments to this problem.²² These commitments spread in wider range from 1972 Stockholm Declaration to 2019 United Nations Climate Change Conference (COP 25) in Madrid, Spain.

In September 2000, hundreds of heads of state met at United Nations and ratified the UN Millennium Declaration. In September 2005, the UN hosted a Millennium+5

²¹ Our Common Future, Chapter 2: Towards Sustainable Development, From A/42/427. Our Common Future: Report of the World Commission on Environment and Development, <http://www.un-documents.net/ocf-02.htm> accessed on 5th April 2020

²² World Conferences on Sustainable Development, <https://youmatter.world/en/definition/definitions-worldconferences-sustainable-..> accessed on 5th April 2020

summits to evaluate the progress towards the goals spelled out in the document. By adopting the original declaration in 2000, world leaders affirmed their faith in the organization and its Charter "as indispensable foundation of more peaceful, prosperous and just world". Leaders also resolved to meet a number of "Millennium Development Goals".(MDGs), which include halving the proportion of people living in poverty and hunger by 2015, ensuring primary schooling for all children, and reversing the spread of HIV/AIDS, malaria and other major diseases.²³ The Sustainable Developments goals replace the Millennium Development Goals. The objective was to produce a set of Sustainable Developments goals that meet the urgent environmental, political and economic challenges facing our world.²⁴

The Sustainable Developments goals (SDGs), also known as the Global Goals, were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030. The 17 SDGs are integrated that is, they recognize that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability.²⁵ The

²³ The Millennium Summit and Its Follow-up, <https://www.globalpolicy.org/un-reform/un-reforminitiatives/millennium-summit-and-it..> accessed on 7th April 2020

²⁴ Sustainable Development Goals, <https://www.undp.org/content/undp/en/home/sustainable-developmentgoals/baC..> accessed on 10th April 2020

²⁵ Sustainable Development Goals, <https://www.undp.org/content/undp/en/home>

General Assembly adopted the 2030 Agenda for Sustainable Development by including these 17

Sustainable Developments goals. Building on the principle of " leaving on one behind", the new Agenda emphasizes a holistic approach to achieving sustainable development for all.²⁶

The sustainable development goals are the blueprint to achieve a better and more sustainable future for all. They address the global challenges we face, including those related to poverty, inequality, climate change, environmental degradation, peace and justice. There are 17 goals which are interconnected. When consider goal 13 which aims to take urgent action to combat climate change and its impacts.²⁷ As mentioned earlier in the Paris Agreement, all countries agreed to work to limit global temperature rise to well below 2 degrees centigrade. As of April 2018, 175 parties had ratified the Paris Agreement and 10 developing countries had submitted their first iteration of their national adaptation plans for responding to climate change. Limiting global warming to 1.5°C would require rapid, far-reaching and unprecedented changes in all aspects of society, the Intergovernmental Panel on Climate Change (IPCC) said in a new assessment. With clear benefits to people and

natural ecosystems, limiting global warming to 1.5°C compared to 2°C could go hand in hand with ensuring a more sustainable and equitable society.²⁷

There are some targets of Goal 13 of Sustainable Development Goals. They are, strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries; integrate climate change measures into national policies, strategies and planning, improve education, awareness raising and human institutional capacity on climate change mitigation, adaptation, impact and early warning; implement the commitment undertaken by developed country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly \$ 100 billion annually by 2020 from all sources to address the needs of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible and promote mechanisms for raising capacity for effective and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities.²⁸ From these targets they hope to ensure right to health including the right to safe, clean, healthy and sustainable

[/sustainable-developmentgoals.html](#) Accessed on 10th April 2020

²⁶ Envision 2030: 17 goals to transform the world for persons with disabilities, <https://www.un.org/development/desa/disabilities/envision2030.html> Accessed on 10th April 2020 ²⁷ About the Sustainable Development Goals, <https://www.un.org/sustainabledevelopment/>

[/development/sustainabledevelopment-goals/](#) Accessed on 11th April 2020

²⁷ Sustainable Development Goals, Goal 13: take urgent action to combat climate change and its impacts <https://www.undp.org/content/undp/en/home/sustainable-development-goals/bac..> Accessed on 12th April 2020

²⁸ Ibid

environment; right to adequate food and right to safe drinking water and right to all peoples to freely dispose of their natural wealth and resources.²⁹

Moreover Goal 16 also correspond with human rights. It's about promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Targets of this goal include reducing all forms of violence against and trafficking of children; promoting rule of law and justice for all; reducing illicit financial and arms flows, corruption and bribery; developing effective institutions; participation in decision making at all levels and legal identity for all. These targets will assure human rights as right to life, liberty and security of person. Further the protection of children from all forms of violence, abuse or exploitation, right to access to justice and due process, right to legal personality, right to participate in public affairs and right to access to information.³⁰ In addition to that goal 11, 12, 14 and 15 also guarantee some fundamental human rights. Accordingly right to adequate housing, including land and resources; right to health including the right to safe, clean, healthy and sustainable environment; right to adequate food and the right to safe drinking water.³¹

It's apparent that sustainable development plays a major role in assuring human rights. Based on the principle of " leaving on one

behind" the parties hope to achieve sustainable development for all. It's the future world we wish to live. Therefore it can argue that the process of sustainable development will help to approach a better existence for all human beings. Not only that it will preserve the ecological balance.

6. Sri Lankan Perspective

The 1978 Constitution of Sri Lanka sets out a framework through which civil and political rights could be enforced through the courts, and provided for an individual redress mechanism. Chapter III on Fundamental Rights in the Constitution contains rights as freedom of thought, conscience and religion, the freedom from torture and the right to equality and non-discrimination. The right to life is not explicitly included in the Fundamental Rights Chapter. However, the Supreme Court of Sri Lanka has recognized the implicit right to life. Sri Lanka ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1980 and therefore is under an obligation to guarantee economic, social and cultural rights (ESCR) through domestic laws and through administrative, executive and judicial action.³²

Chapter VI of the Constitution recognizes to ensure an adequate standard of living for Sri Lankans and to protect nature and conserve its riches under the Directive Principles of State Policy and Fundamental Duties. Article 27 (2) (C) of the Constitution recognizes to

²⁹Sustainable Development Goals Related human rights - OHCHR ,
<https://www.ohchr.org/Documents/Issues/MDGs/Post2015/SDG-HR-Table.pdf>Accessed on 15th April 2020

³⁰Ibid

³¹Ibid

³² Sri Lanka National Action Plan for the Protection and Promotion of Human Rights 2017 -2021, p- 3 ,151,

procure an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions for every person in Sri Lanka.³³ According to Article 27 (14) articulates that, "The State shall protect, preserve and improve the environment for the benefit of the community"³⁴ Moreover Article 28 (f) of the Constitution indicate that, it is the duty "to protect nature and conserve its riches" is one of fundamental duty among the other fundamental duties of every person in Sri Lanka³⁵

Goals of ensuring human rights must correspondence with environmental protection. This provable nature includes in some goals under Sri Lanka National Action Plan for the Protection and Promotion of Human Rights 2017 -2021. Under universal healthcare and highest attainable standard of health and wellbeing for all there are some objectives. One is ensure the right of citizens to enjoy a safe and healthy environment. Under this object there are some short term and medium term activities. Some of them are taking steps to ensure the safe disposal and clearing of clinical and other waste, strengthen a clean environment within healthcare facilities. Another major goal of the National Action Plan is strengthen the link between human rights and the environment. To achieve this goal there are

objectives like introducing legal reforms and policy reforms, ensuring right to information. Some activities under this are review and consider the right to a safe and healthy environment as a fundamental right, update the national environmental act and making publicly available an up to date consolidated version of all applicable Environmental Legislation.³⁶

Recently three young research scientists rediscover of the endemic plant known as the *Sri Lanka* legume within the trace of the proposed Colombo - Kandy expressway. The project was approved for commencement in 2016, but construction has not yet begun. The provisions contained in the National Environmental Act make it mandatory for all proponents of projects deemed as "prescribed projects" to conduct environmental impact assessment (EIA) or an initial environmental examination (IEE) report as the project warrants, in the process of getting it approved. It also highlights the required role of Sri Lanka's Road Development Authority, which is to act in accordance with the country's laws and to engage in a due consultation process with both the Central Environment Authority and Department of Wildlife Conservation before proceeding with the project.³⁷ This incidence shows the significance of environmental protection during the development process.

³³ Article 27 (2) (C) of the Constitution of the Democratic Socialist Republic of Sri Lanka

³⁴ Article 27 (14) of the Constitution of the Democratic Socialist Republic of Sri Lanka

³⁵ Article 28 (f) of the Constitution of the Democratic Socialist Republic of Sri Lanka

³⁶ Supra Note 33 p- 172, 212

³⁷ The Sri Lankan legume: Extinct, rediscovered, and now in risk again (commentary) by Jagath Gunawardana, <https://news-mongabay-com.cdn.ampproject.org/v/s/news.mongabay.com/201912/the-sri-lankan-legume-extinctredi...Accessed on 24th April 2020>

7. Conclusion

Based on the above facts it's clear the interconnection of environmental rights and human rights. Apart from the protection of environment human rights protection is in vain. The objects of international instruments including the Paris Agreement and 2030 Agenda for Sustainable Development must be fulfilled to achieve a healthy life. Effect of climate change will be a major problem in future. Therefore all countries must emulate the due proceedings denoted by relevant authorities. As the centric person of development man has a huge responsibility to preserve natural resources for future generation.

Steps taken under Sri Lankan National Action Plan for the Protection and Promotion of Human Rights 2017 -2021 is a noteworthy inception for a sustainable future. If we can complete the objectives of the National Action Plan, we can enjoy human rights with the ecological balance. Hence it can be concluded that this is the high time to activate a long time process to ensure protection of environment. If not whole mankind will loose not only human rights but also their lives with the effect of dangerous climate changes.

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නුතන බන්ධනාගාර ක්‍රමය සහ සිරකරු අයිතින්

වමික ඉදුවර ගුරුගේ*

“It is not the prisoners who need reformation, It is the Prisons” – Oscar Wilde

හඳුන්වයිම

දහනමවන සියවසේ මූල් භාගයේදී නුතන බන්ධනාගාර ක්‍රමය ලොවට හඳුන්වාදෙන ලදී. දහසය සහ දාහත්වන සියවස් වලදී යුරෝපය තුළ බන්ධනාගාර පැවතියද ද්‍රව්‍යවමක් වශයෙන් බන්ධනාගාරගත කිරීමක් එකල දක්නට නොවේ, ඒ වෙනුවට වැඩි වශයෙන් බන්ධනාගාර හාවතා වූයේ නඩු විභාගය අවසන් වන තුරු සැකකරුවන් සහ තුදිතයන් රදවා තබා ගැනීමේ කාර්යයටය.

නුතන බන්ධනාගාර ක්‍රමය බිජිවීමට බලපානු ලැබූ ප්‍රධානතම සාධක කිහිපයක් වූයේ එවකට පැවති බන්ධනාගාර තුළ මූලික අවශ්‍යතාවල තිගතම මෙන්ම බන්ධනාගාර තුළ සිදුවන නොයෙකුත් වදහිංසා මගින් ඇතිවන මානසික පිඩාවන් හමුවේ දිනෙන් දින වැඩ්වන සිරකරුවන්ගේ සියලුව් නසා ගැනීම්, මානසික විකෘතිභාවයන්ට පත්වීම් සහ ප්‍රකේෂකාරී හැසිරීම් යන ආදියයි.

මෙයට විසඳුමක් වශයෙන් ඇමරිකා එක්සත් ජනපදය සහ එක්සත් රාජධානිය වැනි රටවල් එක්ව මෙම නුතන බන්ධනාගාර ක්‍රමයහඳුන්වා දෙන ලදී. මේ හරහා සිරකරුවන් කෙරෙහි විශේෂ අවධානයක් යොමු කරමින් ඔවුන් පුනරුත්ථාපනය වැනි ක්‍රියාවලීන්ට හාජතයකර සිරකරුවන්ගේ ගාරික මෙන්ම මානසික සෞඛ්‍ය මට්ටම් ඉහළ තත්ත්වයක පවත්වා ගැනීම සහ එහි තවත් එක් පැතිකඩයක් ලෙසට

මුවන්ගේ අයිතිවාසිකම සුරක්ෂිත කිරීම කෙරෙහිද සුවිශේෂ අවධානයක්ද යොමු විය.

බන්ධනාගාරගත කිරීමේ අරමුණු

සමාජයට තරේනාත්මක පුද්ගලයින් යම් කාල සීමාවකට හෝ පිවිතාත්තය දක්වා සමාජයෙන් දුරස් කොට තැනීම බන්ධනාගාරගත කිරීමේ මූලික අරමුණයි, මෙමගින් මූලිකවම බලාපොරාත්තු වෙනුයේ සමාජ ආරක්ෂාව තහවුරු කර ගැනීමයි. ඇතැමුන් මෙයට වෙනස් මතයක් දරයි, එනම් දිරිස කාලයක් සිරගතව සිරි තැනැත්තෙකු සමාජයට නැවත මූදා හැමත් සමගම ඔහු පෙරටත් වඩා දැරණු අයෙකු ලෙසට ක්‍රියා කිරීමට හැකියාවක් පවතින බවයි.

මිට අමතරව පොදු නිවර්තනය (General deterrence), මෙහිදී සිදුවනුයේ සමාජයේ අනෙකුත් පුරවැසියන්ට පණිවුමියක් ලබා දැමයි, එනම් ඔවුන්ද එවැනි වැරදි ක්‍රියාවක නිරත වුවහොත් ඔවුනටද එවන් ද්‍රව්‍යවමක් අත්වැදීමට සිදුවන බවයි. නමුත් මෙය එක් එක් පුද්ගලයාගේ තරකන හැකියාව මත රදා පවති, මන්ද අපරාධකරුවෙකු වරදක් කළ පසු ඔහුට මූහුණපැමුමට සිදුවන ප්‍රතිච්ඡාක පිළිබඳ සිතීමට කරම් අවබෝධයකින් යුතු පුද්ගලයෙකු නම් ඔවුන් අපරාධ කිරීමට පෙළමේද යන්න ප්‍රශ්න සහගතය. තවද මෙය පුද්ගල නිවර්තනය (Individual deterrence) ලෙසටද ක්‍රියාත්මක වෙයි. මෙමගින් වරදකරුද නැවත එවැනීම වරදක් සිදුනොකිරීමට ඔහුට ලබාදෙන අවබාදයක් ලෙසටද ක්‍රියා කරයි.

එසේම ද්‍රව්‍යවමක් (Punishment) වශයෙන් මෙන්ම, ප්‍රතිච්ඡාකයක් (Retribution) ලෙසටද බන්ධනාගාරගත කිරීම ක්‍රියාත්මක වෙයි. මෙමගින් පුරවැසියන් විසින් නීතිය සියතට

*අභ්‍යන්තික වසර, ශ්‍රී ලංකා නීතිවිද්‍යාලය,
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ගෙන නොගැලපෙන ක්‍රමවේද මගින් පලිගැනීමට පෙළිම් වැළකෙයි.

එංගලන්තයේ විසූ සුපුකට නීතිවේදයෙකු වූ ජේත්න් ඔස්ට්‍රින්ගේ මතවාදය වූයේ නීතිය දැඩුවම නා සම්බන්ධ කර දැක්වීමයි. ඔස්ට්‍රින්ට අනුව නීතිය ක්‍රියාත්මක කිරීමේ බලවේගය දැඩුවමයි. මිනිසුන් නීතියට ගරු කරනුයේද දැඩුවමට ඇති බිජ නිසා බව ඔස්ට්‍රින් පවසයි. නීතිරිති කඩ කරන සැම කෙනෙකටම දැඩුවම තොලුවන්ද දැඩුවම ලැබුවන් ගැන දකින - අසන අය තුළ නීතිය කෙරෙහි බිජක් ඇතිවේ.

කෙසේ නමුත් කාඩ්වාදයේ නිරමාතා ලෙස සැලකෙන ලඩ්චිසේ පඩිවරයා විසින් කාඩ්නේවිං නම් මුල ගුන්ථයේ දක්වා ඇති පරිදි දැඩුවම වැඩිකිරීමෙන් අපරාධ අඩුවන්නේ යැයි රිතියක් නොමැත. දැඩුවම වැඩි කිරීමෙන් සිදුවනුයේ මිනිසුන් පිවිතයට ඇති ඇල්ම දුරුලීමය, එහි ප්‍රතිඵලය වනුයේ මිනිසුන් තව තවත් බරපතල අපරාධ කිරීමට පෙළිමියි.

එසේම බන්ධනාගාරගත කිරීමේ තවත් වැදගත් අරමුණක් වනුයේ ප්‍රතිත්තාපනයයි (Rehabilitation). එනම් බන්ධනාගාරගත වූවන් නැවත සමාජයට යහපත් පුරවැසියන් පිරිසක් ලෙසට මුදාහැරීමට කටයුතු කිරීමේ ක්‍රියාවලියයි. මෙහිදී ප්‍රධාන වශයෙන් සිදුවනුයේ උපදේශන සේවා, අධ්‍යාපනික සහ වෘත්තිය පුහුණුව, ක්‍රිඩා, කලා කටයුතු සහ ආගමික කටයුතු වෙත යදිවියන් යොමු කරවීමයි. මෙමින් සමාජයේ සූරක්ෂිතභාවය තහවුරුවන අතර සිරකරුවන්ගේ අනාගතයද යහපත් එකක් බවට පත්කෙරෙයි.

කෙසේ නමුත් ප්‍රයෝගිකව ගත් කළ බන්ධනාගාරගත යදිවියෙකුට බන්ධනාගාර කුලීදී වඩා දරුණු අපරාධකරුවන් සමග ගණුදෙනු කිරීමට ඉඩ ප්‍රස්ථාව උදා වෙයි. එමගින් ඉතා සූක්ෂම ක්‍රම හාවිතයෙන් අපරාධ කිරීමට ඉගෙන ගනී, එමනිසා අපරාධ ප්‍රමාණයද ඉහළ යන අතර නැවත මුදුන්ව නීතියේ රහුනට හසු කර ගැනීම වඩා අපහසු වෙයි.

බන්ධනාගාර වර්ග සහ යදිවියන් පිළිබඳ දත්ත

බන්ධනාගාර වර්ගිකරණයට අනුව ලොව පුරා බන්ධනාගාර 12ක් පමණ ප්‍රධාන වශයෙන් හදුනාගෙන ඇත, වඩා බරපතල අපරාධකරුවන් රඳවා ඇති සාම්ප්‍රදායික බන්ධනාගාරවල සිට කෙරී කාලීන දැඩුවම ලද වරදකරුවන් සඳහා වූ තාප්පවලින් වට නොවූ එලිමහන් කදවුරු දක්වා වූ ආයතන ඩුරුවලියක් මේ තුළ දක්නට ලැබේයි. මෙම එක් එක් වර්ගය කුළ ඒවාටම ආවේණික වූ ලක්ෂණ, හර පද්ධතින් සහ ක්‍රමවේදයන් රාජීයක් පැහැදිලිව වෙන් කොට හදුනාගත හැකිය.

වර්ෂ 1844 අංක 18 දරණ ආයා පනත¹ මගින් ශ්‍රී ලංකාව කුළ බන්ධනාගාර දෙපාර්තමේන්තුව ස්ථාපනය කරන ලදී. නමුත් එකල එය පොලිස් දෙපාර්තමේන්තුව යටතේ ක්‍රියාත්මක විය. අද වන විට බන්ධනාගාර දෙපාර්තමේන්තුව යටතේ දීපව්‍යාප්තව බන්ධනාගාර 23 ක් පවතී.

වර්ෂ 1979 දී හදුන්වාදුන් එලිමහන් කදවුරු ක්‍රමය හරහා බන්ධනාගාර කුළ පවතින තදබදය අවම කිරීමටත්, සුළු වැරදි සඳහා බන්ධනාගාර ගතවුවන් දරුණු අපරාධකරුවන් සමග එක් වීමද පාලනය කිරීමට හැකිවෙයි. මෙයට අමතරව නීතිම කරන ලද දැඩුවමෙන් හතරෙන් එකක ප්‍රමාණයක් ගෙවා තවත් වසර දෙකකට අඩු කාලයක් සිරගතව සිටීමට නියමිත සතුවුදායක හැසිරීමක් ඇති යදිවියන්ද මෙලෙස එලිමහන් කදවුරු වෙතට යොමු කරයි.

එසේම සිරකරුවන් නැවත සමාජානුගතවීම උදෙසා නිවාවූ සහ වැඩ සඳහා මුදා හැරීම මුළුවරට වර්ෂ 1979 දී හදුන්වාදෙන ලදී. ඒ අනුව දැරුසකාලීන සිරකරුවන්ට හයමසකට වරක් තම නිවසට ගොස් නැවත පැමිණීමට හැකිවෙයි. එසේම තෝරාගන්නා ලද සිරකරුවන්ට රකියා ලබා දී ඒ සඳහා පිටත්ව ගොස් නැවත පැමිණීමටද අවස්ථාව ලබා දෙයි.

¹First Prison Ordinance was enacted, entitled "An Ordinance for the better regulation of Prisons Act No. 18 of 1844", Establishment of Welikada Prison.

බාලවයස්කාර රද්ධියන් විශේෂ විධිවිධාන යටතේ පරිවාස ආයතන වෙත යොමුකර ඔවුන්ට වෘත්තිය ප්‍රහුණුව ලබාදීම සිදු කරයි. ඒ අතර ඇතැම් වරදකරුවන් විශේෂය ආයතන කර යොමු කරයි.

වර්ෂ 2018 නිකුත්කළ සංඛ්‍යාලේඛනයන්ට අනුව² එම බන්ධනාගාර තුළ සමස්තයක් ලෙසට රද්ධියන් 133,115 ආසන්න ප්‍රමාණයක් රද්වා තබා ගෙන ඇත. ශ්‍රී ලංකාවේ තත්ත්වය එසේ පවතින අතර ලොව පුරා සමස්ත ජනගහනයෙන් 22%ක ප්‍රතිශතයක්³ බන්ධනාගාරගතව සිටියි, මෙය සමස්ත ලෝක ජනගහනයන් පහෙන් එකක පමණ පිරිසකි. එම නිසා මෙම රද්ධියන්ගේ අයිතිවාසිකම් පිළිබඳ ප්‍රමුඛ අවධානයක් යොමු විය යුතුමය. ඔවුන්ගේ අයිතින් පිළිබඳ හඩක් තැගීමට ලොව පුරා මානව අයිතින් සුරක්මෙහිලා කටයුතු කරන සංචාර පෙරට පැමිණි කටයුතු කළ යුතුය.

සිරකරුවන් සතු අයිතින්වල ස්වභාවය

මානව හිමිකම් යන්න තුතන සංකල්පයක් වූවද එහි වැදගත්කම මානව ඉතිහාසය මෙන්ම පැරණිය. අද වන විට මෙම අයිතින් බෝෂේමයක් රටවල ගනනාවක්ම විසින් මුළු අයිතින් වශයෙන් පිළිගෙන ඒ එක් එක් රටවල ආණ්ඩුතුම ව්‍යවස්ථා මගින් සුරක්ෂිත කොට ඇත. සැබුන්ම සිරකරුවන්ට අයිතින් තිබේද? එසේ තිබේනම් ඒ මොනවාද? එම අයිතින් ප්‍රමාණවත්ද? ඔවුන් එලෙස අයිතින් ලැබේමට සුදුසුද? එකී අයිතින් සුරක්මට ගෙන ඇති ක්‍රියාමාර්ග මොනවාද? ඒවායේ ප්‍රගතිය ක්‍රමෙරද? යන ආදි ගැටුපු රාකියක් අප හමුවේ පැන නැති.

²<http://www.prisons.gov.lk/Statistics/Statistics-2019.pdf>

³World Prison Population List twelfth edition Roy Walmsley

සාමාන්‍ය පුරවැසියෙකු හා සිරකරුවෙකුට සමාන අයිතිවාසිකම නොමැත. ඔවුන් සතු අයිතින් සීමිතය, අල්පය. එලෙස ඔවුන්ගේ අයිතින් සීමා කිරීම යම් ආකාරයකට සාධාරණ වෙයි. නමුත් අනෙක් අතට ඒ හරහා සිරකරුවන්ට මුහුණ දීමට සිදුවන කටුක අත්දකීම රාකියක්ද පවතී. මේ ආකාරයට ඇතැම් අයිතින් ඔවුනට අහිමිවීම තිසා තුතන බන්ධනාගාර ක්‍රමය හරහා බලාපොරොත්තුවන ඉලක්ක සපුරාගත හැකිද යන්න ගැටුපු සහගතය.

කෝර සහ අමානුෂීක වධ හිංසාවන්ට ලක් නොවීමට ඇතියිතිය, සර්ව සාධාරණත්වයේ අයිතිය වැනි අයිතින් කීපයක රකවරණය සිරකරුවන්ටද හිමිය. මෙය ඔවුනට මහත් අස්වැසිල්ලකි, මන්ද මෙවැනි අයිතින් හරහා බන්ධනාගාරය තුළදී කුමන තරාතිරමක පුද්ගලයෙකටද වුවද එක සමාන ලෙසට සලකනු ලැබේයි. තවද තමාගේ තිරුවදානාවය තහවුරු කිරීමට අවශ්‍ය නීතිමය ආධාර ලබා ගැනීමටද මෙමගින් අවකාශය උදා වෙයි.

ජාත්‍යන්තර මට්ටමේ ක්‍රියාත්මක මානව හිමිකම් සුරක්මේ සංචාර මානව හිමිකම් කොමිෂන් සභාව වැනි ආයතන හරහා රද්ධියන්ගේ අයිතින් සුරක්මෙහිලා නීති පියවර ගනු ලැබයි. වර්ෂ 2016 දී මෙරට පැමිණි එක්සත් ජාතින්ගේ සංචාරයේ විශේෂ නීතෝපිතවරයෝක් වන ජ්‍යාන් මෙන්ඩේස් මහකා⁴ විසින් එවකට බන්ධනාගාර තුළයදිවියන් රද්වා තබා ගැනීමට තරම් ඉඩකඩ නොමැති බවත් රද්ධියන්ට ප්‍රමාණවත් තරම් වාතාගුරු, නිදාගැනීමට අවශ්‍ය අවම පහසුකම් පවා නොමැතිකම සහ සිරමැදිරි තුළ පවතින අධික උණුසුම ආදි කරුණු පිළිබඳ දැඩ්ව විවේචනයට ලක් කර ඇත.

මහු තවදුරටත් අණාවරණය කර තිබුණේ ඇතැම් බන්ධනාගාර තුළ රද්වා තබා ගැනීමට ගැකි ධාරිතාව මෙන් 200% - 300% වැනි

⁴<https://www.humanrightscommission.vic.gov.au/the-law/item/918-human-rights-and-the-prison-system>

අගයයන් ඉක්මවාරදියන් සිටින අතර ඇතැම් රද්වියන් ප්‍රචිපල් මත නිදාගෙන සිටි බවත්, එක් රද්වියෙකු වෙනුවෙන් වෙන් කර ඇති සිරමැදීරේ තුළ රද්වියන් 4-5 අතර පිරිසක් රදවා සිටි බවයි.

මෙහිදී ඔහු විසින් යෝජනා කරන ලද්දේ සැම බන්ධනාගාරයක් තුළම දුරකතන ඒකකයක් පිහිටුවන ලෙසත් ඒ හරහා බන්ධනාගාර තුළ අනවසරයෙන් ජ්‍යාම දුරකතන භාවිතය අවම වන බවත්, එමගින් සිදුවන අපරාධද අවම කරගත හැකි බවයි. එසේම රද්වියන්ට නිසි අයිත්ෂණය යටතේ තම සම්පතයන් සමග සබඳතා පවත්වා ගැනීමටද ඉඩ ප්‍රස්ථාව මේ හරහා උදා වෙයි. මෙය යම් ආකාරයකට ඔවුන්ගේ මානසික ආතතිය අවම කර ගැනීමට පිටිවහලක් වෙයි.

මේ හරහා අපට මොනවට පෙනී යන්නේ සියවසකට අයිත් කාලයක් ගතව තිබූණු තුතන බන්ධනාගාර ක්‍රමවේදය ඔස්සේ සාක්ෂාත් කර ගැනීමට බලාපොරාත්තු වන ලද අරමුණු කවිමත් ලගාකර ගැනීමට අපොහොසත් වී ඇති බවයි.

බන්ධනාගාර නිලධාරීන්ගේ කාර්යභාරය

බන්ධනාගාර නිලධාරීන්ට පැවරී ඇති රාජකාරීය අතියය වැදගත් එකක් වෙයි. මන්දයත් ඔවුනට සිය රාජකාරීය ඉටුකිරීමට සිදුවනුයේ තීතිය මගින්ම අයිතින් සිමාකර සිරගත කොට ඇති පිරිසක් සමගයි. ඔවුනගේ වගකීම වනුයේ එකී පිරිස සුරක්ෂිතව රෙක බලාගෙන තැවත යහපත් පුරවැසියෙකු ලෙස සමාජයට මූදා හැරීමයි. මෙය අතියය වැදගත් වූත් අනෙක් අතට අතියය පිඩාකාරී වූත් සමාජයේ යහපත උදෙසාම කරනු ලබන කාර්යයි.

එසේ නමුදු ලෝකයේ බොහෝ රටවල බන්ධනාගාර නිලධාරීන් ඒ උදෙසා නිසි පුහුණුවකට ලක් නොවන අතරම ඔවුනට ලබ දෙන වැටුපද පුමාණවත් නොවෙයි. එසේම ඔවුනට සමාජය තුළ හිමිවන පිළිගැනීමද සැහිමකට පත් විය නොහැකිය.

මෙලෙස බන්ධනාගාර නිලධාරීන් නිසි පුහුණුවකට ලක් නොකිරීම මෙන්ම රද්වියන්ට ඇති අයිතින්ගේ ස්වභාවය පිළිබඳ ඔවුනට ඇති අනවබේදය හේතුවෙන් අවසානයේ සිදුවනුයේ රද්වියන්ගේ අයිතින් උල්ලංසනයට ලක් වීමයි.

මානව හිමිකම් පිළිබඳ විශ්ව ප්‍රයුත්තිය මගින් රද්වියන්ගේ අයිතින් සුරකිමෙහිලා අවැසි අවම රිතින් කිපයක් හැඳුන්වා දී. ඇති. මෙයට බන්ධනාගාර නිලධාරීන් සිය රාජකාරීය ඉටු කිරීමේදී අනුගමනය කළ යුතු ප්‍රතිපත්තින් කිපයක්ද පෙන්වා දී ඇති. මෙවා අතියය මානුෂීය මෙන්ම විනයානුකූල ලෙසට සකස් කරන ලද ඒවායි, මෙම ප්‍රතිපත්තින් දෙනික රාජකාරී කටයුතුවලට එක් කර ගැනීම හරහා බන්ධනාගාර නිලධාරීන්ගේ සේවාව උසස් මටිමක් කරා නගා සිටුවිය හැකි වෙයි, එමගින් ඔවුන්ට සමාජය තුළ ඔවුන්ට හිමිවන පිළිගැනීමද වැඩි වෙයි.

එලෙස හැඳුන්වා දී ඇති ප්‍රතිපත්තින් වර්ෂ 1955 පිනිවා තුවරදී පැවති වරදකරුවන්ට එරෙහිව සිදුවන අපරාධ සහ කෘෂර වදහිංසනයන් වැළක්වීම උදෙසා වූ එක්සත් ජාතින්ගේ කොංග්‍රසය විසින් පළමුව තිරඳේ කොට එය පසුව එක්සත් ජාතින්ගේ ආර්ථික හා සමාජීය කවුන්සලය විසින් අනුමත කරන ලදී. පසුව වර්ෂ 1988 දීමෙම ප්‍රතිපත්තින් එක්සත් ජාතින්ගේ ප්‍රධාන සැසිවාරයේදී සාමාජික රටවල් මගින් පිළිගන්නා ලදී. මෙය ප්‍රධාන වශයෙන් කරුණු එකාලහකින් සමන්විත වෙයි.

එම කරුණු එකාලහ අතරට සියලු රද්වියන්ට එකලෙස මානුෂීයව සැලකීම, රද්වියන්ට බාහිර ලෝකය සමග ගණුදෙනු කිරීමට ඇති අයිතිය, රද්වියන්ගේ සෞඛ්‍යයට අදාළ ප්‍රතිපත්තින් මෙන්ම රද්වියන් වෙන් කොට රද්වීම, ඔවුන් කාණ්ඩා කිරීම සහ ආගමික, සංස්කෘතික කටයුතු කෙරෙහි රද්වියන් යොමු කරවීම ආදිය අයත් වෙයි.

ජාත්‍යන්තර තීතිය සහ සිරකරු අයිතින්

ජාත්‍යන්තර තීතියේ ප්‍රයුත්තින් සහ නීති සම්බාධයන් අනුව මානව හිමිකම් යනු මිනිසෙකුට

සිය උපතින්ම උරුමවන අයිතින් වෙයි. වර්ෂ 1215 දී එංගලන්තයේදී සේපාපිත මැග්නාකාරටා ගිවිසුම මගින් එකළ එංගලන්තයේ රජු සහ වංශාධිපති රදුලයන් අතර එකගතාවයන් කිහිපයකට එළඹුණි.

ඒ අනුව අත්තනොමතිකව සිරහාරයට ගැනීම, නැඩු විභාගයකින් තොරව සිරගත කර තැබීම සහ දුඩුවම් නියම කිරීම ආදි ක්‍රියාවන් තොකිරීමට එංගලන්ත රජය එරට වංශාධිපතින් සමග ගිවිසුම් ගත වුණි. ඉත්පසුව ඇති වූ ප්‍රාග විප්ලවය, සහ ඇමරිකානු නිදහස් සටන, ජාත්‍යන්තර මානව හිමිකම් නිතියේ වැදගත් පරිණාමය සිදුවීම් වෙයි.

දෙවන ලේක යුධ සංග්‍රහාය සමයේ හිටිලර් විසින් භැට දෙලක්ෂයක පිරිසක් වධවේදනාවන්ට ලක් තොට මරා දැමීම ආදි මානව හිමිකම් උල්ලංසණය විමේ සිදුවීම් රාජියක් නිසාවෙන් ජාත්‍යන්තර නිතිය තුළ මානව හිමිකම් සුරකිමෙහිලා වැඩි අවධානයක් යොමු විය. එහි එක් පියවරක් වශයෙන් සිර කරුවන්ට හිමි විය යුතු අයිතින් සම්බන්ධයෙන් ද අවධානයට ලක් විය. ඒ හරහා එකි අයිතින්ට එතෙක් නිමිව තොතිඩු තෙනික ස්වාධාවයක් ලබාදීම ද සිදු විය .මෙම අයිතින් බොහෝමයක් තොයෙකුත් ජාත්‍යන්තර සම්මුතින්, ජාත්‍යන්තර යෝජනා ආදි මූලාශ්‍රවල සැහැන් වෙයි. මෙම සම්මුතින් සහ යෝජනා මගින් සිරකුවන්ට අදාළව පැවතිය යුතු අවම ප්‍රමිතින්, වාරණ, මෙන්ම බන්ධනාගාර තුළ පැවතිය යුතු තත්ත්වයන් ආදිය කෙරෙහි විශේෂ සැලකිල්ලක් යොමු කර ඇත.

කෙසේ නමුත් ජාත්‍යන්තර ප්‍රජාව තුළ මෙවන් සාධනිය පියවර රාජියක් ගෙන තිබුණාද එක් එක් රටවල් විසින් එවැනි සම්මුතින් සහ යෝජනා කෙරෙහි දක්වා ඇති ප්‍රතිචාරය එතරම් යහපත් තොවෙයි. මන්දයන් දිනෙන් දින සිරකරුවන්ගේ අයිතින් උල්ලංසනය විම පිළිබඳව තොරතුරු නිරන්තරයෙන් අපට අසන්නට දකින්නට ලැබෙන නිසාවෙනි.

මෙයට කිහිම නිදසුනක් ලෙස American Civil Liberties Union/ Human Rights Watch

Report, Human Rights Violations in the United States⁵ වාර්තාව පෙන්වා දිය හැකිය. එහිදී තුතන බන්ධනාගාර ක්‍රමය ලොවට හයුන්වාදීමට පුරෝගම් මෙහවරක් ඉටු කළ ඇමරිකා එක්සත් ජනපදය විසින්ම අතිශය බරපතල ලෙසට සිරකරු අයිතින් උල්ලංසණය කරමින් ක්‍රියාකර ඇති බවට කරුණු සැහැන් වෙයි. බන්ධනාගාර තුළ අතිවාසය (Overcrowded) ,සිරකරුවන්ට සිදුවන තොයෙකුත් හිසනයන් සහ ඒවා අවම කිරීමට පියවර තොගැනීම, කාන්තා රැඳවීයන් විසින් මුහුණ පාන තොයෙකුත් දුෂ්කරතා ආදි කරුණු රාජියක් එහිලා සැහැන් වෙයි.

වර්ෂ 1945 දී එක්සත් ජාතින්ගේ සංවිධානය විසින් හයුන්වාදුන් එක්සත් ජාතින්ගේ ප්‍රාදේශීයේ 55වන වගන්තිය අනුව ආගම, ජාතිය, වර්ගය, ස්ක්‍රී පුරුෂ බව, භාෂාව ආදි කරුණු කෙරෙහි අවධානයට ලක් තොකර සියලුම දෙනාට එක ලෙස සලකා ඔවුන්ගේ අයිතින් සුරකිය යුතු බවට පෙන්වා දී ඇත. එසේම එහි 5වන වගන්තියට අනුව කිසිදු පුද්ගලයෙකු කිසිදු ආකාරයක වද හිසනයට ලක්කිරීමට, දුඩුවම් පැමිණවීමට හැකියාවක් තොපවතින බවද පෙන්වා දී ඇත. මෙම අයිතිය ජාත්‍යන්තර සම්මුතින් සහ ජාත්‍යන්තර යෝජනා රාජියකම සැහැන්ව පවතී.

වර්ෂ 1949 දී පිහිටුවාගත් පිනිවා සම්මුතිය මගින් යුධ නිතින් සම්බන්ධ එකගතාවන් රාජියකට එළඹුණි. මෙහි එක් විශේෂත්වයක් නම් සිරකරුවන්ගේ අයිතින් සම්බන්ධයෙන් වැඩි අවධානයක් යොමු කරමින් නිමැවුණු පළමු සම්මුතිය ලෙසට පිනිවා සම්මුතිය පෙන්වා දිය හැකිය. මන්දයන් පිනිවා සම්මුතියේ විශේෂයෙන්ම සැහැන් කර ඇති කරුණුක් නම් එහි සැහැන් අයිතින් සහ සුරක්ෂිතභාවයන් සිරකරුවන්ටද හිමිවිය යුතු බවයි. ඒ අනුව යුද්ධයකදී සිරකරුවන්ට මානුෂීය සැලකිය යුතු

⁵HUMAN RIGHTS WATCH, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON PRISONS xv (1993). 2. H

බවට විශේෂයෙන්ම අවධාරණය කර ඇත. කෙසේ නමුත් මෙම අයිතින් යුද සිරකරුවන්ට පමණක් සීමා සහිත විය.

නමුත් පසුකාලීනව ඇතිව් ජාත්‍යන්තර සම්මුතින් සහ යෝජනා කිහිපයක් මගින්ම පොදුවේ සිරකරුවන්ගේ අයිතින් කෙරෙහි වැඩිමනක් අවධාරණය යොමු කරමින් නිරමාණය වනු දක්නට ලැබේය. ඒ අතර ඇතැම ඒවා පුදෙක්ම සිරකරුවන්ගේ අයිතින් උදෙසාම නිරමිත ඒවා විය. කෙසේ නමුත් එකී බොහෝමයක් සම්මුතින් සහ යෝජනා තුළ දක්නට වූ අඩුපාඩුවක් වූයේ කෘත්වය (Cruelty), අමානුෂිකත්වය (Inhumanity), පහත් කොට සැලකීම (Degrading) ආදි වචන නීසි පරිදි අරුත්ගන්වා නොතිබේය. ⁶මේ හරහා එක් එක් සාමාජික රටවල් තම අනිමතය පරිදි එකී වචන අරුත්ගන්වීම සිදු කරන ලදී.

ජාත්‍යන්තර නීතියට මගින් බලහත්කාරයෙන් සේවයේ යෙදුවීම, කෘත්වය වැළැඳීමෙන් කිරීම ආදි ක්‍රියා වැළක්වීමේ අරමුණින් සිරකරුවන්ගේ අයිතින් සුරකිම වෙනුවෙන් පියවර රාඛියක් ගෙන ඇත. දහඅවච සියවසේ අගහාගයේදී තුනන බන්ධනාගාර ක්‍රමයට පෙර බන්ධනාගාර සලකනු ලැබුවේ රාජ්‍යය දේපලක් ලෙසටය (State Property), එම නීසා බන්ධනාගාර ගතවුවන්ට සලකනු ලැබුවේ වහල්ලන් ලෙසටය. මෙලෙස ඔවුන්ට අමානුෂිකව සැලකීම හරහා ඔවුන්ගේ අයිතින් බොහෝ සෙසින් උදේෂනයට ලක් විය. එකළ අධිකරණ පද්ධතින් තුළ සහ නීති රිතිවල පැවති අඩුපාඩු ද මෙයට සාපුවම බලපාන ලදී. එනම් මේ ආකාරයට ඔවුන්ගේ අයිතින් සීමා කිරීම ලක් කිරීම වරදකරුවෙකුට ලබාදෙනු ලබන දුඩුවමේ කොටසක් ලෙසට එකළ අධිකරණය මගින් සලකන ලදී.

⁶ Rights of Prisoners under International Law: Rights against Forced Labour; Ill Treatments or Punishments; and Right to Work and Receive Wages Ibrahim Danjuma,* Rohaida Nordin** and Mohd Munzil Muhamad***

UDHR⁷, ICCPR⁸, CAT⁹ සහ ICESCR¹⁰ ආදි ජාත්‍යන්තර සම්මුතින් සහ ජාත්‍යන්තර යෝජනා රාඛියක් මගින් බලහත්කාරයෙන් සේවයේ යෙදුවීම (Forced Labour) වැළක්වීම අයිතිය සුරක්ෂිත කිරීම උදෙසා නොයෙකුත් ක්‍රියා මාර්ග ගෙන ඇත. එසේම ජාත්‍යන්තර කමිකරු සංවිධානය (ILO) වැනි සංවිධාන හරහාද එම අයිතිය තවදුරටත් සුරක්ෂිත කිරීමට කටයුතු කරයි.

නමුදු මෙම අයිතිය සිරකරුවන්ට හිමිද යන්න ප්‍රශ්න සහගතය. උදාහරණයක් ලෙසට අධිකරණයක් විසින් වරදකරුවෙකුට එරෙහිව බරපතල වැඩැතිව පණවනු ලබන සිර දුඩුවම (Rigorous imprisonment) මෙම අයිතියට යටත් නොවේද යන්න යමෙකුට නැඟිය හැකි තරකයක් වෙයි. ජාත්‍යන්තර නීතියට අනුව එලෙස අධිකරණයකට දුඩුවම පැමිණවීට හැකියාවක් පවතී. මේ පිළිබඳව ICCPR පනතේ 8(b) වගන්තියේ පැහැදිලිව සඳහන් කර ඇත.

කෙසේ නමුත් එකී දුඩුවම ක්‍රියාත්මක විය යුතු ආකාරය පිළිබඳව, බලහත්කාරයෙන් සේවයේ යෙදුවීමට එරෙහි ජාත්‍යන්තර සම්මුතියේ සඳහන් වෙයි. එයට අනුව එය ක්‍රියාත්මක කළ යුත්තේ පොදු අධිකාරියක මග පෙන්වීම සහ අධික්ෂණය යටතේය. එසේම සිරකරුවන් කළී පදනම යටතේ සේවයේ යෙදුවීම, ප්‍රදාන්තික අංශයේ ආයතනවල හෝ පෙද්ගලික

⁷ Adopted by the United Nations General Assembly by Resolution No 217A(III) of December 10, 1948

⁸ International Covenant on Civil and Political Rights (adopted on December 16, 1966 and entered into force March 23, 1976).

⁹ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

¹⁰ The ICESCR was adopted and opened for signature, accession and ratification by General Assembly Resolution No 2200A(XXI) of December 16, 1966 and entered into force on March 3, 1976, in accordance with Article 27 of the ICESCR

කටයුත්තක් සඳහා යෙද්වීම සිදු නොකළ යුතුය.¹¹ එසේම එහි 2(1) වගන්තියට අනුව,

“All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”¹²

එනම කිසිදු පුද්ගලයෙකු ස්වකැමැත්තෙන් නොරව දුඩුවමක් ලෙසට හෝ බලහත්කාරයෙන් සේවයේ යෙද්වීම කළ නොහැකිය. යුරෝපීය මානව හිමිකම පිළිබඳ අධිකරණයේ (ECHR), නඩු තීන්දුවක්වන *Van der Mussele v Belgium*¹³ තඩුවේදී ස්වකිය කැමැත්ත යන යෙදුම පැහැදිලි කර දක්වා ඇත. තවද එම නඩු තීන්දුව පරිදි, යම් තැනැත්තෙකු මුලදී සිය කැමැත්ත ප්‍රකාශ කර පසුව එය ඉවත් කර ගැනීමට මහුව අයිතියක් ඇති බවටද වැඩිදුරටත් සඳහන් වෙයි.

ජාත්‍යන්තර තීතිය තුළ කවත් වැඩි අවධානයට යොමු වී ඇති අයිතියක් නම් කඟර, අමානුෂික සැලකීම හෝ දුඩුවම පැමණවීමට එරහි අයිතියයි. මේ පිළිබඳව UDHR විශ්ව ප්‍රකාශනයේ 5වන වගන්තියේ පැහැදිව සඳහන් කර ඇත.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

එයට අනුව කිසිදු පුද්ගලයෙකු එලස වදහිංසනයට ලක් කිරීමට හැකියාවක් නොපවති. ඒ අනුව සිරකරුවන්ටද මෙම අයිතිය මගින් රක්වරණය හිමිවේ. මෙයට සමානම රැක්වරණයක් ICCPR සම්මුතිය තුළද,

¹¹Article 2(2)(c) of the Forced Labour Convention

¹²Article 2(1) of the Forced Labour Convention, 1930 (No 29) defines forced or compulsory labour

¹³<https://www.newlawjournal.co.uk/content/forced-labour>

CAT සම්මුතියේ 16(1) වගන්තිය තුළද දැකගත හැකිවේ.

UDHR විශ්ව ප්‍රකාශනයේ 1වන සහ 2වන වගන්තිවල සඳහන් පරිදි, “All human beings are equal” එනම සියලුම මිනිසුන් එකලෙස සලකා කටයුතු කළ යුතුවෙයි. කිසිදු පදනමක් මත ඔවුන් වෙන් කොට සැලකීම සිදු නොකළ යුතුය. යමෙකු සිරගත වූ පමණින් මහු හෝ ඇයගේ පුරුවැසිහාවය අහිමි වීමක් සිදු නොවෙයි.

එසේ හෙයින් රැඳවියන්ටද ලැබිය යුතු අයිතින් හැකිතාක් යුරට සුරක්ෂිත කිරීමට එක් එක් සමාජික රටවල් විසින් වග බලා ගත යුතුය. එසේම ජාත්‍යන්තර ප්‍රජාවද තවදුරටත් සිරකරුවන්ගේ අයිතින් සුරකීම උදෙසා තව තවත් ජාත්‍යන්තර සම්මුතින් සහ ජාත්‍යන්තර යෝජනා ඉදිරිපත් කළයුතුය.

ශ්‍රී ලංකාව තුළ සිරකරු අයිතින් වල ස්වභාවය

බන්ධනාගාර කිරීම හරහා බලාපොරොත්තු වනුයේ පුද්ගලයෙකු පීඩාවට පත් කිරීම නොවෙයි. එමෙන්ම බන්ධනාගාර යනු වධකාගාරද නොවිය යුතුය. ජාත්‍යන්තර ප්‍රජාව විසින් සිරකරුවන් ඉලක්ක කොටගෙන අයිතින් රාජියක් හඳුන්වා දී ඇත, ඉන් ඇතැම් අයිතින් සුරකීමට ශ්‍රී ලංකාවද බැඳී සිටියි.

මෙරට බන්ධනාගාර තුළ දක්නට ලැබෙන කණ්ගාවදායකම තත්වයක් වනුයේ රැඳවියන්ට ඉඩ පහසුකම් ප්‍රමාණවත් නොවීමයි. එසේම ප්‍රමාණවත් පරිදි ජල පහසුකම්, වැෂිකිලි පහසුකම් සහ ඇදන්, පිගන් කේර්ප්ප, තුවා, අදුම් ආදි අනෙකුත් අත්‍යාවශ්‍ය දී වල හිගම තිසාවන් රැඳවියන්ට නොයෙකුත් දුෂ්කරතාවයන්ට මුහුණ පැමට සිදුවෙයි.

මැත කාලීනව සමාජය තුළ සිරකරුවන් සම්බන්ධයෙන් වැඩි අවධානයක් යොමු වූයේ නැවත වරක් මරණ ද්‍රේචනය ක්‍රියාත්මක

කිරීමට යෝජනා කිරීම හරහාය. ශ්‍රී ලංකාව තුළ අවසන් වරට පුද්ගලයෙකු එල්ලා මරණ ලද්දේ වර්ෂ 1976 ජූනි මස 23 දිනය, ඉත්පස මෙරට කිසිදු බන්ධනාගාරයක් තුළ මරණ දැන්ඩනය කියාත්මක වූ බවට තොරතුරු සඳහන් නොවෙයි.

සැම පුද්ගලයෙකුටම උපතින්ම උරුමවන්නා වූ අයිතින් සමුහයක් ලෙසට මානව අයිතින් පෙන්වා දිය හැකිය. ශ්‍රී ලංකාව තුළ ආණ්ඩුකම ව්‍යවස්ථාව මගින් එකී අයිතින් සුරක්ෂිත කොට බලාත්මක කර පවතී. ආණ්ඩුකම ව්‍යවස්ථාවේ 3 වන පරිචේෂ්දය තුළ 10 සිට 17 දක්වා ව්‍යවස්ථා අවකට ගොනු කොට එම අයිතින් සඳහන් කර ඇත. ඉන් අයිතින් දෙකක් කිසි ලෙසකටත්, ක්වර ආකාරයකටත්, ක්වර පදනමක් යටතේ හෝ සීමා කළ නොහැකි අයිතින්වෙයි. (ව්‍යවස්ථා 10 සහ ව්‍යවස්ථා 11). එයට අමතරව පුරවැසියන්ට පමණක් සීමාවන අයිතින්ද වෙයි ව්‍යවස්ථා 12(2) සහ ව්‍යවස්ථා 14(1) එයට උදාහරණ වෙයි.

යම් ආකාරයකින් මෙම මූලික අයිතින් විධායකයේ හෝ පරිපාලනයේ කියාවක් හේතුවෙන් උල්ලාසනය වූ විටක හෝ රට ආසන්න තත්ත්වයකට පැමිණී විටෙක, එකී අවස්ථාවේ සිට මසක කාලයක් ඇතුළත ගරු ග්‍රේෂ්‍යාධිකරණයේ තහවු පැවරීම සිදු කළ යුතුය.

උක්ත සඳහන් 10 සහ 11 ව්‍යවස්ථාවල සඳහන් අයිතින් ක්වර පදනමක් යටතේ හෝ සීමා කළ නොහැකිය. 10 වන ව්‍යවස්ථාවේ සඳහන් වනුයේ ඔහුම පුද්ගලයෙකුට තමන් අහිමත ආගමක් අදහිමට, වැළැඳැනීමට ඇති තිබුනසද, ලබාධියක් හෝ විස්වාසයක් දැඟීමේ පිළිගැනීමට ඇති තිබුනස, සිතිමේ තිබුනස, හඳුනා සාක්ෂිය තිබුනස සහ ආගමික තිබුනස යන අයිතින් වෙයි. එසේම 11 වන ව්‍යවස්ථාව අනුව කිසිදු තැනැත්තෙකු වධහිංසාවලට හෝ ක්වර, අමානුෂික, අවමන් සහගත සැලකිල්ලට තැත්තහොත් දඩුවමට ලක් නොකළ යුතුය.

මේ අනුව අපට පැහැදිලිව පෙනී යන කරුණක් වනුයේ මෙම 10 සහ 11 ව්‍යවස්ථාහිස්දහන් අයිතින් බන්ධනාගාරය රැද්වියන්ටද අදාළ

වන බවයි. මන්දයන් එය ආණ්ඩුකම ව්‍යවස්ථාවේ එලෙසින්ම සඳහන් නොවුනා එකී අයිතින් කිසිදු ව්‍යතිරේඛයකට යටත් නොවන නිසාවෙන් එම අයිතින් භක්ති වැදුමට සිරකරුවන්ටද හැකිවෙයි. ඒ අනුව කිසිදු රැද්වියෙකු වධහිංසාවලට හෝ ක්වර ආකාරයක ක්වර, අමානුෂික හෝ අවමන් සහගත සැලකිල්ලකට තැත්තහොත් දැඩිවමකටලක් නොකළ යුතුය. බන්ධනාගාර භාරයේ සිටින රැද්වියන්ට නිළධාරීන් කරන පහරදීම්, වධහිංසා කිරීම ආදිය මෙම ව්‍යවස්ථා අනුව නීති විරෝධ වෙයි. එලෙස නිළධාරීන් විසින් කායික බලය යොදා හැකි වනුයේ අත්අංශවලන් මේ පලා යාම වැළැක්වීමට හෝ පුද්ගලික ආරක්ෂාවේ අයිතිය සඳහා පමණක් වෙයි.

එසේම 12(2) ව්‍යවස්ථාව සහ 14(1) ව්‍යවස්ථාවන් හි සඳහන් අයිතින් සැම පුරවැසියෙකුටම කිසිදු හේතුකින් තොරව භක්ති වැදිය හැකි අයිතින් වෙයි. යමෙකු බන්ධනාගාරගත වූ පමණින් මහු හෝ ඇයගේ පුරවැසිහාවය අහිමි නොවෙයි. එසේහෙයින් එකී ව්‍යවස්ථාවන්හි සඳහන් අයිතින්ද සමාජයේ අනෙක් පුරවැසියන් මෙන්ම භක්ති වැදුමට බන්ධනාගාරගත රැද්වියන්ටද හැකියාව පවතී. 12(2) ව්‍යවස්ථාවට අනුව කිසිදු පුරවැසියෙකුට සිය වර්ගය, ආගම, භාෂාව, කුලය, ස්ත්‍රී පුරුෂහාවය, දේශපාලන මතය සහ උපන් ස්ථානය ආදි කරුණු මත කිසිදු වෙනසක්මකට හෝ විශේෂයකට ලක් නොකළ යුතුය. මෙම අයිතිය නිසාවෙන් බන්ධනාගාරය තුළදී ඕනෑම තරාතීමක පුද්ගලයෙකු එකසේ සැලැක්වීමට ලක් වෙයි.

ව්‍යවස්ථා 14(1)(ඉ) සඳහන් වනුයේ ආගමික තිබුනසේ හොතික කොටසයි. එනම් ප්‍රයෝගික වාරිතු වාරිතු පිළිබඳ අයිතින්ය. ඒවාද කිසිදු ආකාරයක සීමා කිරීමකට යටත් කළ නොහැකිය. මෙරට බන්ධනාගාර තුළ විවිධ ආගම් සහ ජාතීන්ට අයත් රැද්වියන් සිටියි. බෙංද්ධ, ක්තෙක්ලික, තින්දු, ඉස්ලාම් ආදි ආගම් අදහන රැද්වියන් වෙනුවන් බන්ධනාගාර පරිග්‍රී තුළ ඒ එක් එකී ආගමිවලට අදාළව වන්දනා මාන කිරීමට පහසුකම් සපයා ඇත. එයට අමතරව ඇතැම් බන්ධනාගාරයන්හි දහම් පාසල්ද ස්ථාපනය තර ඇත. තවද එකී

ආගම්වලට අදාළව සමරුනු ලබන ආගමික උත්සව ආදිය සැමරීමටද රද්ධිත්ව ඉඩ ප්‍රස්තාව හිමි වෙයි.

ආණ්ඩුකුම ව්‍යවස්ථාවේ 13වන ව්‍යවස්ථාව අනු කොටස් හතකට බෙදා ඇත. එහි සඳහන් වනුයේ අපරාධ වරදකට සැකැපිට අත්අංගුවට පත් වූ අයෙකුට හිමිවන අයිතිවාසිකම් පිළිබඳවය. මෙම අයිතින් නීතියේ නිසි ක්‍රියාදාමයට අදාළ මූලික අයිතින් ලෙසටද හඳුන්වයි. 13(1) ව්‍යවස්ථා ප්‍රකාරව, යම් තැනැත්තෙකු සිරහාරයට ගනු ලබයි නම් එය නීතිය මගින් නියම කරන ලද කාර්යය පරිපාලියට පමණක් සිදුවිය යුතුය. එසේම අත්අංගුවට ගැනීමට හේතුවද සැකකරුට දැනුම් දිය යුතුය.

13(2) ව්‍යවස්ථාව අනුව යමෙකු රද්ධා තබාගන්නේ නම් ඒ සඳහා අනුගමනය කළ යුතු මූලික පියවරයන් කිහිපයක් වෙයි. ඒ අනුව සිරහාරයට ගත් සැම තැනැත්තෙකුම ආසන්නම නිසි අධිකරණයේ විනිශ්චරු හමුවට ගෙන යා යුතුය. පොලිස් අත්අංගුවේ සාමාන්‍යයෙන් පැය 24 ක කාලයක් රද්ධා තබා ගත හැකිය. තවදුරටත් එමෙස් ප්‍රාදේශීලික මෙහෙයුම් නීතියෙකු අත්‍යාවකා වෙයි.

එමෙන්ම 13(3) ව්‍යවස්ථාව පරිදි සාධාරණ නැඩු විභාගයකට හෙවත් සාධාරණ විනිශ්චයකට සැම ප්‍රාදේශීලික මෙහෙයුම් අයිතියක් ඇත. මෙහිදී වුදිත තැනැත්තාට ප්‍රාදේශීලිකව මෙහෙයුම නීතියෙකු මාර්ගයෙන් කරුණු කියා පැමුව හැකිය.

13(2) 13(4) ව්‍යවස්ථාව රද්ධියන්ට බෙහෙවින්ම වැදගත් එකකි. එහි සඳහන් වනුයේ අත්තනෝමතික දැන්වනයෙන් නිදහස් වීමට මිනිසුන්ට අයිතියක් ඇති බවයි. යම් තැනැත්තෙකුට දැඩුවම් කරන්නේ නම් එසේ කළහැකි වනුයේ නීතියෙන් නියම කළ කාර්යය පරිපාලියට අනුව පමණකි, තවද යමෙකු මරණ දැඩුවමට හේ බන්ධනාගර ගත කිරීමට හැකියාව පවතිනුයේ නිසි අධිකරණයක ගරු විනිශ්චරුමන් විසින් කරන ආදාළ මත පමණකි.

එසේම එහි වැඩිදුරටත් සඳහන් වනුයේ නැඩු විභාගය අවසන් වන තුරු හේ විමර්ශන කටයුතු අවසන් වන තෙක් යමෙකු රක්ෂිත බන්ධනාගරයේ තැබීම දැඩුවමක් ලෙස තොසලකා කටයුතු කළ යුතු බවයි. 13(5)ව්‍යවස්ථාවද මෙයට සමාන අයිතියක් ලෙස පෙන්වා දිය හැකිය. එනම් වරදකරු යැයි ගරු අධිකරණයෙන් තීන්දු කරනු ලබන තෙක් සැම ප්‍රදේශීලික තීක්ෂණීයයි පුරුව නිගමනය කළ යුතු බවයි.

ආණ්ඩුකුම ව්‍යවස්ථාවේ 13(6) වන ව්‍යවස්ථාව සඳහන් වන්නේ අතිතයට බලපාන ආකාරයට දැන්වන නීති පැනවිය තොහැකිය යන්නයි. මෙය ප්‍රධාන වශයෙන් කොටස් දෙකකට බෙදා දැක්විය හැකිය, එනම්

1. යම් ක්‍රියාවක් සිදුකළ අවස්ථාවේ එය වරදක් තොවෙයි නම් පසුව නීති සම්මත කොට ඒවා අතිතයට බලපානවත්වා එම සිදුකළ ක්‍රියාව වරදක් ලෙස සැලකිය තොහැකි වෙයි.

2. යම් වරදකාරී ක්‍රියාවක් සිදුකළ අවස්ථාවේ එයට අදාළ දැඩුවමට වඩා වැඩි දැඩුවමක් පසු අවස්ථාවකදී නීතිම කළ තොහැකිය.

මෙය රද්ධියන්ට අතිතය වැදගත් අයිතියක් වෙයි. මන්දයන් යම් වරදකට දැනැවමත් ඔවුන් දැඩුවමක් අත්වැදින අතරතුර එකි වරදට අදාළ දැන්වනය පසුව වෙනස් වුවද මුවන්ට එරෙහිව එම නව දැන්වනය ක්‍රියාත්මක කිරීමට හැකියාවක් තොපවති.

කෙසේ නමුත් 13(6) ව්‍යවස්ථාවට ව්‍යතිරේඛ අවස්ථා පවතී. ජාත්‍යන්තර නීතිය යටතේ යම් ක්‍රියාවක් සාපරාධි ක්‍රියාවක් වන විටදී වරදකරුට මෙම අයිතිය යටතේ සහනයක් ලබා ගත තොහැකිය. සේපාල එක්නායක එදිරිව රජය නැඩුව මෙවැනි අවස්ථාවකට උදාහරණ සපයයි.

සිරකරුවන් සතු ජන්ද අයිතිය

ජන්දය හාටිතා කිරීමේ අයිතිය අතිශය වැදගත් අයිතියක් වෙයි. එය පුදෙකලා අයිතියක් නොවයි, එය අනෙකුත් අයිතින් කිපයක් සමග සහසම්බන්ධ වෙයි. විශේෂයෙන්ම යුක්තිය සහ සාධාරණත්වය ආදි සංකල්පවලට මනා පිටිවහලක් වෙයි. පුරවැසියන් නොවන තැනැත්තන්ට එය අහිමි කිරීම තරකානුකූලය, නමුත් සිරකරුවන්ට එම අයිතිය අහිමි කිරීම කෙතරම් යුක්ති සහගතද?

ශ්‍රී ලංකාව තුළ සිරකරුවන්ට ජන්ද අයිතිය අහිමි වුවද, ලෝකයේ ඇතැම් රටවල රද්ධියන්ට සිය ජන්දය හාටිතා කිරීමට ඇති අයිතිය සූරක්ෂිත කොට ඇත. ඇමරිකා එක්සත් ජනපදයේ ප්‍රාන්ත 48 කද, ඉන්ද්‍රියානිසියාව, දකුණු අඩුකාව, කැනඩාව සහ කෙන්යාව ආදි රටවල කිපයකම රැඳිවියන්ට ජන්දය ප්‍රකාශ කිරීමේ අයිතිය ලබා ඇත. තවද ඇලබානා, මිසිසිපි සහ ඇල්පිනියාව ආදි ප්‍රන්තවලට උරදු වරදේ ස්වභාවය මත පදනම්ව ඇතැම් රද්ධියන්ට සිය ජන්දය හාටිතා කිරීමට අවස්ථාව ලබා ඇත.

සිරකරුවන්ටද මෙම අයිතිය ලබා දීම වැදගත් වෙයි. එමගින් ඔවුන්ට ඔවුන් වෙනුවෙන් හඩික් තැගීමට අවකාශය උදා වෙයි. බොහෝ විටෙක මෙම අයිතිය සිරකරුවන්ගෙන් අහිමි කිරීමට හේතු පාදකවුයේ සැම සිරකරුවෙකු දෙසම පොදු කොරෝනයින් බැලීම් නිසාවෙන් වැඩිහිටි වේ.

හාමනයේ නිදහස, ආගමික නිදහස, නීතිය ඉදිරියේ සමානාත්මකාවය, ක්‍රිස්තියාවය සහ අමානුෂික වද හිංසනයන්ට ලක් නොවීමට ඇති අයිතිය ආදි අයිතින් ඔවුන්ට හිමි වීමත් අනෙක් අතට ජන්දය ප්‍රකාශ කිරීමේ අයිතිය ඔවුන්ට අහිමි වීමත් පදනම් විරහිතය. මෙය ප්‍රජාතන්ත්‍රවාදී ලක්ෂණවලට පටහැනී වෙයි.

සිරකරුවන්ගේ මතය විමසීම වැදගත් වෙයි. වෙසසින්ම අපරාධ යුක්තිය පසදුලීමේ ක්‍රියාවලියට එය උපකාර වෙයි. පුරවැසියන්ගේ මතවාදය ප්‍රජාතන්ත්‍රවාදී රාජ්‍යයකට අතිශය වැදගත් වෙයි. ප්‍රජාතන්ත්‍රවාදය රදා පවතිනුයේ

සියලු පුරවැසියන් සමාන අයිතිවාසිකම් හිමිවිය යුතුය යන පදනම මතය.

තිගමනය

යමෙකුට ගොඩනැගිය හැකි තරකයක් වනුයේ සිරකරුවන් යනු යම් අයිකරණයක් මගින් වරදකරුවෙකු බවට තින්ද කර රට අදාළව නිසි ද්‍රුවම් පැමිණවූ පුද්ගලයින් බැවින් ඔවුනට මෙවැනි අයිතිවාසිකම් ලබාදීම කෙතරම් ප්‍රායෝගිකද යන වගයි. ඒත් සමගම අනෙක් අතට තැගෙන තරකය නම් අපරාධ පරික්ෂණවල ඇති නිර්වද්‍යතාව, නැඩු විභාගය තුළ සිදුවිය හැකි දේශ, සාක්ෂි ඉදිරිපත් කිරීමේදී සිදුවන අඩුපාඩු ආදිය නිසා ඇතැම් විටක තිර්දේශී පුද්ගලයෙකු වුවද වරදකරුවෙකු ලෙස සිරගත විය හැකි බවයි. එවැනි සිදුවීම් මින් පෙර අවස්ථා කිපයකම සිදුව ඇත. ඇතැම් තිර්දේශී පුද්ගලයන් මරණ දැන්විනයට පවා ලක්ව ඇත.

නුතන බන්ධනාගාර ප්‍රධාන වශයෙන් කාර්යයන් දෙකක් ඉටුකරයි. එනම් යුතුවන්ට පසදුලීමේ ක්‍රියාවලියට සහය දැක්වීම සහ රැදිවියන් ප්‍රනුරුත්තාපනයට ලක් කිරීමේ ක්‍රියාවලියයි. සියවසකට අයික කාලයක් ගකව තිබුණුද නුතන බන්ධනාගාර ක්‍රමය හරහා බලාපාරොත්තු වූ අහිලාෂයන් ඉටු කර ගැනීමට සමත් වී ඇත්ද යන්න ප්‍රශ්න සහගතය.

විශේෂයෙන්ම අද වන විට එනත් අහියෝග රාජියකට මුහුණ පැමිට ලොව පුරා බන්ධනාගාරවලට සිදුව ඇත. ඒ අතරට පසුගිය දැනු කිහිපය තුළ ජාත්‍යන්තර ප්‍රජාවගේ වැඩි අවධානයක් යොමු වූ මාත්‍රකාවක් වන මානව හිමිකම්ද මෙයට අයත් වෙයි.

යදුම්න් බැඳ සිරකොට තැබුවද සිරකරුවන්ද මනුෂ්‍යයන්ය, ඔවුනටද හිමිකම් පවතී. එකී හිමිකම් යුතුකීමට බොහෝ පියවර ගෙන තිබුණුද, එකී පියවර සාධනීයද යන්න නැවත විමසීය යුතු කරුණෙකි. එනම් අවසනයේ පැමිණිය හැකි නිගමනය නම් රැදිවියන් ප්‍රනුරුත්තාපනය කිරීමට මත්තෙන් බන්ධනාගාර ක්‍රමවේදය ප්‍රනුරුත්තාපනය කළ යුතුය යන්නයි.

THE EVOLUTIONARY DEVELOPMENT OF THE CONCEPT OF HUMAN RIGHTS WHICH INFLUENCED BY DIFFERENT RELIGIOUS PERCEPTS AND THEIR CONTRIBUTION TO THE UNIVERSAL RECOGNITION OF THE PRINCIPLES OF EQUITY AND NON-DISCRIMINATION

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This paper discussed about the Historical influence of religion on the development of law and justice. Separation of church and state, the rise of secularism. Religion as influencing the Human Rights movement: positive and negative aspects. Fundamental values of religions versus organized religion in the development of the Human Rights discourse. The relevance of religion in the modern human rights discourse. According to Nazila Ghana on "Religion, Equality and Non-Discrimination" states that they serve social, economic, political and symbolic purposes; and are used as a description of facts or prescription of ideals. Though many have assumed non-discrimination and equality to reflect two sides of the same coin, closer attention suggests that the principles apply differently and sometimes even diverge. They are also construed and applied differently in different jurisdictions. Their bearing on freedom of religion or belief gives rise to particular implications. The rights of non-discrimination and equality. Furthermore since equality and non-discrimination often provide the framework within which religion or belief exemptions are sought, and may be rejected, it is appropriate to revisit the question of religion or belief claims in this context.

Non-discrimination and equality have literary, philosophical, political, legal and other implications. They describe an ideal as well as applying to the day to day At the same time the research design to be carried out by analyzing existing literature subjective to qualitative analysis. Empirical studies carried out by scholars, International and local organizations, use of articles and facts published by recognized authors have been concerned. Qualitative data would be collected from individuals such as academics and policy makers. The paper focused merely to address non-discrimination and equality in the legal sphere. Within international human rights law one can, in turn, conceive of equality and non-discrimination as rights, as principles and as cross-cutting norms. Moreover, both these concepts constitute rights in themselves and they inform other rights in a cross cutting manner. The paper will limit itself to equality and nondiscrimination as legal rights within international human rights law.

Key Words: *Human Rights, Equality, Non- Discrimination, Religion*

"All religions, arts and sciences are branches of the same tree. All these

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aspirations are directed towards ennobling man's life, lifting it from the sphere of mere physical existence and leading the individual towards freedom".¹ Great religions and beliefs are truly based upon ethics such as the duty to strengthen the bonds of good-neighbourliness and the obligation to achieve human need in the broadest sense. The precept that denotes one should love one's neighbour as one - self without any discrimination was included in the faith of Christianity even before it had been organized as a Church. It is clear that the same idea emphasized in Judaism and Islam, as well as the various concepts in Buddhism, Confucianism and Hinduism, and it may also be found in the teachings of many non-religious beliefs. Modern law and religion are important sociopolitical phenomena that have in common some veiled elements. Both require to create, or at least to frame, human consciousness and behaviour in all spheres of private and public life. It is clearly note that all most all the religions and beliefs are filled with a sense of the oneness of mankind, equality and non-discrimination. History probably highlights more instances of man's inhumanity to man than examples of good-neighbourliness and the desire to satisfy the needs of the less fortunately placed.²

Religions and related social and cultural constructions have played an important part in human history. According to article 18 of

the Universal Declaration of Human Rights, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."³ At the same time , later this was discussed in the following instruments as follow; International Covenant on Civil and Political Rights and several regional binding human rights instruments,⁴namely the African Charter on Human and People's Rights (Article 8)⁵ or the European Convention on Human Rights and Fundamental Freedoms (Article 9). The UN Human Rights Committee highlights that this freedom is "far-reaching and profound",⁶that it "encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether expressed individually or in community with others",⁷ that the freedom for conscience should be equal to that for religion and belief and that protection is for "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. Furthermore, the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (DEROB),⁸ as its very title express, highlights non-discrimination on the basis of religion or belief rather than equality. However, today laws securing freedom of

¹ Albert Einstein

² (Ghanea, 2011)

³The Universal Declaration of Human Rights,1948

⁴ (Rights, 1976)

⁵ (RIGHTS, 1986)

⁶ (Rights, 1953)

⁷ (Ghanea, 2011)

⁸ (Belief, 1981)

religion and belief are no longer focused on the need to maintain the status quo in order not to challenge regional security, but focus a number of issues including non-discrimination, equality and dignity.^{9¹⁰}

According to natural religious law a law arise from a faith in God or in divine forces, morality and legality are rooted in religion. Sacred law creates a space for human choices and judicial discretion in the articulation of a celestial divine order. Prominent in the writings of theological thinkers in different religions such as St Augustine, Thomas Aquinas and Maimonides has not only been a normative indicator of a good faith and a virtuous behaviour, but also the absolute criterion for obedience and disobedience to human-made law. However, St Augustine has been a very influential religious thinker over Western thought. His religious concept of “De Civitate Dei” has generated a religious normative model for the perfection of human society and expectations that political power in the ‘City of God’ should be legitimated through a religious faith. During post-medieval science and the rationalization of law as science, natural law, as distinct from what has remained as religious natural law, has been secularized, particularly since the fourteenth century. These genealogical facets of religion in law and law in religion that have been illustrated above are not progressively ordered in a linear historicity of teleological modernity.^{11¹²}

The rights of non-discrimination and equality have long engaged political and legal philosophers, thinkers and practitioners alike. They serve social, economic, political and symbolic purposes; and are used as a description of facts or prescription of ideals. Furthermore since equality and non-discrimination often provide the framework within which religion or belief exemptions are sought, and may be rejected, it is appropriate to revisit the question of religion or belief claims in this context. It is well known fact that, though many have anticipated that non-discrimination and equality to reflect two sides of the same coin, however, closer attention denotes that the principles apply differently and sometimes even diverge. On the other hand as equality and non-discrimination often suggest the framework within which religion or belief exemptions are sought, and may be rejected, it is appropriate to revisit the question of religion or belief claims in this context. It is clear that, within international human rights law one can, in turn, conceive of equality and non-discrimination as rights, as principles and as cross-cutting norms. Earlier they have the capacity of both constitute rights in themselves and they inform other rights in a cross cutting manner.¹³

The attitude embraced by religions towards human rights is today one of the criteria for social relevance or irrelevance, for ethical validation or invalidation, and civic recognition or rejection. Provisions in relations to non-discrimination and equality

⁹ (Heiner Bielefeldt, 2016)

¹⁰ (CENTRE, n.d.)

¹¹ (Freeman, 2004)

¹² (research.vu.nl, n.d.)

¹³ (Heiner Bielefeldt, 2016)

have long been discussed in the sine qua non of all international human rights instruments. The initial movement can on non-discrimination can be seen in the International Bill of Rights; and then in the Convention on the Elimination of All Forms of Racial Discrimination (CERD) that discrimination may be non-formal; the understanding that it often arises in the private sphere and is regularly perpetuated in the name of tradition, as articulated in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); that it may be extinguished in the name of the illegality of the bearer of rights in the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICMW); non-discrimination has traversed an amusing investigative platform, that influence for the growing appreciation of where it may still remain and how to counteract it.¹⁴ The principle of non-discrimination and equal treatment is also contained in regional instruments, such as Article 2 American Declaration, Article 24 ACHR and Articles 2 and 3 ACHPR.¹⁵

If secularization means the loss of the social significance of religion, then the extent of its influence has been exaggerated. This may be illustrated by the following incident. In 1998, the British parliament discussed the Human Rights Bill, which was to be incorporated into the European Convention on Human Rights (ECHR). The debate itself evidenced the strong presence of the Church in the consciousness of the public, especially the Church's autonomy

and integrity. The relationship between religion and human rights has always been troubled. Religions have been, and continue to be, very occupied with the defense of divine rights. Only with great difficulty have they given any attention to human rights. Even when they do this, it is to subordinate human rights or contrast them with divine rights. In cases where the two rights conflict, the absolute rights of God generally predominate over the limited rights of mankind, the Truth of God over people, the Word of God over science, reason and human logic. In Switzerland, the right of the individual to profess the religion of his choice has gradually been recognized by national law. Every canton acquired, under the first peace of Kappel, of 1529, the right to decide for the entire territory subjected to its jurisdiction whether the Reformed or Catholic doctrine was to be the faith of its citizens and subjects. At the same time In France, for many years, concessions granted to religious groups were revoked at will by the State. On the other hand In England, incapacities to which dissenters were subjected were abolished only gradually. The first positive legislation recognizing dissenters was the Toleration Act of 1698, which exempted Protestants who dissented from the Church of England from the penalties of certain laws.¹⁶ The discourse of rights could still draw on Christian, natural-law sources for its legitimacy, but increasingly its practical concerns were secular. In addition to that, increasing knowledge both of classical, Greco-Roman civilization and of non-European cultures

¹⁴ International Convention on the Protection of the Rights of All Migrant Workers and Their Families

¹⁵ (Discrimination, 1965)

¹⁶ Toleration Act of 1698,

provided alternatives to Christianity. Furthermore, the nineteenth century provide the persistent progress of science and technology in the West in the face of a defensive reaction by Christianity. The rise of industrial capitalism produced workers and socialist movements that claimed various economic, social and political rights. Although these demands were sometimes given a Christian justification, these movements were predominantly secular, and left behind the philosophy of natural law. However, by the end of the Second World War, religion still played a role in public life in the Western democracies, but politics had become predominantly pragmatic and secular. The United Nations was established with the primary goal of preventing war.¹⁷¹⁸¹⁹²⁰

Moreover, MacNaughton argues against the collapsing of status-based non-discrimination and positive equality precisely because the former is often used to reject and extinguish claims towards the latter. She further argues that “Positive and negative forms of equality are very different. When positive equality is the norm, any inequality must be justified. When negative equality is the norm, most inequalities are accepted; only inequalities based upon one of the prohibited grounds, for example, race, sex, language or religion, must be justified. By (International law)equating the two forms of equality in international human rights law and calling them “non-discrimination,” On the other

hand, McCrudden gives four meanings to equality in EC Law, clarifications which are in fact of wider application and will be used in our discussion. He distinguishes between the following: 1. equality as ‘rationality’, 2. equality as ‘rights protecting’, 3. equality as preventing ‘status harms’ arising from discrimination on particular grounds, and 4. equality as proactive promotion of equality of opportunity between particular groups. It is important to note that MacNaughton uses Article 2 of the ICCPR to identify these blocs: race, colour, sex, language, religion, political or other option, national or social origin, property, birth or other status” (Article 2, ICCPR), and notes that bloc equality is regularly known as non-discrimination.²¹²²

Examining equality in relation to freedom of religion or belief requires taking on board a range of terrains. These three levels of concern relate to the need to distinguish between: (1) religion as formal set truth claims, and religion as practiced by (2) individuals or (3) groups of individuals. At the level of practice, this distinction between the individual and the group of individuals then requires additional consideration. The first level is that of the formal truth claims of religion or belief. The second level is that of the individual and freedom of religion or belief. The third and final level is that of the group of individuals or community of religion or belief. This entails concern for equal

¹⁷ (Freeman, 2004)

¹⁸ (Ghanea, 2011)

¹⁹ (Commission, 1998)

²⁰ (Europe, 2015)

²¹ (PDHRE, n.d.)

²² (Rights, 1976)

treatment for the group, that communities of religion or belief enjoy appropriate external and internal protections²³

Most human rights violations related to freedom of religion and belief are also related to freedom from discrimination. Discrimination on the grounds of religion and belief is contrary to human rights but it is nonetheless experienced daily by many people across Europe. The fact that religion and belief are often confused with culture, nationality and ethnicity makes it more complicated but also more painful on an individual level: you may be discriminated against on the grounds of religious affiliation even if you happen not to believe in the religion you are associated with. Discrimination and intolerance impact negatively on society as a whole, and particularly on young people who experience it. Such effects include: Low self-esteem, Self-segregation, Internalized oppression and etc.²⁴

Broadly speaking elements of human rights are incorporated in most of the religions around the world. Notion of right is very much there in Buddhism as well. The elements incorporated in social message of Lord Buddha are part and parcel of modern day principles that comes as international conventions, treaties, covenants, protocols and constitution of most of the countries. Lord Buddha started his mission in rebuilding the unjust social order under the pillars of love, compassion, maithree, karuna, character, equality and

brotherhood. Thus the foundation is purely based on human values, natural justice and equality. Even Lord Buddha discussed women's right to education and socio political engagement like slavery. Therefore it is clear that Buddhism has influenced tremendously upon the thinking of civilization even before the birth of Universal Declaration of Human Rights, where those human values were present in a way of a message for the development of Human rights in modern day world. ²⁵

Within Hinduism, a different point of view can be seen with regard to human rights. In Hinduism, like Judaism, there is no word for 'rights'. Closest word to 'rights' is adhikara that highlights the idea of 'just claim. The social structures and underlying social visions of human dignity, equality and non- discrimination in traditional India does not lie upon human rights but on social duties. As, Hindu thought places Article 29 of the UDHR prior to any other Article.²⁶ This is the main difference between Western rights talk and principles within the Hindu tradition. The approach that international human rights law has taken places the fundamental idea of dignity in a rights based context. It is submitted that this founding principle can be better recognized in a rights and duty based system. In this regard, a better recognition and interpretation should be given to the concept of duties as found in Article 29 of the UDHR²⁷ for the development of human rights. Hinduism is the religion of bliss. It considers the Right of Happiness to be the

²³ (FORTMAN, 2011)

²⁴ (research.vu.nl, n.d.)

²⁵ (Bagde, 2014)

²⁶ The Universal Declaration of Human Rights,1948

²⁷ The Universal Declaration of Human Rights,1948

highest fundamental right of all humans. The ultimate goal for Hinduism is material and spiritual well-being of the mankind without any discrimination.²⁸

Religion embodies institutionalized connections with transcendental bases for morally justified behaviour. In the human rights mission, religion has played its part right from the start in two ways. First, freedom of worship (or non-worship) is one of the fundamental human freedoms. Strikingly, realization of this freedom is particularly problematic in a multi-religious context as absolutism easily permeates organized Faith. Secondly, religion, with all that belongs to it, they are beliefs as well as institutions, also falls under the universal norms of the UDHR. People determined to discriminate or even kill others for religious reasons, collide with human rights. Moreover it is clear that, No matter how well rooted in people's life worlds, religion needs human rights as a global justice discourse that puts the human being above ideology and the dignity of the individual person above the organization. Religion's importance to globalization lies in the fact that individuals and groups, experiencing disorientation as a result of the invasion of their micro-cosmic domain by macro-cosmic forces, tend to appropriate spiritual values of their long-held traditions as part of their attempt to resolve the resulting conflicts^{29.30}

Religion needs human rights including the fundamental freedom to critique power. Reciprocally, human rights needs a firm rooting in people's transcendental beliefs the real challenge remains, however, to get

the global faith in a dignified and well-protected existence for everyone, rooted in all hearts and mind. Many of the most important and intractable human rights challenges facing the world today are closely interlinked with religion and belief. Failure to protect freedom of conscience, the enduring problem of religious intolerance and incitement to religious hatred, as well as widespread misunderstandings about the nature of the relationship between religion and universal freedoms, all act as a major break on achieving progress towards the full realization of human rights. The state is required to act in a neutral fashion as between religions and as between religious and non-religious forms of belief. The fostering of pluralism and tolerance is seen as a goal in its own right as a means of preserving democracy; it requires religious adherents to accept a fairly high degree of challenge to their belief systems in the pursuit of this goal. Human rights law has also established the principle of respect for the right of others to believe that is the duty of the state to create a 'level playing field' between different parties, with one side being free to present its point of view, and the other to reject it. This principle might also be expressed as respecting the 'believer' rather than the 'belief'. To conclude, it may be said, without any fear of contradiction that all religions promise to save only their own adherents. The positive point in all revealed religions is that they enjoin peace and preach non-violence. It is their votaries who violate the injunctions of their religions and bring disaster upon mankind. If the believers could practice

²⁸ (hodhganga.inflibnet.ac, n.d.)

²⁹ (Barzilai, 2007)

³⁰ (Europe, 2015)

their several religion in their pristine spirit, there would no need to spell out the basic human rights or to enforce them though declarations at various levels.³¹

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SOME LEGAL ASPECTS OF “COMPANY CONTRACTS”: REFERENCE TO COMPANIES ACT NO 07 OF 2007

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Introduction

A contract can be simply defined as a legally enforceable promise between two or more parties. Contracts play a significant role in business world, as most of the time, when it comes to companies, apart from the company employees, one company is depending on the services provided by another company.

Therefore having a valid legal contract is important not only in terms of company affairs, but also to the economy of the country. “The legal enforceability” of a contract ensure the adherence to the terms and conditions parities has agreed upon entering the contract for a considerable extent and in failure to do so will also not effect to the party who was not defaulted to the extent it would have effect if there is no legal enforceability, as most of the time remedy for the breach is compensated by the court or the terms and conditions in the contract itself.

Under the law of Contract, constituent elements of a contract can be named as; an agreement between two or more parties, the intention to create a legal relationship incompliance to the statutory formalities, the possibility of the object and capacity of the parties to enter in to a contract. Though most of these elements are applied without any difference to all contracts, without

considering whether the party is human being or a company, element of capacity is considered differently. Laws relating to companies are contained in the Companies Act No.07 of 2007 therefore this study will be carried out referring to the provisions of the Companies Act. This paper aims to discuss legal aspects of the company contracts which make the contract legally valid and enforceable under the law.

Capacity of a company to enter in to Contracts

Section 2 of the Companies Act, No.07 of 2007 talks about the legal status and capacity of a company incorporated under this Act. Section 2(2) (a) and (b) of the Act has defined capacity as follows;

“to carry on or undertake any business or activity, do any act or enter into any transaction subject to the provisions of any written law of Sri Lanka or of any other country”

Further it should be noted that this section referred to the Companies incorporated under Companies Act, which clearly suggest that this capacity can be obtain only through the incorporation of a company. Section 4 and 5 contain Companies Act, contain provisions relating to incorporation of a company and section 3 of the Act is about the different types of companies

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which can be incorporated under the Companies Act.

Once Legal personality is acquired by a Company, it separates the company from its shareholders by acting as a veil between company and the members of the company. Therefore this legal status is also called as corporate veil. Salomon v. A.Salomon& Co /1897is the first case which has recognized the separate legal status of a company and this is a landmark case which emphasize the importance of having a separate legal personality in a company's perspective. Case facts are as follows, Mr. Saloman was a boot manufacture and he formed a company and transferred his business to the company he incorporated. Shares of the company were sold among the family members. Later, the company went bankrupt. He could settle the debentures which were bought by him, but not the unsecured debenchers. Therefore a question arose as whether Mr. Saloman was a distinct person from the company. House of Lords Held that the Company has a legal personality distinct from its members, and that the members are not bound to pay them, but the company.

This case established many principles, limited liability of its member is one principle established by this case, according to this principle members are not liable to pay the debts of the company, and also they are not liable for torts, contracts and the taxes of the company. This principle is also accepted in Sri Lanka. According to the Section 87 (1) of the Companies Act, a shareholder is not liable for an act default or an obligation of the company only due to the fact that he is a shareholder. Further in Section 87(2) it states that, liability of a shareholder is limited to any liability expressly recognized by the Article of the

company or any liability under the Act. When considering about this section it is clear that the section does not release from the liabilities, but limit it.

Nevertheless, this separate legal personality cannot be regarded as an absolute status which is acquired upon incorporation, which absolutely separate liabilities of the company from its decision makers. There are instances where court can disregard the separate existence of a company. Normally, this exemption is applied when the separate legal status is used to cover a deliberate wrong. "Agency and the alter ego doctrine" (Lifting The Corporate Veil under National Interest in Sri Lanka., 2020) which suggest that although a company is separate entity, it is possible to treat it as an agent of holding company or other controlling powers has also been applied in determine whether the corporate entity should be treated as an agent of the holding company or the ones who are controlling the company.

Further there are instances where court has disregards the legal personality of companies some examples for such situations are to prevent frauds, National security. This court interference, disregarding the legal personality is called as the lifting of the corporate veil. Grounds for the lifting of corporate veil can be common law ground and statutory grounds(Lifting The Corporate Veil under National Interest in Sri Lanka., 2020). However lifting of the corporate veil is not regularly done unless there is a very good reason (Wikramanayake, A R 2007).

Pre-incorporation contracts

In the case Rover International Ltd v. Cannon film Sale Ltd 1987 1 WLR 1597 it

was held that ‘If someone does not exist it cannot contract’. In Sri Lankan context, Similar decision was delivered in the case **Attygalle and Another v. Commercial Bank of Ceylon Ltd (2002) 1 Sri L.R.** In this case it was held that before a company is incorporated and registered it has no legal existence. During the time this case was taken up in the court, there was no statutory law to govern this area. The Companies Act No 20 of 1982 was the Act in force. This Act contained no provision relating to pre incorporation Contracts. Therefore, during that time, per incorporation contracts was governed by the Common Law. However with the introduction of the new Companies Act No. 07 of 2007, this position changed in Sri Lanka reason (Wikramanayake, A R 2007).

In terms of Section 2 of the Companies Act, only the companies incorporated under this Act can acquire the legal personality, in another words capacity to enter in to a contract. Nevertheless there is an exemption to this requirement. Section 23 to 25 talks about pre-incorporation contracts.

Section 23 (1) defined the terms “Pre-incorporation contracts” as,

- (a) *a contract purported to have been entered into by a company before its incorporation; or*
- (b) *a contract entered into by a person on behalf of a company before and in contemplation of its incorporation.*

As there is no existing incorporated company to enter in to the contract, promoters of the company can enter in to contracts on behalf of the proposed company to secure funding, acquire property and other requirements as

necessary for the proposed company reason (Wikramanayake, A R), but before entering to the contract promoters have to secure certain rights and obligations on behalf of the company as a precondition for proceeding with incorporation reason (Wikramanayake, A R 2007). Companies Act has not provided a definition for the term promoter, this term was described in the case **Twycross V Grant 1877 2CDP 469 CA**, as

“the one who undertakes to form a company with reference to a given project and to set it going, and who undertakes to form a company with reference to a given project and set it going, and who takes the necessary steps to accomplish that purpose”

However, the Act has not imposed a specific time limitation to incorporate the company, but under the section 23(2) it provides that the contract can be ratified within such period as mentioned in the contract or within a reasonable period after the incorporation. According to the Section 23(3) of the Act enforceability and of a contract ratified under the Section 23 (2) will be considered as same as it is entered by a company incorporated by this Act.

In terms of Section 24, unless contrary intention is presented in the contract, the person who has entered in to the contract on behalf of the company gives an implied warranty to incorporate the Company within the period specified in the Contract or within a reasonable period and to ratify the contract within the period provided in the contract or within a reasonable period and, if the person failed to fulfill these warranties, he will be liable for a breach of implied warranty. Further, in terms of

Section 24 (2) breach of aforesaid warranty will give rise to damages and the amount of damages will be same as if it is a breach by a company for an unperformed obligation.

According to the Section 24(3) of the Act, it discharge the liabilities of the person who entered in to the contract on behalf of the company after the fulfillment of above mentioned implied warranties.

Section 25 direct company to return property acquired under the pre incorporation contracts if the company fails to ratify the contract after the incorporation.

Company Contracts

As discussed earlier once a company is incorporated Under the Companies Act, it gets a distinct legal personality which makes the company eligible to enter in to contracts in its own name. Companies Act provides some formalities need to be observed before entering in to a contract. These provisions are applied disregarding whether it is entered within Sri Lanka or outside Sri Lanka. Before 2007 company seal was a mandatory element in a company contract and the ones who signed the documents were only confirming that the seal had been affixed. Companies Act 2007 removed this requirement due to its cumbersome nature in contracting reason (Wikramanayake, A R 2007). Method of contracting is provided in the Section 19 of the Act, According to this provision if law required a natural person to have a contract or other enforceable obligation in writing, signed by that person and be notarial attested same requirements have to be fulfilled by the company in entering in to same kind of a contract or other enforceable obligation. Act provides persons who are eligible to sign on behalf of the company as follows;

- (i) two directors of the company;
- (ii) if there be only one director, by that director ;
- (iii) if the articles of the company so provide, by any other person or class of persons; or
- (iv) one or more attorneys appointed by the company,

Further under Section 19 (b) it states that, if an obligation is a one which a natural person can enter in to in writing and under the person signature, company may enter in to such in writing and signed by a person authorized to do so under company's express or implied authority. According to Section 19 (c) of the Act if a natural person is not required by the law to enter in an obligation in writing, same kind of obligations may be entered into on behalf of the company in writing or orally by a person acting under the company's express or implied authority.

Section 20 of the Act is about the way how attorneys are appointed by the company. According to this section Attorney is appointed either generally or in relation to a specified matter, subject to the Articles of the Association and, in compliance to the section 19 of the Companies Act, and according to the Section 20(2) of the Act, any act of the attorney within power so granted will be binding on the company. According to Section 20(3) it states that, the provisions of the Power of Attorneys Ordinance is applied to the attorneys appointed by the Company, as it is applied to an attorney appointed by a natural person.

Section 21 of the Act talks about the "Authority of Directors, officers and agents", and Section 22 is about the "Constructive Notice", according to that

section no person is deemed to have notice or knowledge of content of Articles of Association irrespective of it being filled with Registrar or being freely available.

Validity of a contract after the dissolution of a Company

According to the Companies Act No 07 of 2007 a company can be dissolved in different ways, as examples, Section 394 of the Act provide an instance and the procedure followed by the registrar of the companies to strike off a company which is not functioning from the company register, amalgamation is another way which dissolve a company, this paper focus will be given to the companies wound up following the court winding up procedure. Section 267 of the Act has provided three modes of winding up, namely winding up by court, winding up subject to supervision of court and voluntary winding up. Winding up procedure for the each type is provided in the Act.

Section 270 of the Act provides grounds for winding up by court as follows;

- (a) the company has by special resolution resolved that the company be wound up by the court;
- (b) the company does not commence its business within a year from its incorporation or suspends it business for one year;
- (c) if the number of the members falls below the minimum number required under subsection (2) of section 4 of this Act;
- (d) the company has no directors;
- (e) the company is unable to pay its debts; or

(f) the court is of opinion that it is just and equitable that the company should be wound up.

Situations provided in (e) and (f) are subjected to number of principles laid down by the court therefore application is not relatively straight forward as the rest of the situations provided in the section 270(Wikramanayake, A R 2007).

Section 271 of the Act provide definition for the “inability to pay debts” and, according to this section three instances where court considered the company is unable to pay its debts. However, these provisions are also important in terms of Company contracts these sections provide how a party of a contract who become a creditor can recover before the dissolution of the company.

In terms of Section 272 application for winding up has to be made by petition procedure of filling this petition is provided in “The Companies Winding Up Rules 1939”. Section 272, Further provide who can apply for winding up as;

272. (1) An application to the court for the winding up of a company shall be by petition presented subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, jointly or separately

Creditors in this section are limited to the creditors who have been creditors before the petition is presented. Though this section has provided contingent and prospective creditors, in terms of section 272 (1)(b) they have to provide security for

costs and establish *prima facie* case for winding up in order to make the court hear the winding up petition presented by them. In the case ***Bell Group Finance (Pty) Ltd v. Bell Group UK Holding Ltd (1996) 1 BCLC 304***, it was decided that, even if the company has no assets, liquidator can investigate whether there has been any impropriety in the conduct of the company's affairs. Further, it is important to check whether there is a winding up order for a company before entering into a contract relating to property, because in terms of the Section 275 of the Act it makes any disposition of property void after the winding up order is made. However, according to the Section 286, court is empowered to appoint a provincial liquidator during the time period between the filings of the winding up application and hearing of the petition. Liquidator's first task is to make a list of assets and liabilities of company, and set off liabilities with liquidator's fund after prioritizing them. Powers of the liquidator is provided in the Section 292(Winding up of a limited liability company in Sri Lanka | D. L. & F. De Saram, 2020). Though liquidator is considered as an independent party, in practice most of the time this process is not carried out independently.

Companies Act contains provisions relating to the Official receiver but the first appointment to this position was made very recently. Official receiver serves as liquidator of last resort and regulator of insolvency proceedings. According to the legal experts official receiver will bring transparency and accountability to the liquidation process. Provisions relating to official receiver are contained in Section 281 to 284.

Conclusion

Entering into a contract with a company is somewhat different from entering into a contract with natural person. Main reason for this is the legal capacity company possessed after its incorporation, which separates the controlling powers of the company, from the company. Therefore, when entering into a contract there are some aspects need to be considered. If a party becomes a creditor of a company due to a contract they can recover their dues in the winding up process up to a certain extent. With the appointment of the official receiver transparency and the accountability of the winding up process has increased therefore it can be said that the risk of loss has been reduced up to a certain extent for the parties who became creditors of the company due to the contracts they had entered with the company.

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JURISPRUDENTIAL PERSPECTIVE ON THE RENAISSANCE IN THE INFLUENCE OF MARX GLOBALLY AT THE MOMENT

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Abstract

As Karl Marx noted, Capitalism teaches a man to fish, but the fish he catches aren't his they belong to the person paying him to fish, and if he is lucky, he might get paid enough to buy a few fish for himself. Accordingly, Marx suggested, "Let the ruling classes tremble at a communist revolution. The proletarians have nothing to lose but their chains. They have a world to win...workingmen of all countries unite"¹. This article would cause a jurisprudential insight towards the renaissance in the influence of the Marxist theory in the 21st century despite it being welcomed as far as back in the 19th century. By this means, in line with Karl Marx's and his followers' assessment, this article would analyse the historical background of the Marxist theory outlining essential features such as; thesis, antithesis, synthesis, base and superstructure, law and state, ideology and mystification, and the most crucial concept of revolution, and

would look into the application of the same features in the modern era with reference to modern day controversial concepts such as American exceptionalism, the active role of United Nations General Assembly(UNGA), United Nations Security Council(UNSC), Veto power, sovereign equality, conditions of labors of third world countries, Marxist feminism and so on, in order to come to a reasoned conclusion as to whether there is a renaissance in the influence of Marx globally at the moment.

Introduction

Harold James, a historian, colorfully points out that, "Karl Marx has returned, if not quite from the grave then from history's dustbin..."². This notion depicts the fact that Marxism is inevitably coming back. Furthermore, Vista M Kelly colorfully points out that, "Snowflakes are one of the most fragile things, but just look what they can do when they stick together"³. Moreover, Che Guevara, a Cuban

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¹Marx, K., Engels, F., Engels, F. and Wood, E., 1998. *The Communist Manifesto*. New York: Monthly Review Press.

²James, H., 2008. *The Marx Renaissance / By Harold James - Project Syndicate*. [online] Project Syndicate. Available at: <<https://www.project-syndicate.org/commentary/the-marx-renaissance?barrier=accesspaylog>> [Accessed 9 May 2020].

³Zuranski, R., 2020. *Snowflakes Are One Of Nature'S Most Fragile Things, But Just Look What They Can Do When They Stick Together*. Vista M. Kelly - Be A Hero To Your Kids And Grandkids. [online] Be a Hero to Your Kids and Grandkids. Available at: <<https://insearchofheroes.com/snowflakes-are-one-of-natures-most-fragile-things-but-just-look-what-they-can-do-when-they-stick-together-vista-m-kelly/>> [Accessed 9 May 2020].

revolutionist on the Marxist theory points out that, “Marx expresses a revolutionary concept: the world must not only be interpreted it must also be transformed. Man ceases to be the slave and tool of his environment and converts himself into the architect of his own destiny”⁴. This depicts Karl Marx’s view on class struggle and his resolution to wither away from law and state.

Michael Freeman defines Marxism, as a “system of sociology, a philosophy of man and society and a political doctrine”. To some, it comprises of the dangerous ramblings of a power crazy group of outsiders, whereas to others it is a set of writings based on the humanist reflections of one of the world’s greatest scholars⁵. More specifically, Karl Marx believed that the history of all hitherto Societies was a history of class struggle⁶. Thereby, it was the Marxists’ belief that ultimately this dialectic between the two classes would reach a resolution when the oppressed class overthrew the ruling class through a revolution. This would lead to a dictatorship of the proletariat and a classless society. The state and law would wither away, and there would be an administration of things. This is the foundation work of Karl Marx’s theory.

Historical Background of the Marxist theory

It is noteworthy that both Marx and Engels based their philosophies on the insights of

Hegel and the Hegelian dialectic. For instance, Hegel’s theory of the dialectical method of thought is claimed as the immediate background of Marx’s philosophy. Thereby, according to Lenin without Hegel “Marx’s Das Kapital is unintelligible”. Hegel was a German philosopher who believed that civilization progressed through intellectual development and saw the history of society as a series of conflicts or “dialectics”. Marx following Hegelian view declared his own philosophy as, “the ideal is nothing else than the material world reflected by the human mind and translated into forms thought”. Both Marx and Engels borrowed from Hegel the notion that everything in the world is in constant flux (change), something new is always developing and something old is dying away, soon or later all this change is for the better. Accordingly, adopting Hegelian Dialectical Materialism, in “Das Kapital”⁷, Marx sets out to show how capitalism (thesis) must inevitably by its own inner laws become so increasingly intolerable to the proletariat as to produce revolt against the bourgeoisie (antithesis) and a classless society (synthesis).

In addition to the Hegel’s dialectical materialism, there are number of other contributing factors towards the Marx’s thinking, starting from the industrial revolution, among them three main causes of Marx’s thinking of a classless society can be listed as; laissez-faire theory, the

⁴D' Angelo, E., 2011. *Che Guevara'S Concept Of Revolutionary Love*. [online] The Center for Global Justice. Available at: <<https://globaljusticecenter.org/papers/che-guevara%E2%80%99s-concept-revolutionary-love>> [Accessed 9 May 2020].

⁵Freeman, M., n.d. *Lloyd's Introduction To Jurisprudence*. 9th ed. Sweet and Maxwell.

⁶Collins, H., 2001. *Marxism And Law*. Oxford: Oxford University Press.

⁷MARX, K., 2014. *DAS KAPITAL*. [Place of publication not identified]: CREATESPACE.

labor theory of value and lastly the non-implementation of the Factory Acts. The driving principle behind laissez-faire, the French terms, translates as, “leave alone”, or in other words means the less interference by the government in the economy of the country. Laissez-faire economics is a key part of free market capitalism. However, during Karl Marx’s time, this non-interference itself maintained the domination of the bourgeoisie over the proletariats which placed the proletariats in a vulnerable position.

In addition to the laissez-faire theory, the labor theory of value also played a vital role. This theory can be traced to the writings of John Locke, an English philosopher. While Locke assumes that all the resources that were found in nature had been provided by God, he argued that indeed, the products that a worker produced become an extension of that worker.

Accordingly, Locke employed the Labor theory of value to justify Private Ownership of property which is the cornerstone principle of capitalism. In a way, this became an influential basis for Marx to become a radical critic of the capitalist economy and to justify his views on society.

Lastly, the non-implementation of the Factory Acts which led to the exploitation of the workers (proletariats) by the factory owners was another crucial reason. The working conditions during the industrial revolution were hideous as the main aim of employers was to maximize profit. Workers were exploited through very low wages,

⁸The British-English phrase (**dark**) **satanic mills** denotes industrial mills or factories—especially those of Britain in the nineteenth century—associated with harsh working

long working hours, dangerous working environments. Moreover, worker’s conditions associated with poor ventilation, lack of accident prevention, medical facilities, and sanitation. Employment regulations, conditions, working hours, and related laws were nonexistent, particularly for women and children. Accordingly, the phrase ‘**dark satanic mills**⁸’ is often used to describe the early industrial revolution and its destruction of nature and human relationships. As a result, a series of Factory Acts was campaigned for by workers themselves and these Acts were passed by the UK parliament addressing their major problems. However, these acts were largely ineffective and the legislative content took a long time to be fully enacted.

Moreover, although factory inspectors were appointed in less they had little important they had little impact until much later. Accordingly, it is clear that Hegel’s dialectical materialism, laissez-faire principle, the labor theory of value, and factories Acts provided the background for Marx to be a radical critic of capitalism. However, in comparing with the 19th century where Karl Marx lived in, isn’t the 21st-century proletariats are better off? Therefore, isn’t Marx’s theory more applicable globally at the moment?

Is there a real need to call back the Marxist theory globally at the moment?

After the fall of the Soviet Union as highlighted in the publication of Animal

conditions and regarded as representing exploitative and dehumanizing industrialization.

Farm⁹ by George Orwell, many academics concerned that it seems like Marxism had finally been proved wrong and capitalism was the only show in the town and had finally reached the glorious ‘end of history’. Moreover, in the current state of global politics with the development of international organizations subsequent to the world war II, such as; United Nations, Red Cross, International Court of Justice, International Criminal Court etc. one may argue that capitalist’s concepts such as ‘colonization’,¹⁰ has come to an end which was replaced by concepts such as ‘sovereign equality’¹¹ and ‘independence of states’ and thereby the current position of global politics is better off than the 19th century. However, whether these concepts and organizations achieved their real meaning is yet another issue to be concerned about.

In the modern context, Louis Menand and G. Stedman Jones state to put Marx back to the current surrounding mission itself are worthy! and this is what scholars do! For instance, through the hit of the global economic crisis and faith in globalization and capitalism been crumbled Marxism has made a political comeback. Particularly through the concepts of American exceptionalism¹², it is apparent that there is no equality among states and thus the concept of ‘sovereign equality’ has only a conceptual value rather than a practical value. For example, show casting US’s

power in the event of not supporting the Jerusalem decision in the United Nations General Assembly (UNGA), President, Donald Trump went on cutting off the funds given to third world countries such as GSP funds.

Moreover, not only the United States of America (USA) but also other powerful states have used their economic and military power to oppress third world countries. A modern-day example of such would be the granting of thousands and thousands of loans to third world countries in the world, by the Republic of China, implicitly to gain control and support over those third world countries, which many people do not realize, especially the daily wage workers who have many other reasons to be worried about in their fight over hunger. In addition, exploitation inside factories can be seen even today. For example, some researchers of china’s Foxon city also known as iPhone city has been successful in finding accusations of poor conditions in factories where people outside want to join but people inside want to quit. Accordingly, isn’t there a need for a renaissance in Marxism in the 21st century?

Base and Superstructure

In order to evaluate the renaissance of the Marist theory globally at the moment, Marx’s concept of base and superstructure needs to be identified in determining the way in which the hierarchical system of

⁹Orwell, G. and Tull, P., 2008. *Animal Farm*. Chagrin Falls, Ohio: Findaway World.

¹⁰the action or process of settling among and establishing control over the indigenous people of an area:

¹¹Sovereign equality is the concept in which every sovereign state possesses the same

legal rights as any other sovereign state in international law.

¹²American exceptionalism is the theory that the United States is different from other countries in that it has a specific world mission to spread liberty and democracy.

global politics has been used to oppress third world countries. Marx being a dialectical materialist developed a science of historical materialism that explains the world in scientific and economic terms. Thus he believed that the structure of classes at any given time is determined by the mode of production as the 'nature of individuals depends on the material conditions determining their production'. Using this base and superstructure metaphor Marx pointed out that the base of any given society was its economy, whereas all other factors such as law, religion, the state were merely the superstructure which rose upon the economical foundation.

Accordingly, Marx indicates how the ruling class which has control over the base uses the superstructure to exploit the working class. This approach of Karl Marx can be seen clearly in current world politics, as in countries such as Nepal, India, and Bangladesh the poor in society have nothing to sell but their labor and are helpless at the hands of the economically wealthy. A more prominent example of this is the conditions of workers from countries such as the Philippines and Sri Lanka in Arabic countries. A very high number of women and men go to work as domestic servants in Arabic countries, which is also one of the main incomes for the economy of these third world countries. However, their working conditions are hideous; some come back to the home country with nails being inserted into their body by their

masters and some will never get a chance to come back to their home country. Nevertheless, even today many people go to work as domestic servants due to poverty.

Moreover, in *people of the state of California v Orenthal James Simpson*¹³ the American footballer OJ Simpson was acquitted after being charged with the murder of his ex-wife and her friends. Moreover, another prominent example is the UK's richest man Jim Ratcliffe has billions of realms to move to Monaco and some argue it is due to tax liabilities, but on the contrary, if it was done by a proletarian in an Asian country or in a western country itself the consequences would be hazardous. In addition, the exercise of Presidential pardon in Sri Lanka giving the freedom for prisoners has been recently debated, with a common view developing among the general public that even a murderer or a rapist may be lucky enough to be awarded a presidential pardon if he or she is a wealthy or an influential person in the society.

However, if it is so what about other inmates who cannot afford such a luxury, being born as poor? These are clear examples of how the economically wealthy may use the superstructure for their advantage even in the modern era. Even in the international system, such an unequal distribution can be seen specifically with the Veto power¹⁴ granted only to 5 powerful countries in the world inside the United Nations Security Council (UNSC),

¹³ O. J. Simpson murder case (officially People of the State of California v. Orenthal James Simpson) was a criminal trial held in Los Angeles County Superior Court.

¹⁴The United Nations Security Council "veto power" refers to the power of the five

permanent members of the UN Security Council (China, France, Russia, the United Kingdom and the United States) to veto any "substantive" resolution.

which had been used by these countries to prevent any measures being imposed upon them or their friendly nations, thereby oppressing the less powerful countries in a larger scale who do not possess such a power. NATO intervention in Kosovo, Palestine being not regarded as a state by the United States are such clear examples where the powerful countries used their veto power to oppress other Nations.

Law and State

On the other hand, one may argue that although there is no world government in the international system to protect states from such oppressions; United Nations, International Court of Justice etc. act as international organizations to maintain sovereign equality and thereby to protect the citizens of every country in an equal manner. Accordingly, isn't the condition better off? Marx answers this through his idea on Law and state. For Marx law and state are both oppressive tools used by the bourgeoisie to further their interests. As Marx stated, "the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie"¹⁵. It was also his view that "Through the emancipation of private property from the community the state has become a separate entity, besides and outside society, but it is nothing more than a form of organization which the bourgeoisie necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and

interests"¹⁶. Furthermore, as David and Brierley point out "law is only a superstructure; in reality, it only translates the interests of those who had reigns of commands in any given society"¹⁷. As per Karl Marx, "The ruling ideas of each age have ever been the ideas of its ruling class"¹⁸. This Marxian approach towards Law and State is not an outdated concept and is very much linked to the current global politics. For instance, a follower of Marxist would argue that, by ordering others not to steal property via Laws such as criminal laws that prohibit certain activities such as theft, is just another way for the wealthy to keep their property to themselves? In this manner doesn't the law merely serve the bourgeoisie interest. Moreover, even in the modern era although world institutions are established to govern international relation, rules enacted by such institutions do not apply equally as economically strong countries such as China, Russia, Korea etc. have used this economic base to rule third world countries even by implied ways such as loans/funds which would hold the poor countries binding. Even today a larger number of countries are within China's debt trap.

However, the above-mentioned institutions couldn't take any appropriate measures to safeguard the third world countries which spectacles that these institutions were also institutions of superpowers. As was stated by Marx himself, "In acquiring new productive forces men change their mode of production; and in changing their mode of

¹⁵Ibid 1

¹⁶Marx, K., 2000. *German Ideology*. London: Electric Book Company.

¹⁷Zimmermann, A., 2009. Marxism, law and evolution: Marxist law in both theory and practice. *JOURNAL OF CREATION*,.

¹⁸Ibid 1

production they change social relations. The hand mill gives you society with a feudal lord; the steam mill, society with the industrial capitalist”¹⁹. Thus, it is clear that whether it is the 19th century or the 21st Century, in effect it is the identical system of class struggle that is happening in the world, though it is known with different terminology.

Oppression and Mystification

However, one may wonder why oppressed countries would not revolt if there is such injustice. This is answered by Marx using the concepts of ideology²⁰ and mystification²¹ by explaining how the proletariats are unaware of their exploitation and thus have no inclination to revolt. For instance, as Christine Sypnowich points out in Stansfield encyclopedia of philosophy, “ideology conserves by camouflaging flawed social relations, giving an illusionary account of their functions or rationale to justify and win acceptance of them”²². This false consciousness is the biggest obstacle to the proletarian revolution and Marx calls for a “demystification of ideology where the proletariats develop class consciousness and are thus inclined to revolt” (Marx, and Engels).

¹⁹Marx, K., 2003. *The Poverty Of Philosophy*. [Belle Fourche]: NuVision Publications.

²⁰ Ideology according to Marx is a veil pulled over the economic base in order to prevent people from seeing its inherent injustice (that is, until communism comes). Ideology convinces people that the current state of production is justified, warranted, "natural" or anything else which gets them to comply to it.

²¹Mystification is the process of consciously making objects mysterious out of the domain of reason.

Even in the modern global context, this theory can be seen as even today oppressed countries are unaware of their exploitation either because the exploitation was done in an implied such as by way of loans or the exploitation itself being covered by laws and regulations such as by the name of the United Nations. Moreover, the question as to why this exploitation was done implicitly was answered by Marx himself stating that “the consent of the masses of the people to law and governance in liberal democratic states will not be available if the ideology of the law bears no relation to actual reality”²³. Thus, Marx suggested the only way to achieve social justice is a revolution and withering away from law and state. However, although the Marx’s theory is applicable globally at the moment, it is highly doubtful how shall a state exist after withering away from state and law, “wherever law ends tyranny begins”- John Locke²⁴.

Marxist Feminism

Marxist feminism focuses on how women are oppressed through capitalist economic practices and the system of private property. Accordingly, they point out how women are exploited in the home as well as in the workplace. Marx in communist

²²Cudd, A., 2007. Sporting Metaphors: Competition and the Ethos of Capitalism. *Journal of the Philosophy of Sport*, 34(1), pp.52-67.

²³ Ibid 14

²⁴→, V., 2020. *Wherever Law Ends, Tyranny Begins*. [online] A Principled view. Available at: <<https://jameswilding.blog/2016/04/29/wherever-law-ends-tyranny-begins/>> [Accessed 9 May 2020].

manifesto pointed out that the capitalists used their wives like instruments of production. He further argued that marriage could be considered as a legalized form of prostitution and concluded that it is only by the abolition of cases this can be abolished. Moreover, Marxist feminists recognized two types of labor present in a Capitalist Economic System: Productive labor and reproductive labor. Marxist feminists point out that in a capitalist economy, reproductive labor is usually considered to be exclusively women's labor. This creates a system in which women's labor is separated from men's labor, and is considered to be less valuable because it does not earn monetary compensation. Supporters of this theory believe that because women's labor is devalued, women as a group are devalued and oppressed. To overcome this system Marxist feminist, support a radical reconstruction of the capitalist economy. Even in the modern context although the situation of European women would slightly be different, most of the African and Asian Women are still facing the same tragedy with no recognition for the work done inside the house, which calls for a radical reconstruction of the society even in the 21st century.

However, at least outside the domestic context now the work done by women are recognized and valued thanks to Human Rights activists, equal pay Directives and cases such as Defrenne Vs Sabena²⁵which

decided on equal pay and non-discrimination based on sex.

Conclusion

Adrian Wooldridge, a British journalist and columnist for *The Economist* believes “Marxism is absolutely making a political comeback”²⁶. Strongly this could be seen in with the labor party in Britain, particularly Jeremy Corbyn is very much influenced in Marx's thinking, also in his team his chancellor, John Mc Dowell globally at the moment claims himself to be a Marxist and thinks that his biggest influences are Marx, Lenin, and Trotsky. Even this has been the case in the USA where Bernie Sanders talk more about Marx. Moreover, there is also a renaissance in the influence of Marxist analysis of the law on countries such as Vietnam, Laos, and Cuba. Moreover, on May 5, 2018, New York Times ran its heading to mark the 200th birth anniversary of Karl Marx as “Happy birthday Karl Marx. You were right”²⁷ which speaks volumes of his relevance today. Further according to Sitaram yechury secretary general of the communist party of India and even according to Marshal Tito one would agree even the last five communist countries even to a certain extent has a renaissance in their views on Marx's theory globally at the moment.

In conclusion, as per many eminent academics, Marxism is back! Like the final act of a horror movie, the monster has

²⁵Defrenne v Sabena [1976] ECR 455

²⁶Debating Europe. n.d. *Is Marxism Making A Political Comeback?* - Debating Europe. [online] Available at: <<https://www.debatingeurope.eu/2018/02/19/marxism-making-comeback/#.Xrb5t2gzZPY>> [Accessed 9 May 2020].

²⁷Nytimes.com. 2018. *Opinion | Happy Birthday, Karl Marx. You Were Right!*. [online] Available at: <<https://www.nytimes.com/2018/04/30/opinion/karl-marx-at-200-influence.html>> [Accessed 9 May 2020].

returned to life for one last scare. As was proved above it is clear that although Marx's theory is best suited for a 19th century even today considering the current world politics it can be argued that what Marx then described can even be seen today differently and today the exploitation is of large scale. It must also note that, Marx's theory was never a dead theory; it was followed by many academics and adopted by many countries around the world. It is provided that due to the great scale exploitation of proletariats Marx's theory is now more convincing than ever. Thereby it is clear that given the current global politics there is a renaissance in Max's theory globally at the moment and as a result, many more countries should pave their pathway towards Marxism.

STOP SAYING “I AM WHAT I AM TODAY BECAUSE I WAS HIT”

CORPORAL PUNISHMENT – IS IT NECESSARY TO DISCIPLINE YOUR CHILD?

S. Rashmi Balama*

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This song of famous Sri Lankan baila singer Nihal Nelson gives you a nice explanation of the importance protecting children rights.

Let me ask you a simple question.

Haven't you ever got punished in the school or house? Haven't you ever kneel down in front of the class room or principal's office for not doing home works or for getting late to the school. Duster filled with white chalk powder! Remember? Scariest weapon of the Maths teacher.

Haven't you ever been a part of a "Sibling Fight" with your own sister or brother? Then got punished by mom or dad & missed the next meal or missed the chance to watch the favourite TV program; sesame street?

It's really hard to find someone who never got punished in their childhood.

But the time has come for a change in order to create a better world!!!

Child protection is important because it addresses some of the most vulnerable sector of people in the society. In this article, I will discuss about the Corporal punishment which is considered as a main aspect of Child violence.

Violence in childhood has been linked to psychological, physical and emotional health problems as children grow up. Child protection is about preventing violence and ensuring children who have experienced violence are cared for.

The Convention on the Rights of the Child (CRC)

The international law instrument that covers the rights of children is the Convention on the Rights of the Child (CRC).

It was adopted by the United Nations in November 1989, and less than a year later it became law in September 1990, which, in UN terms, is a very quick turnaround. The Convention consists of 54 articles, of which 41 refer to substantive issues and the rest are just procedural.

The UN Convention on the Rights of the Child (CRC) is the most widely ratified international human rights treaty in history and outlines the fundamental rights children have, and the obligations of governments to children. These global standards guide programs and policies for children and can be used to identify when children are denied their rights and be used to seek redress.

What is Corporal punishment?

Corporal punishment is defined by the United Nations Committee on the Rights of the Child as: "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light"¹.

Moreover, Corporal punishment means punishing someone using physical force in a way which is meant to hurt them or make them uncomfortable. Corporal punishment can take the form of hitting ('smacking' or 'spanking') children, kicking children, shaking them or forcing them to stay in uncomfortable positions. Any punishment using force is corporal punishment, however light it is. There are also other forms of punishment which are not physical, but which are just as cruel – for example, deliberately making children feel scared or embarrassed.

Corporal punishment is widely practiced across countries and cultures, and a child protection issue that many of us have personally experienced.

Over the last few decades, the acceptability of severe corporal punishment has decreased and corporal punishment is increasingly being recognized as a violation of a child's rights. As we will go on to discuss, the rights in the CRC are contested. The CRC challenges existing ideas of what children deserve and how they should be protected, and offers new approaches to conceiving of the rights and well-being of children.

The United Nations Committee on the Rights of the Child is in charge of making

¹UN Committee on the Rights of the Child (2001) "General Comment No. 1:" par 11.

sure that the countries who have signed the Convention actually put it into practice. The Committee has been clear that for countries to properly protect children's human rights one of the things they must do is have laws that ban all corporal punishment of children. However, passing and implementing these laws is challenging. Explore the map below to see which countries have prohibited the different forms of corporal punishment.²



As you can clearly see, Sri Lanka is in blue colour meaning our Government is committed in full prohibition.

Where does it happen?

- *Home*
- *Schools*
- *Alternative care settings* – Corporal punishment should be prohibited in all alternative care settings (foster care, institutions, places of safety, emergency care, etc).
- *Day care* – Corporal punishment should be prohibited in all early childhood care (nurseries, crèches, preschools, family centres, etc) and all day care for older children (day

² <https://endcorporalpunishment.org>

centres, after-school childcare, child-minding, etc).

Most importantly, children living in detention facilities, orphanages, on the street or in refugee camps require additional protection, resources, and support to ensure their rights are not being denied, to reunite them with their families, or to find alternative care for them.

Why it is more important? Because those children are not placed under their biological parents who does not wish to destroy them or with teachers who are legally obliged to protect them. These children are out of the sight of the society and thus can easily be abused.

How does it happen?

These are few types of Corporal punishments that can be seen in the society.

- **Forced children to kneel.**

A 35-year-old Tokyo school teacher made 96 high school students kneel for 20 minutes in the plaza outside the Tokyo Metropolitan Government building in who said he was annoyed with the students who were late for a field trip and ordered them to kneel on the tiles for 20 minutes to discipline them, Fuji TV reported.

- **Made children swear not to misbehave.**

This is several notches down from kneeling. One kid was made to stand in front of the class, put up three fingers, and swear that he would never misbehave again.

- **Called childrens' names and hurled verbal abuses.**

One time, a myopic student walked up to the front of the class to have a closer look at the whiteboard and got scolded for that. When he explained his poor eyesight, this is what she had to say. “*TOO BAD THAT YOU CAN’T SEE, GO GET NEW SPECS!*” On a separate occasion, another student did the same thing and was told:

“GO BACK TO YOUR SEAT! GO GET NEW SPECS, YOU DON’T HAVE MONEY TO BUY ONE?!?”

Students who forgot to bring their science books were also called “*retarded monkeys*”. Guess what – this insult happens to be the tamest of this list.

- **Threw actual objects at children.**

So far, the brazen teacher has thrown a stapler, water bottle, and several markers in the direction of kids whom she deemed deserved it. One of the markers actually struck a child on the lip.

Here was her defence: the marker slipped out of her hand and accidentally hit the child in the face. Apparently, it’s gotten so bad that students have to stay alert and dodge when it happens. Never thought there’d be a day this happens in Singapore.

- **Called a Christian student a “disgrace to God”.**

On several occasions, she publicly shamed a student whom she knew was a Christian, and told him that he was a “disgrace to God”.

Her statement was so emotionally traumatic that upon returning home that day, the kid held his Bible, went to the store room alone and sobbed.

- **Threatened students who complained to parents.**

Upon discovering that the school had received complaints from worried parents, the teacher decided to scare them into submission.

“I KNOW SOMEBODY COMPLAINED ABOUT ME. I WILL NOT SAY YOUR NAME BUT I KNOW WHO IT IS...”

Some netizens expressed their concern regarding her abusive tendencies, with one

Facebook user commenting that “abuse should never be tolerated or excused”, and advised her to “seek help”.

Why Corporal punishment should be prohibited?

Those who advocate for corporal punishment in schools believe that it is an effective and immediate way to curb discipline problems in the classroom. It also sends a strong message to the other children that there are swift and uncomfortable consequences for misbehavior in the school environment.

But is it what really happened?

Corporal punishment and physical abuse are commonly viewed along a continuum, so that, when corporal punishment is administered too severely or frequently

the outcome can be physical abuse³. The American Academy of Paediatrics has concluded that corporal punishment is ineffective at best and harmful at worst⁴. Canadian researchers dug through 20 years of published research and found that spanking fails to change a kid's behaviour and can cause long-term damage. They found that kids who are spanked are more likely to be depressed, aggressive, antisocial and anxious⁵. In Sri Lanka, there have been few studies on corporal punishment and physical abuse. The most detailed study was by De Zoysa, Newcombe, and Rajapakse in 2008, on 12- year-old Sinhala speaking school children. It reported a high prevalence and frequency of corporal punishment⁶.

Dr Piyanjali De Zoysa, Professor in Clinical Psychology, Faculty of Medicine, University of Colombo, elaborated on

³Gershoff ET. Corporal punishment by parents and associated child behaviours and experiences: A macroanalysis and theoretical review. *Psychological Bulletin* 2002; 128:539-79.

<http://dx.doi.org/10.1037/00332909.128.4.539>

⁴American Academy of Paediatrics. Guidance for effective discipline. *Pediatrics* 1998, 101:723-8.

⁵Durrant J, Ensom R. Physical punishment of children: lessons from 20 years of research. *Canadian Medical Association Journal* 2012; 184(12): 1373-7. <http://dx.doi.org/10.1503/cmaj.101314>

⁶de Zoysa P, Newcombe PA, Rajapakse L. Consequences of parental corporal punishment on 12-year old children in the Colombo district. *Ceylon Medical Journal* 2008; 53(1): 7-9. <http://dx.doi.org/10.4038/cmj.v53i1.218>

why corporal punishment persists in the country. She said, "When we consider why an adult would beat up a child we see that most people do this with an idea of compliance. They expect the child to behave at that certain time. Usually when you hit a child or pull at the child's hair, there is immediate compliance. Most people are very happy about that. But as rational adults we want something more than immediate compliance and we want something more for our children. We want to make them functioning citizens of the world." She further showed how there is no moral internalisation when a child is subjected to corporal punishment, and added, "The values that the adults want to impart to the child when they hit a child is not internalised. For instance when a child is hit for not producing the completed home work, the child feels unhappy, shameful and angry. They do not grasp the message that the teacher wants to give. The biggest problem when a child is hit is that they do not learn societal values. Children also learn that aggression is okay. They begin to imitate this behaviour. This is seen in our state universities when students rag other students and at the work place when we find work place harassment. Of course in the work place physical abuse is seldom seen, however verbal harassment and passive aggression exists in the work environment. The reason is that as children if we learned that hitting is normalised it is carried in their adulthood as well."

She highlighted the three main reasons that teachers beat up children, referring to a study done by Professor Harendra De Silva in an island wide survey, in six district in

Sri Lanka on school corporal punishment:
Not doing homework, Love affairs and
Dress code.

These are basic issues that are seen in all schools in the globe. Children not doing homework because there is an inundation of homework in our system and having love affairs and not dressing properly are normal psycho-sexual behaviour. However, beating children for such behaviour has a plethora of consequences.⁷

Sri Lanka's approach in prohibiting corporal punishment

Sri Lanka expressed its commitment to prohibiting all corporal punishment of children, including in the home, at the July 2006 meeting of the South Asia Forum, following the 2005 regional consultation of the UN Study on Violence against Children. This commitment was reiterated during the Universal Periodic Review of Sri Lanka in 2017, during which Sri Lanka clearly accepted a recommendation to prohibit corporal punishment in all settings. Sri Lanka is a Pathfinder country with the Global Partnership to End Violence Against Children, which was established in 2016.

The Penal Code Amendment Act No. 22 of 1995⁸ provided for the offence of

Cruelty to Children (section 308A) which reads as follows:

- (1) "Whoever, having the custody, charge or care of any person under eighteen years of age, willfully assaults, ill-treats, neglects, or abandons such person or causes or procures such person to be assaulted, ill-treated, neglected, or abandoned, in a manner likely to cause him suffering or injury to health (including injury to, or loss of sight or hearing, or organ of the body or any mental derangement), commits the offence of cruelty to children.
- (2) Whoever commits the offence of cruelty to children shall on conviction be punished with imprisonment of either description for a term not less than two years and not exceeding ten years and may also be punished with fine and be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person".

Through the Penal Code Amendment Act No. 16 of 2006⁹, Section 308A was amended by the addition of the following explanation: "injury" includes psychological or mental trauma. However, article 82 of the Penal Code¹⁰ states: "Nothing, which is done in good faith for the benefit of a person under twelve years of age, or, of unsound mind, by or by consent, either

⁷ <http://www.dailymirror.lk/news-features/Corporal-Punishment-discipline-and-truth>

⁸ Parliament of the Democratic Socialist Republic of Sri Lanka: Penal Code (Amendment) Act, No. 22 of 1995.

⁹ Parliament of the Democratic Socialist Republic of Sri Lanka: Penal Code (Amendment) Act, No. 16 of 2006.

¹⁰ Penal Code

express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause/or be intended by the doer to cause, or be known by the doer be likely to cause, to that person”.

Article 341 of the Penal Code provides for the offence of “criminal force”. It states: “Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending illegally by the use of such force to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use "criminal force" to that other”.

However, Illustration (i) of article 341 states that if a schoolmaster, in the reasonable exercise of his discretion as master, flogs one of his scholars, he does not use criminal force, because, although he intends to cause fear and annoyance to the scholar, does not use force illegally.

Article 71 of the Children and Young Persons Ordinance (1939)¹¹ provides for the offence of Cruelty to Children and Young Persons. 71(1) states: “If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted,

ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence and shall be liable to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not exceeding three years, or to both such fine and imprisonment”. In addition, 71(6) states: “Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having lawful control or charge of a child or young person to administer punishment to him”.

Thus, currently in Sri Lanka, corporal punishment is lawful in the home, at school and in alternative care settings such as public and private day care, residential institutions, foster care, etc. Although section 2 of Circular No 2005/17, issued by the Ministry of Education in 2005, states that corporal punishment should not be used in schools, this had not been confirmed in the legislature.

A National Action Plan for the Promotion and Protection of Human Rights 2011-2016¹² (NAPHR), has been approved by the Cabinet and its implementation strategy was approved in 2011. NAPHR 2011-2016 Goal No. 7.5 is the elimination of corporal punishment

¹¹ Children and Young Persons Ordinance

¹² Sri Lanka National Action Plan for the Promotion and Protection of Human Rights 2011-2016.

in schools. The activities envisaged are as follows:

- Implement effectively existing legislation/policy
- /circulars prohibiting corporal punishment and establish a reporting procedure so that instances of corporal punishment can be reported effectively.
- Enact and enforce legislation to prohibit corporal punishment in schools and educational institutions.
- Create awareness among parents, teachers and principals on the law and on alternate forms of discipline consistent with the dignity of the child.
- Establish a grievance mechanism to report corporal punishment.
- Conduct periodic survey on the incidence of corporal punishment to ascertain statistics on corporal punishment.

There seems to be some degree of apparent or perceived ambiguity and possible conflicts in the many documents, circulars and legislative pronouncements regarding corporal punishment in Sri Lanka. In view of the clear scientific evidence for the obvious ineffectiveness and potentially harmful long-term effects of corporal punishment in children, what is probably the need of the hour is a clear, explicit and unequivocal legal declaration on the matter in question.

It is a must that Sri Lankans find the time to read up and analyze the corporal punishment laws that have been enacted.

Apart from legislation, Non-governmental organizations such as UNICEF is working with partners to strengthen the child protection system at the national, regional and community level so that children can thrive within supportive family and community environments that protect them, and provide them with safe and equal access to important services.

Over the past three decades, UNICEF has been working with the Sri Lankan government to strengthen the child protection system and has played a central role in policy formulation and strategic planning.

Is Corporeal punishment is the only way out? Are there any alternative methods to discipline the child?

Despite of the facts I explained above it is an acceptable truth that parents, teachers or officers in charge of a child, it could be really frustrating, upsetting and mentally exhausting when these children fight with each other or engaged in any type of misbehavior. So these are fascinating and effective solutions to that problem.

- **Hold Hands, (Or Sit Nose to Nose) or Hug it Out-** this is a sure-fire solution to end the quarrelling.
- **2 Bodies 1 Tee-Shirt** - Some call it the punishment shirt, while other families call it the I Love You Shirt. The idea is that you have an extra-large men's T-shirt that the children have to wear *together* until they stop bickering. Older kids can even be made to do chores while crammed in the tee-shirt together. While the shirt is on, talk about how things work out

better when they work together. This method is mostly used by western countries in sibling fights.

- **Be Calm** – Adults can always explain to their children conflict resolution skills, so when the fighting breaks out, they stay out of it, intervening only when absolutely necessary.
- **Clean the House or classroom or dorm**-So adults can make their kids clean the house when they're bickering needlessly. Given the choice to clean the house or classroom or dorm or stop arguing, kids will stop arguing every time.
- **Give them a Problem to Solve Together** - One mom had three boys very close in age, and to stop their arguing she would have them do a puzzle together. When they finished that one, she would give them a harder one. Solving puzzles together encouraged them to get along, rely on each other, and help one another. This method can be used even in schools as it drives the mind of the child in an effective way.

Conclusion

We have to accept the fact that practices that have existed for generations are very hard to change. It is sad that there is a mistaken notion that it is good for the child.

"Once I gave a lecture on corporal punishment at a leading school in Colombo, and after the lecture a teacher came up to me and said I am what I am today because I was hit. I said if you were not hit you would have been the principal of this school," said Prof. Harendra de

Silva, Founding Chairperson, NCPA and Professor Emeritus of Paediatrics (Col), Former Member Presidential Task Force on Child Protection.

The attitudes of people have not changed since their childhood. However, Prof. Harendra illustrated the different stages we need to go through to stop corporal punishment: Provide information and knowledge to the people, as to why we should not beat up a child. This knowledge must be ingrained within the people. We need to have attitudinal change; simply giving knowledge is insufficient. We must provide skills to people regarding what to do when a child misbehaves.

Most people believe that corporal punishment is part of our culture and other forms of soft discipline is from western culture,¹³ which is a "pure myth".

So it's time to stand up against Corporal Punishment – Start the mission first within you!



<https://srilankabrief.org/2018/06/73-4-of-children-between-1-and-14-subjected-to-corporal-punishment-in-srilanka-unicef>

¹³ <http://www.dailymirror.lk/news-features/Corporal-Punishment-discipline-and-truth>

MANURAWA 2020

'AN ACCUSED'S TALE OF WOE BENEATH THE GLASS CEILING': A LEGAL DISSECTION

Zamzam Ismail*

Born as a human being well equipped with human rights, it could be heinous to distort the rights of another by committing a socially unacceptable act against humanity. Yet, the sanctum of justice reserves a place for this being, a glass box in which he stands, exposed to the world, offered with an opportunity to unveil his unsworn tale of woe, whose authenticity is only known to the conscience of this very being. The under lying notion of this is that how distasteful the individual is, the justice system will never denigrate the rights he has as an accused.

The right to a fair trial is considered to be the essence of democracy and rule of law. This right encompasses prime safeguards to an accused in a criminal trial more often than not which are the right to be presumed innocent until proven guilty and the right to remain silent. It also includes the right to make a statement from the dock and/or the right to legal representation in order to setup a defence. The whole notion of the justice systems around the world is intrinsically connected with honouring human dignity. These principles are enshrined in the Constitution, International Conventions but are deeply rooted in the common law jurisprudence.

A criminal trial being yet another instance where the life, liberty and freedom of parties (an accused) are jeopardized till proven guilty, recognizes the principle of fair hearing, akin to **DUE PROCESS of Law**. The pragmatic approach to ensure fairness is by scrutinizing the

competency of an accused in a criminal trial to make a statement from the dock. The Law of Evidence which deals with this aspect in Sri Lanka have been enshrined in the Evidence Ordinance in Toto. As per Section 120(6);

"In criminal trials the accused shall be a competent witness in his own behalf, and may give evidence in the same manner and with the like effect and consequences as any other witness, provided that, so far as the cross-examination relates to the credit of the accused, the court may limit the cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness."

According to the aforementioned section, an accused in a criminal case is a qualified witness and can testify in the same manner and with the same results as any other witness. Hence, the accused has been made a "competent" witness. Therefore, our law allows for an accused to testify on his own behalf and call upon witnesses to testify on his behalf. Further, in terms of section 120 (6) above, it is clearly seen that when an accused gives evidence, he is provided with protection that no other witness given.

Should an accused be entitled to a right to make a statement from the dock while such provisions are made in our law? Why, then, does our law recognize such a right? In what law is that right mentioned? What is the effect

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of such a statement? What is the evidentiary value of a dock statement? Under what circumstances would such a statement be useful?

The answers to these queries lie beneath the analysis of how the accused got the right to make a statement from the dock.

Where It All Started – The Origin Story Of The Dock Statement

The Sri Lankan Evidence Ordinance is a complete statute of law. It was first adopted in 1895, but the number of amendments made to the principal enactment is minimal.

The fundamental question revolves around the origin of the right of an accused to make an unsworn statement from the dock as it is neither embedded in the Evidence Ordinance nor in any other written law.

"In the early days English Law did not permit a defendant in criminal proceedings the right to give evidence in his own defence. The law of England at that time was exposed to the criticism that exclusion of sworn testimony by the Accused gravely hampered a blameless Accused in vindicating his innocence. Thus, the position in England was changed by Section 1 of the Criminal Evidence Act of 1898 which rendered an Accused a competent witness for the defence in all criminal cases. Furthermore, Section 1 (h) of the said Act embodied the express proviso that, "Nothing in this Act shall affect ... any right of the person charged, to make a statement without being sworn ". Thus, it appears that proviso to Section 1 of the Criminal Evidence Act No. 1898 is what allowed an Accused, when

called up for defence, to make an unsworn statement from the dock."¹

Even before the Criminal Act of England in 1898 provided for the right to an Accused to give sworn evidence, Evidence Ordinance in Sri Lanka embraced it in 1895.

The Code of Criminal Procedure Act. No. 15 of 1979, in Section 7 provides that,

"As regards matters of criminal procedure for which special provisions may not have been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require and as is not inconsistent with this Code may be followed."

As the aforementioned fundamental question arose, in addition to the provisions of Criminal Procedure Act, Section 100 of the Evidence Ordinance provided that recourse was to be had to English Law in the case of a Casus Omissus. Accordingly, making use of Section 100, Sri Lankan Courts recognized the right of an Accused to make an unsworn statement from the dock in the case of King V. Vallayan Sittambaram², where His Lordship Bertram C.J. stated;

"... There is no provision on this subject one way or the other in the Code, and this is, therefore, another point on which we may have recourse to English procedure. The rules of English procedure are plain. The prisoner may still if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box, and on this analogy he has the same right in Ceylon...."

¹ Professor Peiris, G.L. 1981, 'UNSWORN STATEMENTS BY ACCUSED PERSONS: TRENDS IN THE COMMONWEALTH'

²[1918] 20 N.L.R. 257

Thus it is seen that, the right of an accused person to make an unsworn statement from the dock, as was recognised under the English Law, had been consistently followed by our Courts for a long time, and it is in conformity with the legal provisions found in our law, even at present.

Justice Shaw delivering a separate judgment on the same case emphasized on the fact that, “our code is silent as to whether or not it is open to an accused to make an unsworn statement at the trial.” But has gone on to refer to **Section 6 of the Criminal Procedure Code of 1898**, and has stated as follows at page 274.

“Section 6 of the Code, however, provides that, as regards matters of criminal procedure for which no special provision is made, the law relating to criminal procedure for the time being in force in England shall be applied, so far as the same shall not conflict or be inconsistent with the Code and can be made auxiliary thereto. In England it has always been open for an accused to make an unsworn statement at the trial, should he desire to do so, and this right still exists, notwithstanding the right of an accused to give evidence on oath under the provisions of the Criminal Evidence Act, 1898.”

It was subsequently held that a prisoner may, if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box and gradually Dock statement crept into our criminal procedure and became a rule of practice.

Sri Lankan Courts on this basis have continued to place evidentiary value in dock statements, as seen in cases such as Queen V. Buddharakkita

Thera³and Queen V. Kularatne⁴where it was held that while jurors must be informed that such a statement must be looked upon as evidence, subject however to the infirmities that the Accused statement is not made under oath and not subjected to cross examination.

In “Kularatne” Court further held that;“But the jury must also be directed that,

- a) If they believe the unsworn statement it must be acted upon,
- b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and
- c) That it should not be used against another Accused.”⁵

However, the two infirmities to which the dock statement is subject to, i.e. the statement made been not under oath and it is precluded from either cross examining or questioning, has welcomed plethora of criticisms in all forms. Thus it is in fact a weak form of evidence which in practicality needs corroboration from other material witnesses in order to stand on its own footings.

The dubious nature with regard to the evidentiary value of dock statements has led to the abolition of the right of the Accused to make an unsworn statement in the United Kingdom by Section 72 of the Criminal Justice Act 1982. Other commonwealth countries that followed the English approach in bringing the right of an Accused to make an unsworn statement, such as South Africa (Criminal Procedure Act 1977) and South Australia (Section 18 of the Evidence Act 1929) abolished the same even before the United Kingdom.

³[1962] 63 N.L.R. 433

⁴[1968] 71 N.L.R. 529

⁵ Ibid

However, until and unless this is explicitly taken out of our law by the legislature, or is revisited by the Superior Courts, the Sri Lankan Courts are bound to follow the same legal principle which gives such right to an Accused as stated in cases 'Vallayan', 'BuddharakkithaThera' and 'Kularatne'.

In case of PunchiRala V. The Queen⁶, it was held that, where at a trial before the Supreme Court, the Accused makes a statement from the dock, the Judge would be misdirecting the jury, if he tells them that they should consider the statement of the Accused but that it is not much value having regard to the fact that it is not on oath and not subject to cross examination.

In case of Don Shamantha Jude Anthony Jayamaha V. Hon. Attorney General held;

"Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of the evidence that is in the light of the evidence for the prosecution as well as the defence ".⁷

Reception of unsworn statements by the judiciary

An accused, who is a layman in terms of the way prosecution functions and the nature of the court proceeding, should be made well aware of the three options given to him by the court of law. It is the defense counsel who should act in the best interest of the accused by taking multiple factors into consideration including the accused's psychology and his ability to face a rigorous course of cross-examination.⁸ The dock statement would be the safest way to relate the

accused's version of the series of event and prove his innocence, if and only if the defense counsel has a firm defense in his favour to back up the dock statement which in turn would create a reasonable doubt in the prosecution case.

Often times the reluctance to accept dock statements with the entire anomaly surrounding it, is quite obvious by the acts of trial judges. Such an instance was elicited in the case of Ganganandav.The state.⁹ It was stated by their Lordships of the Court of Appeal that;

“...In addition, it is pertinent to note here that, the right given to a prosecuting Counsel under **Section 201(2) of the Criminal Procedure Code** is, “to cross-examine all the witnesses called by the defence to testify on oath or affirmation”, (emphasis is mine).As the right to cross-examination, under that provision, is given only in respect of witnesses who have given evidence on, “oath or affirmation”, that provision will have no application to statements from the dock, which always are made, not on oath or affirmation. Furthermore, the admission of dock statements, as evidence, will not offend the provisions of that Section, because it does not exclude the defence from adducing evidence, other than on “oath or affirmation”.

The right of an accused to make an unsworn statement as stated earlierhas now become a deep-rooted principle within the Sri Lankan legal framework. This is yet another rule of practice that has infiltrated our law as a result of misinterpretation of the relevant provisions.

The evidentiary value of the dock statement is the centre of a major anomaly which has been

⁶75 N.L.R. 174

⁷CA 303/2006 (11.07.2012)

⁸Walaliyadda, T. (2013). The Craft of Cross-examination,
pp 166-168

⁹ (1995) 2 SLR 373

controversial and confusing. The infirmities inherent to the unsworn statement necessarily diminish its significance as evidence. It is as if one hand has taken back a thing that the other hand had offered.

The degree of significance attached to dock statements varies from case to case based on the circumstances. Hence it is rather a subjective matter to ponder upon. “An unsworn statement by the accused can consist of one or more of four distinct types of assertions or contentions:

- a) Admissions of fact against the accused
- b) Allegations of fact in his favour
- c) Argument pertaining to (a)
- d) Argument relevant to (b)”¹⁰

Thus based on the facts of the case the, the veracity of the statements made by the accused and his ability to narrate the series of events in a similar fashion as the prosecution and then eventually deviate at a certain point would make the situation strikingly chaotic for the presiding trial judge to make a clear decision. The accused could escape liability without being traumatized by strenuous cross examination using the weakest possible mode of adducing evidence which is making an unsworn statement in such a way that the judge nor the jury (if the trial was led by a jury) would no longer latch on to the Prosecution’s version of the sequence of events by creating an imbalance in the well discharged burden of proof by the prosecution.

This was well explained by Prof. G.L Pieris in his work.

“...One of the fundamental objections to an unsworn statement by the accused is that it enables him to have the best of both worlds by using the opportunity of making averments of fact consisting with his innocence – which are adverted to by the jury in reaching their verdict – without submitting himself to cross-examination by Opposing counsel.”¹¹

In a Criminal trial the, trial judge is duty bound to consider the evidence placed before the court in its totality in order to pronounce the judgment. Even though an unsworn statement carries lesser weight it is still evidence subjected to infirmities which should also be taken into account. In a recent case the trial judge had failed to consider the dock statement, let alone an analysis of the defence evidence. The appellate court emphasized the on the principles of natural justice and the requisites of a fair trial and cited Section 283(1) of the Code of Criminal Procedure Act, which reads as follows:

“The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.”

“It would thus be seen that, the Code of Criminal Procedure Act requires the judgment to contain the following among other features:

- Points for determination
- Decisions of the Court with regard to such points

¹⁰ Ibid 1

¹¹Peiris, G.L. (1980) “LAW ENFORCEMENT AND PROTECTION OF THE RIGHTS OF THE ACCUSED: A COMPARATIVE ANALYSIS OF MODERN LEGAL SYSTEMS.”

- Reasons for such decisions

Therefore, where an Accused makes **an exculpatory dock statement** (as it is often the case), the learned trial judge is required to decide whether or not to accept the position of the Accused, and give reasons for his decision. In the instant case, the learned High Court should have

- a) Referred to the nature of the dock statement made by the Accused,
- b) Pronounced his decision to reject the contents of the dock statement, and
- c) Given reasons for the rejection of the dock statement.

The absence of these features in the impugned judgment renders such judgment voidable. In the circumstances of this Appeal, this Court must hold that the impugned judgment is not in compliance with the rules of natural justice, incompatible with Section 283(1) of the Code of Criminal Procedure Act, and is therefore, unlawful.”¹²

This authority has clearly laid a solid foundation for the unsworn statements made by the accused where now there is no space for it to go unnoticed by the trial judge as the their Lordships’ court has clearly embarked on creating precedence to state reasons for rejecting the dock statement and more over to refer such unsworn statement made, especially if it is exculpatory in nature, in the judgment.

The evidentiary value and the significance of an unsworn statement are intrinsically interconnected to two factors. The first is that an

accused has the right to remain silent in a criminal case, based on the presumption of innocence of the accused. The second is the burden of proof on a criminal case. The burden of proof can be considered in two folds. The first is the **legal burden of proof**. The second is the **evidentiary burden of proof**.

Legal burden is the standard of proof required by law. For example, the prosecution of a criminal case must prove beyond reasonable doubt. Lord Sankey famously described the duty upon the prosecution to prove guilt as the ‘golden thread’ running through criminal law in the case **Wolmington V. DPP [1935] 1 AC 462, 481-82 (HL)**.¹³ The burden of proving special and general exceptions rests on the accused. The relevant standard is to prove on a balance of probability. The evidentiary burden is the burden of presenting sufficient evidence to prove what is required to be proved according to stipulated standards. It is not a *sine qua non* for an accused in a criminal case to adduce evidence by calling for witnesses, in order to discharge the evidentiary burden of proof. Often times, the cross-examination of prosecution witnesses will enable the counsel appearing on behalf of the accused to draw the essence of the facts to their advantage. When deciding when to make an unsworn statement, the theory of the burden of proof mentioned above, the established evidence of the case, and the formula set out in the **Kularatne case** must be taken into due consideration.

¹²NimalPinsiriGodakandeniyage alias NimalPinsiri V. Hon. Attorney General, CA 77/2014 (decided on 18.11.2019)

¹³A report by JUSTICE. (2015) In the Dock / Reassessing the use of the dock in criminal trials. Retrieved from

<https://justice.org.uk/wp-content/uploads/2015/07/JUSTICE-In-the-Dock.pdf>. Accessed 31st April 2020

A Pragmatic Approach

An unsworn statement could be of utmost use, albeit the infirmities and anomalies. A number of simple and general principles can be set out as a guideline to determine the most suitable time at which an unsworn statement can be made from the dock, by meticulously examining authorities and the embedded facts in it. But none of such principles are final or conclusive, and more often than not, the making of a dock statement solely depends on the evidence presented in each case. It is important to note that the basis of the defence is well placed and properly before Court in the course of the cross-examination. The accused can always add his embellishments in his dock statement or in the course of giving evidence, but the basic defence structure should be firmly placed in cross-examination.¹⁴

Be that as it may, the dock statement in fact is a double edged sword. The accused has to walk on a tight rope, as his statement though not made under oath, is required to be true in nature like any other evidence adduced by the defence or the prosecution. An accused in dire need to be relieved from liability cannot blindly make an unsworn statement which may be incompatible with the other established evidence in the case or falsify a well-established fact. The reason for this been that the falsehood of evidence given, **Dock Statement** or a statement made outside the Court by the accused may be used to *corroborate* the prosecution case. This corroborative nature of the defence case has been provided by the celebrated case of **Rex V. Lucas**, whose dictum is now well settled as the “**Lucas theory**”.

It is to be noted that a lie told out of court, or in court to be capable of amounting to corroboration must satisfy the following requirements:-

- 1) It must be deliberate.
- 2) It must relate to a material issue.
- 3) The motive for the lie must be a realization of guilt and fear of the truth.
- 4) The statement must be clearly shown to be lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.¹⁵

The application of the **Lucas Test** to an unsworn statement made by an accused was extensively discussed in the case of **AjithSamarakoon V. The Republic (Kobaigane Murder Case)**¹⁶

“.....This manifest lie uttered by the accused in his dock statement too satisfies the three tests formulated by Lord Lane in **Rex V Lucas (Supra)**.”

This is the very reason why the defense counsel should explain the options an accused has and inform him that he must take the consequences of his actions based on the choice he makes. If the accused makes a false statement from the dock, the defense counsel will be burdened with an additional task to defend the making of the false statement. The counsel is duty bound to observe the demeanour and deportment of an accused upon consultation, so that he could

¹⁴ Ibid, 8

¹⁵ De Silva, U.R, (2010), Criminal Defense (Bilingual Version-Sinhala and English)

¹⁶[2004] 2 Sri. L.R 209

suggest the best option as far as he can see, but the final conclusion must be with the accused.

In the meantime, it is of paramount importance to scrutinize the instances where an unsworn statement could be used to reap benefits by the defense.

- When the evidence presented by the prosecution corroborates the contents of the unsworn statement, fair and square. Here ironically the dock statement will be reinforced by the prosecution case itself. The space to create such an opportunity may arise at the time of cross examining the prosecution witnesses. At this juncture, the trial judge is left with no other option but to believe the evidence brought by the prosecution and also the unsworn statement in a similar fashion. This is sufficient to create a reasonable doubt in the mind of the judge on the prosecution case. The accused should definitely have the benefit of such doubt.
- When the dock statement is corroborated by the evidence adduced and established by the accused. A plea of alibi could be propounded by the defence by sliding it through the dock statement if and only if the presence of independent evidence can prove that the accused was hospitalized or elsewhere at the time of the crime.
- At times the prosecution case tends to be weak. In such instances the shortcomings cannot be highlighted or brought to the attention of the learned trial judge if the accused opts to exercise his right of silence. Hence, an unsworn statement

made from the dock at this point will bolster up the loopholes which will provide an opportunity to create a reasonable doubt in the prosecution case.

- The burden is cast upon the accused to tender an explanation only where a **strong prima facie case** is established against the accused, in which case, the silence of the accused may engender an adverse inference may be justifiably drawn by the Court. **Ellenborough Dictum**, a benchmark created by the case of *Rex V. Cockraine* requiring an explanation from the accused is abundantly applied in Sri Lankan Courts.¹⁷ In such an instance, the accused could render an explanation from the dock which is once again required to be compatible and corroborated by the established evidence in the case.
- If the defence relentlessly persist on a complete 'denial', an unsworn statement blatantly contradicting the well-established evidence of the case would be of no purpose. A more effective dock statement could be woven if it is substantiated by indisputably independent evidence. In such a case, the defence should be able not only to corroborate the dock statement but alongside prove to the court to a certain extent that the evidence presented by the prosecution lacks evidentiary value.

¹⁷ De Silva, U.R. (2017) The Burden of Proof in a Criminal Case, MEEZAN Annual Law Journal, pp.80-106

Conclusion

Under the present law the unsworn statement of an accused person has four main incidents: it is not on oath and therefore not subject to any of the sanctions for perjury or false swearing, it is not subject to cross-examination: it has a probative capacity in the case of the accused who makes it in the sense that the jury should take it into account in their deliberations if they accept its truthfulness or are not satisfied of its untruthfulness, and, though theoretically subject to the rules of evidence, nevertheless can be delivered in a manner that may make it difficult to control so far as compliance with those rules are concerned.¹⁸

The jury considers the making of an unsworn statement by the accused as an act of deliberately abstaining from giving evidence under oath and being subjected to cross-examination. Therefore, the dock statement should be of such nature that, it could win the trust of the jury regardless of its infirmities and the deficiencies. If so, it must be corroborated by some piece of evidence. The best way is to seek corroboration from the prosecution evidence itself.

The dock statement should at least be strong enough to emphasize that the prosecution was not even in a position of drawing an irresistible inference of guilt with regard to the culpability of the accused. At this point, the accused shall not contradict him with the prosecution case. This strategy could be diverted to create a doubt in the prosecution case. It is not possible to formulate a complete framework of laws and authorities relating to the use and benefit of the dock

statement. Often it depends on the prowess, expertise and proficiency of the lawyer.

*"An unsworn statement made with no purpose and without any corroboration does a good deal of harm rather than any benefaction to the accused"*¹⁹

¹⁸NSW Law Reform Commission,(1985) REPORT 45–
CRIMINAL PROCEDURE: UNSWORN STATEMENTS
OF ACCUSED PERSONS, Retrieved from
<https://www.lawreform.justice.nsw.gov.au/Documents/>

[Publications/Reports/Report-45.pdf](#) Accessed on 09th
May 2020.

¹⁹Kathubdeen v. Republic o f Sri Lanka [1998] 3 SLR 107

NUCLEAR WEAPONS ; THE RAIN OF DEATH

WITH SPECIAL FOCUS ON CASE LAWS AND THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS (TPNW) 2017

M.K. Lochana Thilini*

"It doesn't matter , whether it is X,Y or Z country ,every penny spends for nuclear weapons strengthen the hands of the evil force...."

-Amit Ray-

Introduction and Background

It was the final year of world war ii .On 6th of August 1945 ,Japanese civilians woke up with sorrowful minds. They have suffered a lot during this 6 years. Farmers, fishers and other civil workers were spending a tough time period. Japan had lost so many young lives due to this war , Most of the parents had lost their children. Some were wounded. Among all these tragedies they were asked for an unconditional surrender. But, Japan refused to surrender and the war continued .On that one of the most darkest days in world history a uranium gun-type "Little boy" was dropped on Hiroshima and three days later a plutonium implosion "Fat man" was dropped on Nagasaki. Ultimately, Japan surrendered to the allies. The Manchester Guardian's lead story declared Britain and America had won the greatest scientific gamble in history¹ "The

atomic bomb has been dropped on Japan. It has two thousand times the last power of the R.A.F, a ten -tonner, which was previously the most powerful bomb in use. Thus British and American scientists have achieved what the Germans were unable to do and have won the greatest scientific gamble in history".² According to reports between 90000 -166000 Japanese civilians were killed from the above two explosions .The US department of Energy has estimated that after 5 years there were perhaps 200000 or more fatalities as a result of the bombing, while the city of Hiroshima has estimated that 237000 people were killed directly or indirectly by the bomb's effects including burns, radiations ,sickness and cancer.³

Who was behind this inhumane act? The basic organization who was behind this was Manhattan Project. They were a research project of US government. They corporated to produce the first atomic bombs in world history. "The story of the Manhattan project began in 1938 and it was officially created in 1942.It's weapons research laboratory was located at Los Alamos ,New Mexico".⁴

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¹ The Manchester Guardian 7th August 1945

² The Manchester Guardian 7th August 1945

³en.wikipedia.org/wiki/Manhattan_Project

⁴ Atomic Heritage Foundation in partnership with National museum of nuclear science and

Since then, the world has engaged in so many activities by centralizing atomic power. Now a days most of the countries have engaged in peaceful nuclear innovations while others are still trying to fulfill their greedy and hatred through these evil weapons. So there must be ceiling which legally bind those people who try to empower evil forces.

Ryuichi Shimoda Vs The State **(The “Shimoda” Case)**

This is a civil action which brought before the Tokyo District court from 1955 to 1963 by the Japanese nationals who asked compensation for what they lost due to nuclear attack. “The plaintiffs were residents either of Hiroshima or Nagasaki when atomic bombs were dropped on these cities by bombers of the United States [Army] Air force in August 1945. Most of the members of their families were killed and many including some of the plaintiffs themselves, were seriously wounded as a result of these bombings. They claimed damages on the following grounds:

- That they suffered injury through the dropping of a atomic bomb by members of the [Army] Air force of the USA.
- That the dropping of atomic bombs as an act of hostilities was illegal under the rules of positive international law.
- That the dropping of atomic bombs also constituted a wrongful act on the

history –The Manhattan Project article written on 12th May 2017 –atomicheritage.org/history/Manhattan-Project

plane of municipal law ,ascrivable to the United States and its President, Mr Harry .S.Trruman.

- That Japan had waived by virtue of the provisions of Article 19(a) of the treaty of peace with Japan of 1951 ,the claims of the plaintiffs under international law and municipal law with the result that the plaintiffs had lost their claims for damages against the USA and its President.
- That this waiver of the plaintiff's claims by the defendant, the state gave rise to an obligation on the part of the defendant to pay damages to the plaintiffs.”⁵

The District court held that this action must fail on the merits .So this is an unsuccessful case in the history. The court held that the aerial bombardment with atomic bombs of the cities of Hiroshima and Nagasaki was an illegal act of hostilities according to the rules of international law. It must be regarded as indiscriminate aerial bombardment of undefended cities, even if it were directed at military objectives only, inasmuch as it resulted in damage comparable to that caused by indiscriminate bombardment. Nevertheless, the claimant as an individual was not entitled to claim damages on the plane of international law, nor was he able as a result of the doctrine of sovereign immunity, to pursue a claim on the plane of municipal law. In these circumstances the plaintiffs had no rights to lose as a result of

⁵ Japanese Annual of International Law ,No.8(1964),p.212

the waiver contained in Article 19(a) of the treaty of peace with Japan.⁶

So according to the law this was an unsuccessful effort which was taken by the bomb victims.

Legality of the Use by a State Of Nuclear Weapons in Armed Conflict. Advisory Opinion of 8 July 1996

In 1993 The World Health Organization requested the opinion from the international court of justice in Hague Netherlands, about legality of the use by a state of nuclear weapons in armed conflict .But the court refused to act on that request by saying that The WHO is acting ultra vires and they don't have a right for an such request. So the United Nations General assembly did another request in 1994 and an advisory opinion was issued in 1996.

"there is no source of law , customary or treaty that explicitly prohibits the possession or even use of nuclear weapons. The only requirement being that their use must be in conformity with the law on self – defence and principles of international humanitarian law"⁷

Therefore we didn't have any authority to prevent or prohibit the use of nuclear weapons. At this time peoples have the freedom to develop, test, produce,

⁶ Hanrei Jiho ,vol355,p17 translated in The Japanese Annual of International Law ,vol 8,1964

⁷ Legality of the Threat or Use of Nuclear Weapons [1996] ICJ 2

manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices in their countries .No one was looking at them.

Anti-nuclear movements were fighting for a future which has restrained the use of nuclear weapons. They enormously tried to show the bad outcomes and future losses of using nuclear power as a weapon against the mankind .Not only that but also they asked for a legally binding agreement or anything in that manner to bind those stubborn states who were training this evil force

Treaty on The Prohibition Of Nuclear Weapons (Tpnw) 2017

Treaty on the prohibition of nuclear weapons or the nuclear weapon ban treaty is one of the finest outcomes of the efforts of anti –nuclear weapons movements. This is the first agreement which ban the nuclear weapons with the ultimate goal of total elimination nuclear weapons .This treaty was passed on 7 July 2017⁸ Although this agreement is still not in force it bares treasures constituents as an international agreement.

Article 1 of the treaty strictly prohibits the use, develop, manufacture and other activities which is related to nuclear weapons. Therefore a party who have signed

⁸ en.wikipedia.org/wiki/Treaty_on_the_Prohibition_of_Nuclear_Weapons

the treaty don't have the power to develop nuclear weapons.

Article 1: Prohibitions

1. Each State Party undertakes never under any circumstances to:
 - (a) Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
 - (b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;
 - (c) Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;
 - (d) Use or threaten to use nuclear weapons or other nuclear explosive devices;
 - (e) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;
 - (f) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;
 - (g) Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control⁹

Each state who has signed the treaty has to declare about their current situation regarding the nuclear weapons. So states cannot launch

their nuclear weapons projects secretly and confidentially.

Article 2: Declarations

Each State Party shall submit to the Secretary-General of the United Nations, not later than 30 days after this Treaty enters into force for that State Party, a declaration in which it shall:

- (a) Declare whether it owned, possessed or controlled nuclear weapons or nuclear explosive devices and eliminated its nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities, prior to the entry into force of this Treaty for that State Party;
- (b) Notwithstanding Article 1 (a), declare whether it owns, possesses or controls any nuclear weapons or other nuclear explosive devices;
- (c) Notwithstanding Article 1 (g), declare whether there are any nuclear weapons or other nuclear explosive devices in its territory or in any place under its jurisdiction or control that are owned, possessed or controlled by another State.

1. The Secretary-General of the United Nations shall transmit all such declarations received to the States Parties.¹⁰

Article 3: Safeguards

⁹ Article 1 of Treaty on the prohibition of nuclear weapons 2017

¹⁰ Article 2 of the Treaty on the prohibition of nuclear weapons 2017

Each State Party to which Article 4, paragraph 1 or 2, does not apply shall, at a minimum, maintain its International Atomic Energy Agency safeguards obligations in force at the time of entry into force of this Treaty, without prejudice to any additional relevant instruments that it may adopt in the future.

Each State Party to which Article 4, paragraph 1 or 2, does not apply that has not yet done so shall conclude with the International Atomic Energy Agency and bring into force a comprehensive safeguards agreement (INFCIRC/153 (Corrected)). Negotiation of such agreement shall commence within 180 days from the entry into force of this Treaty for that State Party. The agreement shall enter into force no later than 18 months from the entry into force of this Treaty for that State Party. Each State Party shall thereafter maintain such obligations, without prejudice to any additional relevant instruments that it may adopt in the future.¹¹

Article 4: Towards the total elimination of nuclear weapons

This is the ultimate goal of the agreement. According to this Article with the time passes states will be refraining from developing , manufacturing or testing new nuclear weapons.

Each State Party that after 7 July 2017 owned, possessed or controlled nuclear weapons or other nuclear explosive devices and eliminated its nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities, prior to the entry into force of this Treaty for it, shall cooperate with the competent international authority designated pursuant to paragraph 6 of this Article for the purpose of verifying the irreversible elimination of its nuclear-weapon programme. The competent international authority shall report to the States Parties. Such a State Party shall conclude a safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear material or activities in that State Party as a whole. Negotiation of such agreement shall commence within 180 days from the entry into force of this Treaty for that State Party. The agreement shall enter into force no later than 18 months from the entry into force of this Treaty for that State Party. That State Party shall thereafter, at a minimum, maintain these safeguards obligations, without prejudice to any additional relevant instruments that it may adopt in the future.

Notwithstanding Article 1 (a), each State Party that owns, possesses or controls nuclear weapons or other nuclear explosive devices

¹¹ Article 3 of the Treaty on the prohibition of nuclear weapons 2017

shall immediately remove them from operational status, and destroy them as soon as possible but not later than a deadline to be determined by the first meeting of States Parties, in accordance with a legally binding, time-bound plan for the verified and irreversible elimination of that State Party's nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities. The State Party, no later than 60 days after the entry into force of this Treaty for that State Party, shall submit this plan to the States Parties or to a competent international authority designated by the States Parties. The plan shall then be negotiated with the competent international authority, which shall submit it to the subsequent meeting of States Parties or review conference, whichever comes first, for approval in accordance with its rules of procedure.

A State Party to which paragraph 2 above applies shall conclude a safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear material or activities in the State as a whole. Negotiation of such agreement shall commence no later than the date upon which implementation of the plan referred to in paragraph 2 is completed. The agreement shall enter into force no later than 18 months after the date of initiation of negotiations.

That State Party shall thereafter, at a minimum, maintain these safeguards obligations, without prejudice to any additional relevant instruments that it may

adopt in the future. Following the entry into force of the agreement referred to in this paragraph, the State Party shall submit to the Secretary-General of the United Nations a final declaration that it has fulfilled its obligations under this Article.

Notwithstanding Article 1 (b) and (g), each State Party that has any nuclear weapons or other nuclear explosive devices in its territory or in any place under its jurisdiction or control that are owned, possessed or controlled by another State shall ensure the prompt removal of such weapons, as soon as possible but not later than a deadline to be determined by the first meeting of States Parties. Upon the removal of such weapons or other explosive devices, that State Party shall submit to the Secretary-General of the United Nations a declaration that it has fulfilled its obligations under this Article.

1. Each State Party to which this Article applies shall submit a report to each meeting of States Parties and each review conference on the progress made towards the implementation of its obligations under this Article, until such time as they are fulfilled.
2. The States Parties shall designate a competent international authority or authorities to negotiate and verify the irreversible elimination of nuclear-weapons programmes, including the elimination or irreversible conversion of all nuclear-weapons-related facilities in accordance with paragraphs 1, 2 and 3 of this Article. In the event that such a designation has not been made prior to the entry into force of this Treaty for a

State Party to which paragraph 1 or 2 of this Article applies, the Secretary-General of the United Nations shall convene an extraordinary meeting of States Parties to take any decisions that may be required.¹²

Article 6: Victim assistance and environmental remediation

Each State Party shall, with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, without discrimination, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.

Each State Party, with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices, shall take necessary and appropriate measures towards the environmental remediation of areas so contaminated.

1. The obligations under paragraphs 1 and 2 above shall be without prejudice to the duties and obligations of any other States under international law or bilateral agreements.¹³

According to Article 6.2 the states shall take necessary actions to prevent the environmental pollution which rose as a result of using nuclear energy. Nuclear power and environment .What is the relationship between these two? Specially, nuclear weapons are consisted of various components which hazardous to the environment.

"There is a great deal of hazardous substances used and disposed of during production of nuclear weaponry. These include plutonium, uranium, benzene, polychlorinated biphenyls (PCBs), strontium, cesium, mercury and cyanide. All of these materials have negative impacts on the environment and often find their way into oceans, rivers and soil harming wildlife living local to the production of the weaponry. Unlike conventional bombs, the power of nuclear weapons comes from thermal and ionizing radiation generated by the splitting or joining together of atoms. Ionizing radiation, unique to the nuclear bomb, causes additional damage and death. Exposure to this form of radiation causes the victim to suffer greatly, with no effective medical treatments to help them. Synonymous with nuclear explosions, "mushroom clouds" are formed through the displacement of vast amounts of earth, water and debris which becomes radioactive. This debris then falls back to earth and contaminates very large areas surrounding the initial location of the explosion rendering it uninhabitable for many years."¹⁴

¹² Article 4 of the Treaty on the prohibition of nuclear weapons 2017

¹³ Article 6 of the Treaty on the prohibition of nuclear weapons 2017

¹⁴Alessandro Pirolina-How nuclear warfare affects the environment-

AzocleanTech.com/article.aspx?ArticleID=31

Conclusion

According to specialists the life on the Earth began nearly 4.28billion years ago and it was microorganisms who originated firstly on earth. Since then, with the help of the nature and other chemical components on earth, organisms have developed and have come this far .Now we are influential humans who have knowledge and capacity to invent new things which will definitely brighten our race. With the revolution of human, peoples invented so many new things .They invented fire, wheel, writing systems, vehicles, medicines and etc. So undoubtedly nucleic power is one of the greatest achievements of mankind .With the decrease of natural energies, nucleic power is a new solution .Most of the countries use nucleic power to fulfill their day today energy essentials.

But, the problem is with the master of this servant .If he uses this servant to kill or threaten his enemies it obviously turns into an evil who can't differentiate good or bad. So as developed humans we must stop the evil use of nuclear power because every living creature on this earth deserves an undisrupted life.

Earlier we didn't have any binding authority to stop the use of nuclear weapons .So as the first international agreement on prohibiting the use of nuclear weapons, The Treaty on prohibition of nuclear weapons 2017 is a helping hand to protect mankind being the victims of this evil force.

MANURAWA 2020

THE CONSTITUTIONAL RECOGNITION OF THE RIGHT TO CLEAN ENVIRONMENT UNDER 1978 CONSTITUTION OF SRI LANKA: A REVIEW WITH REFERENCE TO CHUNNAKKAM POWER PLANT CASE

P.K. Manawa Nanayakkara*

Introduction

"The right to a healthful and clean environment has been regarded as a vital aspect of the right to life, for without a healthy and clean environment it would not be possible to sustain an acceptable quality of life even life itself"(Hashim,2013)

The above statement testifies the vital link between life and the environment. Human life is heavily depended on the sustainability of the environment. Therefore, the right to clean environment has been recognized as one of the main aspects in the human rights context. Some countries have provided an explicit reference to the right to clean environment in their constitutions while other countries have recognized this right through the judicial interpretation of the existing constitutional provisions like equality before law and right to life. The Constitution of the Democratic Socialist Republic of Sri Lanka (hereafter referred to as 1978 Constitution), does not accept the right to clean environment as a fundamental right unless some environmental protection appears as an obligation under directive principles of State policy(Chapter 6 of the 1978

Constitution). However, in the RavindraGunawardene Kariyawasam Vs. Central Environment Authority & 10 others (hereafter referred to as Chunnakam Case) case, Justice Prasanna Jayewardene pointed out that there can be implied constitutional acceptance to the right to clean environment by reading Article 12(1) of the 1978 Constitution and obligations relating to environment protection under directive principles of the State Policy simultaneously. This research examines firstly, what is the concept of the right to clean environment followed by why we need to accept it as a constitutional right. Secondly, this research focusses on examining how the Supreme Court has interpreted and recognized right to clean environment as a constitutional right under Article 12(1) and the directive principle in the 1978 Constitution. Finally, this research makes recommendations on how to provide constitutional recognition to the right to the environment under the Sri Lankan constitution.

Methodology

This research is normative in nature and is based on a literature review. Furthermore, primary and secondary

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sources are used to conduct this research. The 1978 Constitution of Sri Lanka, 1949 Constitution of India (hereafter referred to as Indian Constitution) and case law has been used as primary sources in conducting this research. Besides journal articles, books and policy papers have been used as secondary sources to enhance the outcome of this research.

Results and Discussions

What is Right to Clean Environment?

Right to clean environment associated with the rights of an individual to grow physically, mentally and intellectually to be completed humankind (Hashim, 2013). The Principle 1 of the Stockholm Declaration on the Human Environment in 1972 (hereafter referred to as Stockholm Declaration) refers to the obligation of humankind in protecting environment by following words, “*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing and he bears a solemn responsibility to protect and improve the environment for present and future generation.*” Furthermore, Principle 2 of the Stockholm Declaration stresses that “*the natural resources of the earth, including the air-water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate.*” The

Stockholm Declaration recalls the duty of humankind to protect the environment for the betterment of present and future generations emphasizing the importance of recognizing the right to clean environment substantially in the constitutions or other laws.

The Declaration on United Nations Conference on Environment and the Development (hereafter referred to as the Rio Declaration) is also playing a vital role in the international arena to uphold and recognized the right to clean environment as one of the fundamental concerns of every human being on the globe. Principle 1 of the Rio Declaration highlights “*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*” Simultaneously, it provides an obligation on the States to protect the environment as a universal heritage.

As a part of the universal family, we are also required to follow and adhere to the guaranty of the right to clean environment recognized in this universal declaration to achieve sustainable development and to preserve the environment for our present and future generation. In this context, the right to clean environment is interwoven together with some other principles of environmental protection such as intergenerational equity, the concept of guardianship and importantly, the concept of public trust. Therefore, it is clear that the right to clean environment based on a combination of universally

accepted environmental principles and provides a comprehensive concept. The Indian judiciary has upheld the concept of the right to life as a fundamental in ***Chameli Singh v. State of Uttar Pradesh*** case highlighting that "*right to live guaranteed in any civilized society implied the right to food, water, decent environment, education, medical care, and shelter. These are basic human rights known by any civilized society*". This decision itself provide an account to consider the right to clean environment as a part of the right to life and human rights.

The Sri Lankan Constitution does not expressly recognize either right to clean environment or right to life under fundamental rights. However, there is some judicial interpretation which recognizes the right to clean environment as a fundamental right. In the case of ***Ahangama Vithanage Deshan Harindra & four others v. Ceylon Electricity Board***, the petitioner took an attempt to established right to clean environment as a fundamental right by highlighting that " ...although there is no express right to life or right to clean environment in Chapter 3 of the Constitution, this right is so fundamental that without it all other rights would be meaningless, and therefore it is necessarily recognized under chapters 3 and 4 of the constitution." The Chunnakam case reflects the recent most example of recognizing the right to clean environment under fundamental rights by providing long-lasting vision towards environmental protection.

Background of the Chunnakam Case

Chunnakam is a town situated in Jaffna peninsula in the northern part of Sri Lanka. This area is crowded, and it is a hive of commercial and agricultural activity. The petitioner (Ravindra Gunawardene Kariyawasam, Chairman, Centre for Environment and Nature Studies) of this case made public interest litigation against a Thermal Power Station in the Chunnakam area and due to the impact of this operation is polluting groundwater in the area. In this petition, the petitioner/s further pointed out that Central Environment Authority (1st respondent), Ceylon Electricity Board (3rd Respondent) and Board of Investment (10th Respondent) were failed to enforce the law against the Northern Power company (Pvt) Limited (8th Respondent) and having failed to stop the 8th Respondent polluting groundwater and having failed in their duty to act in the best interests of the public. In addition, the petitioner stated that, thereby, the respondents had violated the fundamental rights guaranteed to the petitioner and the residents of the Chunnakam area by Articles 12(1) of the 1978 constitution.

The respondents have refused the alleged violations and stressed that the electricity services in the Jaffna peninsula had been disrupted during the war and therefore they allowed the 8th Respondent to start thermal power station in Jaffna. They further pointed out that soon after the war ended, respondents have taken adequate measures to protect the environment.

Accordingly, the Supreme Court had to decide whether the omission of the Respondents in failing to perform their statutory and regulatory duties in issuing Initial Environmental Examination Report (hereafter referred to as IEER) and Environmental Impact Assessment Report (hereafter referred to as EIAR) and therefore, violates the fundamental rights guaranteed to the residents of the area and the petitioner under the Article 12(1) of the Constitution.

Legal Reasoning of the Court

The Supreme Court assessed the relevant statutory and regulatory provisions to solve the pertaining issues of this case. Consequently, the Supreme Court scrutinized the ways and means of issuing IEER and EIAR under the sections of the National Environment Act no 47 of 1980 (as amended) (hereafter referred to as N.E. Act) to determine whether there was an omission in the part of statutory bodies in granting the license to the 8th Respondent to operate the power plant. The Central Environment Authority is established under the Act described above with the powers, functions, and duties of making recommendations relating to national environmental policy and the conservation of natural resources and engaging in related research, educational and advisory activities.

The Court went on stating that, "*This is particularly so since, in an application of this nature, which has the favour of public interest litigation and which raises important issues regarding the right of a section of the citizens of this country.*

Therefore Section 57 of the Evidence Ordinance, and Section 32 and 23A of this the N.E. Act amply entitle this Court to take orders and regulations into consideration when determining this application." The considerations of statutory authority were used to justify the 'executive and administrative nature' of the Central Environment Authority (hereafter referred to as CEA) and Board of Investment (hereafter referred to as BOI) of Sri Lanka in allowing the 8th Respondent to operate the power plant in the Chunnakkam area. Therefore, as statutory bodies, these respondents were required to act and perform powers, duties, and functions in the interest of people by respecting the fundamental rights and freedoms guaranteed in the Constitution.

The Court pointed out that the BOI as a "Project approving agency", is primarily responsible for the failure to ensure the 8th Respondent submitted an IEER or EIAR and obtained approval under the Part 4 C of the N.E. Act. Same time The Central Environment Authority is also failed to perform their duty as per the pertaining law, and it must also bear the responsibility for the failure to ensure that the 8th Respondent obtained the requisite approval before the implementation of the project to add to the power generation capacity of its thermal power station. Accordingly, the Supreme Court has stressed that the duty and legislative responsibilities relate to BOI and both statutory authorities have neglected CEA and, such omissions have directly linked to violating the rights of petitioners and

the people living in Chunnakkam area under the Article 12(1) of the Constitution.

Interestingly, the directive principles of the State Policy provided in the Section 27 of the 1978 constitution have been interpreted by the Court in a pragmatic way by mentioning, "the *CEA and BOI which are agencies of the State are to be guided by these directive principles abs fundamental duties when carrying out their statutory and regulatory duties.*"

Apart from that, the Court has mentioned that the Directive Principles of State policy '*are not wasted ink in the pages of the constitution*' and should be given due consideration as substantive aspects of the in interpreting the Constitution. The Article 27(14) under the directive principles points out that "*State policy is that the state and its agencies shall protect, preserve and improve the environment for the benefit of the community*" The Supreme Court linked this with the Article 12(1) of the Constitution and pointed out that both sections together recognizes right to clean environment as a fundamental right. Justice Prasanna Jayewardene has quoted the well-known judgment of **Wattegedra Wijebanda vs. Conservator General of Forest** and pointed out that "*while environmental rights are not specifically alluded to under the fundamental rights chapter of the constitution, the right to clean environment and the principle of intergenerational equity with respect to the protection and preservation of the environment are inherent in meaningful*

reading of article 12(1) of the constitution".

Furthermore, the Supreme Court went on analyzing that, the Environmental Principles to upgrade the right to a clean environment. The Court mainly discusses the importance of Sustainable development, Precautionary principle and Public Trust doctrine to describe the responsibilities of executive or administrative bodies act or omission regarding environmental concerns.

Therefore, it is amply clear that Article 12(1) of the Constitution read in the light of Article 27(14) of the Constitution provides that the people of Sri Lanka has a fundamental right of right to clean environment and all the state and regulatory authorities are required to protect, respect and uphold this right in a proper manner. The Chunnakkam case provides a far-reaching vision on the recognition of the right to clean environment under the 1978 Constitution of Sri Lanka.

Implied recognition of the right to clean environment

As discussed earlier, a healthy and clean environment is vital to human life because it helps a person to grow physically, mentally and intellectually. Hence, a country needs to provide constitutional recognition to the right to clean environment through explicit terms.

India provides a classic example to prove the constitutional recognition of the right to clean environment, whereas it has

explicit provisions regarding right to clean environment in the Constitution. The Indian constitutional framework regarding the right to a clean and healthy environment is described under its fundamental rights Chapter. Article 48 (a) of the Indian Constitution provides that “*the state shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country.*” Moreover, Article 51A (g) of the Indian Constitution provides an obligation “*to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures.*” Furthermore, Article 21 provides that ‘*no person shall be deprived of his life or personal liberty except according to the procedure established by law*’ which can also be linked with the right to clean environment.

The concept of the right to clean environment has been upheld in the Indian Supreme Court decisions to accomplish the environmental principles as well as human dignity. In T.N. Godavarman Thirumulpad (87) v. Union of India case, the Court decided that natural resources are the asset of the nation and hence, the government has to conserve and prevent wastage of the resources. Furthermore, the Court went on stating that, if there were any danger made to the ecology, such danger would result in the infringement of the fundamental right to a healthy and clean environment protected under Articles 48, 51 and 21 of the Constitution. Moreover, in MC Mehta v. Union of India case, the

Indian Supreme Court, has decided that the right to a living atmosphere amiable to human existence is part of the right to life under Article 21 of the Constitution. The explicit reference to this right will provide a certainty and well recognized to the right to clean environment and support the judiciary for in the process of interpreting such rights.

Recommendations

As discussed through this paper, our court system is utilized existing constitutional provisions to uphold the right to clean environment, but there is a question on the adequacy of having only an implied reference in the Constitution and lack of certainty. We have a recent experience that the importing of clinical waste to Sri Lanka from developed countries to dump here which is directly impacts on the country’s environment and to degrade the people’s right to clean environment. The Chunnakkam case provides a direction to policymakers and society that the people's right to clean environment should be given a priority. As we are in a constitutional reforming process, it can be suggested that this is the high time to consider adopting right to clean environment as a fundamental right in our Constitution to provide constitutional recognition, better protection and assurance to clean environment.

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AN ANALYSIS OF THE ADEQUACY OF LAW RELATING TO HIRE PURCHASE IN SRI LANKA; WITH SPECIAL REFERENCE TO THE CONSUMER PROTECTION

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Introduction

With an increasing demand for a better life, the consumption of goods and services has been gradually raised. However, the increasing demand has not been backed up by adequate purchasing power, which transforms it into an effectual demand (Mukharjee and Hanif 1998). As a result of that, a market has been created for hire purchase (hereafter referred to as HP) system. HP is one of the most commonly used methods to purchase goods on credit. The foundation of HP agrees to purchase goods in instalments over some time. When people use HP, they usually enter into hire purchase agreements with banks, financial institutions or any other institutions that provide the HP facility. HP is a system which a buyer pays a seller for a thing in regular installments while enjoying the use of it and during the repayment period, property (title) of the item does not pass to the buyer. Consequently, the title passes to the buyer upon the full payment of as agreed by the HP Agreement.

In a hire purchase agreement, the ‘hirer’ (buyer) can utilize the goods, and responsible for maintaining the goods, while the legal

property remains with the lender (lender). Until the last installment is paid, the hirer does not acquire the property of the good. In other words, the property of a good under an HP Agreement can only be transferred to the hirer upon the fulfilment of the condition – the completion of instalment payments. Interestingly, HP provides ample opportunities for consumers to consume goods under better terms and legal certainty.

Accordingly, this research aims to discuss the adequacy of the law of HP in Sri Lanka with particular reference to achieve its objectives by providing better consumer protection. Further, this research intends to examine the existing Sri Lankan law relating to HP as a substantive part of commercial law. Finally, this research aims to make recommendations to enhance Sri Lankan law relating to HP by drawing examples from some selected jurisdictions.

Methodology

This research is a normative research that is based on an extensive review of literature. Legislative enactments and case laws have been used as primary sources in order to carry out this research. Similarly, the Central Bank

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Annual reports, Annual reports of banks and other financial institutions in Sri Lanka, policy reports, journal articles and published researches have been used as secondary sources. This research compares and contrasts Sri Lankan law relating to HP with that of the United Kingdom and Malaysia where we can find developed HP laws.

Results and Discussion

Why HP?

In cases where a buyer cannot afford to pay the asked price for a good as a lump sum but can afford to pay a percentage as a deposit, HP Agreement allows the buyer to hire the goods for a monthly rent, when a sum equal to the original full price plus interest has been paid in equal installments, the buyer may then exercise an option to buy the goods at a predetermined price usually a nominal sum or return the goods to the lender (Adera, A. 1995). Accordingly, the HP system is more critical as it provides more advantages for the hirer as well as the lender, and it would create a win-win situation. However, as Atieno, R. (2001) observed, HP is frequently advantageous to clients that are hirers because it spreads the cost of expensive items over an extended period.

As the HP system attracted more customers as the payment is to be made in easy installments, the aggregate sale of the economy increases while a large volume of sales ensures increased profits to the industry. It is believed that HP encourages thrift among the buyers who are forced to save some portion of their income for the payment of the installments, and this inculcates the habit to save among the people. Furthermore, this

system is a blessing for the small manufacturers and traders, and they can purchase machinery and other equipment on an installment basis and in turn, sell to the buyer charging full price.

Consequently, when considering these significances, HP can be considered as one of the most powerful means to boost the consumption of goods and eventually the economic growth.

Law Relating to HP in Sri Lanka

The law relating to HP in Sir Lanka, primarily contained in the Consumer Credit Act, No. 29 of 1982 (hereafter referred to as CCA) (as amended the Consumer Credit (Amendment) Act, No. 7 of 1990). The CCA provides provisions to define and regulate the duties of parties to HP Agreements and to provide for matters connected therewith or incidental thereto. Section 31 of CCA provides a comprehensive definition to an HP Agreement.

As stipulated in Sections 7 to 19 of CCA, the rights and obligations of a hirer visa versus consider as the obligations and rights of the lender. Furthermore, it provides express provisions regarding the conditions and warranties of an HP Agreement, which provide more excellent protection to the hirer. Moreover, the CCA mandates the availability of HP Agreements and with specific provisions such as the agreement is made and signed by all parties to the agreement; the agreement contains a statement of the hire-purchase price, the cash price of the goods, the deposit paid and a list of the goods to which the agreement relates sufficiently to identify them; and also a copy

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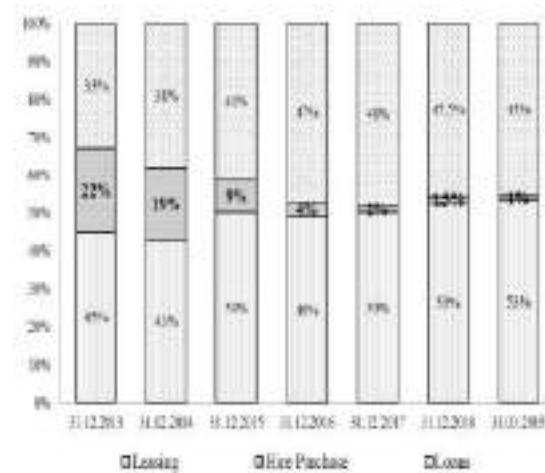
of the agreement is delivered or sent to the hirer within fourteen days of the making of the agreement. In that sense, the CCA provides a substantive legal framework on HP in Sri Lanka.

However, there are some loopholes and shortcomings in the part of the implementation of the CCA in Sri Lanka. Surprisingly, the use of HP is gradually decreased in the recent past, even though CCA provides a protective mechanism to sale and purchase goods. The following section analyses the practical application of the HP in Sri Lanka.

How does HP work?

There has been an increasing trend in Sri Lanka in replacing HP by the leasing and loan facilities. As depicted in the Sector Report (March 2017) - published by the First Capital Equities (Pvt) Ltd, the usage of HP has been decreased over time. The following chart demonstrates the decreasing trend of HP in Licensed Finance Companies (LFC) and Specialized Leasing Companies (SLC) sector in Sri Lanka (the period from 2013 to 2019).

Figure 1: Moving from HP to Leasing and other Loans in NBFIs (2013 – 2019)



(Source: Central Bank of Sri Lanka)

According to the above chart, HP which was 22% of the total loan portfolio of the Non-Banking Financial Institutions (hereafter referred to as NBFIs) by the end of December 2013 had decreased to 1% over nearly five years. The leasing and loans have been acquired considerable growth over the period by replacing HP. As it is observed, when NBFIs apply their risk mitigation techniques and product diversifications, they try to reduce their HP portfolio even though HP provides more advantages to the customer rather than leasing. As a result of that, customers' opportunity to enter into HP Agreements has been inappropriately restricted or neglected. It can also be argued that the customers are deprived of the protection available under the CCA. We can identify the following substantive and procedural weaknesses in the law relating to HP in Sri Lanka.

Whether the existing HP law in Sri Lanka is adequate?

Even though the CCA appears to be as comprehensive legislation, it needed to be amended and revised in order to provide better protection to the consumers and incentivize commercial activities. Accordingly, we can identify the following defects in CCA.

- CAA does not prove provisions relating to establish an HP Regulatory Authority (hereafter referred to as HPRA). As a result, there is no authority to supervise, monitor, investigate, examine or regulate the HP system in Sri Lanka.
- CCA is silent regarding the license required to carry on HP business.
- There are no caps or sealing rates provided in the CCA which determining the interest rate of HP, and any directions to determine the HP price designed by a regulatory. As a result of that, the lenders can apply any interest rate to calculate the HP price. Thus, lenders use interest rates to discourage HP by increasing the HP price. Then, the customers are stimulated to move from HP to leasing or any other similar loan products such as Vehicle Loan, Auto Loan, Consumable Loan, and Mortgage Loans.
- There are no provisions in CCA on the following aspects;
 - Consistency relating to the point of repossession. (The point of repossession can be varied as a result of the discretion of the hirer.)
 - How can the lender reschedule or restructure the existing HP agreement?

- What the penal interest rates are, that can be charged on arrears payments? Instance
- Conditions for early settlement of the HP price.

Also, due to non-availability of any directions, circulars or guidelines on the above aspects, the lenders exploit HP system and protection available to the costumers. Ultimately, such inadequacies lead HP is to be an unpopular mean of purchasing goods.

What lessons from other jurisdictions?

It is worthwhile, considering the HP related provisions of the United Kingdom and Malaysia in order to make suggestions to enhance Sri Lankan law relating to HP. We can identify the following best practices regarding HP and consumer protection in both countries.

- *Consumer Credit Act 1974 – the United Kingdom*
 - Establishment of the enforcement authorities: The Director-General of Fair Trading, the Local Weights and Measures Authority and the Department of Commerce have to enforce the Act and regulations made under it.
 - A license is required to carry on HP: The Director-General of Fair Trading administers the licensing system set up by the Act. The power to renew, suspend or revoke the license is also vested in the Director-General of Fair Trading.

- *Hire Purchase Act 1967 - Malaysia*

- Appointment of officers: The Minister of Consumer Affairs has the power to appoint a Controller of Hire-Purchase and other members as may be necessary for the purposes.
- Provisions for further protection of customers;
 - i. Option to the hirer: A lender shall provide an option to the hirer for the terms charges under a hire-purchase agreement to be at a fixed rate or a variable rate. A variable rate of terms charges shall be quoted at a margin percentage above the base lending rate.
 - ii. Early completion of agreement: The hirer can complete the purchase of the goods by paying to the lender the net balance due under the agreement with the statutory rebate.
 - iii. Repossession:
 - The lender shall not exercise any power of taking possession without giving a notice in writing, which is which shall not be less than twenty-one days after the service of the notice;
 - The lender shall not, without the written consent of the hirer, sell or dispose of the goods or part with possession thereof until after the expiration of twenty-one days after the date of the service on the hirer of the notice;
 - No person shall undertake repossession of goods undertake repossession of goods comprised in an HP agreement without a written permit issued by the Controller.
- iv. Limitation on terms charges: The terms charges concerning an HP agreement shall not exceed a rate per annum as may be prescribed by any regulations made under this Act in respect of any goods or class of goods.
- v. Booking fee: No lender, dealer, agent or person acting on behalf of the lender shall collect or accept a booking fee from an intending hirer before the receipt of the duly completed form.
- vi. Minimum deposits: Where the minimum amount of the deposit in respect of any goods or class of goods is not prescribed shall be guilty of an offence under this Act.
- vii. Powers of investigation and arrest: Act provides comprehensive provisions relating to criminal offences which boost the effectiveness of the Act.

Therefore, it is clear that the HP law in the United Kingdom and Malaysia provide advanced provisions on HP administration and consumer protection. These provisions can be and should be used as a guide to enhance the HP administration system and consumer protection under HP in Sri Lanka.

Conclusion

The HP system in Sri Lanka has been deliberately neglected and underutilized due to the inadequacy of the existing HP related legal mechanism. Even though the HP system is more critical to an economy as it can contribute to economic growth, it cannot be sustained without a comprehensive legal regime. The above discussion shows that CCA has some weaknesses in the areas of HP administration and consumer protection. This has been a result to exploit HP provisions by the lenders and too unpopular its importance among hirers. This situation can be remedied through enhancing the HP administration and consumer protection under Sri Lankan law. Accordingly, this study recommends that the Sri Lankan CCA should amend to provide greater certainty on the HP system as practiced in the United Kingdom and Malaysia.

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AN EVALUATION OF SRI LANKAN LABOUR LAW STANDARDS IN LIGHT OF THE CONVENTIONS OF INTERNATIONAL LABOUR ORGANIZATION.

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Introduction

International Labour Organization (ILO) is the UN specialized agency dealing with work and workplace issues, labour related rights and standards. Its goal is to achieve decent work for everyone benefits from working conditions that offer freedom, equity, security and human dignity. In working towards this goal ILO has certain principal objectives; to promote and realize standards, fundamental principles and rights at work, to create greater opportunities for women and men, to secure decent employment, to enhance the coverage and effectiveness of social protection for all and to strengthen the relationship between workers, employers and governments and encourage social dialogue. ILO was established in 1919 after 1st World War; during a period the class struggle was very much in the minds of working class especially in Europe. Subsequently globalization created a serious impact on social pattern of almost every country in the world. In 1948 the **Havana Charter** pointed out a common understanding on fair labour standards related to productivity and in the improvement of wages and working conditions of employees.¹

As having a universal application; ILO continued to enjoy its primacy as the engine

for implementing labour standards. It was stated that; ILO should safeguard and promote basic worker's rights. Those rights were identified as prohibition of forced labour, freedom of association, right to organize and bargain collectively, equal remuneration for men and women for work of equal value and non-discrimination in employment and opportunity.

In 1998 the Annual Conference of ILO adopted a **Declaration of Fundamental Principles and Rights at Work**. This Declaration contains a set of principles and rights derived from the Constitution of ILO. All members are obliged to respect and promote these principles irrespective of whether they have ratified the relevant conventions or not. These principles are as follows.²

- Freedom of Association and effective recognition of right of collective bargaining.
- Elimination of discrimination in respect of employment and occupation.
- Elimination of all forms of forced or compulsory labour.
- Effective elimination of child labour.

The relevant ILO conventions that cover these issues are;³

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- Freedom of Association and protection of the Right to Organize Convention, No.87
- Collective Bargaining Convention, No.98
- Forced Labour Convention, No.29
- Abolition of Forced Labour Convention, No.105
- Minimum Age Convention, No.138
- Worst Forms of Child Labour Convention, No.182
- Equal Remuneration Convention, No.100
- Discrimination in Employment Convention, No.111

These 8 conventions are categorized as core conventions of ILO. The mandate of ILO, as stated before is to establish equitable conditions of employment by a social partnership.⁴

Sri Lanka became a member of ILO in 1948.⁵ Among whole 188 ILO Conventions; Sri Lanka has ratified about 40 ILO Conventions including these entire 8 core Conventions while many other countries in our region have not ratified them.⁶ Therefore Sri Lanka has an obligation to give effect to the principles adopted in these core Conventions. Hence, the ambit of this paper is to evaluate in what extent Sri Lankan labour legislations and other legislations expressly or implicitly embody the principles of core Conventions and to discuss some important ILO Conventions that have not been ratified by Sri Lanka yet.

In what extent Sri Lankan labour law legislations and other legislations follow the principles of core Conventions?

Freedom of peaceful assembly⁷, Freedom of association⁸, Right to form and join a Trade Union⁹, Freedom to engage in association with others in any lawful occupation, profession, trade¹⁰ are guaranteed fundamental rights under 1978 Constitution in Sri Lanka. However in same manner the Constitution provides certain restrictions for these fundamental rights as may be prescribed by law in the interest of racial and religious harmony or national economy.¹¹ As well as the 1978 Constitution guaranteed the right to equality of people.¹² Under that all the persons are equal before law and are entitled to equal protection of law. Further no citizen shall be discriminated against on the ground of race, religion, caste, sex, political opinion etc.

Conflicts are an inevitable part of the employer-employee relationship. Industrial revolution gave birth to large and minor scale entrepreneurship and consequently it created conflicts between employer and employee and subsequently it made a threat to the industrial peace.¹³ Therefore there was an urgent need of availability of set of rules to resolve, manage and to prevent conflicts which occur between them in order to maintain the peace in working places. The significance of an industrial dispute is that those disputes between employer and employee would adversely affect to the industries, socio-economic values of entire country. The objective of public policy is to manage conflict and promote sound labour relations by creating a system for effective prevention and settlement of labour disputes. On this background the **Industrial Dispute Act No. 43 of 1950** was enacted and it has

number of amendments also .The preamble to the Act describes objectives of enactment as to prevent industrial disputes, investigate industrial disputes, to settle industrial disputes and to provide for other matters connected to or that arises due to industrial disputes. Hence this Act helps to protect the relationship between employer and employee and to protect the rights of employees as well.

Freedom of Association and protection of the Right to Organize Convention provides; the workers and employers without any distinction shall have the right to establish and to join organizations of their own choosing¹⁴ right to draw up their constitutions and rules, elect their members¹⁵ etc., right to establish and join federations and confederations¹⁶. And Collective Bargaining Convention, No.98 provides; workers shall enjoy adequate protection against acts of anti-union discrimination in their employment.¹⁷

In Sri Lanka while 1978 Constitution guaranteed the fundamental right to form and join a trade union in government sectors; **No. 56 of 1999 Amendment to the Industrial Dispute Act** provides the right to form trade unions and engage in trade union activities in semi-government and private sectors also¹⁸. Further the **Trade Unions Ordinance, No.14 of 1935** as amended provide for the registration and control of trade unions. According to this Ordinance every trade union shall apply to be registered under this Ordinance within a period of three months from the date of establishment¹⁹. Otherwise such trade unions are considered as unlawful according to this Ordinance²⁰. And this Ordinance provides the controls over trade unions also²¹. As well as it provides right to

strike²² and Industrial Dispute Act promotes and secures collective bargaining and collective agreements of employees²³. Any way there are certain statutory limitations to the right to strike and there are certain conditions for collective bargaining such as; encouragement by the state, freedom of association, strong and stable union movement, sufficient representation of workers and recognition by employers and good faith²⁴. Freedom of association enhances bargaining power of members of the association and enables them to win their collective rights. Further No. 56 of 1999 Amendment of Industrial Dispute Act provides protection against anti-union discriminations also²⁵. Trade union rights are basic rights of workmen and abuse of these rights by workmen may violate the rights of others. Hence, protection and promotion of rights of workmen and all others is an obligation of the state. Therefore the legal framework provides certain wide powers to the State to maintain a balance in the interests of all.²⁶

According to the Forced Labour Convention and Article 1 of the Abolition of Forced Labour Convention; each member undertakes to suppress and not make any use of any form of forced or compulsory labour.

In Sri Lankan context the 1978 Constitution guaranteed the fundamental right of freedom from torture²⁷. Under that no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. And according to the **Penal Code (Amendment) Act No.16 Of 2006**; any person who subjects or causes any person to be subjected to debt bondage or serfdom, forced or compulsory labour, slavery and recruitment of children for use

in armed conflict shall be guilty of an offence²⁸. Further the **Prevention of Social Disabilities Act No.21 of 1957** as amended stipulates that any person who imposes any social disability on any other person by reason of such other person's caste shall be guilty of an offence. Under that imposing any social disability at the place of such other person's employment, or in the course of such other person's trade, business or employment is considered as guilty of an offence²⁹.

As Equal Remuneration Convention provides each member shall appropriate to the methods in operation for determining rates of remuneration, promote and to equal remuneration for men and women workers for work of equal value. And each member undertakes to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation without any discrimination as Discrimination in Employment Convention, No.111 provides.

According to the 1978 Constitution of Sri Lanka all the persons are equal before law and are entitled to equal protection of law. Further no citizen shall be discriminated against on the ground of race, religion, caste, sex, political opinion etc. And also the **Wages Board Ordinance No.27 of 1941** provides regulation of wages and other emoluments of persons employed in trades, for the establishment and constitution of wages boards, and for other purposes connected with or incidental to the matters aforesaid.³⁰ According to that wages board has to decide minimum rates of wages, different rates of wages to suit special circumstances, annual holidays, wages of worker who works for less than normal working day or does not work at all

on any day and etc. The decisions of Wages Board have effect notwithstanding any-written law other than this Ordinance. Special thing is that it imposes a liability on employer to pay minimum wages to employees.

Another special thing is that the Industrial Dispute Act focuses on the just and equitable principles when an industrial dispute has been referred to an arbitrator, an Industrial Court or to any Labour Tribunal³¹.

Another plus point of Sri Lankan context is providing special care and attention towards women and children. Eventhough 1978 Constitution guaranteed the right to equality; in same Provision it says that "nothing in this Article shall prevent special provision being made, by law, subordinate legislation or execute action for the advancement of women, children or disabled persons"³². On this basis there are certain legislations on labour matters which provide job security of women in special situations. For an example **Shop and Office Employees' (Regulation of Employment and Remuneration) Act No.19 of 1954**³³ and **Maternity Benefits Ordinance No.32 of 1939**³⁴ provide job security against termination for maternity reasons.

According to the **Section 345 of Penal Code** of Sri Lanka unwelcome sexual advance by words or action used by a person in authority, in a working place or any other place shall constitute the offence of sexual harassment and punished with imprisonment. Other than that there are some other national legislations; which promote equality of opportunity and treatment in respect of employment and occupation without any discrimination.³⁵

The purpose of the Minimum Age Convention is ensuring effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with fullest physical and mental development of young persons.

In Sri Lanka also **Shop and Office Employees' (Regulation of Employment and Remuneration) Act** provides a person who has not attained the age of fourteen years shall not be employed in or about the business of a shop or office³⁶. **Employment of Women, Young Persons and Children Act (Amendment) No.8 of 2003** provides restrictions on employment of children. Under the interpretation section of this Act "child" means a person who is under age of fourteen years³⁷.

Worst Forms of Child Labour Convention provides the duty of each member state to take immediate and effective measures to secure the prohibition and elimination of worst forms of child labour as a matter of urgency³⁸. And for the purpose of this Convention the term "child" shall apply to all persons under age of 18 years³⁹.

In same manner in Sri Lanka also through the **Employment of Women, Young Persons and Children Act (Amendment) No.24 of 2006** brings the prohibition against persons under eighteen years of age being employed in hazardous occupations.⁴⁰

Penal Code Amendment Of 2006 provides; any person who subjects or causes any person to be subjected to debt bondage or serfdom, forced or compulsory labour, slavery and recruitment of children for use in armed conflict and also child trafficking considered as guilty of an offence. The term

"child" under Penal Code also shall apply to all persons under age of 18 years.⁴¹

The **National Child Protection Authority Act No.50 of 1998** also considers all the persons under age of 18 years as children.⁴² This Act is formulated to advise the Government in formulation of a national policy on prevention of child abuse and protection and treatment of children who are victims of such abuse. And as a part to the **Convention of the Rights of the Child (CRC)** Sri Lanka has an obligation to protect and uphold the rights of children.

According to all these things it can be ultimately concluded that Sri Lankan standards in labour law legislations and other relevant legislations are mostly compatible with the standards of core Conventions of ILO. And another thing is that Sri Lankan standards in labour law legislations are having a nature of balancing the interests of employees, employers, society and State.

Furthermore in this paper the author intends to discuss some important ILO Conventions that have not been ratified by Sri Lanka yet. They are; Migration for Employment Convention (Revised) 1949, (No.97), Occupational Safety and Health Convention, 1981 (No.155) and the Decent Work for Domestic Workers Convention 2011 (No.189). Under each of these Conventions the author will focus on special features of these Conventions, what is the importance of these Conventions into Sri Lankan context and how Sri Lankan legal system is dealing with the matters relating to these conventions and justifications for suggestions given by author that Sri Lanka should ratify these conventions. However recently the

Government of Sri Lanka has ratified the Maritime Labour Convention, 2006 and expressed its willingness to ratify the Occupational Safety and Health Convention and Seafarers' Identity Documents Convention, 1958 (No. 108).⁴³

Migration for Employment Convention (Revised) 1949, (No.97)

The migration of Sri Lankans for overseas employment is having a significant feature of socio-economic position of the country and in foreign exchange remittances. There are three international instruments for the protection of rights of migrant workers currently. But Sri Lanka has ratified only the International Convention on the Protection of All Migrant workers and Members of Their Families of 1990. That means Sri Lanka has not still ratified the International Convention on Migrant workers (Supplementary Provisions) 1975 (No.143) and the Migration for Employment Convention (Revised) 1949, (No.97)⁴⁴.

When considering about Migration for Employment Convention; it ensures the equality for nationals and regular migrants in relation to the employment and provides the access to redress for employment related disputes. It contains provisions to assist migrant workers in their employment and this Convention applies to the labour migration process and covers the conditions governing orderly recruitments of migrant workers.⁴⁵

Article 1 of this Convention provides that a state ratifying the Convention has to maintain or satisfy itself that there is an adequate and free service to assist migrants

for employment and to provide them with accurate information. Sri Lanka has fulfilled this requirement in some extent. Because information regarding emigration is available in Sri Lanka at the Bureau for Foreign Employment, the Department of Immigration and Emigration and the Ministry of External Affairs. However this Article provides certain difficulties for Sri Lanka in ratifying this Convention. Because **Sri Lankan Bureau of Foreign Employment Act** (SLBFE Act) is one of the major legislations that deals with foreign employment and Section 51 of the amended Act No.4 of 1994 requires; Sri Lankans who leaving for employment outside from Sri Lanka have to pay a registration fee to the Sri Lankan Bureau for Foreign Employment (SLBFE) prior to their departure. Article 2 of the Migration for Employment Convention also requires States to maintain adequate free services to assist the migrants. Therefore SLBFE cannot be considered as a free public employment service and it is not within the scope of the Convention.

Article 3 of the Convention requires State to take necessary steps against misleading propaganda relating to emigration and immigration. In Sri Lanka SLBFE Act requires all private requirement agencies to be licensed in order to operate. Section 24(1) of this Act provides that all advertisements for requirements must be submitted to SLBFE for approval prior to the publication. And breach of this requirement may result in the cancelation or the refusal of license to operate according to this Act. The amendment to the SLBFE Act in 2009 imposes an obligation to verify this section. But however the inability to hold unlicensed sub-agents accountable has led to the continuation of abusive and

exploitative practices in this area. That means the lack of proper monitoring mechanism for licensed agencies is a major challenge in reducing those malpractices.

Article 4 of the Convention requires State to facilitate departure journey and reception of migrants for employment. According to SLBFE Act also one of the objectives of SLBFE is to assist Sri Lankan workers going abroad for employment. However, the reception of migrants in host countries is largely a matter for employment agency. Nonetheless, SLBFE does not appoint a welfare officer to operate through Sri Lankan embassies in major destination countries.

Article 5 of the Convention requires State to undertake appropriate medical tests within its jurisdiction. But the current requirement and practice is that migrant workers seeking employments in Saudi Arabia, Kuwait, Oman and United Arab Emirates should obtain a medical certificate from a medical clinic in Sri Lanka appointed by Gulf medical centers.⁴⁶ Sometimes this may lead to a discriminatory medical screening without the knowledge or consent of prospective migrant workers. Through the Constitution also Sri Lanka guarantees right to equality and equal protection of law. And in *Coeme v BlankaDiamonds*⁴⁷ Sri Lankan judiciary held that migrant workers employed in Sri Lanka are entitled to all benefits from employment such as social contribution. Therefore it can be argued that Sri Lankan government has to comply with principle of equality recognized in the Convention.

According to above facts it is clear that the ratification of this Convention will require

the States to strictly regulate the private agencies which will reduce some negative experiences we have had in the past. Generally Sri Lanka is the primary state of origin of an estimated 200,000 registered migrant workers in Middle Eastern and South East Asian countries.⁴⁸ This Convention can also provide practical and stringent guidelines in negotiating and concluding bilateral and multilateral agreements. Hence ratification of this Convention will also strengthen international support for Sri Lanka where its nationals suffer violations, abuse of discriminations while in employment in abroad.

Occupational Safety and Health Convention, 1981 (No.155)

The theme of this Convention and Recommendation No.164 is the implementation of a policy focused on prevention rather than a reaction to the consequences of occupational accidents and diseases. Because when occupational hazards arise at the workplace; it is the responsibility of employers to ensure that the working environment is safe and healthy. That means employers must prevent and protect the workers from occupational hazards and ensure that the management processes promote the safety and health at work.

According to the Part 1 of the Convention the government is required to hold consultations at the earliest possible stage prior to the action taken, hold consultations with the representative organizations of employers and workers concerned and report on exclusions made to the ILO. In Article 3(a) of this Convention the term "branches of economic activity" covers all

the branches in which workers are employed including public service. However regarding the self-employed persons this Convention is silent. But it follows Paragraph 1(2) of Recommendation No.164 and it says that it is up to the each country to determine what protective measures may be necessary and practicable to apply to this category of persons.⁴⁹

As Article 4(1) of this Convention provides the national policy shall be formulated, implemented and periodically reviewed in consultation with the most representative organizations of employers and workers. According to the Article 5(c) the national policy should be take into account the training, qualifications and motivation of persons involved in one capacity or another in the achievement of adequate levels of safety and health.

According to this Convention governments are responsible for drawing up occupational safety and health policies and ensure that they are implemented. And also under this Convention the employer's responsibility goes further; entailing knowledge of occupational hazards and ensuring that the management processes promote the safety and health at work. In Sri Lanka the Factories Division and the Occupational Hygiene Division of the Department of Labour are statutorily responsible for the implementation of the occupational safety and health programs in Sri Lanka.

The **Factories Ordinance No.45 of 1942** and subsequent amendments⁵⁰ are the principle occupational safety and health legislation in Sri Lanka. They provide minimum safety standards to be maintained by the employer in factories and

manufacturing processes. Further addresses the matters of health welfare and hygiene, welfare of the workers and addresses the special provisions in the employment of women and young persons in factories. But this Ordinance does not cover the health and safety of field workers like farmers in the agricultural field.

Furthermore **Shop and Office Employees' Act** prescribed the provisions for the health of workers employed in the shop and offices and sets out the requirement of adequate light, ventilation, sanitary facilities and washing facilities in work places. And the **Maternity Benefits Ordinance** is directly applicable to the female workers and imposes certain restrictions regarding the employment of pregnant females for certain types of works that could be considered harm to her and her child.

The **Workmen's Compensation Ordinance No.19 of 1934** provides for the payment of compensation to workers who are injured in the course of their employment. And also it contains a list of occupational diseases.

When considering all these things it seems that the laws and practices in Sri Lanka are generally in compliance with this Convention. However Sri Lanka is feeling effect of globalization and the impact of economic development and industrialization. Therefore it is increasingly recognized that the protection of life and health at work is a basic worker's right. In **Consumer Education and Research Centre v Union of India**⁵¹ the court held that; the right of health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also to robust health and vigor

without which worker would lead a life or misery.

Therefore the ratification of this Convention will lead to an amendment to the Factories Ordinance in accordance with the changes in the technology and substance used in the factories to ensure the health, safety and welfare of the workers. This is important, because in present high number of physical, chemical and biological agents as well as adverse ergonomic, physiological factors are found in working environment. And the workers in highest risk industries such as mining, forestry, construction, agriculture and plantation are often known to be at an unreasonably high risk. The work related matters are untenable and not only because of the occupational issues itself, but also because of the simultaneous exposure to heat, dust, noise, chemicals and environmental pollution. That means workers face physical, biological, chemical and psychosocial workplace hazards in everywhere. Sometimes non-occupational health hazards increase the risk of workers as in the case of lung cancers, where smoking can exacerbate the effects of occupational exposure to asbestos. Therefore ratification of this Convention will guide the State to ratify other related Conventions to the protection of occupational safety and health of workers.⁵²

Decent Work for Domestic Workers Convention 2011 (No.189)

Eventhough Sri Lanka has paid its attention to protect the rights of migrant domestic workers; a less attention has been paid towards the domestic worker population. The Decent Work for Domestic Workers

Convention and Recommendation No.201 widen the standards of domestic workers. This Convention mainly addresses the issues of facilitating organization of domestic workers and their employers, awareness-raising advocacy and development of knowledge base and policy tools. And also this Convention recognizes that real change of lives of domestic workers requires building national capacities and institutions and facilitating social and institutional change. And this Convention provides standards that would ensure that domestic workers are treated with same respect, dignity and protection given to the other workers. This Convention promotes a basis for the introduction of legislative and government reforms that are rooted in a rights-based approach.

Article 2 of this Convention requires States to respect promote and realize fundamental principles and rights at work.⁵³ In Sri Lanka the Maternity Benefits Ordinance is not applicable to domestic workers. And the domestic workers are expressly excluded from the application of **Payment of Gratuity Act No.12 of 1983**.

Article 3 of this Convention lists out basic hours of work, a limit on rights for domestic workers including reasonable working hours, weekly rest of at least 24 consecutive hours, a limit on in-kind payment and clear information on terms and conditions of employment. Article 6 recognizes a decent living condition. In practically Sri Lankan domestic workers face long hours of work, a heavy work load, a lack of privacy, low salaries, inadequate accommodation and food, lack of job security, absences of benefits generally granted to other categories of workers and exposure to violence and abuses. Article 10 of this

Convention mainly addresses the issues of protection of rights of domestic workers, promotion of equality of opportunity and treatment and improving working and living conditions.⁵⁴

According to the interpretation for the term "workman" in Industrial Disputes Act in Sri Lanka; this Act would include the domestic workers also. That means in Sri Lanka domestic workers are governed by certain provisions of Industrial Disputes Act. According to this Act verbal agreements can be considered as binding and the domestic workers who often do not have written contracts can seek legal remedies under Industrial Disputes Act and can complain to the Department of Labour or the Commissioner of Labour. Under this Act the reliefs for unjustified terminations of services of domestic workers are not reinstatement but entitled to compensation.

The Employment of Women, Young Persons and Children Act provides that the minimum age for employment is 14 years and the minimum age for hazardous employment is 18 years. This Act is applicable to domestic workers as well without any distinction.⁵⁵ Article 11 of this Convention recognizes minimum wages for domestic workers. But in Sri Lanka the wages of domestic workers are depending on the location of employment. The Wages Board Ordinance determines terms and conditions of employment in trades covered by the Ordinance. As the word 'trade' has a commercial connotation, it cannot be interpreted to include domestic workers.⁵⁶

Furthermore the existing laws of Sri Lanka have ratified certain ILO Conventions as mentioned earlier.⁵⁷ In addition to that this Decent Work for Domestic Workers Convention recognizes that a real change in

the lives of domestic workers require building national capacities and institutions and facilitating social and institutional change which are complex and longer processes. Domestic workers will become legally binding on the countries only upon the ratification of the Conventions and their recommendations. Therefore the ratification of this Act shows a commitment of policy makers regarding the protection of labour rights of domestic workers. And ratification of this Convention will encourage the legislative bodies to amend prevailing labour laws to include domestic workers or to introduce separate specific legislation for domestic workers. However the law enforcement is singularly difficult in the field of domestic work. But to be effective legislation on domestic work should include clear, appropriate deterrents for breaches of law and national laws should contain effective supervisory mechanisms.

As a dualistic country while ratifying the International Conventions Sri Lanka has a duty to enact national legislations to give effect to these Conventions. These Conventions can be considered as a best tool in order to encourage the States to establish and improve the national legislations in harmony with the international standards.⁵⁸ And ratification of these Conventions may provide an opportunity to review and reconsider the laws relating to migrant workers, domestic workers and occupational safety and health of workplaces in Sri Lanka.

Conclusion

Sri Lankan standards in labour law legislations and other relevant legislations are mostly compatible with the standards of

core Conventions of ILO. That means Sri Lankan legal system provides a considerable attention regarding the protection of labour rights. Hence if Sri Lanka consider about the ratification of some other important and suitable ILO Conventions to the Sri Lankan context as discussed previously it will help to protect and ensure labour rights in Sri Lanka further. And it gives an opportunity to consider current international norms and developments and to bring them for the national legislations in line with the international standards.

End Notes

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නායුනන මළුසිරුරු සම්බන්ධව සිදු කෙරෙන පශ්චාත් මරණ පරීක්ෂණය

කොළඹ අධ්‍යීක්ෂණ*

මිනිසාගේ බිජිවීමන් සමගම මනුෂා හැසිරීම බොහෝමයක් ඒ සමග නිරමාණය විය. ඒ අතරින් සංවේදී සහ නපුරු දැඩි තත්වයන්ද විය. පසුව ක්‍රමතුමයෙන් සමාජ ගතවීමෙදී සහ ශිෂ්ටවාර ගතවීමන් සමගම මනුෂා ජීවිතය කෙරෙහි මනුෂා ජීවිතයේ ඇති වටිනාකම කෙරෙහි ඉගැන්වීම සහ දාරුනික අදහස් ඉස්මතුවිය. ශ්‍රී ලංකාව තුළ බෞද්ධ ශිෂ්ටවාරය පදනම් කරන ගොඩ නැගුණු සමාජයේ සියලු සතුන්ගේ ජීවිතවල වටිනාකම පිළිබඳව මන ඉගැන්වීමක් සහ හික්මීමක් විය. රාජා පරිපාලනයේදී නීති රිති රසක් වූ අතර මනුෂා සාතනය සැම සමාජයකම පිළිකුල් කරන ලදී. ඒ සඳහාම නීතින් සහ දුෂ්චරිතම තුමයන් සම්පාදනය වී තිබේ.

හඳිසි මරණ සහ අස්චාභාවික හේතුන් නිසා සිදුවන මරණ පිළිබඳ කුකුසක් නොමැතිව ඉතා පැහැදිලි විමර්ශනයක් කිරීමේ අවශ්‍යතාවය සැම සමාජයකම ඉතිහාසය පිරික්සීමේදී දැකිය හැකි වෙයි. සිංහල රජ ද්වස මරණ පරීක්ෂණය සඳහා රජු විසින් ලේකම්වරුන් , කොරලේකම්වරුන් සහ විදානේවරුන් පත් කරන ලදී. එසේ සිදු කරන ලද පරීක්ෂණ ක්‍රියාවලිය හඳුන්වනු ලැබුයේ "සාක්ක බලන්ව" යනුවෙනි. මහනුවර යුගයේදී වූ මෙම මරණ පරීක්ෂණ ක්‍රියාවලින් පසුව රජතුමා විසින් දුෂ්චරිතම පැමිණවීමක් සිදුවිය. මෙම සාක්ක බැලීමේ කරරයය අවසන් වනතුරු සොයාගත් දේහය ස්ථාපන කිරීමක් සිදු නොකළ යුතු බව සඳහන් විය.

අදාළරණයක් ලෙස ගෙල වැළැලා එල්ලී මිය ගිය අයකුගේ එල්ලී සිවින ස්ථානයෙන් බිමට බැමක් සිදු නොවිය යුතුයි. එහිදී විශේෂ කාරණය

වගකීම දරනුයේ ඉහත සඳහන් කරන ලද නිලධාරීන්ටයි. 1796 දී ලන්දේසින්ගෙන් ශ්‍රී ලංකාවේ මුහුදුබඩ පළාත් අත්කරගත් බ්‍රිතානාය ආණ්ඩුකාරවරුන් එංගලන්තයේ ප්‍රවත්තී "කොරනර ක්‍රමය" ලංකාවට හඳුන්වාදුන්නේය.

මනුෂා සාතන පිළිබඳ අධිකරණ වෛද්‍ය පරීක්ෂණ ඉතාමත් අභියෝගාත්මක පරීක්ෂණයකි. මනුෂා සාතනයක් ඉතාමත් සහායික ක්‍රියාවක් වෙයි. එයට මුළුක්වන අපරාධකරු නිතිය ඉදිරියට ගෙන ඒමට පොලිසිය සහ සමාජය යන දෙපාර්තමේන්තු පැවරි ඇත්තේ ඉතාමත් වැදගත් කාර්යභාරයකි. මේ නිසා මෙවැනි පරීක්ෂණයක යෙදෙන පොලිස් නිලධාරීන් ඇතුළ අනෙකුත් සියලුම නිලධාරීන් වෙත වැඩි පිඩිනයක් සහ ආතතියක් ගෙන දෙන කාර්යයක් බවට මෙය පත්වේ. මෙහි තව දුරටත් අභියෝගාත්මක බව තියුණු වෙන්නේ මෙම මනුෂා සාතන සිදුවන විවිධ හේතුන් සහ තත්වයන්ය.

මෙම හේතුව නිසා මනුෂා සාතන පරීක්ෂණය පතන් ගැනීමට පෙර ර්වට මුල් වී ඇති කරුණු ස්ථානය හා සිදුවී ඇති ආකාරය ගැන මනා වැටහිමක් තිබිය යුතුය. ඉහත දක්වන ලද කරුණු කෙරෙහි සවිස්තරාත්මක විස්තරයක් ලබාගැනීම අත්‍යවශ්‍ය වන අතර මෙය ඉතාමත්ම සංකීරණ සහ දුෂ්කර කාර්යයක් වේ.

හඳිසි මරණයක් හැඳින්වීම

ලේක සෞඛ්‍ය සංවිධානයේ නිරවතනය අනුව , කළුන් මන සෞඛ්‍යයෙන් හෙබි පුද්ගලයකු හඳිසියේම යම් රෝග ලක්ෂණයක් පෙන්වා පය 24ක් තුළ එම රෝග නිදානාය හඳුනා නොගෙන

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(Dip.Deathinvest.UOC)(PQHRM-CIPM)

මිය ගියහොත් එය හඳුනීම මරණ ලෙස හඳුන්වයි.(Emro.who.int. 2020.)

මානව හීමිකම්

දෙවන ලේක පුද්ධයෙන් පසුව 1945 දී එකසත් ජාතින්ගේ සංවිධානය පිහිටුවිය. මෙම සංවිධානය විසින් එවක යුධ සමයේ මිනිසුන්ට සිදුවූ අමානුෂීක සිදුවීම් යලි සිදු නොවීම උදෙසා මානව හීමිකම් පිළිබඳ විශ්ව ප්‍රකාශනය ලොවට හඳුන්වාදෙන ලදී. එහි ප්‍රතිඵලයක් ලෙස 1948 දෙසුම්බර් මස 10 වන දින එකසත් ජාතින්ගේ මහා මණ්ඩලය එම මානව හීමිකම් පිළිබඳ විශ්ව ප්‍රකාශනය සම්මත කරන ලදී. පශ්චාත් මරණ පරීක්ෂණවලදී එම ප්‍රකාශනයේ අති යම් කරුණු පිළිබඳව අවධානය යොමු කිරීම අත්‍යවශ්‍යයයි.

විශ්ව ප්‍රකාශනයේ 02 වන වගන්තියට අනුව ජාති, වංශ, වර්ණ, ස්ත්‍රී පුරුෂ භාවය, ආගම, දේශපාලන ආදී කවර හේදයක් හෝ සමාජ, ජාතික, දේපල, උපත ආදී කවර තත්ත්වයක විශේෂයක් නොමැතිව සියලු හීමිකම් භා ස්වාධීනත්වයක් සම පුද්ගලයකුටම උරුම වේ. එබැවින් පශ්චාත් මරණ පරීක්ෂණ වලදී කවර ආකාරයක වෙනස් කර සැලකීමක් නොකළ යුතුය. පශ්චාද් මරණ පරීක්ෂණ වලට එන සම කෙනෙකුම සමානව සැලකිය යුතුය. එසේම එම වගන්තිය අනුව පුද්ගලයන්ගේ දේශපාලන පක්ෂපාතිත්වය අනුව කිසිදු විශේෂ සැලකීමක් කිරීමද නොකළ යුතුය.

ප්‍රකාශනයේ 05 වන වගන්තියට අනුව කිසීම පුද්ගලයකු වද තිංසාවට හෝ කර අමානුෂීක පහත සැලකිල්ලකට හෝ දුඩුවමකට හෝ බඳුන් නොකළ යුතු බව දැක්වේ. එබැවින් පශ්චාද් මරණ පරීක්ෂණයෙදී පොලිසියේ හෝ බන්ධනාගාර නිලධාරීන්ගේ හෝ වෙනත් අයකුගේ වධ තිංසාවක් නිසා මරණයක් සිදුවූ විට ඒ පිළිබඳව විශේෂයෙන් සැලකිලිමන් විය යුතුය.

ප්‍රකාශනයේ 11 වන වගන්තියට අනුව වරදක් සම්බන්ධයෙන් වේ. එබැවින් පුද්ගලයකු අධිකරණයෙන් වරදකරු බව ඔප්පු වනතුරු තීරණයේ පුද්ගලයකු ලෙස සැලකිය යුතු බව සඳහන් වේ. එබැවින් පශ්චාත් මරණ පරීක්ෂණ වලට පැමිණෙන හෝ පොලිසිය විසින් ඉදිරිපත්කරන සම සැකකරුවෙකුටම කිසිදු ආකාරයකට වෙනස්කාට සැලකීමක්

නොකළ යුතුය. හඳුනීම මරණ පරීක්ෂණයකදී කවර පුද්ගලයකුගේ හෝ මානව හීමිකම් කඩි කිරීමක් සිදුවුවහොත් ඔහුට එරෙහිව මානව හීමිකම් කොමිස මට පැමිණිලි කළ හැකිය . නැතහොත් ග්‍රෑෂ්ඩාධිකරණයේ මානව හීමිකම් තැබුවක් පවරා වන්දී ඉල්ලා සිටිය හැකිය.

ශ්‍රී ලංකාව තුළ අපරාධ නිතිය සහ පශ්චාත් මරණ පරීක්ෂණ ක්‍රියාවලිය

ශ්‍රී ලංකාවේ අපරාධ නිතිය තුළ දැන්වනීති සංග්‍රහය වෙත ලැබෙනුයේ ඉතාමත් වැදගත් ස්ථානයකි. එහි අපරාධ වරදයන් සහ දුඩුවම් සංග්‍රහ ගත කර පවතී. දැන්වනීති සංග්‍රහයේ XVI වන පරිවේදයේ 293 වගන්තියේ සාවදා මනුෂ්‍ය සාතනය පිළිබඳවද, 294 වගන්තියේ මිනිමැරුම යන වගන්තිය පිළිබඳවද සඳහන් වන අතර 296 වගන්තිය යටතේ මිනිමැරුම සඳහා දුඩුවමද අඩංගු කර ඇත. 297 වගන්ති ප්‍රකාරව විධි විධාන පනවා ඇත්තේ සාවදා මනුෂ්‍ය සතනය නම් වරද කෙරෙහි පවතින දුඩුවම් සඳහාය. මහාධිකරණයේ අධිවෝදනා පත්‍රයක් ගොනුකිරීම මගින් රජය විසින් අපරාධ නඩු මෙහෙයවයි.

මනුෂ්‍ය සාතන වර්ග පිළිබඳව අවධානය යොමු කිරීමේදී ආකාරයන් කිහිපයක් වෙයි. එනම් ගෘහාග්‍රිත සිදුවන මිනි මැරුම්,

- සහකරු/සහකාරිය
- වෙනත් අපරාධයක් ආග්‍රිතව සිදුවන මනුෂ්‍ය සාතන
- සොරකම් කිරීම, මැකාල්ලකුම, කාම අපරාධ ආග්‍රිතව
- අපරාධ කළේ මගින් සිදුක රණ මිනි මැරුම්
- ද්බරයක් මුල් කරගත් මිනි මැරුම්
- ඉරිසියාව හෝ පලිගැනීම සඳහා සිදු කරන මිනි මැරුම්
- දේපල ආරච්චල් වලදී කරන මිනි මැරුම්
- හඳුනීම කෝපය ආග්‍රයෙන් කරන මිනිමැරුම්
- නොසැලකිල්ල මගින් සිදුවන මිනිමැරුම් තුස්තවාදී ක්‍රියා, සාමූහ

සාතන ,දුරුලබගනයේ මනුෂ්‍ය සාතනආදිය දැක්වීය හැක.

තවද මෙහිදී වැදගත්ම දෙයක් වනුයේ මිනිමරුමක්ද සියදිනි නසාගැනීමක්ද යන්න වග සොයා බැලීමයි. ඉහත දක්වන ලද ආකාර වලින් 50% ක පමණ මනුෂයේ සාතන බොහෝමයක් ගෘහීතුව සිදුවන මිනිමරුම වෙයි. මධ්‍යසාර භාවිතය සහ මත්වීම මගින් සිදු කෙරෙන මිනිමරුම බොහෝමයක් දැකගත් හැකිකේ පොදු ස්ථාන ආග්‍රිතවය.

මනුෂ්‍ය සාතන පිළිබඳ හඳිසි මරණ පරික්ෂණ යන්ගේ මුලික පරමාර්ථය වන්නේ මරණයට අදාළ කරුණු ලබාගැනීම සහ ඉන් ඉදිරියට මෙස්ස්ත්‍රාත් පරික්ෂණයකට (පෙළු තොවන නඩු විභාගයකට) යොමු කිරීම සඳහා වාර්තාවක් පිළියල කිරීමයි. මෙහිදී කිසීම ආකාරයකට සැකකරුගේ දොස් තොඳාස් භාවය තීරණය කිරීමක් සිදු නොවේ.

මනුෂ්‍ය සාතන පරික්ෂණයන් පටන් ගැනීමේදී මුලික පියවර කිහිපයක් අනුගමනය කරයි.

1. අදාළ සාතනය පිළිබඳ තොරතුරු ඉත්හාසය ලබා ගැනීම.

පොලිසිය මගින් සහ වෙනත් සාක්ෂි කරුවන් ලෙස සලකන හිතවතුන්, නැදුයන් හෝ වෙනත් සාක්ෂිකරුවන් මෙහිදී හැකිනම් අදාළ මිනි මරුම සිදුවූ ස්ථානයේ සැලැස්ම වායාරුප ගත කළ හැකිය.

2. ස්ථාන පරික්ෂාව

ස්ථාන පරික්ෂාව ඉතා සුක්ෂමව සිදු කළයුතු දෙයක් වනුයේ ඉතා කුඩා හෝ සාක්ෂියක් ලබාගත හැකි බැවිනි. අපරාධ නඩු විධාන සංගහයේ හඳිසි මරණ පැවැත්වීමේ විධිවිධාන අනුව මෙස්ස්ත්‍රාත්වරයාට හෝ හඳිසි මරණ පරික්ෂකවරයාට මියයිය කෙනාගේ සිරුර ඇති තැනට ගොස් පරික්ෂ කිරීම සිදු කළ යුතු බව දක්වා ඇත.

ඉතාමත්ම වැදගත් දෙයක් වනුයේ ප්‍රශ්නයේ අධිකරණ වෛද්‍යවරයා මෙහිදී පරික්ෂණය වෙත සම්බන්ධ වීමයි. මෙම ස්ථාන පරික්ෂණය

තුළින් ලබාගන්න තත්වයන් වනුයේ නාදුනන මල සිරුරක අනනායන්වය සොයා ගැනීමට, අපරාධකරුගේ අනනාතාවය වහවුරු කරගැනීමට, සාක්ෂි සුරක්ෂිතව ලබාගැනීමට, සැකකරුවන්ගේ අනනාතාවය තහවුරු කරගැනීමට හැකි වෙයි.

මනුෂ්‍ය සාතන පරික්ෂණයක සැලැස්ම කිරීම පිළිබඳ දැන ගැනීම ඉතාමත් විවින්නේය. මෙහිදී එය අවස්ථා කිහිපයක් යටතේ සිදු කරයි.

1. මුලික ප්‍රතිචාරය

මෙය අපරාධයේ ස්වභාවය අනුව වෙනස් වෙයි. ස්ථානය ආරක්ෂා කිරීම සඳහා පොලිසි නිලධාරීන් යොදවනු ලබයි. මෙය ස්ථානය සුරක්ෂිමේ මුලික පියවර වෙයි.

2. නිසියාකාර පරික්ෂාව

මනුෂ්‍ය සාතනයක් බව ඔප්පු කිරීම සඳහා අවශ්‍ය දත්ත ලබා ගැනීමට ද්‍රව්‍ය ලබා ගැනීම සිදුවීය යුතුය. මෙම සාතනයන් සඳහා සැක පිට අත්අඩංගුවට ගන්න පුද්ගලයන් හඳුනා ගැනීමටත් නියම අපරාධකරු හඳුනා ගැනීමටත් අවශ්‍ය සාක්ෂි ලබා ගනීමට හා ඉදිරියේදී විභාගය වන නඩුව සඳහාත් යොදා ගත හැකි ද්‍රව්‍ය මෙම පරික්ෂාවන් සිදුකළ යුතුයි.

3. පරිපාලනය

මනුෂ්‍ය සාතන කියාවලියද තිසි අයුරින් සිදු කිරීමට පරිපාලන කියාවලියක් සිදු කරයි. එහිදී ලැයිස්තු ගත කිරීම, නඩුත්තු කිරීම අදි දැ සිදු කෙරෙයි.

මෙසේ දක්වන ලද කරුණු තෘප්ත කිරීම සඳහා නිසි පුහුණුව ලත් කාර්ය මෙෂ්ඳුලයක් සිටියයුතු අතර වාර්තා කරන සියලු දත්ත නිවැරදිව සිදු කළ යුතුයි. මරණ පරික්ෂණයකට ලැබෙන තුවාල සහිත දේහයක් යම් ආකාරයකින් නිවැරදි තිරවුල් සාධකයක් විය හැක. නමුත් සම්භර අවස්ථාවන්හිදී යම් අපරාධයක් පිළිබඳව ලැබෙන තොරතුරු අපැහැදිලි හෝ සැකකටයුතු හෝ විය හැක. විශේෂයෙන් පහත

මහුමා සාතනයක් සිදු වී ඇතිද තැතිද යන්න පිළිබඳව සැකයක් මතු වෙයි.

එනම අතුරුදහන් වීම, හඳිසි බලාපොරත්තු නොවූ මරණයක්, පැහැරගැනීම් පිළිබඳ ජ්‍යෙෂ්ඨීය, අපරාධයක් සිදුවුබවට සාක්ෂි ඇති නමුත් මඟ ගරීරයක් තැති අවස්ථා, දිවිනසගැනීම්, ගිනි ගැනීම් නිසා ඇතිවන මරණ, රිය අනතුරු සහ රිය අනතුර සිදු කර පලා යාම, මත්ද්වා සම්බන්ධ මරණ.

මරණය පිළිබඳව ලබාගතයුතු විස්තර

දැනුම්දෙන්න පිළිබන්ද විස්තර, මඟ ගරීරය පිළිබඳව ඔහු දනුවන්වූ ආකාරය, මිය ගිය තැනැත්තාගේ අනනුතාවය දනිනම් පමණක්, මරණය ගැන දැනුම් දෙන්න සහ මරණයට පත් තැනැත්තා අතර සම්බන්ධතාවය, මරණය සිදුවී ඇති ස්ථානයේ සිටී පුද්ගලයන්, මරණය ගැන දැනුම් දෙන්නගේ හැසිරීමේ ස්ථානය.

කෙසේ වුවද මරණය සිදුවී ඇති ස්ථානය සුරක්ෂිත කිරීමේදී මරණය දැනුම්දෙන්නගේ සම්බන්ධය පිළිබඳව දැනගැනීම ඉතාමත්ම වටින්නේය . මක්නිසායන් මරණය වාර්තා කරන්නම මිනිමරුවා විය හැක. හඳිසි මරණ සඳහා බහුලවම හේතුසාධක වී ඇත්තේ රුධිර සංසරණ පද්ධතියේ පවතින අක්‍රිතවන්ය. බහුලව දක්නට ලැබෙන හඳිසි මරණ වලට හේතු කිහිපයක් පහත දැක්වේ.

හදවත් ආබාධ

- 1.කිරීමක ධමනියේ ප්‍රතිඵිතය(මේද තැන්පත්ව)
2. හඳු ජේඩියේ (වැහිරකන්තුවේ) රුධිර සැපයුම අදාළ වීම.
- 3.අධික රුධිර පිඩිනය නිසා වන හඳුයාබාධ
4. හඳු ජේඩිවල ආබාධ
5. සමහර උපතින්ම එන හඳුයාබාධ

පශ්චාත් මරණ පරික්ෂණයක් සිදු කරනුයේ කුමක් අරමුණු කරගනාද?

සමහර අවස්ථාවන්හිදී නීතිමය කටයුතු සඳහාද වටත් විටක වෙළඳුමය කටයුතු සඳහාද පශ්චාත් අරණ පරික්ෂණ සිදු කරයි. නීතිමය කටයුතු සඳහා කරන ලද පශ්චාත් මරණ පරික්ෂණ "අධිකරණමය පශ්චාත් මරණ පරික්ෂණ" ලෙස හඳුන්වයි. මේ සඳහා මහේස්ත්‍රාත්වරයකු හෝ හඳිසි මරණ පරික්ෂකවරයෙක් සහබඳවීම අවශ්‍යවේ. අපරාධ නඩු විධාන සංග්‍රහයේ XXX පරිවේදයේ 373 වන වගන්ති ප්‍රකාරව පශ්චාත් මරණ පරික්ෂණය සිදු කිරීම නියෝග කිරීම සඳහා එන දීමටමහේස්ත්‍රාත්වරයාට භා හඳිසි මරණ පරික්ෂකවරයාට නීතිමය බලයක් පවතී.

මුළුනට ඕනෑම රජයේ වෙළඳු නිලධාරියෙකුට මරණ පරික්ෂණයක් සිදුකර මරණයට හේතුව සහිත වාර්තාව ලබාදීමට පැවරිය හැකිය.

අධිකරණමය පශ්චාත් මරණ පරික්ෂණයක් පැවැත්වීමේ අරමුණ වන්නේ මරණය සිදු වූ ආකාරය තහවුරු කරගැනීමට, මරණයට පත් පුද්ගලයාගේ අනනුතාවය තහවුරු කරගැනීමට, සාක්ෂි සඳහා සාම්පූල ලබා ගැනීමට, සිදුවීම නැවත ගොඩ ගැනීමට, තන්වන පාර්ශවයක් මගින් සිදු වූ යම නොසලකා හැරීමක් මරණයට හේතු වුයේදැයි හෝ දායක වුයේදැයි සොයා බැලීමට සහ මරණයට හේතු වුයේ අපරාධයක්ද තැන්හොත් වෙන හ්තුවක්ද යන්න සොයා බැලීමට. ව්‍යුදිවෙදික පශ්චාත් මරණ පරික්ෂණයක් අධ්‍යාන කටයුතු සඳහා පමණක් සිදු කරන අතර අධ්‍යාන කටයුතු වලදී රෝගයක් ඇතිවන්නේ කෙසේද එහි සංකුලතා පිළිබඳව සෙවීමක් සිදු කරයි. මේ සඳහා මහේස්ත්‍රාත්වරයාගේ හෝ මරණ පරික්ෂකවරයාගේ සහභාගිත්වයක් අවශ්‍ය නොවේ. ඒ කෙසේ වුවද ව්‍යුදිවෙදික පරික්ෂණයක් සඳහා නැදුයන්ගේ අවසර ලබා ගත යුතුයි.

අධිකරණමය පශ්චාත් මරණ පරික්ෂණය සිදු කරනුයේ අස්චාභාවික , මරණයට හේතුව සොයා ගත නොහැකි මරණ වලදී වන අතර හේතුව දන්නා සොභාවික මරණ සඳහා ව්‍යුදිවෙදික පශ්චාත් මරණ පරික්ෂණ සිදු කරයි.

පහත සඳහන් නේතු මත මරණයක් සිදුවූ විට එමවිමර්ශනය මහේස්ත්‍රාත් වරයකු විසින් සිදු කර යුතුය.

1. බන්ධනාගාරයක් තුළසිදුවූ මරණයක්
2. මානසික රෝහලක් තුළ සිදුවූ මරණයක්
3. ලාංඡරු රෝහලක් තුළ සිදුවූ මරණයක්
4. ප්‍රවෘත්ති ලෙස සිදුවූ මරණයක්
5. හදිසි අනැතුරකින් සිදුවූ මරණයක්
6. හදිසියේ සිදුවූ මරණයක්
7. මරණය සිදුවී ඇත්තේ කොස්ඳුදී දැනගැනීමට නොහැකි ලෙස මළසිරුරක් හමු වූ විට.

අධිකරණමය පශ්චාත් මරණ පරික්ෂණයන් සිදු කරන්නේ කොහොද?

සාමාන්‍යයෙන් පශ්චාත් මරණ පරික්ෂණයන් සිදු කරනුයේ රෝහල් මෘත ගරිගරයේය. ලංකාවේ පවතින සමහර ග්‍රාමීය රෝහල් වලද දිස්ත්‍රික් රෝහල් දක්වා වන රජයේ රෝහල් සතුව මෘතගරිගර පහසුකම් ඇති අතර එම රෝහල් තුළ අධිකරණමය වෙදා කටයුතු සඳහා සහතික කළ අභිකරණ වෙදා නිලධාරියෙක් සිටියි. ඒ කෙසේ වූවද අධිකරණ වෙදා නිලධාරියකු නොසිටින රෝහල් තුළ එම කටයුතු සිදු කරනුයේ රෝහල් හෝ වෙදා අධ්‍යක්ෂකවරයා විසිනි.

සාමාන්‍ය ආකාරයට අදාළ පොලිස් කොට්ඨාසයට අයත් ආයතනයක පශ්චාත් මරණ පරික්ෂණය සිදු කරද විවිධ ඩොතුන් ඩොතු කොටගත පශ්චාත් මරණ පරික්ෂණ වෙනත් ආයතන තුළද සිදු කිරීමට මහේස්ත්‍රාත් තුමාව නියෝග කිරීමට හැකියාවක් පවතී.

වෙදාවරුන්ගේ නොසැලකිමුන්හාවය ,කුඩා ලදරු මරණ ,ඉතා සංකීරණ බෝමබ ආදිය ඩොතු කරගනිමින් ඇතිවන මරණ ආදිය පරික්ෂාවට ලක් කිරීමට එවැනි සංකීරණ තත්ත්වයන් පිළිබඳ සුදුසුකම් ලත් අධිකරණ වෙදා මධ්‍යස්ථාන වෙත පැවරීම වට්තන්නේය. දැනට පුද්ගලික රෝහලක හෝ පුද්ගලික වෙදා වරයකු විසින් පශ්චාත් මරණ පරික්ෂණ කිරීමට කිසිදු බලයක් නොමැත.

අධිකරණ වෙදාවරයාගේ කාර්යභාරය සැකවින්

පශ්චාත් මරණ පරික්ෂණය සිදු කරන වෙදාවරයා විසින් දේහ විවිධෙනාය ආරම්භ කිරීමට පෙර පහත කරනු සම්පූර්ණ බව සහතික කළයුතුය. පළමුව හදිසි මරණ පරික්ෂණය හෝ මහේස්ත්‍රාත්වරයා විසින් මරණ පරික්ෂණය සඳහා අවසර දිය යුතුය. පසුව දේහය පවිලේ කෙනෙකු විසින් හුදාගත යුතුය.

මෙසේ තමාට ලැබේ නිබෙන මෘතදේහය පිළිබඳ සවිස්ටරන්මක සටහනක් වෙදාවරයා විසින් ලබාගනී. මේ සටහන ලබාගනුයේ පොලිස් නිලදරින්ගෙන් හෝ පවිලේ සම්කියන්ගෙන්. ඒහි අරමුණ වන්නේ බොහෝ විට අධිකරණ වෙදාවරයාට සිදුවීම පිළිබඳව අවබෝධයක් ලනගනිමටය. සිද්ධිය සිදුවූ ස්ථානය බොහෝවිට අවශ්‍යනම් පමණක් වෙදාවරයා පරික්ෂා කරනු ලබයි. මෙය පශ්චාත් මරණ පරික්ෂණයට පෙර හෝ පසුව සිදු කළ හැකිය. වර්තමාන නීතියට අනුව අධිකරණ වෙදාවරයාට ස්ථානය පරික්ෂ කළයුතුමයයි නියමයක් නොමැත.

මරණයෙන් පසුව සිදුවන වෙනස්කම්

මරණය යනු සෞඛ්‍යවිකව ගත කළ ක්ෂේක ත්‍රියාවක් නොව. කාලයක් තිස්සේ ගරිරය තුළ සිදුවෙමින් පවතී ත්‍රියාවලියක් වෙයි. ඒවා විද්‍යාත්මකව ගත කළ මරණය යනු ගරිරයෙ ඒවා ත්‍රියාවලින් අතර සම්බන්ධතාවය තැවත ගොඩ නොහැකි ලෙස බිඳියාම නිසා සිදුවන අප්තිවර්ත වූ තත්ත්වයක්. ඒවා විද්‍යාත්මකව තුන් ආකාරයක මරණ ගැන සඳහන් වේ.

1. දෙහික මරණය (Somatic death)

පුද්ගලයා තුළ සිදුවන ඒවා ත්‍රියාවලි අතර සම්බන්ධය බිඳියාමක් සිදුවෙයි. එබැවුන් පුද්ගලයා තනි ඒකකයක් ලෙස ත්‍රියා කිරීම සම්පූර්ණයෙන් නවති.

2. සෙසලිය මරණය (Cellular death)

දේහයේ සෙසලිය කොටස් මියයාම සිදුවේ. විවිධ සෙසලිය කොටස් විවිධ කාලයන්හිදී මියයාමට පවත් ගනී.

3. මොල මුල මරණය (Brain steam death)

වෙදාවරයාගේ උපරිම සැලකිල්ල මේ අවස්ථාවේදී ලැබෙන අතර ස්වසන යන්ත්‍ර ආධාරක මගින් කෘතීම ස්වසනය ලබා දීම උවද සිදු කරයි. Cadaveric spas යනු මරණය

සිදුවන මොහොතේදී බලවත් ලෙස ක්‍රියා කළ පෙශීන්ගේ දරදුඩු භාවයයි.. උදාහරණයක් ලෙස දියේ සිදුණු අයකු මරණයට පත්වීමට යාමේදී දිව් ගලවා ගැනීම සඳහා අවට වූ ජලප ගාක තදින් අල්ලාගනී. එසේ පෙන්තුම් කරන ක්‍රියාව ඔහු මියයමේදී දැඩිව කළ ක්‍රියාව වන අතර පෙශීන්හි දරදුඩු භාවයක් පවතී. ඊට පසුව සිදුවන වෙනස්කම් ලෙස සමෙහි සිදුවන වෙනස්කම් , අධෝස්ථානිය , ගරිර උෂ්ණත්වය අඩු වීම සහ යම් කාලයක් ගත වූ පසු සිරුර කුණු වීම දක්නට ලැබෙන්නේය. මෙත කටිනය හෙවත් දරදුඩු වීම මාංග ජේෂි තුළ සිදුවන රසායනික විපරියාස ජේතුවෙන් සිදු වේ. එය මුහුණේ සියුම් මාංග පෙශීන්ගෙන් ආරම්භ වී සිරුරේ අනෙකුත් කොටස් කරා යන අතර එක්වරක් බිඳ දැමු පසු තෙවත් ඇති නොවේ. මෙය ගරිර උෂ්ණත්වය ඉහළ අවස්ථාවලදී හෝ උණුසුම් පරිසර කළපයන්හිදී සිදුවෙයි.. උදාහරණ ලෙස මියගිය පුද්ගලයා මියයාමට පෙර පොර බෙදීම දී ක්‍රියාවක යෝදනද යන්න මේ මගින් සොයාගත හැක.

මරණයෙන් පසුව සිදුවන අධෝස්ථානිය (hypostasis) නිසා ගුරුත්වය යටතේ ඇති ප්‍රදේශ දුර්වරණ වීමක් සිදුවේ. මිට හේතුව මරණීන් පසු රුධිර තැල තුළ තිබෙන රුධිරය ගුරුත්ව බලය ඔස්සේ දේහයේ වඩා පහලින් යොමු වී ඇති කොටස් කරා එක් රස් විමයි. උදාහරණයක් ලෙස කිඩියකින් එල්ලි සිටින දේහය ගුරුත්වය අනුව සිරුරේ ඇති පා කෙළවර රතු හෝ දීම් පැහැද දැකගත හැකිය.

මෙසේ කාලය යාමන් සමගම වියෝගනය (decomposition) ආරම්බවේ. ප්‍රතිහවනය (putrefaction) යනු ක්ෂේද්‍යීවී ක්‍රියාවලිය නිසා සෙසල කුණුවීමට පතන්ගැනීමයි. මෙම ක්‍රියාවලියේදී මළයිරු දියවීමට පතන්ගැනීම සිදුවෙයි. මෙම ක්‍රියාවලියේදී සිදුවන දුර්වරණ වීම සාමාන්‍යයෙන් කොටපාට ගන්න අතර එය පය 18-30 දක්වා කළක් ගත වූ විට ආරම්භ වේ.

Adipocereformation මෙම අවස්ථාවේදී ගරිරයේ මේද කොටස්වල සිදුවන වෙනස් කමකි. පිටත වායුගේලයට නිරාවරණය නොවූ

මෙත ගරිර වල භා ආරදුතාවය ඉහළ පරිසර තන්ත්ව යටතේ තැම්පත් කර ඇති මෙත ගරිර වල වැඩ බහුලව දැකිය හැකිය. මදය ඉට වැනි ද්‍රව්‍යකට පරිවර්තනය වන අතර සිරුරේ තෙල් සහිත ප්‍රදේශවල බහුලව දැකගත හැකිය.

Mummification යන තත්වය ඇතිවන්නේ අධික උෂ්ණත්වයක් සහිත වියලි දේශග්‍රැන

තත්වයන් යටතේය. නමුත් (arsenic) විෂ වීම නිසා අලුත උපන් දරුවන්ගේ මරණ වලද දක්නට ලැබේ. මෙහිදී සිරුරේ පවතා , සලකුණු ආදිය බොහෝ කාලයක් ගේෂව පවතී. ශීලංකාවේ වියලි කළාපයේ බහුලව දැකගත හැක.

මෙත ගරිරයක සිදුවන වෙනස්කම් කාලය අනුව.

පැය 18 අවසානයේදී (පැය 12 ත් 24 ත් අතර)

උදරයේ දකුණු පස පහල (right iliac fossa) කොළ පාට වීමක් ඇත. මහාන්තුයේ බැක්වීරියා ක්‍රියාව නිසා දුර්වරණ බවක් සිදුවේ.

පැය 24 අවසානයේ (පැය 16 ත් 32 ත් අතර)

කොළපාට වීම සම්පූර්ණ උදාර බිත්තිය පුර පැතිර දක්නට ලැබේ. ඒ අවස්ථාවේදී නිපදවන වායුන් නිසා උදර ප්‍රදේශය පිම්බමක් (distention) සිදුවන බව නිරික්ෂණය කළ හැකිය. මුදය ආශ්‍රිත ප්‍රදේශයන්ගෙන් ඕනෑස් (putrefactive) වහනයක් සිදුවේ. මෙම දුවයන්ට දැඩි දුර්ගන්ධයක් පවතින අතර මැස්සන් ආකර්ශනයක් වීමක් සිදුවේ. එහිදී මැස් බිත්තර භා ඔවුන්ගේ පිටත වකුයේ කිට අවස්ථා මෙත ගරිරය මත දක්නට ලැබේ.

පැය 48 අවසානයේදී (පැය 32 ත් 64 ත් අතර)

ඇස් , ගෙල , මුහුණ , ලිංගේන්දුයයන් , තුළ වායු රස්වීම නිසා රේවා පිම්බ ගිය ආකාරයක් දක්නට ලැබේයි. දේහයේ තැනින් තැන දිය පටිවා මතුවීම සහ ඒවාහි තුළ ඉව්‍යය දුර්ගන්ධයක් සහිත වේ. මේ අවස්ථාවේදී උඩුසම (epiderms) පහසුවෙන් ගලවියාමක් සිදුවේ.

පැය 72 අවසානයේදී (පැය 48 ත් 96 ත් අතර)

කෙසේ බුරුල් වී ගැලවියාම දක්නට ලැබේ. මෙට පෙර සදහන් කළ සියල්ල ඉතා තීව්‍ය දක්නට ලැබේ.

දින 4 අවසානයේදී (දින 3 ත් 5 ත් අතර)

අත් , පා , සම අත්වැසුම් ඉවත්කරන්නාක් මෙන් ඉවත් කිරීමට හැකිය.

මෙම කාල පරාසයන් දී ඇත්තේ සාමාන්‍ය උෂ්ණත්වයන්ට අදාළව උවද මෙම කාල

පරාසයන් විවිද සාධක නිසා වෙනස වීමක් විය හැකිය. එනම් මත ගුරුත්‍ය වල දැමීම, පසේ ස්වභාවය, ගැහුර, වර්ණව, වැනි සාධක මේ බලපාන අතර කාම් සහ සත්ව උච්චරුදී සේතුවෙයි.

මරණ්න් පසුව ගතවේ ඇති කාලය නිර්ණය කිරීමට අනුගමනය කරන ක්‍රම (methods used for estimation of time since death)

විද්‍යාත්මක ක්‍රම

1. මරණ්න් පසුව සිදුවන වෙනසකම (post mortem changes)

2. කායික විද්‍යාත්මක අන්තිවීම (cessation of physiological functions)

3. කාමින්, කාමි බිත්තර හා ඔවුන්ගේ ජිවන වකු අධ්‍යනය (forensic entomology)

4. රසායනික ක්‍රම (chemical methods)

ප්‍රෝට්‍රාත් මරණ පරික්ෂණයක් සිදු කිරීම

1. බාහිර පිරික්ෂුම

වෛද්‍යවරයා විසින් දේහයේ බාහිර තොරතුරු පිළිබඳ සියලු තොරතුරු වාර්තා කරගැනීමක් සිදු කරයි. එහිදී දේහයේ තුවාල, ඉරියව්, සිරුරේ විරුපියනාවයන්, තුවාල කැලුලේ හෝ සිරුර හුද්‍යනාගැනීමේ වෙනත් ලක්ෂණ වාර්තාවට ඇතුළත් කරයි. මිය ගිය පුදුදලයාගේ උස සහ ගරීර ප්‍රමාණයද මැනැගන්න අතර මෙම ලක්ෂණ සටහන් කර ගැනීමේ ප්‍රධානතම අරමුණ වනාහි සිරුරේ දක්නට ලැබූණු තුවාල හුද්‍යනාගැනීමටයි.

උදාහරණයක් ලෙස තුවාලය මගින් ලි පතුරු, විදුරු කටු හෝ වයර් සලකුණු හුද්‍යනා ගත හැක. විල්පත්තුව මිනි මැරුම් නැඩුව

2. විවිධිනය සහ අභ්‍යන්තර පිරික්ෂුම

විවිධින ක්‍රියාවලිය ආරම්භ වන්නේ ගෙලෙහි පදයේ (උරෝස්පිය ඉහා කෙළවරේ) සිට ශෞශ්ණියේ ඉහළ කෙළවර (පුනික අස්පිය) දක්වා වන මධ්‍ය අක්ෂය ඔස්සේ වන කැපුමකින්ය. මෙම කැපුම ගෙල දෙපස හරහා 'ව' හැඩියට හා ඩිස් මුදුනේ එක කනක සිට අනෙක් කන දක්වා සිදු කරනු ලබයි. තවද පුප මත පවතින සම දෙපසට ඇත් කරන අතර පර්‍රු කුඩාව කුමන හෝ දෙසකට විවර කරයි. දිවෙහි

සිට අන්තුය දක්වා වන කොටසෙහි වන අභ්‍යන්තර අවයව විවිධින්ය කෙරේ. ඩිස මත ඇති ශිරුප වර්මය නොපිට හරවා කපාලය ඉවත් කිරීමක් සිදු කරයි. මොලය විවිධිනය කොට පිටතට ගනු ලබන්නේ ඉන් පසුවය. එය සැලකිලුමත්ව කළ යුතුය. ඉන්පසුව සැම අවයවක්ම විවිධිනය කොට බර මැන ගැනීම සහ පරික්ෂණය සිදු වේ. දේහයේ තුල ඇති සියලුම කුහර, කපල, පුප, උදර හා ශෞශ්ණි අභ්‍යන්තරයා නිබෙදියි බැලීම සඳහා පිරික්ෂුමට ලක්වේ.

සිරුරේ නිබෙන සියලුම විවරන්ද කිසිදු තුවාලයක් හෝ වෙනසකමක් නිබෙදියි බැලීමට පිරික්ෂුමට ලක් කෙරේ. සමහර අවස්ථාවලදී වෛද්‍යවරයා විසින් විශේෂ විවිධිනය සිදු කරනු ලැබේ. මේ විවිධින අතරින් වැඩි වැදගත්ම විවිධිනය ක්‍රමයක් වන්නේ ස්ථීර වශයෙන් ගෙල ප්‍රදේශය විවිධිනය කිරීමයි. ඩිස කබලේ කපාල කොටස ඉවත් කර මොලය ඉවත් ගැනීමෙන් මේ අවස්ථාවේදී ප්‍රෝට්‍රාත් මරණ පරික්ෂණය ආරම්භවේයි. මෙමගින් ගෙලෙහි ශිර වලින් රුධිරය ඉවත්ව යාමට ඉඩ සැලකේ. ඉන්පසුව ගෙලෙහි : "V" හැඩියක කැපුමක් යොදනු ලැබේ. ඉන්පසු සම තොපිටට පෙරලා එක එක ජේඩ් ස්තරය වෙන් වෙන්ව විවිධිනය කොට පරික්ෂාවට ලක් කිරීම ආරම්භකෙරේ. ගෙලෙහි අවට පවතින අස්ථීමය හා කටිලේජමය වුශුහයන් පරික්ෂාව මගින් ස්වරාලයට සිදුවී ඇති කුමන හෝ තුවාල පිළිබඳ තොරතුරක් ලබා ගැනීමට තව දුරටත් පරික්ෂා සිදු කරයි. එහිදී සාහසික මරණයකට හේතුවන් යම තත්ත්වයන් හුද්‍යනා ගැනීමටත් ගෙල වැල්ලා ගැනීම ආදිය කරුණ හුද්‍යනාගැනීමටත් හැකියාවක් ලබාගත හැක.

මෙම විවිධින ක්‍රියාවලියේදී ගරීරයට කර ඇති පහරදීම, මොට ආයුධයකින් කර ඇති පහරදීම, අස්පි පටකයන්ගේ විශේෂ පෙහෙදිවිව සහ සියුම්ව හුද්‍යනාගත හැක. අධ්‍යාව්‍යමිය විවිධිනය මගින් සමෙහි යටි පාඨ්‍රය සහ එහි සිදුව එති තැලීම ප්‍රදේශ හුද්‍යනාගත හැක.

ශෞශ්ණි විවිධිනයේදී දේහයට සිදු වූ ලිංගික අතවරයන්, මරණයන්හිදී අභ්‍යන්තර ප්‍රජනන පද්ධතියට සිදුවී ඇති තුවාල සහ නීති විරෝධී ගබඩාවේ ආදිය කරුණු සොයාගත හැක. එපමණක් නොව සුපුම්නාවට සිදුව ඇති

හානි හඳුනාගැනීමට කශේරුකා විවිධීනය ඉතාමත් වැදගත් වේ.

3. වැඩිදුර විමර්ශනය

අධිකරණය පළුවාත් මරණ පරික්ෂණ වලදී සිදුකරනු ලබන ප්‍රධාන විමර්ශනයන් වන්නේ, බුලකවේදය හා පටකවේදයයි. බුලක වේදය යනු විෂ සහිත ද්‍රව්‍යයන් පිළිබඳව සිදු කරන අධ්‍යනයයි. බුලකවේදය සඳහා විවිද සාම්පල් ලබා ගනු ලැබේ. ඒවා නම් රුධිරය, මුතු, අක්ෂී කුහරය තුළ ඇති තරලය. මෙම සාම්පල් සුදුසු හානි වලට ගෙන ලේඛල් කරනු ලබයි. මෙවා මූජ තබන ලද කවර වල බහා බුලවේදක අධ්‍යනයන් සඳහා රජයේ රස පරික්ෂණ දෙපාර්තමේන්තුව වෙත යවතු ලබයි. නියමිත පරික්ෂණ අනුව මෙසඳහා කාලයක් ගත වේ. එය මාස එකක් දෙකක් පමණ කාලයක් වේ.

අන්වික්ෂිය පටක පිළිබඳ අධ්‍යනය පටකවේදය නම් වේ. සමහර රෝගී තත්ත්ව පියවි ඇසින් නිරික්ෂණයෙන් හඳුනාගත නොහැකි. එමනිසා එම පටක අධ්‍යනය කිරීම සඳහා අන්වික්ෂියක් තුළින් නිරික්ෂණය අත්‍යවශ්‍ය වේ. මෙසඳහා එම පටක ගොමල්දිහයිඩ් ද්‍රව්‍යන්හි බහා කඩාවක් මතට ගැනීමේ ක්‍රියාවලිය පටක විද්‍යාගාර තුළදී සිදුවෙයි. මෙම කඩාව සැකසීමේ ක්‍රියාවලිය සඳහා යම් කාලයක් ගත වේ. එය සති දෙක තුනක කාලයක් වේ. තවද අන්වික්ෂිය නිරික්ෂණය කොට වාර්තා කිරීමට තවත් වික කාලයක්ද ගත වේ. පළුවාත් මරණ පරික්ෂණයෙදී සිදුකළ හැකි වහ්වත් විමර්ශනයන් වන්නේ විකිරණ විද්‍යාව, ක්‍රුඩ්ප්‍රිව විද්‍යාව, මස්තුවිද්‍යාව, ප්‍රක්ෂීෂණ විද්‍යාව, ප්‍රක්ෂීෂණ දැනුම් සැලකුණු මුදුණය සහ අනුකූ ජාත අධ්‍යනයයි.

වාර්තාකරණයෙදී පළුවාත් මරණ පරික්ෂණය අවසන් වූ වහාම වෙළදුවරයා විසින් මරණයට හේතුව සඳහන් පත්‍රිකාවක් හඳිසිමරණ පරික්ෂකය වෙත බාරදෙනු ලබයි. සාමාන්‍යයෙන් මරණයට හේතුව සඳහන් කරන්නේ ලෝක සෞඛ්‍ය සංවිධානය විසින් ලබාදී ඇති නිර්ණායකයන්ට අනුවයි. එම නිර්ණායක නම්

1a. මරණයට ආසන්නතම හේතුව. --
අවසානයේ මරණයට මුල් වූ තුවාලය හෝ තත්ත්වය හෝ සාධකය

1b. පෙරවු හේතුව

ඉහත 1a කෙරෙහි බලපාන හිනුම සාදකයක්

1c. උක්ත හේතුව -- මරණයට හේතුවන ක්‍රියාවලි ආරම්භයට මුල් වූ ඔනිම තුවාලයක් හෝ රෝගයක්.

සමහර අවස්ථාවලදී පියවි ඇසින් බලා පළුවාත් මරණ පරික්ෂණය සිදු කිරීමෙන්ම පමණක් මරණයට හේතුව තීරණය කිරීම කළ නොහැකි. එවිට අනිත් විමර්ශන කටයුතු අවසන වනතෙක් මරණයට හේතුව විමර්ශන යටතේ යයි සටහන් තබනු ලබයි. සියලු විමර්ශනයන්ටද පසුව මරණයට හේතුව අනාවරණය කරගත නොහැකි අවස්ථාවලදී මරණයට හේතුව "නිශ්චිතව දැනගත නොහැකි" බව සටහන් කරයි. මේ අවස්ථාවේදී මරණය කෙරෙහි බලපාන අස්ථාභාවික හේතු බැහැර කිරීමට වෙළදුවරයා විසින් සියලු උත්සාහයන් දරන අතර මරණයට දායක විය හැකි කිසිදු තුවාලයක් හෝ කම්පනයක සාක්ෂි නොමැති බව සටහන් කළ යුතුය.

මරණයට හේතුව සඳහන් පත්‍රිකාව ලබාදීමෙන් අනතුරුව මරණ සහනිකය නිකුත් කිරීමේ ක්‍රියාවලිය හඳිසි මරණ පරික්ෂකයට හැකියාව ලැබේ. පසුව වික කාලකින් අනෙකුත් සියලුම විමර්ශන අවසන් වූ පසුව හඳිසි මරණ පරික්ෂක හෝ උසාවිය වෙත විස්තරාත්මක වාර්තාවක් යැවීම වෙළදුවරයා විසින් සිදු කරනු ලබයි. පළුවාත් මරණ පරික්ෂණයේදී සොයාගත් කරුණු සහ පසු විමර්ශනවලදී දැනගත් කරුණු පිළිබඳව වාචික සාක්ෂියක් ලබා දෙන මෙන් වෙළදුවරයා වෙත කැඳවීම හඳිසි මරණ පරික්ෂකවරයා සිදු කරයි.

මෙහිදී වෙළදුවරයා පෙනී සිටින්නේ සොයාගනු ලැබූ දේ සඳහන් කිරීමට සහ හඳිසි මරණ පරික්ෂකවරයා විසින් සිද්ධිය සම්බන්ධයෙන් අසන ප්‍රශ්නවලට පිළිතුර දීම සඳහා පමණි. හඳිසි මරණ පරික්ෂණයකදී හරස් ප්‍රශ්න කිරීමක් කරනු නොලබයි.

අවයව / සාම්පල රදවා ගැනීම

පළුවාත් මරණ පරික්ෂණයක් අතරතුරදී පහත කරුණු අනුව අවයව හෝ පටක සාම්පල ලබා ගැනීම සිදු කෙරේ.

1වැඩිදුර සකස් කිරීමෙන් පසු පරික්ෂණ සිදු කිරීමට

2. බුලවේදක හෝ ජේව රසායනික ද්‍රව්‍ය විශ්ලේෂණය කිරීමට

3.සාක්ෂියක් ලෙස ඉදිරිපත් කිරීමට

4.වැඩිදුර අධ්‍යන කටයුතු හෝ පරීක්ෂණ කටයුතු සඳහා

ඉහත දක්වන පළමු කරන ත්‍රිත්වයම සිදු කරනු ලබන්නේ විමර්ශන ක්‍රියාවලියේ කොටසක් ලෙස බැවින් ඒ සඳහා කිසිදු විශේෂ අවසරයක් හෝ අධිකාරියක් අවශ්‍ය නොවේ .නමුත් අධ්‍යන කටයුතු සඳහා සාම්පල් යොදාගත්ත්නේනම් ඒ සඳහා පවිලේ පිරිසගේ අවසරයද සමහර විටක නීතිමය අධිකාරියක අවසරයද අවශ්‍ය වේ.දැනට අධිකරනය පශ්චාත් මරණ පරීක්ෂණ වලදී අවයව හෝ පටක සාම්පල රදවා ගැනීම සම්බන්ධව කිසිදු විශේෂ නීතිමය අවසරයක් අවශ්‍ය අපරාධ නඩු විධාන සංග්‍රහයේ දක්වා නැත.එම නිසා එසේ වැඩිදුර විමර්ශන සඳහා සාම්පල් රදවා ගැනීමේ තීරණය වෛද්‍යවරයාගේ අනිමතය පරිදි සිදුවේ. සමහර අවස්ථාවලදී එම සාම්පල ගැනීම සහ දන් දින් DNA විධාන සලකුණු මූල්‍යය ,දන්තික අධ්‍යනය වැනි වැඩිදුර විමර්ශනයන් සිදු කරන ලෙස උසාවිය විසින් වෛද්‍යවරයාට නියෝග කරනු ලබයි.

මරණයෙන් පසුව අවයව දන්දීම.

මේ සම්බන්ධ නීතිමය කටයුතු පිළිබඳ හදිසි මරණ පරීක්ෂකවරයාගේ අවධානය යොමු විය යුතුය.මෙම මරණයෙන් පසුව අවයව දන්දීමේදී මැරුණු පුද්ගලයාගේ අවයව හෝ පටක පිවිසුම් පුද්ගලයකට බද්ද කිරීම සිදු වේ. එය ප්‍රතිකාරයක් ලෙස සිදු කරයි.මෙයට අදාළ නීති 1987 අංක 48 දරණ මානව අවයව හෝ පටක බද්ද කිරීම සම්බන්ධ පනතෙහි දක්වා ඇත.ශ්‍රීලංකාව තුළ තවමත් මෘතදේහ දන්දීම සීමුසහිත වේ.එය සිදුවන්නේ පවිලේ සාම්ප්‍රදායකයාගේ දැනුවත්වීම මතය.

පශ්චාත් මරණ පරීක්ෂණය සම්බන්ධව නීතිමය සඳාවාරමය හා සමාජය වශයෙන් සැලකිල්ලට ගත යුතු කරුණු මොනවද?

පශ්චාත් මරණ පරීක්ෂණය සිදු කරනු ලබන වෛද්‍යවරය සියලු තොරතුරු වල රහස්‍යභාවය ආරක්ෂා කළයුතු අතර වගකිවයුතු ආයතනයකින් කරනු ලබන ඉල්ලීමක් හෝ දැනුම්දීමකින් තොරව එම තොරතුරු නිදහස්

නොකළ යුතුය.නීතිමය වශයෙන් එම තොරතුරු අධිකරණයට හදිසි මරණ පරීක්ෂකවරුන්ට ලබා දීමට ඔහු බැඳී සිටයි.

එම කෙසේ වූවද සමහර අවස්ථාවන්වලදී රක්ෂණ සමාගම්,බැංකු,දෙපාර්තමේන්තු කටයුතු විමර්ශන නිලධාරීන් වෙත අනෙකුත් පාරුගවයන් සේ සලක තොරතුරු ලබා දීමට සිදුවේ.එවන් අවස්ථාවලදී පවුලේ සාමාජිකයන්ගෙන් හෝ හදිසි මරනපරීක්ෂකවරයාගෙන් ඒසම්බන්ධව අවසර ලබා ගැනීම වෛද්‍යවරයා විසින් සිදු කළ යුතුයි.

පශ්චාත් මරණ පරීක්ෂණයක් යනු ඉතාමත්ම සංවේදී ක්‍රියාවලියකි.සමහර ජන වර්ග සහ ආගමික පාරුගවයන් අනුව පශ්චාද් මරණ පරීක්ෂණයක් යනු තුදෙක් අංග විශේෂනයක් පමණක් වෙයි. එමනිසා එය පවිලේ සමාජිකයන් වෙත ඉතාමත් දැඩි මානසික පිඩිනයක් ලෙස සලකයි.එපමණක් නොව අවසාන කටයුතු සඳහා මෙත දේහය තැයැන්ට බාර දීමද පමා වෙයි.එබැවින් අධිකරණ පශ්චාත් මරණ පරීක්ෂණයක් කිරීමට ගන්න තීරණය කළ යුත්තේ පශ්චාත් මරණ පරීක්ෂණයෙන් ලබාගත හැකි ප්‍රයෝගන සහ එමගින් තැයැන්ට ඇතිවන අපහසුතාවයන් සහ අනික්ත් ප්‍රයෝගික ගැටළ සලකා බැලීමෙන් අනතුරුවය.එම තීන්දුව ගැනීමේ වගකීම ඇත්තේ මෙස්ස්ත්‍රාත්වරයාට හෝ හදිසි මරණ පරීක්ෂකවරයට වන බැවින් පශ්චාත් මරණ පරීක්ෂණ ක්‍රියාවලියන් එහි සීමාවන් සහ ප්‍රයෝගන පිළිබඳවත් මතා අවබෝධයක් ඔවුනට තිබිය යුතුය.

පරිසිලන

WHO EMRO / Incidence And Causes Of Sudden Death In A University Hospital In Eastern Saudi Arabia / Volume 17, Issue 9 / EMHJ Volume 17, 2011. [online] Available at: <http://www.emro.who.int/emhj-volume-17/volume-17-issue-9/article-04.html> [Accessed 8 May 2020].

LAW RELATING TO COMPUTER CRIMES; IS IT EQUAL IN SRI LANKA AND UNITED KINGDOM?

A. S. Samarakoon *

History and Evolution of Computer

With the passage of time, social, cultural, economic and behavioral patterns of people started to change and as a result, level of intelligence of people too started to improve and this made them to engage in experiments which further led innovations. These innovations introduced equipment with high technology and subsequently computers were made to meet challenges of the developing world.

Computers which were introduced as such were initially capable of performing minor tasks whereas now computers are developed to a greater level that those can perform tasks that an ordinary man cannot even think of doing. Computer was initially innovated by Greeks and as a result of its development, in 1812 Charles Babbage invented the abacus which performed the task of a computer. Computer was initially introduced for mathematical purposes. Later its purposes were widened and at present its technology has developed to a state where information of things happening around the world could be obtained in the doorstep of the user with the use of internet.

What are Computer Crimes?

Human beings in common have various qualities. They have certain qualities that come from birth. For an instance some human beings are introvert and others are extrovert. However behavioral patterns of human beings are a major determinant factor to analyze their qualities. Further morals and thinking patterns of people too act as an external factor in deciding these qualities and behavioral patterns. Thinking patterns of certain people could also be harmful when they do not consider about morals and societal norms. When people with such thinking patterns make use of technologically developed equipment such as computers in order to carry out their tasks, computer crimes take place.

National Institute of Justice in United States of America defines computer crimes under three criteria¹

1. Many persons are affected because of an act done with the use of knowledge on computer and technology by an individual or set of persons.
2. Using computers to commit crimes directly or indirectly relates to computer crime.
3. Any type of computer crime is wrongful under law relating to computer crimes.

Above three factors define the term computer crime clearly. According to first criteria, a computer crime has not been banned as an illegal act. For example,

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¹ Home office, accessed 9th April 2020
[http://www.gov.uk/government/organizations/home-office>](http://www.gov.uk/government/organizations/home-office)

murder is considered as an act which is banned by certain laws and regulations but computer crimes are not banned as such. Further only a handful of people have knowledge about computer crimes.

The specialty of computer crimes is that unlike other type of crimes; these have a characteristic of being subjected to change so rapidly. Because of that feature, when one such crime is identified by the authorities, another crime relating to the prior crime can take place at the same time. The main reason for that is computer crimes are directly influenced by technological advancement.

If a person intends to commit such a crime, he must possess the knowledge of handling a computer. The parties to a computer crime could be either one person or a set of persons. However, the effect of such crimes could be at times so serious that its damage cannot be calculated in monetary terms. For example, because of fraudulent activities that are done in banks using computers, both the bank and its customers are affected. Second criteria mention that computer must be used directly for a computer crime to take place. Which means a computer cannot function in isolation and it requires set of persons for it to be handled and controlled. Based on the nature of such an act a computer crime can take place. Third criteria define that these types of acts are wrongful under the laws that govern the state. Ex; Computer crimes act no 24 of 2007.

Crimes such as Cybercrime, Digital crime and High-tech crime must also be differentiated from computer crimes. At the same time, it is also important to identify the definitions presented on these type of crimes. Further according to Wikipedia, crimes that are widely done violating information technology related laws are termed as computer crimes.²

Internet is composed of a large number of websites. Crimes that are committed using internet are called internet crimes. It must be identified that there is a special criteria of requirements to identify a crime as a computer crime. For example, if a man injures another person by smashing with a computer, that would not come under the ambit of computer crime. Therefore, that shows that all the wrongful acts done using a computer would not fall under computer crimes. Therefore, as mentioned crime in order to be a computer crime must have unique features. However according to National Research Council Computer Report of 1991³, computer crimes which are committed using advanced technology, have a specific feature of spreading fast and can cause high damage could be more severe in the future than those crimes which are committed by using weapons and other dangerous weapons in the present. For example, when global positioning system is used for terrorist activities, more serious harm could happen than expected.

Therefore, computer crimes which are given different interpretations as provided above have become a serious

²Cybercrime, wikipedia.org accessed 10 April 2020

<<https://en.wikipedia.org/wiki/cybercrime>>

³computers at risk safe computing in the information Age, Napedu, accessed on 10th

issue and a threat to the current developing world. At initial stages only few crimes such as watching porn by children and spreading computer viruses were considered as computer crimes. However now the situation is so much changed that computer crimes take place along with the developing technology and one could hardly anticipate the effects caused by such crimes.

Computer crimes and related law in United Kingdom

It's been more than twenty years since first computer virus appeared. Since then such threats were influenced with the advancement of technology and were spread around the world along with the increasing number of computers being used. Until few years ago viruses and other malicious programs were mainly concerned as computer crime.

Most viruses were used to damage stored data and corrupt data in the hard disks. But now this has totally changed. At present, computer crime is a major issue which has extended to make illegal money. One of the major reasons for this change could be noted as the evolution of internet.

Computer crimes could take place either by computer being used as a tool to commit offence or by committing computer specific crimes. The case of Aids Information Trojan⁴ illustrates this point. In late 1989 this Trojan was distributed through a floppy disk by a company named PC Cyborg. The

Trojan encrypted the contents of the hard disk and after ninety reboots leaving just a README file containing a PO Box address to which a payment was to be sent. However later the alleged author of the Trojan was extradited to United Kingdom to stand trial on charges of blackmailing and damaging computer systems.

The first legislation in United Kingdom which was designed to address computer crimes was "Computer Misuse Act of 1990". The Act mainly focused on the inadequacy of sufficient legal framework to deal with computer hackers. The Computer Misuse Act 1990 made provisions for securing computer material against unauthorized access or modification and for connected purposes which was set out under three computer misuse offences⁵

1. Unauthorized access to computer material
2. Unauthorized access with intent to commit or facilitate commission of further offences.
3. Unauthorized modification of computer material

Maximum prison sentences specified by the act for each of the above offence were six months, five years and five years respectively. However, amendment Computer Misuse act was introduced by "Police and justice Act 2006".

Section 02 of Computer misuse act 1990⁶ holds that, a person is guilty of an offence

⁴AIDS(*Trojan horse*), Wikipedia, viewed 10 th April 2020
<[http://en.wikipedia.org/wiki/AIDS\(Trojan_horse\)](http://en.wikipedia.org/wiki/AIDS(Trojan_horse))>

⁵Computer misuse Act 1990 , united kingdom, viewed 11 th April 2020

<<http://www.legislation.gov.uk/ukpga/1990/18/contents>>

⁶ ibid

if he commits an offence under section 01 (unauthorized access offence) with intent

- a) To commit an offence to which this section applies or
- b) To facilitate the commission of such an offence (whether by himself or by any other person)

In the case *Ex parted*⁷, Allison was alleged to have obtained data relating to customer accounts which were false credit cards. This case related to application by United States authorities regarding securing unauthorized access to the American Express computer with the intent to commit theft and forgery. It was also alleged that the accused had caused unauthorized modification to the contents of the computer system. Following the decision in *Bignall* it was held that a section 1 offence had not been committed. On appeal the House of Lords rejected the notion that misuse of access rights could not incur criminal sanctions. Therefore, misuse of facilities by authorized users will expose them to the risk of criminal prosecution.

According to section 03 of computer misuse act 1990⁸ a person is guilty of an offence if;

- a) He does any act which causes an unauthorized modification of the contents of any computer
- b) At the same time when he does the act he has the requisite intent and the requisite knowledge.

⁷*Regina v Bow Street Magistrates Court and Allison (AP) Ex Parte Government of the unitedstates of America* (on appeal from a divisional court of the queen bench Division) viewed on 11 th April 2020

Section 03 requires that, performing of an act by accused which causes an unauthorized modification of contents of any computer and at the same time of commission of the act, the accused knew that any modification that he intended to cause is unauthorized. Further the accused intended either to damage the operation of any computer or prevent access to any data or program the computer or to impair the operation of any such program or the reliability of any such data.

Spam is also a serious issue faced by persons holding email accounts. Spam is also used to deliver malicious codes. Spam is the main tool of phishers to direct their victims to fake web sites from which confidential data is then taken. Having addressed to this issue, Department of Trade and Industry introduced the Privacy and Electronic Regulations (EC Directive) 2003.

The Police and Justice Act 2006 which covers broader issues than computer crime alone, also include amendments to the computer misuse act. Moreover, the prison sentence was increased up to two years from six months. Further section 3 of the Act relating to unauthorized modification of computer crime was amended to read unauthorized acts with intent to impair or with recklessness as to impairing operation

<<http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/id990805/bow.htm>>

⁸computer misuse act 1990, united kingdom, <<http://www.legislations.gov.uk/ukpga/1990/18/contents>> accessed on 11 th April 2020

of computer and carries a maximum sentence of ten years⁹.

It is a clear fact that existence of a specific legislation alone to govern criminal activities alone is not sufficient to overcome the issue of computer crimes. It is also required that authorities such as police must undertake a major duty in keeping up the lever of computer crimes at a lower level. Therefore, in order to overcome issues of computer crimes, the government of United Kingdom established the “National Hi-Tech Crime Unit” in year of 2001 with the objective of controlling computer crimes. However with the establishment of “Fraud act in 2006”¹⁰, banks and financial institutions were made to focus on cheques and online banking fraud which further limited computer crimes related to financial institutions.

It's a clear fact that computer crimes will not disappear completely, however it could be seen that United Kingdom has taken some steps to limit the computer crimes to a greater level. Although circumstances are as such, it is a felt need that relevant provisions must be always updated since computer crimes keeps developing with the advancement of technology.

Computer crimes and related law in Sri Lanka

Computer Crimes is considered as a novel aspect in the criminal activities of Sri

⁹*Police and Justice Act 2006*, united kingdom, <<http://www.legislation.gov.uk/ukpga/2006/48/contents>> accessed 11 th April 2020

¹⁰*Fraud Act 2006*, united kingdom,<<http://www.legislation.gov.uk/ukpga/2006/35/contents>> accessed 11 th April 2020

¹¹ 'ERENBURG, Ilia, 1891 -1967' <<http://connection.ebscohost.com/tag/FREN>>

Lanka. ‘Ilya Ehrenberg’¹¹ statement is dedicated to make Sri Lanka the wonder of Asia today has to focus on the aspect of Computer Crimes which has become a great threat to the whole world. With the development of Information Technology and Computer Science in Sri Lanka people tend to focus on Computer Crimes as a way acquiring wealth. Fact pointed out in Ilya statement is once again highlighted because most of the persons affected by computer crimes are youth around the world.

Computer Crimes Act no 24 Of 2007¹² which defines a computer as an electronic or similar device having information processing capabilities was designed with the objective of providing identification of computer crime and to provide the procedure for the investigation and prevention of such crimes and to provide for matters connected therewith and incidental thereto.

Section 2(1)¹³ defines that act shall apply where;

(a) A person commits an offence under this Act while being present in Sri Lanka or outside Sri Lanka;

(b) The computer, computer system or information affected or which was to be affected, by the act which constitutes an offence under this Act, was at the material time in Sri Lanka or outside Sri Lanka.

[BURG%2C+Ilia52C+1891-1967](#)> accessed on 12 th April 2020

¹²*COMPUTER CRIME ACT,NO 24 of 2007*, [http://www.slcert.govt.lk/Downloads/Acts/computer_crimes_Act_No_24_of_2007\(E\).pdf](http://www.slcert.govt.lk/Downloads/Acts/computer_crimes_Act_No_24_of_2007(E).pdf) accessed on 12 th April 2020

¹³ ibid

(c) The facility or service, including any computer storage, or data or information processing service, used in the commission of an offence under this Act was at the material time situated in Sri Lanka or outside Sri Lanka; or

(d) The loss or damage is caused within or outside Sri Lanka by the commission of an offence under this Act, to the State or to a person resident in Sri Lanka or outside Sri Lanka

It is also important to focus on the offences that have been highlighted under section 3¹⁴ of the act which states that any person who intentionally does any act, in order to secure for himself or for any other person, access to,

(a) any computer; or

(b) any information held in any computer, knowing or having reason to believe that he has no lawful authority to secure such access, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees, or to imprisonment of either description for a term which may extend to five years, or both such fine and imprisonment.

Section 4¹⁵ is an expansion to section 3(b) which states that any information held in any computer, knowing or having reason to believe that he has no lawful authority to secure such access and with the intention of committing an offence under this Act or

any other law for the time being in force. Section 4 therefore focuses on applicability of the act or any other law prevalent in the country.

The Act does not expect criminal intention to use the computer to commit an offence. Section 17(1)¹⁶ of United Kingdom Computer Misuse Act defines about access which states that; A person secures access to any program or data held in a computer if by causing a computer to perform any function he,

(a) Alters or erases the program or data;

(b) Copies or moves it to any storage medium other than that in which it is held or to a different location in the storage medium in which it is held;

(c) Uses it; or

(d) Has it output from the computer in which it is held (whether by having it displayed or in any other manner); and references to access to a program or data (and to an intent to secure such access) shall be read accordingly.

However, Sri Lankan Computer Crimes Act does not have an interpretation for the term access as in United Kingdom act.

According to an article on Sunday Leader newspaper by Kashman Indrajith Keerthisinghe¹⁷ the number of cybercrimes complaints have shown an increase according to reports of Computer Emergency Response Team (SLCERT). The reports further reveal that most of the complaints in Sri Lanka relate to hacking passwords, stealing of information,

¹⁴ ibid

¹⁵ibid

¹⁶computer misuse Act

1990<<http://www.legislation.gov.uk/ukpga/1>

[990/18/section/17](#)> accessed on 12 th April 2020.

¹⁷Kashmanindrajithkeerthisinghe,(2020) *The Sunday leader*, 15 Jan .<<http://www.Thesundayleader.lk/>>

demanding ransoms in addition to Facebook and credit card related crimes.

It is also important to focus on the Intellectual Property act no 36 of 2003 when computer crime related acts are concerned. According to section 178(1)¹⁸, any person who willfully infringes any of the rights protected under Part II of this Act shall be guilty of an offence.

- Any person knowing or having reason to believe that copies have been made in infringement of the rights protected under Part II of the Act, sells, displays for sale, or has in his possession for sale or rental or for any other purpose of trade any such copies, shall be guilty of an offence...
- Any person knowingly or having reasons to believe that he is in possession or has access to a computer program infringing the rights of another person, and willfully makes use of such program for commercial gain, shall be guilty of an offence.

Moreover Sri Lanka Telecommunications Act section 53¹⁹ which relates to telecommunication transmission holds that Every person who willfully seeks to intercept and improperly acquaint himself with the contents of any telecommunication transmission not intended for general reception shall be guilty of an offence, and shall be liable on conviction to a fine not

exceeding ten thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and such imprisonment.

Investigation procedure for these criminal activities is also of wide importance. Section 15²⁰ holds that except as otherwise provided by this Act, all offences under this Act shall be investigated, tried or otherwise dealt with in accordance with the provisions of the Code of Criminal Procedure Act, No. 15 of 1979. And moreover section 16²¹ holds that every offence under this Act shall be a cognizable offence within the meaning of, and for the purpose of, the Code of Criminal Procedure Act, No. 15 of 1979 where by a person may also be arrested without a warrant.

Law relating to computer crimes in Sri Lanka must be amended and updated considering the changing technology and new trends of computer crimes like in United Kingdom. However United Kingdom is considered as a country in which a higher number of computer crimes are reported. Because of this reason, authorities in United Kingdom implement laws and appoint bodies to govern such crimes whenever it's required. In Sri Lanka computer crimes are considered as a novel concept but it is found that rate at which computer crimes being recorded show a rapid growth therefore implementing such an action would result in reduction of computer crimes in Sri Lanka to a greater extent.

¹⁸*Intellectual property act no 36 of 2003,*
[https://www.lawnet.gov.lk/1946/12/31/intellectual-property-3>](https://www.lawnet.gov.lk/1946/12/31/intellectual-property-3)

Accessed on 12 th April 2020

¹⁹Sri lanka Telecommunication Act(No.25 of 1991), Sri lanka<<http://www.commonlli.org/lk/legis/n>

[m_act/slta25o1991337/](#) > accessed on 12th 2020

²⁰*computer crimes Act No 24 of 2007,* srilanka<[http://www.slcert.gov.lk/Downloads/Acts/computer_crimes_Act_No_24_of_2007\(E\).pdf](http://www.slcert.gov.lk/Downloads/Acts/computer_crimes_Act_No_24_of_2007(E).pdf)> accessed on 12th April 2020.

²¹ Ibid

It would be better if limitations are imposed by producers and owners of software and applications so that copies of such products will not be sold illegally by third parties. Although precautionary steps are taken, it is an undoubtable fact that copies of software are made, therefore owners can design special applications to detect illegal software when installed to a computer.

It is paramount important that users of internet must be given knowledge of criminal acts done though computer and internet. In countries like Sri Lanka computer crime is a novel concept and users of internet at most of the time are not aware of the crimes that take place through internet. Therefore, relevant authorities must take actions to provide knowledge to persons who do not have sufficient knowledge about such crimes and must pay special attention to persons who do not have sufficient knowledge

Most of the time persons who are engaged in computer crimes engage in such acts due to the availability of high protection that is available to conduct such malpractices.

The main reason for this is because when computer crimes are being conducted, personal identity is not revealed. In such cases, it would be better if data are stored to computers in a way that personal identity is revealed.

In Sri Lanka a national initiative is urgently required to tackle the issue of computer crimes. If such a national initiative set of laws are available, then most of the crimes can be solved at national level leading to no involvement in international law. Further it needs to be applied across Sri Lanka and needs to be a part of transnational effort whereby such set of laws have the

acceptability of the world. When such laws are designed it must made sure that those confine with international standards and have the capability of governing computer crimes that keep growing with the advancement of technology.

The government must also take actions to conduct seminars and programs that could educate general public about trending computer crimes and they should informed about the harmful effects that take place due to computer crimes.

Government must take actions to impose severe punishments for those who engage in computer crimes. It is quite acceptable that when punishments are made more severe people would not tend to engage in certain types of crimes. So this procedure could be applied to reduce computer crimes that keep growing in Sri Lanka. Further such an act would reduce the crimes that could take place in future as well.

The level of unemployment of the country too can result in the growth of computer crimes. Some persons those who have good knowledge regarding computers and internet engage in computer crimes and such malpractices for the sole purpose of enjoying monetary benefits. Therefore, being a developing country, Sri Lanka too must focus on answering the issue of unemployment and providing employment opportunities for persons considering their level of knowledge and intelligence. Such an act could bring down the computer crime rate that keeps growing along with the advancement of technology.

Therefore having analyzed above circumstances it could be identified that current law in Sri Lanka regarding computer crimes has to be amended and updated. This is because computer Crimes is a type of a crime that keeps developing with the advancement of technology and

really needs to be compatible with international law regarding computer crimes. However, in United Kingdom unlike in Sri Lanka, computer crimes are being reported at a high rate and authorities in United Kingdom have taken due steps so far by amending and updating relevant law to overcome such issues. Available provisions in United Kingdom could be used as a supporting factor to amend law in Sri Lanka in a way that loopholes or gaps that exist in Sri Lankan legal system would be filled.

ඉඩම් හා සම්බන්ධ ත්‍යාග පිළිබඳ නෙතික තත්ත්වයේ ඉතිහාසය හා බලවත් අකෘතයුතාවය මත ත්‍යාග අවලංගු කිරීම.

මධුප දිසානායක*

ත්‍යාගයක් යනුවෙන් හඳුන්වන්නේ පුද්ගලයකු විසින් තවත් පුද්ගලයකු වෙත කිසිදු පෙරලා බලාපාරොත්තු වීමින් තොරව ලබා දෙනු ලබන වංචල හෝ නිශ්චල දේපලක් ලෙස පෙන්වා දිය හැකිය. එසේම මෙය දේපලක හිමිකම ලබා ගත හැකි ආකාර අතුරින් එක් ආකාරයක් ලෙසද හැඳින්වය හැකිය. එනම් 'inrem' අයිතියක් හෙවත් ඉතා හොඳ අයිතියක් මේ හරහා පිරිනැමේ. මෙලෙස ත්‍යාග දීම හා ත්‍යාග ලබා ගැනීම ඇත් අතිතයේ සිටම සිදු වී ඇති අතර මූල්කාලීනව මෙම ත්‍යාග සම්බන්ධයෙන් වන නීතියේ මැදිහත් වීම ඉතාමත් අවම වූ ආකාරයක් දැක ගත හැකි වේ.

ඉඩම් හා සම්බන්ධ ත්‍යාග පිළිබඳව නෙතික තත්ත්වයේ ඉතිහාසය රෝම නීතිය දැක්වාම විහිදී යන අතර රෝම ලන්දේසි නීති ප්‍රතිපත්ති අනුව ලංකාවේ ත්‍යාග නෙතික තත්ත්වය සකස් වී ඇති බව දක්නට ලැබේ. මෙයට හේතුව වී ඇත්තේ රෝම නීතිය නොදැරුණ්‍යට පැමිණ ලන්දේසි නීතිය සමග එකතුව පසුව ලන්දේසින් විසින් ලංකාව යටත් කර ගැනීම බව සරලව පෙන්වා දිය හැකිය. ඒ අනුව ත්‍යාගය හෙවත් 'donation' යන වදන 'donatio' යන ලතින් හාජාවෙන් බැඳී එන ලදීක් වන අතර වර්තමානය වන විට ත්‍යාග පිළිබඳ රෝම ලන්දේසි නීතියේ එන සරල වර්ගීකරණයක් පහත පරිදි හඳුනාගත හැකි වේ.

donatio propter nuptias - විවාහය අභේක්ෂාවෙන් ලබා දෙනු ලබන ත්‍යාග
donatio anti nuptas - විවාහයට පෙර ලබා දෙනු ලබන ත්‍යාග
donatio inter-vivos - ජ්‍යෙෂ්ඨ අතර සිටියදී ලැබෙන ත්‍යාග

donatio mortis causa - මරණයන්න ත්‍යාග

රෝම ලන්දේසි නීතියේදී ත්‍යාගයක් ලබා දීම සඳහා සාධාරණ හේතුව (justa causa) යන සාධකය අත්‍යවශ්‍ය වන බව සඳහන් කළ යුතු වේ. දෙමාපියන් දරුවන් හා යුතීන් අතර මවුනොවුන් කෙරෙහි බලපවත්නා ස්වභාවික ආදරය හා දයානුකම්පාව ත්‍යාගයක් ලබා දීමට හොඳ හේතුවක් ලෙස නීතිය පිළිගනී. එසේම ඉහත වර්ගීකරණයේදී ද සඳහන් කරන ලද පරිදි සිදුවීමට නියමිත විවාහයක් වෙනුවෙන් දෙන ත්‍යාගයකදී එම විවාහය වෙනුවෙන් යම් පරිත්‍යාගයක් ලබා දීම සුදුසු බැවින්, එය ද ත්‍යාගයක් සඳහා හොඳ හේතුවක් ලෙස සැලකේ. කෙසේ නමුත් ඉංග්‍රීසි නීතිය තුළ මෙම සාධාරණ හේතුව යන සංකල්පය දැකිය නොහැකි අතර ඒ වෙනුවට අගනා ප්‍රතිශ්‍යාව (valuable consideration) නැමැති සාධකය දැකිය හැකි වේ.

ඉහත කරුණු අනුව ඉඩකඩීම තැගි දීම සම්බන්ධ නීතිමය තත්ත්වය අධ්‍යයනය කිරීමේදී පලමුකොටම රෝම ලන්දේසි නීති සිද්ධාන්ත වෙත යොමුවිය යුතුය. රෝම ලන්දේසි නීතිය අනුව තමාට අයත් ඉඩම් හා නිශ්චල දේපල තවත් කෙනෙකුට තැගි කර පවරා දිය හැකිය. 1840 අංක 7 දරණ වංචා වැළැක්වීමේ ආයුජනතේ 2 වන වගන්තිය අනුව යමින් ඉඩම් ගනුදෙනු නොතාරිස් ඔප්පුවක් මගින් සිදු කළයුතු වේ. ඒ අනුව ඉඩකඩීම හා නිශ්චල දේපල තැගි දීමට ත්‍යාග ඔප්පුවක් ලිවීමට සිදුවන අතර එම ත්‍යාග ඔප්පුව සාක්ෂිකරුවන් දෙදෙනෙකු ඉදිරියේ නොතාරිස්වරයකු විසින් ලියා සහතික කළහොත් පමණක් නීතිය ඉදිරියේ වලංග ලියවිල්ලක් බවට පත් වේ.

රෝමලන්දේසි නීතිය අනුව ත්‍යාගයක් වලංග වීමට නම් ත්‍යාගලාභියා එම ත්‍යාගය පිළිගත

* LL.B ශ්‍රී ලංකා විවාහ විශ්වවිද්‍යාලය

යුතු අතර, ත්‍යාග ලැබුම්කරුට ත්‍යාගය ප්‍රතික්ෂේප කිරීම ද සිදු කළ හැකිය. උදාහරණයක් ලෙස බාලවයස්කරුවෙකුට වයස්පූර්ණත්ව වයසට එළඹී වසර දෙකක් ගත වන තෙක් ආදාළ ත්‍යාගය පිළිගැනීම හෝ ප්‍රතික්ෂේප කිරීම සිදු කළ හැකිය. කෙසේ නමුත් ත්‍යාග පිළිගැනීමේදී සැම ත්‍යාග ඔප්පුවකම පිළිගැනීමේ වගන්තියක් ඇතුළත් විය යුතු අතර ත්‍යාගලාහියා එම ත්‍යාගය පිළිගනිම්න ඔප්පුවේ අත්සන් තැබිය යුතුය. ත්‍යාගලාහියා බාල වයස්කරුවෙකු හෝ ආබාධිත තැනැත්තෙකු නම් ඔහුගේ වැඩිහිටියෙකු හෝ භාරකරුවෙකු විසින් බාලවයස්කරුවෙකු හෝ ආබාධිත තැනැත්තා වෙනුවෙන් ත්‍යාගය පිළිගත් බවට ඔප්පුවේ අත්සන් කළ යුතු වේ. මෙහිදී වැදගත් කරුණක් වනුයේ ත්‍යාගය ලබා දෙන විටදීම එකී ත්‍යාගය පිළිගතයුතු බවට නීතියක් නොමැති වීමයි. එබැවින් ත්‍යාගය ලබා දෙන අවස්ථාවේදී එය පිළිගැනීමට නොහැකි වුවහොත් පසු අවස්ථාවකදී එම පිළිගැනීම කළහැකි වේ. තව ද විවාහය අපේක්ෂාවෙන් දෙන ත්‍යාගයක් පිළිගත් බවට අත්සනක් නොමැතිවද විවාහය සිදුවීමෙන් ත්‍යාගය පිළිගත් බව සැලකේ. එසේම විවාහය අපේක්ෂාවෙන් කරන ලද ත්‍යාගයක් විවාහය සිදු නොවීම මත ත්‍යාග දීමනාකරුට එම ත්‍යාගය අවලංගු කළ හැකිවේ.

රෝම ලන්දේසි නීතිය අනුව විකුණුමකදී මෙන්ම ත්‍යාගයකදී ද පැවරීම සහ හිමිකරදීම යන පියවර දෙකකින් ත්‍යාග දීමනාකරුවා හා ලැබුම්කරුවා අතර දේපලෙහි හිමිකම පුවමාරු වේ. ත්‍යාගයෙහි මුල් පියවර වන පවරා දීම ඔප්පුවට අත්සන් ලැබීමෙන් ඉටුවන අතර දෙවන පියවර වන භාරදීම හොතිකව සංකේතාත්මකව හෝ අනුමිත ලෙස සිදු විය හැකිය. හොතිකව ත්‍යාගය භාරදීම යනු, ත්‍යාග ලැබුම්කරු දේපලෙහි සන්තකයේ පිහිටුවීමයි. සංකේතාත්මක ලෙස ත්‍යාගය භාර දීම නීවසක නම් යතුරු භාර දීම වැනි ක්‍රියාවකින් සම්පූර්ණ වේ. කෙසේ නමුත් ත්‍යාග ලැබුම්කරු දේපල වෙත කැඳවාගෙන ගොස් ඔහු දේපලේ පඳිංචි කරවීමක් ත්‍යාගය සම්පූර්ණ වීමට අත්‍යවශ්‍ය නොවන අතර දේපලෙහි ඔප්පුව භාර දීම අනුමිත ලෙස සන්තකයේ පිහිටුවීමක් බව නීතිය විසින් පිළිගනු ඇත. මේ සම්බන්ධව රෝම ලන්දේසි

නීතියෙහි බලපවත්තා ප්‍රධාන මූලධර්මයන් දෙකක් ඇත. එය මෙසේය,

1. donator nunquam desinit possidere antequam donatorious incipiat possidere.

2. donatio perficitur possessione accipientis.

මෙම මූලධර්මයන්ගෙන් සරලව කියවෙනුයේ ත්‍යාගලාහියා භැක්තියට පිවිසෙන තුරු ත්‍යාග දීමනාකරුගේ භැක්තිය අවසන් නොවන බවත්, ත්‍යාගලාහියා භැක්තියට පැමිණීමෙන් ත්‍යාගය සම්පූර්ණ වන බවත්ය.

රෝම ලන්දේසි නීතියට අනුව දේපල බෙදිය හැකි තවත් ආකාරයක් වන නිශ්චල දේපල හා වංචල දේපල යන වර්ගිකරණය අනුරිත් වංචල දේපලක් ත්‍යාග දීම වලංගු වන්නේ ත්‍යාගකරු විසින් ත්‍යාගය භාර දීම මගින් හා ත්‍යාග ලැබුම්කරු විසින් එකී ත්‍යාගය පිළිගැනීමෙන් අනතුරුව වේ. නිශ්චල දේපලක් තැගී දීමේදී එය වලංගුව පැවරීම ආකාර කිහිපයකට දැකිය හැකි වේ. 'Donatio Inter-vivos' හෙවත් ජ්‍යෙෂ්ඨන් අතර ත්‍යාගය ඉන් එක් ආකාරයක් වේ. මින් අදහස් වන්නේ සාමාන්‍ය ත්‍යාගයේ සුවිශේෂී ලක්ෂණය නම් ත්‍යාගය දුන් විගස හිමිකම මාරු වීමයි. කෙසේ නමුත් ත්‍යාගයේ දෙවන පියවර වන භාර දීම අනවශ්‍ය බව මෙයින් නොකියවෙන අතර හිමිකම මාරු වීම පමණක් ඔප්පුව ලියු සැනින් සිදු වන බව මතක තබා ගත යුතුය.

රෝම ලන්දේසි නීතිය අනුව හිමිකම මාරු වීම පසුව සිදු වන සේ ත්‍යාග ලබා දිය හැකි ආකාර කිහිපයක්ම ඇත. ඉන් පලමු ආකාරය මරණින් මතු ක්‍රියාත්මක වන ත්‍යාගයක් නම් වේ. මේ ආකාරයේ ත්‍යාගයකදී ත්‍යාග දීමනාකරු ත්‍යාග ඔප්පුවේ සුවිශේෂී වගන්තියක් මරණින් මතු ත්‍යාගය ක්‍රියාත්මක වන බව සනාථ වන පරිදි ඇතුළත් කළ යුතුය. එවන් විටකදී ත්‍යාගය ක්‍රියාත්මක වනුයේ ත්‍යාග දීමනාකරුගේ මරණයන් සමාය. මෙවන් ත්‍යාගයක් ලියු පසු ත්‍යාග දීමනාකරුට පෙර ත්‍යාග ලැබුම්කරු මිය ගියහොත් දේපල හිමිවනුයේ ත්‍යාග ලැබුම්කරුගේ උරුමකරුවන්ටද නැතහොත්

ත්‍යාග දීමනාකරුවද යන බරපතල ප්‍රශ්නය නොවිසඳී ඉතිරි වේ. රෝම ලන්දේසි නීති මූලධර්ම අනුව මෙබදු සුවිශේෂී ත්‍යාගයක ලැබුම්කරු දීමනාකරුට පෙර මිය ගියහොත් ඔප්පුව අවලංග වී දේපල ත්‍යාග දීමනාකරු වෙතම හිමි වේ.

සාමාන්‍ය ත්‍යාගයක් සහ ජ්විත භුක්තියට යටත් කර ලියු ත්‍යාගයක් අතර වෙනස්කම් කිහිපයක් ඇත. ජ්විත භුක්තියට යටත් ත්‍යාගයක හිමිකම ත්‍යාගය ලියු සැනින් පැවරෙන අතර දේපල වල සන්තකය ලැබීමේ අයිතිය හිමි වනුයේ ජ්විත භුක්තිකරුවන්ගේ මරණින් පසුවය. මෙවැනි ත්‍යාග ඔප්පුවක ජ්විත භුක්තිය විස්තර කෙරෙන වගන්තියක් අඩ්‍ය වන අතර අසවලාගේ ජ්විත භුක්තියට යටත් කර ත්‍යාගය ලබා දෙන බව එහි සඳහන් වනු ඇත. ත්‍යාග දීමනාකරු හෝ ඔහු කැමති ඕනෑම අයකු ජ්විත භුක්තිකරුවන් ලෙස නම් කළ හැකිය. ජ්විත භුක්තිකරු ඔප්පුවහි දීමනාකරු නොවේ නම් එවැනි ඔප්පුවක ජ්විත භුක්තිකරු අත්සන් කිරීමේ අවශ්‍යතාවයක් නැත. එමෙන්ම ත්‍යාග ඔප්පුවක ජ්විත භුක්තිකරුට එම දේපලෙහි රඳී සිටීමට පමණක් නොව වැවිලි එලදාව ආදිය ලබා ගැනීමටද දේපල බඳු දීමට ද අයිතියක් ඇත. මත්ද යන් එලදාව භුක්ති විදිම හා බදු දීම භුක්තියේ අයිතිය ත්‍යාගයක කිරීමක් වන බැවැනි.

යමෙකු තම මරණය අභේක්ෂාවෙන් දෙනු ලබන ත්‍යාගයක් මරණාසන්න ත්‍යාගයක් හෙවත් donatio mortis causa නම් වේ. එබදු ත්‍යාගයක අයිතිය පුවමාරු වනුයේ ත්‍යාග දීමනාකරුගේ මරණයත් සමගය. ත්‍යාග දීමනාකරුට පෙර ත්‍යාග ලැබුම්කරු මියගිහොත් එයින්ම මරණාසන්න ත්‍යාගයක් අවලංග වේ. මරණාසන්න ත්‍යාග ඔප්පුවක් ලියනුයේ මරණය සමග පොර බඳීමින් සිටින රෝගී තැනැත්තෙකු විසිනි. යම් කළක ත්‍යාග දීමනාකරු සුවපත් වුවහොත් ඔහුට තම ත්‍යාගය අවලංග කළ හැකිය. මෙහිදී බලපවත්නා මුලික රිතිය වන්නේ මරණාසන්න ත්‍යාගය දීමනාකරු විසින් ඕනෑම අවස්ථාවක දී අවලංග කළ හැකි බවට වන රිතියයි.

තම දේපල දු දරුවන් වෙත තැගි කර පවරා දුන් සමහර දෙමාපියන් දරුවන් විසින්

නොසලකා හැරීම නිසා මහ මගට අද වැවෙන අවස්ථාවන් පිළිබඳව නීතර නීතර අසන්නට ලැබේ. එහිදී ප්‍රතිකර්මයක් ලෙස ත්‍යාග අවලංග කිරීමේ සිවිල් නඩුකරය ගෙන ආ හැකිය. ඒ අනුව මුල් කාලීනව පැවති අවලංග කළ හැකි සහ අවලංග කළ නොහැකි ත්‍යාග ලෙස පැවති ගෙනතික තත්ත්වය නඩු තීරණ හරහා අවලංග කළ නොහැකි ත්‍යාග පවා අවලංග කිරීමට හැකි බවට තීරණය කර ඇත. මෙහිදී ත්‍යාග අවලංග කිරීමේ නඩුවක පදනම වනුයේ ත්‍යාගලාහියාගේ බරපතල ආකෘතයෙනාවයි. එවන් නඩුවකදී ත්‍යාග දීමනාකරු විසින් ලැබුම්කරුගේ බරපතල ආකෘතයෙනාව සාක්ෂි වැඩි බර මත ඔප්පු කොට පෙන්විය යුතුය. එනම් ත්‍යාග ලැබුම්කරු ගොනෙක් ආකෘතයෙදී යන් ඔහු ත්‍යාගය දරන්නට නුසුදුස්සේකු බව ත්‍යාග දීමනාකරු විසින් ත්‍යාග ලැබුම්කරුට එරහිව ඔප්පු කළ යුතුය. මෙවැනි නඩුකරයකදී ත්‍යාග දීමනාකරු විසින් පොලීසියට කරන ලද පැමිණිලි වැදගත් සාක්ෂියක් සේ සලකනු ඇත. මෙලෙස දෙන ලද ත්‍යාගයක් අවලංග කිරීම නඩු තීරණ නීතිය හරහා සිදුව ඇති බව මතක තබා ගත යුතුය.

එ අනුව බලන කළ රෝම ලන්දේසි නීතිය අනුව තම තීයාවේ ස්වභාවය හා ප්‍රතිඵල වටහාගත නොහැකි මත්දුලුද්ධික අයකු විසින් දෙන දේපල ත්‍යාගයක් වලංග නොවේ. පියරත්න එ. සිසිලියානා ද සිල්වා¹ නඩුවේදී විස්තර කළ පරිදි යමෙකු අසාමාන්‍ය හැසිරීම් ස්වභාවයක් පළකළ පමණින් ඔහු මත්දුලුද්ධිකයු ලෙස නිශ්චය කළ නොහැකිය යනුවෙන් තීරණය කරන ලදී. ත්‍යාග ලැබුම්කරු විසින් ත්‍යාග දීමනාකරුට පහර දී තුවාල සිදු කිරීම ත්‍යාග ඔප්පුවක් අවලංග කිරීමට තරම් බරපතල ආකෘතයෙනාවක් බව ප්‍රනාන්දු එ. පෙරේරා² නඩුවේදී තීරණය විය. ත්‍යාගයක් අවලංග කිරීමට බලපාන ආකාරයේ බරපතල ආකෘතයෙනාවන් මොනවාද යන්න පිළිබඳව ලෝරා සිල්වා එ. සුමනාවති³ නම් මැතකාලීන

¹ *Piyarathne v Sisiliyana de Silva (2002) 3 SLR 414*

² *Fernando v Perera (1959) 63 NLR 236*

³ *Lora siva v Sumanawathi SC/SPL/LA-7/2008*

නඩුවේදී අහියාවනාධිකරණය විසින් විස්තර විභාග කරනු ලැබේය. ඒ අනුව ත්‍යාග ලැබුම්කරු දීමනාකරුට දෝහිලෙස ක්‍රියා කිරීම, දාමරික ක්‍රියාවකින් ත්‍යාග දීමනාකරුට ත්‍යාල කිරීම, වේතනාත්මකව ත්‍යාග දීමනාකරුගේ දේපල වලට අනර්ථයක් කිරීම, ත්‍යාග දීමනාකරුගේ දේපල වලට අනර්ථයක් කිරීම, ත්‍යාග දීමනාකරුගේ ජ්‍යවිතය නැසීමට උත්සාහ කිරීම, ත්‍යාග ඔප්පුවේ සඳහන් යම් කොන්දේසියක් කඩ කිරීම වැනි බරපතල ක්‍රියාවන් පමණක් ත්‍යාග ඔප්පුවක් අවලංග කිරීමට ප්‍රමාණවත් බරපතල ආකෘතියේම ලෙස සැලකිය හැකි බව එහිදී තීරණය විය. කෙසේ නමුත් මෙම ලෝරා සිල්වා එ. සුමනාවති නඩුවේ අවසන් අහියායවනයේදී ග්‍රේෂ්ඩාධිකරණය තරමක් දැඩි ආකල්ප දැරිය. ඒ අනුව සාමාන්‍ය ත්‍යාගයක් අවලංග කිරීමට ත්‍යාගලාභියාගේ ආකෘතියාවය පැහැදිලි සාක්ෂි මත ඔප්පු කළ යුතුය. එම නීතිය අපේරටද අදාළ බව ලෝරා සිල්වා එ. සුමනාවති නඩුවේදී අහියාවනාධිකරණය විසින් ප්‍රකාශ කර ඇත. මේ සම්බන්ධ නෙතික තත්ත්වය වන්නේ එසේ අවලංග කිරීමට නම් තම සම්පූර්ණ දේපල හෝ ඉන් වැඩි ප්‍රමාණයක් බැහැර කරනු ලැබේ තීවිය යුතුය. මේ බව ගුණරත්න එ. යාපා⁴ නඩුවේදී ද දක්වා ඇත.

ත්‍යාග ලබා දීම හා සම්බන්ධ නඩුවක් ඔප්පු කිරීමේදී ත්‍යාගලාභියාගේ යම් නිශ්චිත ආකෘති ක්‍රියාවක් ඔප්පු කළ යුතුදී නොඑසේනම් ත්‍යාග ලැබුම්කරුගේ ක්‍රියාකළාපය සමස්තයක් ලෙස සැලකිය යුතු ද යන ප්‍රශ්නය දීර්ඝ කාලයක් තිස්සේ නොවිස්දී පැවතුණි. **ක්‍රිජ්‍යස්වාමි එ. කිල්ලසියාපාලම් නඩුවේදී අධිකරණය ප්‍රකාශ කළේ මෙදු නඩුවක් ඔප්පු කිරීමට යම් තිශ්චිත අවස්ථාවකදී සිදු වූ ක්‍රියාවක් මෙන්ම සිදුවේම මාලාවක් වුව ද අදාළ කර ගත හැකි බවයි. විවාහය අපේක්ෂාවෙන් දෙන ලද ත්‍යාග සම්බන්ධව නෙතික තත්ත්වය පිළිබඳ සාකච්ඡා කිරීමේදී දේශන පොවිනෝනා රණවීර මැණික් එ. රෝහිණි සේනානායක්⁵**

⁴ *Gunarathne v Yapa* 28 NLR397

⁵ *Krishnaswami v Thillayyapalam* 59 NLR 265

⁶ *Dona Podinona Ranawera Manike v Rohini Senanayake* (1992) 2 SLR 180

නඩු තීරණය වැදගත් වේ. මෙම නඩුවේ පැමිණිලිකාරිය විසින් තම දියණය වෙත වර්ෂ ඉඩමක් තැගි කරනු ලැබුවේ තම දියණයගේ විවාහය අරමුණු කර ගණීමිනි. එකී අරමුණ සාක්ෂාත් වෙමින් දියණය විවාහ පත් වූ අතර එතැන් සිට පැමිණිලිකාරිය සහ දියණය අතර නොහොඳ නොක්කාඩුකම් වර්ධනය විය. එකී නොහොඳ නොක්කාඩුකම් උත්සන්න වීම හේතුවෙන් පැමිණිලිකාරිය හා ඇගේ සැමියා බලවත් ආකෘතියාවය යන හේතුව මත මෙම ත්‍යාගය අවලංග කරන ලෙස ඉල්ලා දියණය සහ යසරන්න තමැති ඇගේ සැමියාට විරුද්ධව නඩු පවරණු ලැබේය. එම ත්‍යාගය අවලංග කළ හැකි බවට දිසා අධිකරණය තීරණය කළද පසුව අහියායවනාධිකරණය තීරණය කළේ මෙය විවාහ දායාදයක් සේ දුන් ත්‍යාගයක් බවත් (donatio propter nuptias) ඒ අනුව අරමුණු කරන ලද විවාහයද සිදු වී ඇති නිසා එම ත්‍යාගය බලවත් ආකෘතියාවය මත අවලංග කළ නොහැකි බවත් ය. නමුත් පසුව ග්‍රේෂ්ඩාධිකරණ ත්‍යුපුද්ගල විනිසුරු මඩුල්ලක් විසින් එකී අහියායවනාධිකරණ තීරණය ඉවත දම්මන් දිසා අධිකරණයේ තීරණය ස්ථීර කරමින් අදාළ ත්‍යාගය අවලංග කළ හැකි බව දක්වන ලදී.

මෙම නඩුවේදී ග්‍රේෂ්ඩාධිකරණය විසින් සාමාන්‍ය ත්‍යාගයක් හා විවාහ දායාදයක් ලෙස දුන් ත්‍යාගයන් දෙක අතර වෙනස පැහැදිලිව අවධාරණය කරන ලදී. ඒ අනුව සාමාන්‍ය ත්‍යාගයක් යනු ත්‍යාගකරු විසින් පෙරලා කිසිදු ප්‍රතිලාභයක් අපේක්ෂා නොකරමින් ත්‍යාගලාභියාගේ යහපත උදෙසා පරිත්‍යාගයිලි වේතනාවෙන් යුතුව තීරලෝහීව දෙනු ලබන ත්‍යාගයකි. අනෙක් අතට විවාහ දායාදයක් ලෙස දෙනු ලබන ත්‍යාගයක් යනු විවාහයට පෙළඳවීමට හෝ විවාහ වීමට පොරොන්දු වීම නිසා හෝ දෙනු ලබන ත්‍යාගයකි. මෙය කොන්දේසියකට යටත්ව දෙනු ලබන ත්‍යාගයක් වේ. එහිදී අමරසිංහ විනිසුරු දැක්වූයේ "මෙය විවාහය සිදුවිය යුතුය යන අරමුණ ඇතුව දෙනු ලබන්නකි. මෙය පූදු ලාභ අපේක්ෂාවෙන් තොරව පූදු පරිත්‍යාගයිලි වේතනාවෙන් දෙන්නක් නොව ත්‍යාගලාභියා ලබා යටත් කරවා ගැනීමට පෙළඳවීන්නා වූ හෝ මහුගෙන් යම් පොරොන්දුවක් ලබා ගැනීමට පෙළඳවන්නාවූ

හෝ ‘ගනුදෙනුවක්.’” යනුවෙති. මේ අනුව ග්‍රේෂ්‍යාධිකරණය තීරණය කළේ මෙම ත්‍යාගය “ත්‍යාගකරු විසින් විවාහය සිදු කළ යුතුය” යන කොන්දේසියට යටත්ව ලබා දුන් ත්‍යාගයක් නොවන බවත් මෙය දෙමාපියන් විසින් තම එකම දුවගේ විවාහය සිදු වන ප්‍රිතිදායක මොඩොන්දී ඇගෙගේ යහපත පිණිස බුදු පරිත්‍යාගයිලි වේතනාවෙන් ලබා දුන් ත්‍යාගයක් බවත්ය. මෙය අන්තර්ගතය අතින් ද ආකෘතිය අතින්ද පැහැදිලිවම සාමාන්‍ය සරල ත්‍යාගයක් වන බැවින් බලවත් අකෘතියාවය යන හේතුව මත මෙය අවලංගු කරවා ගත හැකි බවට තීරණය කරන ලදී.

කෙසේ නමුත් වර්තමානය වන විට 2017 අංක 05 දරණ අවලංගු කළ නොහැකි තැගි ඔප්පූ, බලවත් අකෘතියාවය පදනම් කොටගෙන අවලංගු කිරීමේ පනත පැනවීම දක්වා නීතියේ වර්ධනය සිදුව ඇත. මෙම පනත පැනවීමට මුල් වූයේ ආරියවතී මීමැදුම එ. ජීවතී බොධිකා මීමැදුම⁷ යන නඩු තීන්දුව මගින් තීරණය කරන ලද කරුණු විය. එසේම තමන් පාලනය වන පුද්ගල නීතිය අනුව ද එනම් උචිරට නීතිය, තේස්වලමේ නීතිය හා මුස්ලිම් නීතිය වැනි විශේෂ නීතින් මගින් පාලනය වන පුද්ගලයන්ට ත්‍යාග සම්බන්ධයෙන් අදාළ වන නීතිය වෙනස් වන බවද ඒ සඳහා සීමා පවතින බවද මතක් කිරීමට කැමැත්තෙමු.

⁷ Ariyawathi Meemeduma vs Jeewani Bodika
Meemeduma SC appeal no 68/2010

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THE “TIMOROUS SOULS” AND “BOLD SPIRITS” – THE ROLE OF LORDS AS “GODS” IN ENSURING RIGHTS OF THE CITIZENS

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Introduction

In terms of the Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka, “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.” (Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 3) The concept of ‘Sovereignty of the People’, which is considered as the foundation of our second republican Constitution of 1978, ensures that all the governmental powers are derived from the people, and thus all the governmental agencies, legislative, executive and judiciary, are answerable to the people. The three organs of the government must exercise their power in trust for the people and in accordance with the ‘Rule of Law’ (JUSTICE THROUGH LAW: FIVE PUBLIC LAW PERSPECTIVES, 2012).

When the legislature fails in playing its proactive role and the executive is wielding a higher degree of power, which is practically uncontrollable, the role of judiciary can be interpreted as a “many-faceted instrument of public welfare”. But, ‘Power corrupts, and absolute power corrupts absolutely’. Therefore, it is strictly needed to ensure the fact that all the

government agencies will act in adherence with the mechanism of checks and balances.

In a society where the legislature enacts the rights of the citizens, the executive is empowered with the authority to ensure the consumption of those rights, the judiciary is considered as the guardian of the rights vested on the citizens.

The judges make new laws by way of interpreting the existing laws. The judiciary can follow precedents established in previous decisions; it can also over-rule such precedents, and thereby makes new laws to be followed. The importance of the judiciary in a democratic society can hardly be exaggerated. Judiciary is a part of the democratic process. Judiciary not only administers justice, and also it protects the rights of the citizens while acting as the interpreter and guardian of the constitution. In many states the judiciary enjoys the power of judicial review by virtue of which the judiciary decides the constitutional validity of the laws enacted or of the decree issued. It can invalidate such laws and decrees which are not constitutional (Rana, March 7, 2014). Sri Lanka, being a nation which does not have a judiciary vested with the power of judicial review of legislation (Constitution of the Democratic Socialist

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Republic of Sri Lanka, Art. 80(3)), is vested with ‘pre-enactment judicial review’.

Though the judicial officers in US and India are enjoying the concept of judicial review, the Sri Lankan Bench does not have such a benefit in order to uphold the rights of the people (Abeysekara, 2015). And when it comes to the standards that had been set by international institutions, the six basic principles on the independence of the judiciary, which were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders which was held in Milan from 26 August to 6 September 1985 and endorsed by the United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (The United Nation-Human Rights, 2020) and Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) which ensures the equal justice, fair trial and independency and impartiality of the tribunals established by law (United Nations Human Rights, 2020) are prominent.

Thus, when it comes to the Sri Lankan scenario, challenge before the Sri Lankan judiciary is on playing the role of “Bold Spirits” as it was pronounced by Lord Denning, in a context where the country’s legislature has failed to incorporate these provisions into the domestic legal literature, while ensuring the fact that “...*the rule of law binds the judiciary as well as other organs of Government.*”, as it was stated by Justice Mark Fernando in his judgment of the case Faiz v. Attorney General (Faiz v. Attorney General, 1995).

Legal Analysis

“Amidst the cross currents and shifting sands of public life, the law is like a great ark upon which a man may set his foot and be safe”

-Lord Chancellor Sankey

(C.G.Weeramantry, The Law In Crisis; Bridges of Understanding, 1975).

Lord Chancellor Sankey explains the role of law in a society where the public has to spend their lives “*Amidst the cross currents and shifting sands*”, while it is the judiciary who is responsible for constructing the “*great ark upon which a man may set his foot and be safe*” in order to give life to this role. The “Lords” - the “Judges” - are the craftsmen who are functioning besides the law and the courts, in giving life to their roles as “the most potent agencies for the public good” (C.G.Weeramantry, The Law In Crisis; Bridges of Understanding, 1975).

In realizing the “expectations of justice”, it is the role of the judges which matters the most, as they are the human beings who gives life to the black letters of the statute – interpretation of statutes and application of Legal principles. Lord Denning also has shed light on the role of judges through one of his remarkable statements as follows: “*the development of law completely depends on ‘bold spirits’ and ‘timorous souls’*”.

Justice Hobart once attributed his authority in respect of legislation to “*that liberty and authority that judges have over laws, especially...statute laws, according to reason and best convenience, to mould them to the truest and best use*”. Thus, development of law, being the process of resolving the scourge of unpredictability, it

is the instance where the judiciary is needed to play its proactive role for the purpose of ‘expanding canvas’.

Judiciary, in performing its role as "a many-faceted instrument of public welfare", is essential to see it in light of the personals who are meant to serve this function (C.G.Weeramantry, *The Law In Crisis; Bridges of Understanding*, 1975). Thus, it is the "discretion" imposed upon the judiciary and "independence of the judiciary" that matters.

The Supreme Law of the country - the Constitution – has a separate set of Articles (Constitution of the Democratic Socialist Republic of Sri Lanka, Art. (107 to 117)), named “Independence of the Judiciary” in Chapter xv, which provides for the law relating to “The Judiciary”. Further, these Articles provides for the independence of the judiciary by providing a transparent and unbiased procedure for the appointments and removal of the Superior Court Judges. And also it provides for the procedure as to the payment of salaries, while declaring the fact that the interference with judiciary as an offence (Constitution of the Democratic Socialist Republic of Sri Lanka, Art. (116)).

Expressing an extra-judicial opinion, Sharwananda C.J., has stated that, "*Independence of the judiciary means the independence of the judges that constitute the judiciary*" (*Bulankulame v. Secretary Ministry of Industrial Development*, 2000). Further, Blackstone regards an independent judiciary as the main preservation of public liberty. Therefore, eradicating undue influences while ensuring ethno-political-justice that should be employed by our "Lords" in addressing the social realities, classifies them as "bold spirits". "It is a very

strong commitment", as it was stated by Mr. K.Kang-Isvaran P.C., [at the oration delivered on the inaugural K.C. Kamalasabayon, P.C. Memorial Oration in 2009, which was titled “The Tissue of Justice and Judicial Attitudes – A Wind of Change over Hulftsdorp Hill?”] (*JUSTICE THROUGH LAW: FIVE PUBLIC LAW PERSPECTIVES*, 2012).

According to Andrew Terry, "*Reaping without sowing will continue to haunt, until one of Lord Denning's "bold spirits" pushes back the perceived limits of judicial doctrine and formalities in the judiciary's sphere of influence*". Andrew Terry's statement is a clear portrayal of the role of judges in scourges of unpredictability, in establishing the rule of law for the purpose of ensuring public welfare. The public interest litigation system is one such revolutionary litigating system which is being adopted by many countries that have a "colonially inherited legal system", that fails in addressing the current social realities, while having a very powerful executive - a social context which is very similar to what exists in Sri Lanka.

Our neighboring nation, India, is one country who has adopted this public interest litigation system and their attempts flag the commitments of Indian judiciary - Indian judges - in addressing public interests and individual rights of their citizens against the corruptions that occur as a result of the absolute power vested on the officials; as it is the surest protection to shield the public. Former Chief Justice, P. N. Bhagwati, Justice V. R. Krishna Iyer can be referred to as the judges who pioneered public interest litigation system in India.

Even in the Sri Lankan legal system, the role played by judges ranks a premium place, as judges enjoy a high public profile in our legal system. And also we pay great attention to what courts say, as a nation which is adhered into realistic legal philosophy. The courts, the Supreme Court in particular, have articulated a set of benchmarks in administering justice. The Bulankulama Case (Bulankulame v. Secretary Ministry of Industrial Development, 2000) can be referred to as the first significant case in this regard, which depicted the active participation of the judiciary in ensuring the rights of the individuals - judicial activism – as a response to the societal needs of the country. Three sensational cases; the Lanka Marine Services case (Vasudeva Nanayakkara v. K.N. Choksy and Others, 2008), the Waters Edge case (Mendis and 9 Others v. Kumaratunge and Others, 2008) and the privatization of the Sri Lanka insurance Corporation case (Vasudeva Nanayakkara v. K.N. Choksy and Others, 2009), may also be considered as the high watermarks of public interest litigation system in Sri Lanka; broadening the rules of standing and scope of such litigation (Goonetilleke, 2014). Former Chief Justice Sarath N. Silva can be referred to as a Judge who did a great service in broadening the scope of public interest litigation system in Sri Lanka.

Through a process of interpretation, that has involved a blending of administrative law concepts, democratic values and constitutional text, the Supreme Court has articulated a right to administrative justice. The predilection of the judges, that has moved from the black letter law to an interest which lies more in public policy, the dynamic two-way relationship that has

been developed in between the principles of administrative law and fundamental rights, the cross fertilization of domestic law with the principles of international law, the intersection of different legal paradigms - specially with the human rights arena - , the different approaches that has been newly adopted - specially the rights based approach - are some clear depictions where the judges had taken pains to enlighten the social realities through a "culture of justification" and through a "culture of interpretation".

Although these efforts has been interpreted as "judicial hunt" and also as "judicial thugism" by many critics, it is the "judicial activism" that is "in need" to the society. These processes of using naked power - using discretion as they please - could be justified under the norms of natural justice as it is being used for the sake of public interest in addressing the social realities.

The question '*quis custodies custodet?*', '*Who guards the guards?*', as it was posed by Mr. Faisz Musthapa, P.C., [at the oration delivered on the inaugural K.C. Kamalasabayson, P.C. Memorial Oration in 2011, which was titled “Fundamental Rights – Changing Judicial Attitudes?” by referring to an oration delivered by Mr. R.K.W. Goonesekera on the occasion of the 60th anniversary of the Law Faculty], (JUSTICE THROUGH LAW: FIVE PUBLIC LAW PERSPECTIVES, 2012), is a question which is still unanswered and will always be on debate, as it will always be a circumstantial matter that should be addressed according to the facts of each case.

Conclusion

As per Kevin Mackey, "Legal Realism was an engine of change" (Mackey, 2004). Thus legal realism being the school of jurisprudence which believed that 'law is what judges say it is', it is the best "engine" to address the social realities in a context where Sri Lanka being a Democratic Nation, which has an executive vested with practically uncontrollable powers.

Formalism –'the official theory of judging' - being a feature of mechanical jurisprudence and being the antithesis of realism should be replaced with legal instrumentalism where the creativity in the interpretation of legal texts is justified in order to assure that the law serves good public policy and social interests, as legal instrumentalists could also see the end of law as the promotion of justice or the protection of human rights.

As the great American Judge, Justice Cardozo stated, law should be viewed "*not solely as an authoritative technique for the resolution of strife, but chiefly as a social process for recognizing and marshalling the values that we prize*" (Wyzanski, 1952). So, it is the duty of "bold spirits" to "sow" the "social values that we prize" as to "reap" "the expectations of justice" while heading towards "perfect justice", without being sticking into the "black letters" and being "timorous souls", and it will mark their roles as "Gods" in a needy society.

In the process of strengthening judicial power, independence of the judiciary is an essential element as it is a basic feature of the rule of law. Sri Lanka, being a nation leading towards a process of post conflict development, in all its social, cultural,

economical and legal aspects, and being in a context where the country's hot debate is on the drafting and enactment of a new Constitution – the Supreme Law of the country – the only hope that the Sri Lankans being Democratic Nationalists, have is to "hope for the best", in relation to rule of law and on the independence of the judiciary that would pave path for the rising of "bold spirits" as to create a proper legal instrumentalism with the social realities of the country.

But, there's always a BUT; As 'Power corrupts, and absolute power corrupts absolutely', a reminder alert which was raised by Mr. Soli Sorabjee, a former Attorney General of India is cautioned as follows:

"It must never be forgotten that in a democracy people have every right to scrutinize and appraise not merely what the judiciary actually delivers but the integrity of the judicial process. The judiciary must constantly guard against the danger of judicial populism. It should not by hyper exercise of judicial power usurp decision making power from the legislature, the cabinet or civil service, in respect of matters of policy. That would be impermissible judicialisation of politics, an encroachment on other wings of the State."

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බලතල බෙදීම සිද්ධාන්තය 1978 ආණ්ඩුවෙහි ව්‍යවස්ථා සංදර්භය ඔස්සේ පිරික්සීම

ග්‍යාමිත් වෙධිසිංහ*

රටක¹ පවතින උත්තරීතර නීතිය ආණ්ඩුවෙහි ව්‍යවස්ථාව වේ. ශ්‍රී ලංකාවේ ආණ්ඩුවෙහි ව්‍යවස්ථාව තුළද මෙම බලතල බෙදීම නම් වූ සංකල්පය ඇතුළත් කොට ඇත. රටකට බලතල බෙදීමක් අවශ්‍ය වන්නේ ඇයි? ඒ තුළින් එම රටෙහි පුරවැසියන්ට සිදුවන යහපත කුමක්ද? ඒ පිළිබඳව සාකච්ඡා කිරීම වැදගත් වේයි.

එක් මනුෂ්‍යකුට සියල්ල කළ හැකිද? පිළිතුර පුදුවන් යන්නයි. එසේ නම් එක් පුද්ගලයකුට හෝ එක් ආයතනයකට සියල්ල සිදුකිරීමට කටයුතු නොකර බලතල කිහිප දෙනෙකු අතර බෙදීම සිදුකරනු ලබන්නේ කුමක් නිසාද? එයට පිළිතුර වනුයේ බලය අයුතු ලෙස භාවිතා කළ හැකිවිම ය. උදාහරණයක් ලෙස ඔබම නීතිය සාදා, ඔබම නීතිය ක්‍රියාත්මක කිරීම අනුමත කර, එහි හරි වැරදි සෙවීමට ඔබම බලය තිබේ නම් කුමක් සිදුවේද? එලෙසම කිසිවකුට ඔබේ තීරණ ප්‍රශ්නතත් කළ නොහැක. එසේනම් එය වැළැක්වීම සඳහා යොදාන පිළියමක් ලෙස මෙම බලතල බෙදීම නම් වූ සංකල්පය ලොව පුරා ප්‍රවලිත වන්දි. බලය බෙදීමකදී සිදුවන්නේ වැඩි බලයක් තිබෙන ආයතනයකින් එක්තරා බලයක කොටසක් වෙනත් ආයතනවලට පැවරීම ය. එනමුත් බලතල බෙදීම තුළ එක සමාන ගක්තියක්, හැකියාවක්, ගකයාතාවයක්, විහාරයක් තිබෙන ආයතන ගණනක් අතරේ කාර්යයන් හා කර්තව්‍යයන් සිදුකිරීමක් සිදුවේ.

අනීතය දෙස බලන කළහිදි සමාජය දේව වරම් වාදය යන සංකල්පය තුළින් සමාජ සම්මුති වාදයට එළඟිනි .සමාජ සම්මුති වාදයේදී සමාජයේ පොදු මහජනතාව සහ පාලකයා අතර ශිවිෂුමක් ඇති වන ලදී.එම ශිවිෂුම සමාජ සම්මුතිය ලෙස හැඳින්විය හැකිය.

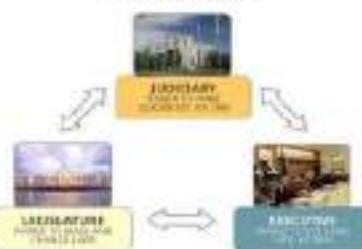
*අධ්‍යක්ෂක වසර, ශ්‍රී ලංකා නීති විද්‍යාලය

මෙම ශිවිෂුම ඇති වී යම් කාලයක් ගත වන විට මිනිසුන්ට මෙහි අර්ථය කුමක්ද යන වග බුද්ධිගේවර විය. එමගින් පාලකයාගේ බලය තවදුරටත් සීමා කිරීමට මිනිසුන් පෙළවිනි. ඉන් පසුව පාලකයාව කොටස තුනකට හඳුනා ගන්නා ලදී.එනම්,

1. නීති සකසන කොටස
2. නීති ක්‍රියාත්මක කරන කොටස
3. නීතිය අර්ථ නිරුපතා සිදුකරන කොටස ලෙසය

රජයේ ප්‍රධාන ආයතන ත්‍රිත්වය ලෙස මෙම කොටස ත්‍රිත්වය දක්වා ඇත. එනම් විධායකය, ව්‍යවස්ථාදායකය සහ අධිකරණය වේ.

SEPARATION OF POWERS

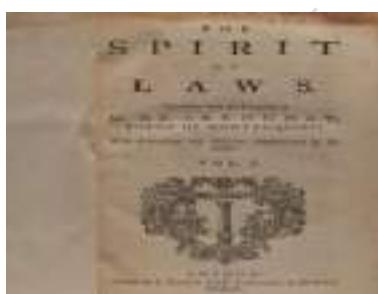


පසු කාලීනව මෙම සංකල්පය කුම කුමයෙන් වර්ධනය වී බලතල බෙදීම යන සංකල්පය විවිධාකාරයෙන් අර්ථකථනය විය. මූල්කාලීන පසුබීම තුළ බලතල බෙදීම ලෙස වටහාගනු ලැබුණේ පැහැදිලිවම ආයතන තුනට වෙන්වූ කාර්යයන් පවතින බවය .

එනමුත් පසුකාලීන සමාජයේ සහ ආණ්ඩුවෙහි ව්‍යවස්ථා නීති විද්‍යාව තුළ සාකච්ඡාවට බඳුන් වූයේ සැබැඳු ලෙසටම වෙන් වූ බලතල බෙදීමක් නොවේයි . ආණ්ඩුවෙහි ව්‍යවස්ථාව නීති විද්‍යාව තුළ හඳුනාගනු ලබන්නේ බලතල බෙදීම යන සංකල්පය යම් අවස්ථාවකදී එක් ආයතනයක් සතුව පවතින බලතල අනෙක් ආයතනය මත පැවරීය හැකි බවය . ඇතැම් අවස්ථා වලදී ව්‍යවස්ථාදායකය, අධිකරණය

ස්වරුපයෙන් හැසිරීමට ඉඩ ඇත. ඇතැම් අවස්ථා වලදී අධිකරණය නීති පනවයි. සමහර අවස්ථා වලදී ව්‍යවස්ථාදායකය නීති අර්ථකථනය සිදුකරයි. එබැවින් පැහැදිලි ලෙස ඉරක් ගසා මායිමක් ලකුණු කොට පෙන්විය හැකි බලතල බෙදීමක් අද සමාජයේ හඳුනාගත තොහැකිය .එසේ හඳුනා ගැනීමට උත්සාහ කිරීමද ප්‍රායෝගික තොවන කරුණකි .

නුතන බලතල බෙදීම යන සංකල්පය හොඳින්ම අර්ථකථනය කරනු ලබවේ මොන්ටේස්කු විසින් රචිත “The spirit of laws” නම් කාතිය මගිනි මෙහි දැක්වෙන පරිදි “දේශපාලන නිදහස ලගා කරගත හැකි එකම මාරුගය බලයෙහි අවහාවිතාවක් තොපැවතීමයි” නමුත් පවතින උදාහරණ වලින් පැහැදිලි වන්නේ බලය සහිත සැම මිනිසේකුම එම බලය අවහාවිතා කිරීමටත් එම බලය යොදාගෙන ය හැකි උපරිම මට්ටම දක්වා ගමන් කිරීමට උත්සාහ කිරීමයි” බලය අවහාවිතය හෝ අනිස ලෙස යොදා ගැනීම වැළැක්වීමට හැකි එක් දෙයක් නම් එක් පුද්ගලයෙකු මත තිබෙන බලය අනික් පුද්ගලයා මත පවතින බලය මත සංවර්ණයක් ලෙස ක්‍රියා කිරීමය.



මේ හේතුව මත මොන්ටේස්කු පවසන පරිදි ආයතන ත්‍රිත්වය අතර බලතල බෙදීමක් පැවතිය යුතු අතර ව්‍යවස්ථාදායකය හෝ විධායකය එකම ආයතනයක් වෙත බලය එකරායි වීමේ ප්‍රතිඵලය නිදහස අනිම වීමයි. එයට හේතුව නම් එකම පුද්ගලයෙකු වෙත දැඩි බලයක් ලැබේම තුළින් තනි පුද්ගලයෙකුගේ අයිතිවාසිකම වලට ලැබෙන ගරු කිරීම තොලබෙනු ඇත. තනි පුද්ගලයෙකුගේ අයිතිවාසිකම ආරක්ෂා වීමට නම් ආයතන අතර බලතල බෙදීමක් පැවතිය

යුතුම වේ. තමන්ගේ බල ව්‍යපරිය තුළ රදවා ගැනීමට ඒ මත ක්‍රියාත්මක කළ හැකි බලයක් තවත් ආයතනයකට දෙනු ලබයි. එනමුත් එම බලයට සීමා පනවයි .

උදාහරණයක් ලෙස :

ජනාධිපතිවරයාට පාර්ලිමේන්තුව විසිරුවා හැරීම සම්බන්ධයෙන් පවතින බලය

ආණ්ඩුකුම ව්‍යවස්ථාවේ 70 (1) ව්‍යවස්ථාව

ජනාධිපතිවරයා විසින් ප්‍රකාශයක් මගින් පාර්ලිමේන්තුව කැදිවීම, පාර්ලිමේන්තුවේ වාර අවසාන කිරීම සහ පාර්ලිමේන්තුව විසිරුවා හැරීම කළ හැක්කේය; ජනාධිපතිවරයා නිරුපතනය කරනු ලබන්නේ විධායකය වේ. එසේ නම් විධායකයට හැකියාවක් පවතිනවා ව්‍යවස්ථාදායකය කෙරෙහි බලය ක්‍රියාත්මක කිරීමට .ව්‍යවස්ථාදායකය මත ක්‍රියා කරන බලය වනුයේ ව්‍යවස්ථාදායකය ස්වරුපයක් හා ව්‍යවස්ථාදායකය සම්බන්ධයෙන් යම් යම් ගැටුළ පවතී නම් ජනාධිපතිවරයාට හැකියාවක් පවතිනවා ව්‍යවස්ථාදායකය විසිරුවා හැරීමට.එනමුත් ව්‍යවස්ථාදායකය විසිරුවා හැරීමට ඇති බලය සීමා කර තිබේ.

19 වන ආණ්ඩුකුම ව්‍යවස්ථා සංශෝධනය මගින් 70(1) ව්‍යවස්ථාව තුළ මෙලෙස පාර්ලිමේන්තුව විසිරුවා හැරීම සඳහා පාර්ලිමේන්තුව විසින් එහි තොපැමිණී මන්ත්‍රීවරයෙක්ද ඇතුළු මූල මන්ත්‍රීවරයෙකුගේ සංඛ්‍යාවෙන් 2/3 තොඟ්‍රා සංඛ්‍යාවකුගේ යෝජනා සම්මතයක් මගින් පාර්ලිමේන්තුව විසිරුවා හරින ලෙස ජනාධිපතිවරයාගෙන් ඉල්ලීමක් කරනු ලබන්නේ මිස, පාර්ලිමේන්තුවේ ප්‍රථම රැස්වීම සඳහා තියම කරනු ලැබූ දිනයෙන් අවුරුදු හතරක් සහ මාස හයක කාලයක් අවසන් වන තෙක් ජනාධිපතිවරයා විසින් පාර්ලිමේන්තුව විසිරුවා හැරීම තොකළ යුත්තේය.

මෙම සිදුවීම සංවර්ණය හා තුළනය ලෙස හැදින් වේ. සංවර්ණය යනු පාලනය කිරීම වන අතර තුළනය යනු පාලනය කිරීමට ඇති බලය පාලනය කිරීම වේ.

ජනාධිපතිවරයාට පාර්ලිමේන්තුව විසිරුවා හැරීමට බලයක් දී පැවතියද , එම බලයට සීමා කිරීමක් යොදා ඇත. මේ නිසා සංවරණයට ලබා දී ඇති හැකියාව අනිසි හැකියාවක් තොවනු ඇත.

කිසිදු පාලනයකින් තොරව පාර්ලිමේන්තුව විසිරුවා හැරීමට බලයක් ලබා දී තිබුණහොත් කුමක් සිදුවේද? එසේ ව්‍යවහාර්ත් මේ ප්‍රධාන සංකල්පයක් වන බලතල බෙදීම යන සංකල්පයට කිසිදු වැදගත්කමක් තොලැඳී යනු ඇත.

අවාසනාවකට ශ්‍රී ලංකාව තුළ ප්‍රධාන ආයතන තිත්වයම හදුනා ගනු ලබන්නේ සංවරණ පමණි. එනම් තමන්ට පවතින බලය සහ අනෙකුත් ආයතන සඳහා ඇති සීමා කිරීම පමණි. ජනාධිපතිවරයා හදුනාගනු ලබන්නේ ව්‍යවස්ථාදායකය සහ අධිකරණය සීමා කළ හැකි ආකාරය වේ. එම සීමා කිරීමට යාම කුළුදී තමන් මත ඇතිවන පාලනයක් හදුනා ගැනීමට අපොහොසත් වේ. එම නිසා ශ්‍රී ලංකාව වැනි රටවල් වල සංවරණය සහ තුළනය යන මූලධර්මය ත්‍රියාත්මක වන්නේ බොහෝම ගැටුළුකාරී ස්වභාවයෙන් වේ. එනමුත් එලස ගැටුළුකාරී තත්වයක් මධ්‍යයේ වුවද ශ්‍රී ලංකාවේ ආණ්ඩුකුම ව්‍යවස්ථාව තුළ මෙම බලතල බෙදීම ත්‍රියාත්මක වේ.

ශ්‍රී ලංකාවේ බලතල බෙදීම.

ශ්‍රී ලංකාවේ බලතල බෙදීම පිළිබඳ සාකාච්ඡා කිරීමේදී ශ්‍රී ලංකාව තුළ 1978 ආණ්ඩුකුම ව්‍යවස්ථාවට පෙර පැවති ආණ්ඩුකුම ව්‍යවස්ථා දෙකක් පිළිබඳව සාකච්ඡා කළ යුතුය. ඉන් එක් ආණ්ඩුකුම ව්‍යවස්ථාවක් බ්‍රිතාන්තුන් විසින් ශ්‍රී ලංකාවට හඳුන්වා දුන් අතර 1947 සොල්බී ආණ්ඩුකුම ව්‍යවස්ථාව වේ .අනෙක් ආණ්ඩුකුම ව්‍යවස්ථාව නම් 1972 පළමු ජනරජ ආණ්ඩුකුම ව්‍යවස්ථාව වේ. මෙම ආණ්ඩුකුම ව්‍යවස්ථා දෙකකි බලතල බෙදීම සම්බන්ධයෙන් විවේචන ද පැවතුණි .

ආචාර්ය සී.එල් අමරසිංහ මහතා පවසන පරිදි "සොල්බී ව්‍යවස්ථාව පිළිබඳ කරුණු දැක්වීමේ දී එය ප්‍රධානිත ආණ්ඩුකුම

ව්‍යවස්ථාවක්. බ්‍රිතාන්තු තුළ කාර්යයන් අනුව බලතල බෙදීම හදුනා ගැනීම අපහසුය. ආයතන අනුවද බලය බෙදීමද හදුනාගැනීම ද අපහසුය සම්පූර්ණයෙන්ම පාහේ බ්‍රිතාන්තු නිර්මාණයක් වූ සොල්බී ව්‍යවස්ථාව තුළ පැවතියේ බ්‍රිතාන්තු ලක්ෂණ වේ

එ අනුව පෙනී යන කරුණ නම් 1947 ආණ්ඩුකුම ව්‍යවස්ථාව තුළ බලතල බෙදීම සම්බන්ධයෙන් ප්‍රකාශිත ප්‍රතිපාදන පැවතියේ තැන. එ අනුව බලන කළේද 1972 හා 1978 ආණ්ඩුකුම ව්‍යවස්ථා ප්‍රබල යැයි කිව හැකිය. එයට හේතුව නම් , 1972 ආණ්ඩුකුම ව්‍යවස්ථාවේ 5 වන ව්‍යවස්ථාව සහ 1978 ආණ්ඩුකුම ව්‍යවස්ථාවේ 3 වෙති වගන්තිය සමග කියවිය යුතු 4 වෙති වගන්තිය මගින් රාජ්‍යයේ ප්‍රධාන ආයතන තුනක් පවතින අතර එම ආයතන තිත්වය හරහා ජනතාවගේ පරමාධිපත්‍ය ත්‍රියාත්මක වන බවද දක්වා ඇත.



එසේම "බලතල බෙදීම යන සංකල්පය තුළ පවතින ඇතැම් ලක්ෂණ 1947 ආණ්ඩුකුම ව්‍යවස්ථාව තුළින් තිවැරදිව හදුනාගෙන නැති බව" අමරසිංහ විනිපුරුතුමා ප්‍රකාශ කරන ලදී.

1972 ආණ්ඩුකුම ව්‍යවස්ථාවේ 5 වගන්තිය තුළ දැක්වෙන පරාමාධිපත්‍ය ජනතාව සතු වන්නේය. අන්හළ නොහැක්කේය, අන්සතු කළ නොහැක්කේය. පරමාධිපත්‍ය ත්‍රියාත්මක කිරීම මත දැක්වෙන ආකාරය සිදුකළ යුත්තේය. ජනතාවගේ ව්‍යවස්ථාදායක බලය ජාතික රාජ්‍ය සහාව විසින් ත්‍රියාත්මක කළ යුතුය. ජනතාවගේ අධිකරණ සහ විධායක පරමාධිපත්‍යයන් ජාතික රාජ්‍ය සහාව හරහා ත්‍රියාත්මක කළ යුතුය. මෙහිදී අනෙක් ආයතන සතු බලතල ද එක් ආයතනයකට පමණක් එකාරුදී වීම සිදුවිය. නිදුසුනක් ලෙස, වෙන්ව ගළායන ජල පාරවල් තුනක් එක ගෙවෙටුවතින් පිටතට මුදාහැරීමක් සිදු කළ විට සිදුවන සිදුවීම ම මෙහිදී සිදුවිය.

1972 ආණ්ඩුවෙනුම ව්‍යවස්ථාව තුළ මෙම සැම බලයක් ම ජාතික රාජ්‍ය සභාව තුළින් ගමන් කිරීමක් සිදුවිය. එම නිසා බලතල බෙදීම යන සංකල්පය ආණ්ඩුවෙනුම ව්‍යවස්ථාව තුළ සාමූහිකව පැවතිය ද, 1972 ආණ්ඩුවෙනුම ව්‍යවස්ථාව තුළ ප්‍රායෝගික ලෙස බලතල බෙදීම ක්‍රියාත්මක නොවුන බව මින් පැහැදිලි වේ.

ලියනගේ එ. රජිණ නඩු තීන්දුව තුළ, විධායකය අධිකරණයේ බලය ක්‍රියාත්මක කරන තාක් දුරකට, විධායකයේ ක්‍රියාකාරකම බලරහිත විය යුතුය. එනම් අධිකරණයේ බලතල වෙනත් ආයතන තුළට ලබා දීමට නොහැකි බව මෙම නඩුවේ තීරණය කරන ලදී. මේ අනුව බලතල කළේහි ද ප්‍රකාශිත සඳහනක් නොතිබුන 1947 ආණ්ඩුවෙනුම ව්‍යවස්ථාව බලතල බෙදීම සංකල්පය අතින් ප්‍රකාශිත සඳහනක් පැවති 1972 ආණ්ඩුවෙනුම ව්‍යවස්ථාවට වඩා විශිෂ්ටව බව පැවසිය හැකිය. එයට හේතුව නම් 1972 ආණ්ඩුවෙනුම ව්‍යවස්ථාව මගින් ජාතික රාජ්‍ය සභාව මත සැම බලයක්ම සංකීර්ණයෙන් පැවතිය ය. මේ නිසා බලතල බෙදීම නම් වූ කාර්යය ප්‍රායෝගික සිදු නොවුන නිසාවෙනි.

1972 ආණ්ඩුවෙනුම ව්‍යවස්ථාව ඉතාමත් කෙටිකළකින් ප්‍රතික්ෂේප වීමට හේතුව නම් තීතියේ බලය සම්බන්ධ ගැටුව, අධිකරණයේ ස්ථාධිනාත්වය පිළිබඳ ගැටුව, බලතල බෙදීම සම්බන්ධ ගැටුව, මූලික අයිතිවාසිකම් ක්‍රියාත්මක කිරීම සඳහා වන යාන්ත්‍රණයක් නොතිබු පිළිබඳව පැවති ගැටුව, එවැනි ගැටුව නිසාවෙන් ජනතාව තීරණය කරනු ලබන්නේ දේශීය පසක් තුළ ගොඩ නැගැණු ආණ්ඩුවෙනුම ව්‍යවස්ථාවක් ලෙස සැබැවම සැලැකිය නොහැකි බවය.

ඉන්පසු ගෙනන්නු ලබන ආණ්ඩුවෙනුම ව්‍යවස්ථාවක් බලාපොරාත්තුවෙන් සහ එම පොරාත්තුව මත ජනතාව විසින්ම මෙම 1972 ව්‍යවස්ථාව ප්‍රතික්ෂේප කරන ලදී. මෙහිදී සිදුවූයේ පැවති රජය පරාජය කිරීමක් පමණක් ම නොව පැවති ආණ්ඩුවෙනුම ව්‍යවස්ථාව ප්‍රතික්ෂේප කිරීමය. එයට හේතුව එම ආණ්ඩුවෙනුම ව්‍යවස්ථාව තුළින් ජනතාවගේ සිතුම් පැතුම් සහ අභිලාෂයන් තීරුපණය නොවන නිසාවෙනි. 1978 ආණ්ඩුවෙනුම ව්‍යවස්ථාව පිළිබඳව සාකච්ඡා කිරීමේ දී බලතල බෙදීමේ සිද්ධාත්තය අනෙක්

ආණ්ඩුවෙනුම ව්‍යවස්ථාව ව්‍යවස්ථාව ඉතා ඉහළින් පවති මෙම ව්‍යවස්ථාව තුළ දැක්වෙන පහත සඳහන් වගන්ති විලින් ඒ පිළිබඳව මතාව පැහැදිලි වේ.

3 ව්‍යවස්ථාව:

ශ්‍රී ලංකා ජනරජයේ පරාමාධිපත්‍ය ජනතාව කෙරෙහි පිහිටා ඇත්තේය. පරාමාධිපත්‍ය අත්තල නොහැක්කේය. පරාමාධිපත්‍යට පාලන බලතල, මූලික අයිතිවාසිකම් සහ ජන්ද බලය ද ඇතුළත් වන්නේ ය.

4 ව්‍යවස්ථාව:

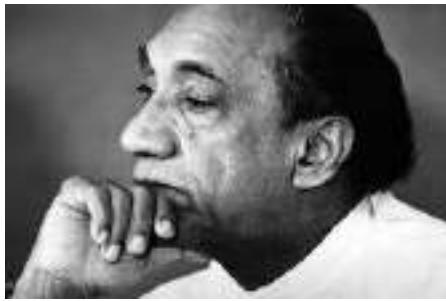
ජනතාවගේ පරාමාධිපත්‍ය ක්‍රියාත්ම වීමද පුක්ති විදීමද, මතු දැක්වෙන ආකාරයෙන් සිදුවන්නේ ය.

4(අ) - ජනතාවගේ ව්‍යවස්ථාදායක බලය ජනතාව විසින් තෝරා පත්කර ගනු ලබන මන්ත්‍රිවරයන්ගෙන් සමන්විත පාර්ලිමේන්තුව විසින්ද ජනමත විවාරණයකදී ජනතාව විසින්ද ක්‍රියාත්මක කළ යුත්තේය.

4 (ආ) - රටේ ආරක්ෂාව ඇතුළව ජනතාවගේ විධායක බලය ජනතාව විසින් තෝරා පත්කර ගනු ලබන ජනරජයේ ජනතාව විසින් ක්‍රියාත්මක කළ යුත්තේය.

4(ඇ) - නීතිය අනුව පාර්ලිමේන්තුව විසින්ම ක්‍රියාත්මක කළ හැකි පාර්ලිමේන්තුව සහ එහි මන්ත්‍රිවරයන්ගේ වර්පණය, පරිභාර හා බලතල සම්බන්ධයෙන් විනා ජනතාවගේ අධිකරණ බලය, ආණ්ඩුවෙනුම ව්‍යවස්ථාවක් ඇතිකොට පිහිටිවන ලද හේ ආණ්ඩුවෙනුම ව්‍යවස්ථාවෙන් පිළිගන්නා ලද නැතුහොත් වෙනත් යම් නීතියකින් ඇතිකොට පිහිටිවන ලද අධිකරණ, විනිශ්චය සහ ආයතන මගින් පාර්ලිමේන්තුව විසින් ක්‍රියාත්මක කළ යුත්තේය.

එමෙහි 1978 ආණ්ඩුවෙනුම ව්‍යවස්ථාව තුළ 7වෙනි, 8 වෙනි, 9 වෙනි පරිවිශේද තුළ විධායකය පිළිබඳව 10 වෙනි, 11වෙනි සහ 12 වෙනි පරිවිශේද තුළ ව්‍යවස්ථාදායකය පිළිබඳව, 15 වෙනි සහ 16 වෙනි පරිවිශේද තුළ අධිකරණය පිළිබඳව සඳහන් වේ. බැලු බැලුමට මෙම ආණ්ඩුවෙනුම ව්‍යවස්ථාව තුළ බලතල බෙදා ඇත. එමෙහි පැවසිමට හේතුව නම් ආයතන තුනටම නිශ්චිත වූ බලතල මොනවාදැයි මෙහි දක්වා ඇති නිසාය.



1978 ආණ්ඩුව ව්‍යවස්ථාව පිළිබඳ අධ්‍යයනය කිරීමේදී එහි බලතල බෙදීම කවර ආකාරයකින් සිදු වී ඇත්දැයි පරික්ෂා කර බැලිය යුතුය. එමෙස බලතල බෙදා ඇති ආකාරය පිළිබඳව සාකච්ඡා කිරීම සඳහා බලතල බෙදීමේ සංකල්පය කොටස් 4ක් යටතේ ගොනුකර දැක්වීය හැකිය

1. ආයතනික වශයෙන් බලතල බෙදීම
2. කාර්යයන් වශයෙන් බලතල බෙදීම
3. පාලනය හා මැදිහත් වීම අනුව බලතල බෙදීම
4. සංවරණය හා තුළනය මත බලතල බෙදීම

ආයතනික වශයෙන් බලතල බෙදීම යටතේ ප්‍රථමයෙන් විධායකය කෙරෙහි අවධානය යොමුකළ යුතුය. 1978 ආණ්ඩුව ව්‍යවස්ථාවහි 30(1) ව්‍යවස්ථාව තුළ මේ පිළිබඳව සඳහන් වේ.

30(1) ව්‍යවස්ථාව - ශ්‍රී ලංකා ජනරජයේ ජනාධිපතිවරයෙක් වන්නේය. ජනාධිපතිවරයා රජයේ ප්‍රධානීය ද, විධායකයේ ප්‍රධානීය ද, ආණ්ඩුවේ ප්‍රධානීය ද, සන්න්ද්ධ සේවාවන්හි සේනාධිනායකයා ද වන්නේය.

30(2) ව්‍යවස්ථාව - ජනරජයේ ජනාධිපතිවරයා ජනතාව විසින් තෝරා පත් කරගනු ලැබිය යුතු අතර පස් අවුරුදු කාලයක් ඔරු දරන්නේය.

93 ව්‍යවස්ථාව - ජනරජයේ ජනාධිපතිවරයා සහ පාර්ලිමේන්තු මන්ත්‍රීවරුන් තෝරා පත් කරගැනීම සඳහා ද, ජනමත විවාරණ වලදී ද ජන්දය දීම නිදහස් ව, සමානව ද රහස් ද විය යුත්තේය.

ඉහත දැක්වෙන ව්‍යවස්ථා මගින් විධායකය වෙත ආයතනික වශයෙන් බලතල බෙදා ඇති ආකාරය දැක්වීය හැකිය.

ව්‍යවස්ථාදායකය වෙත ආයතනික වශයෙන් බලතල බෙදීම දැක්වෙන ව්‍යවස්ථාවන් ලෙස;

42(1) ව්‍යවස්ථාව - ජනරජයේ ආණ්ඩුවේ පාලනය මෙහෙයුම් සහ ඒ පාලනය පිළිබඳ විධානය හාර අමාත්‍ය මණ්ඩලයක් වන්නේය.

42(2) ව්‍යවස්ථාව - අමාත්‍ය මණ්ඩලය පාර්ලිමේන්තුව ට සාමූහිකව වගකීමට සහ පිළිතුරු දීමට බැඳී සිටින්නේය.

43(1) ව්‍යවස්ථාව - අග්‍රාමාත්‍ය වරයාගේ අදහස් විමසීම අවශ්‍ය යැයි ජනාධිපතිවරයා සළකන අවස්ථාවන්හිදී අග්‍රාමාත්‍යවරයා ගේ අදහස් ද විමසා ජනාධිපතිවරයා විසින් අමාත්‍ය මණ්ඩලයේ අමාත්‍යවරුන් ගේ සංඛ්‍යාව ද අමාත්‍යාංශ සංඛ්‍යාව ද ඒ අමාත්‍යවරයාට පවරන විෂය සහ කාර්යයන්ද නිශ්චය කළ යුත්තේය.

අප රටෙහි විධායකයේ කොටසක් ව්‍යවස්ථාදායකය තුළ සමන්විත වේ. එනම්, අමාත්‍ය මණ්ඩලය වේ. ඉහත සඳහන් කරනු ලැබූ වගන්තීන් තුළ ඒ පිළිබඳව සඳහන් විය. අමාත්‍ය මණ්ඩලය තෝරාගනු ලබන්නේද පාර්ලිමේන්තුව ට තෝරා ගත් සාමාජිකයන්ගෙනි. මේ නිසාවෙන් 1978 ආණ්ඩුව ව්‍යවස්ථාව දෙමුහුන් ආණ්ඩුව ව්‍යවස්ථාවක් ලෙස හඳුන්වනු ලබයි.

අධිකරණය සම්බන්ධයෙන් විශේෂ ප්‍රතිපාදන ලෙස ආණ්ඩුව ව්‍යවස්ථාව තුළ 105 ව්‍යවස්ථාව සහ 1978 අංක 02 දරණ අධිකරණ සංවිධාන පනත වැදගත් වේ.

ආයතනික වශයෙන් බලතල බෙදීම තුළ අවසන් වශයෙන් එළඹිය හැකි නිගමනය වනුයේ, මෙම ආණ්ඩුව ව්‍යවස්ථාව තුළ බොහෝම පැහැදිලි ලෙස ආයතන ත්‍රිත්වය පිළිබඳව පෙන්වා දී ඇත. එපමණක් තොව ජනාධිපතිවරයා තෝරා පත්කර ගනු ලබන්නේ එක් ජන්දයකින් වන අතර පාර්ලිමේන්තු මන්ත්‍රීවරුන් තෝරා පත්කර ගනු ලබන්නේ පාර්ලිමේන්තු මැතිවරණයකින්ය. එනම්, මෙම ආයතන දෙක අතර පැහැදිලි වෙනසක් පවතින බව ඉන් පැහැදිලි වේ.

1978 ආණ්ඩුකුම ව්‍යවස්ථාව තුළ කාර්යයන් අනුව බලතල බෙදී ඇති ආකාරය

විධායකය - ජනාධිපතිවරයාගේ දුරය අවස්ථා දෙකක් යටතේ වැදගත් වේ. එනම්, රජයේ ප්‍රධානියා. අනෙක් අවස්ථාව කැබේනට මණ්ඩලයේ ප්‍රධානියා ලෙස වේ. රජයේ ප්‍රධානියා ලෙස ජනාධිපතිවරයාට තිබෙන බලතල ලැබෙනුයේ රුපු ලෙසය. මේ පිළිබඳව සොයා බැඳීමේ දී රුපුගේ ලක්ෂණ ම විධායකයේ ප්‍රධානියාගේ ලක්ෂණ ලෙසට පවත්වා ගැනීමට උත්සාහ දා ඇත. මිනිසුන් සමාජ සම්මුත්වාදය තුළ රුපු සහ තනතුර ප්‍රතික්ෂේප කළද රුපු හට තිබූ ඇතැම් ලක්ෂණ විධායකයේ ප්‍රධානියා තුළ තබාගැනීමට අවස්ථාව සලසා දෙන ලදී. ජනරජයේ මුද්‍රාව දැරීම, ජනරජය වෙනුවෙන් ගිවිසුම් වලට එළඹීම, රාජ්‍ය තාන්ත්‍රිකයන් පත්කිරීම, දුන මෙහෙර ආරම්භ කිරීම, යුද්ධය හා සාමය ප්‍රකාශ කිරීම වේ. මෙම බලතල මුල් කාලයේ රුපුට පැවති බලතලය. මෙවා පරමාධිකාරී බලතල ලෙස ද හැඳින්වේ. පරමාධිකාරී බලතල ඒ අයුරින් ම රාජ්‍යයක ප්‍රධාන ප්‍රරුෂියා ලෙස විධායකයේ ප්‍රධානියා ව පවතී.

ජනාධිපතිවරයා සතු කාර්යයන් නීතිවය කිරීම ආණ්ඩුකුම ව්‍යවස්ථාව මගින් සිදු කරයි. එනම්, ජනාධිපතිවරයා ජනරජයේ ප්‍රධානියා ලෙසද කැබේනට මණ්ඩලයේ ප්‍රධානියා ලෙසද ආණ්ඩුකුම ව්‍යවස්ථාව මගින් දක්වා තිබේමෙනි.

70(1) ව්‍යවස්ථාව - ජනාධිපතිවරයා විසින් ප්‍රකාශයක් මගින් පාර්ලිමේන්තුව කැදීවීම පාර්ලිමේන්තුව වාරාවසාන කිරීම සහ පාර්ලිමේන්තුව විසුරුවා හැරීම කළ හැකිකේය.

එසේ වුවද පාර්ලිමේන්තුව විසින් එහි නොපැමිණී මන්ත්‍රීවරයන්ද ඇතුළුව මුදු මන්ත්‍රීවරුන් ගේ සංඛ්‍යාවෙන් තුනෙන් දෙකකට නොඅඩු යෝජනා සම්මතයක් මගින් පාර්ලිමේන්තුව ව විසුරුවා හරින ලෙස ජනාධිපතිවරයා ගෙන් ඉල්ලීමක් කරනු ලබන්නේ නම් මිස, පාර්ලිමේන්තු වේ ප්‍රථම රෝවීම සදහා තියම කරනු ලැබූ දිනයෙන් අවුරුදු හතරක් සහ මාස හයක කාලයක්

අවසන් වන තෙක් ජනාධිපතිවරයා විසින් පාර්ලිමේන්තුව විසුරුවා හැරීම නොකළ යුතුය මේ අනුව බලත කළේ ද 80(2) ව්‍යවස්ථාව , 83(6) සහ 85(1) ව්‍යවස්ථා තුළින් ද ජනාධිපතිවරයා සතු බලතල සීමා කිරීම වලට ලක් වී ඇත. එයට හේතුව අනෙකුත් ආයතන කෙරෙහි බලපැමක් කිරීමට හැකියාව අවම කිරීම සදහා වේ.

ඉන් පසුව අවධානය යොමු කළ යුත්තේ ව්‍යවස්ථාදායකය කාර්යන් අනුව බලතල බෙදීම සදහාය. මේ සදහා වැදගත් වන ව්‍යවස්ථා දෙකක් ආණ්ඩුකුම ව්‍යවස්ථාව තුළ දැක්වේ. එනම් 75 ව්‍යවස්ථාව හා 76 ව්‍යවස්ථාව වේ.

75 ව්‍යවස්ථාව - අතිකයට ද බලපාන්තා වූ නීති සහ ආණ්ඩුකුම ව්‍යවස්ථාවේ කවර හෝ විධිවිධානයක් පරිවිෂ්ණ්‍ය කරන්නා වූ හෝ සංශෝධනය කරන්නා වූ හෝ ආණ්ඩුකුම ව්‍යවස්ථාවට යම් විධිවිධානයක් එකතු කරන්නා වූ හෝ නීති ඇතුළුව නීති පැනවීමේ බලය පාර්ලිමේන්තුව වට ඇත්තේය. එසේ ව්‍යවද:

(ආ) ආණ්ඩුකුම ව්‍යවස්ථාවේ හෝ එහි යම් කොටසක හෝ ක්‍රියාකාරීත්වය අත් හිටුවන්නා වූ නීතියක් පැනවීම හෝ

(ඇ) ආණ්ඩුකුම ව්‍යවස්ථාව පරිවිෂ්ණ්‍ය කරන්නා වූ නීතියෙන්ම ඒ වෙනුවට නව ආණ්ඩුකුම ව්‍යවස්ථාවක් පහවනු ලබන්නේ නම් මිස ආණ්ඩුකුම ව්‍යවස්ථාව මුදුමනින්ම පරිවිෂ්ණ්‍ය කරන්නා වූ නීතියක් පැනවීම හෝ පාර්ලිමේන්තුව විසින් නොකළ යුත්තේය.

76(1) ව්‍යවස්ථාව - පාර්ලිමේන්තුව විසින් පාර්ලිමේන්තුවේ ව්‍යවස්ථාදායක බලය අත් නොහළ යුත්තේය. කිසියම් ආකාරයකින් අන් සතු නොකළ යුත්තේය. කවර වූ හෝ ව්‍යවස්ථාදායක බලයක් ඇති කිසිම අධිකාරියක් පාර්ලිමේන්තුව විසින් නොපිහිටුවිය යුත්තේය. අධිකරණය සතු කාරුණ්‍යන් පිළිබඳව 105, 106, 107 සිට 111 දක්වා ව්‍යවස්ථාන් තුළ දක්වා ඇත.

105 ව්‍යවස්ථාව - මහි පහත සදහන් ආයතන එනම්;

(අ) ශ්‍රී ලංකා ජනරජයේ ශේෂ්‍යාධිකරණය
 (ආ) ශ්‍රී ලංකා ජනරජයේ අභියාචනාධිකරණය
 (ඇ) ශ්‍රී ලංකා ජනරජයේ මහාධිකරණය සහ පාර්ලිමේන්තුව විසින් කළ නියම කොට එහිටුවනු ලැබිය හැකි වෙනත් යම් මුළු අවස්ථා අධිකරණ , විනිශ්චය අධිකාර හෝ ආයතන යන මේ ආයතන ආණ්ඩුකුම ව්‍යවස්ථාවේ විධිවාන වලට යටත්ව, ජනතාවගේ අයිතිවාසිකම් ආරක්ෂා කරන්නා වූතහවුරු කරන්නා වූ සහ බලගන්වන්නා වූ යුත්තිය පසිදාන ආයතන වන්නේය.

මේ අනුව, ශ්‍රී ලංකා ආණ්ඩුකුම ව්‍යවස්ථා සංදර්භය තුළ කාර්යාලය් අනුව බලතල වර්ගීකරණයක් පවතී. එය බොහෝම පැහැදිලි ලෙස මෙම ආණ්ඩුකුම ව්‍යවස්ථාව තුළ දක්වා ඇත.

විධායකය සහ ව්‍යවස්ථාදායකය අතරද, ව්‍යවස්ථාදායකය සහ අධිකරණය අතරද, අධිකරණය සහ ව්‍යවස්ථාදායකය අතරද කාර්යාලය් බොහෝ ඇති ආකාරය පිළිබඳව දැක්වීය යුතුය. මෙහිදී 76(2) ව්‍යවස්ථාව අනුව නීති සැදීමේ බලය පවතින්නේ ව්‍යවස්ථාදායකයට ය. එහෙත් 155(2) ව්‍යවස්ථාව තුළ දැක්වෙන පරිදි හඳුසි අවස්ථා රෙගුලාසි පැනවීමට ජනාධිපතිවරයාට බලය පවතී. මෙහිදී ජනාධිපතිවරයා ප්‍රතිච්‍රිත ව්‍යවස්ථාදායකයක් ලෙස කටයුතු කරයි. එම නිසා 1978 ආණ්ඩුකුම ව්‍යවස්ථාව තුළ ඕනෑම නීතියක් පැනවීය හැකිය. පාර්ලිමේන්තුව ප්‍රතිච්‍රිත ව්‍යවස්ථාදායකයක් නොපිළිගනීය යන සංකල්පය සීමා වී ඇත. එවැනි අවස්ථා දෙකක් පවතී. එක අවස්ථාවක් නම් ජනමත විවාරණය, අනෙක් අවස්ථාව නම් හඳුසි අවස්ථා රෙගුලාසි සැදීමේ බලයවේ. මෙහිදී ගැමුරට අධ්‍යාපනය කිරීමේදී පෙන් යන්නේ එක් ආයතනයක් විසින් තවත් ආයතනයක කාර්යයක් සිදුකිරීම වේ.

වරුණ කරුණතිලකල සූදේව දේශීය එදායානන්ද දිසානායක: මැතිරණ කොමිෂන්ස්
 නීතියක් නොමැති ස්ථානයක නීතියක් ඇතිකිරීමට උත්සාහ ගත් නඩු තින්දුවක් ලෙස මෙය හැදින්වීය හැකි අතර, ආණ්ඩුකුම ව්‍යවස්ථාව ප්‍රූජල් ලෙස අර්ථ නිරුපණයට ගිය අවස්ථාවක් ලෙස ද දැක්වීය හැකිය මෙහිදී ප්‍රශ්නගත කරුණ වූයේ නිසි දිනට පැවැත්වීය යුතු ජන්දයක් නොපැවැත්වීම සම්බන්ධයෙනි.

හඳුසි අවස්ථා රෙගුලාසියක පැවතිය යුතු ස්වරුපය, මෙම හඳුසි අවස්ථා රෙගුලාසිය සැකසීම සිදුකළ යුත්තේ ව්‍යවස්ථාදායකයේ ස්වරුපයෙනි. එනම්, මෙම අවස්ථාවේදී නීති සැදීමේදී ක්‍රියාත්මක වන යම් කිසි ප්‍රමිතින් වලට, සඳාවාර වලට සහ සිරිත් විරිත් වලට අනුගත විය යුතු බව මෙම නඩු තින්දුවේදී ප්‍රකාශ කරන ලදී. එසේ නම් ව්‍යවස්ථාවක් සකස් කරනුයේ නීති කෙටුම්පත් දෙපාර්තමේන්තුව මෙන් නම් එම අදාළ බලය යටතේ තමන් සම්මත කරනු ලබන නීතිය කෙටුම්පත් කිරීම නීති කෙටුම්පත් දෙපාර්තමේන්තුව හරහා සිදුකළ යුතුය.

ව්‍යවස්ථාදායකය හා අධිකරණය අතර කාර්යයන් අතර ගැවැලුවක් පවතීද?

මෙහිදී වැදගත් නඩු තින්දුවක් ආගුරෙන් පැහැදිලි කිරීමක් සිදුකළ හැකිය. ශිරාණී බණ්ඩාරනායක අගවිනිසුරුවරියගේ දේශාහියේගය නඩුවේදී අහියාචනාධිකරණයේදී ගාමිණී අමරතුංග විනිශ්චයකාරතුමා මෙසේ සඳහන් කරයි. පාර්ලිමේන්තු ස්ථාවර තියෝග 78 (1) මෙන් බලය පවතු ලබනුයේ ස්ථාවර තියෝග කම්ටුවේ සාමාජිකයන් හට පවතින බලය නම් ලෝද්‍යාව ලැබූ ප්‍රදේශලයා වරදකරුවේද, තිවරුදිකරු වේද යන්න තීරණය කිරීම වේ. මෙහිදී පෙන්වා දෙනු ලබන්නේ වරදකරුවෙකු ද, තිවරුදිකරුවෙකුද කියා තීරණය කිරීමට පාර්ලිමේන්තු කම්ටුවකට බලය පැවරීම තුළින් ආණ්ඩුකුම ව්‍යවස්ථාවේ 4(ඇ) වගන්තිය බලාතිකුමණය වී ඇති බවයි. අධිකරණය බලය අධිකරණය ට පමණක් සීමා විය යුතුය. ව්‍යවස්ථාදායකය විසින් ඇතිකරන ස්ථාවර කම්ටුවකට අධිකරණයක් ලෙස කටයුතු කිරීම සඳහා ඉඩ නොදිය යුතු බවත් මෙහෙදී පෙන්වා දෙන ලදී. 4(ඇ) වගන්තිය මෙන් අධිකරණයේ ස්වාධීනත්වය පවත්වා ගැනීමට උත්සාහ දරයි.



ආණ්ඩුවෙම ව්‍යවස්ථාවේ ග්‍රේෂ්ඨාධිකරණයේ රිති සැකසීම සදහා පවතින බලය, විශේෂයෙන් අභියාචනාධිකරණය හා ග්‍රේෂ්ඨාධිකරණයේ නඩු ව්‍යාග වන්නේ ග්‍රේෂ්ඨාධිකරණයේ රිති මත වේ. නීතිය වෘත්තිය සම්පූර්ණයෙන්ම පාහේ පවතින්නේ ග්‍රේෂ්ඨාධිකරණය විසින් සකස් කරන ලද නීති නිසා වෙති. ඒ අනුව ග්‍රේෂ්ඨාධිකරණ රිති සමඟ අවස්ථා වල නීතියකට සමාන වේ. මෙහිදී එළඹිය හැකි නිගමනය වනුයේ කාර්යයන් අනුව බලතල බෙදීමෙදී සමඟ කාර්යයන් ආයතන දෙකම පුවමාරු කරගෙන සිදුකරන බවයි. මෙම මූල්‍යීම යන සංකල්පය මගින් බලතල බෙදීමට බාධාවක් සිදුවන්නේ නැතු. එයට හේතුව ග්‍රේෂ්ඨාධිකරණය ව ගැලපෙන නීති පිළිබඳ ව අවබෝධයක් පවතිනුයේ ග්‍රේෂ්ඨාධිකරණය ව වන බැවිනි. මෙම හේතුව නිසා පාර්ලිමේන්තු මන්ත්‍රීවරුන් ගේ වැටුප්, බලතල, වරුප්‍රසාද සම්බන්ධයෙන් තීරණ ගැනීමේ බලය ව්‍යවස්ථාදායකය ව පවරා ඇත. මෙහිදී හොඳින් කාර්යයන් කිරීම සදහා හැකියාවක් පවතින අතර බලතල බෙදීමේ සිද්ධාන්තය ව හානියක් සිදු නොවේ.

විධායකය හා අධිකරණය

ඇතැම් අවස්ථා වලදී විධායකයේ කාර්යයන් අධිකරණය විසින් සිදුකරනු ලබයි. දේපල පරිපාලනය කිරීම අ.කැ.ප. ඇතිව හෝ නැතිව මිය ගියවිට දේපල සම්බන්ධ යෙන් පරිපාලකයා ලෙස කටයුතු කරනු ලබන්නේ අධිකරණය වේ. නීතිය ක්‍රියාත්මක කරන ස්වරුපයෙන් හැසිරේ. සමාගමක් විසුරුවා හැරීමෙදී මැදිහත් වේ. අධිකරණ සේවා කොමිෂන් සභාව 111වන්තිය අනුව පහළ



අධිකරණ වල නිලධාරීන් පත් කිරීම, උසස් කිරීම, ඉවත් කිරීම, මාරු කිරීම සහ විනය පාලනය කටයුතු කරයි. එමෙස කටයුතු කරනුයේ විධායකයේ ස්වරුපයෙනි. නීතිය ක්‍රියාත්මක කිරීම අධිකරණ සේවා කොමිෂන් සභාව මගින් සිදුකරයි. අධිකරණයේ නිලධාරීන් අධිකරණය කාර්යයන්ද නොකරන අතර, විධායකයේ කාර්යයන් සිදු නොවේ.

සිදුකරයි. එහෙත් මෙය බලතල බෙදීමට පහඳුනී නොවේ. එයට හේතුව බලතල බෙදීමට සහායක් ලබා දේ. අධිකරණය කාර්යයන් පාලනය කිරීම සදහා විධායකයේ නිලධාරීන් යෙදුවාක් ගැටීමක් ඇති වේ. බොහෝ සුම්මත ක්‍රියාත්මක වන මෙම ක්‍රියාත්මත එය බාධාවක් විය හැක. එම නිසා විධායකයේ කාර්යයන් කිරීමට අධිකරණය ව ඉඩ සලස්වා ඇත. එම නිසා බලතල බෙදීම යන සංකල්පයට හානියක් සිදු නොවේ.

අපරාධ නඩු විධාන සංග්‍රහයෙහි 112(8) වගන්තිය හදිසි මරණ පරීක්ෂණයක් මූලිකවම සිදු කළ යුත්තේ මහේස්ත්‍රාත්වරයා විසිනි. එවිට මහේස්ත්‍රාත්වරයා සිදු කරනු ලබන්නේ අධිකරණයේ කාර්යයක් නොව විධායකයේ කාර්යයකි.

විධායකය අධිකරණය ස්වරුපයෙන් කටයුතු කරන ආකාරය දැක්වා හැකිය. ඇතැම් පරිපාලන නිලධාරීන් අධිකරණය ස්වරුපයේ තීරණ ගනියි. ඇතැම් ආයතන වල පරුණද තුළ විනය කම්ටු පවතී. මෙම විනය කම්ටුවට විනිශ්චයකාරවරුන් ගෙන්වන්නේ නැතු. ආයතනය විසින්ම විනය කම්ටුව පත් කරන අතර ඔවුන් ගන්නා තීරණ අධිකරණය ස්වරුපයක් ගනි. කාර්යයන් අනුව බලතල බෙදීමෙදී විශේෂයෙන් හඳුනාගත හැකි විශේෂ ලක්ෂණය වන්නේ යම් යම් කාර්යයන් අනෙක් ආයතන විසින් ඉටු කරනු ලැබීමයි. එනමුත් මෙහිදී කිසිදු අවස්ථාවකදී බලතල බෙදීමේ සිද්ධාන්තයට පහඳුනී වීමක් සිදු නොවන අතර ඒ සදහා උපකාරයක් ලැබේ.

පාලනය හා මැදිහත් වීම.

70(1) ව්‍යවස්ථාව තුළ දැක්වෙන පරිදි ජනාධිපතිවරයා තම පාර්ලිමේන්තුව විසිරුවාලීමට හැකියාවක් පවතී. එනම් සීමා පවතී.

එනමුත් මෙම සිදුවීම නීතියේ ආධිපත්‍යය සමඟ ගැටීමකට ලක්වන අවස්ථාවකි. එයට හේතුව වනුයේ පාර්ලිමේන්තුව පත්වන්නේ එක් ජන්දයකිනි, ජනාධිපතිවරයා පත්වන්නේ තවත් ජන්දයකිනි. එවිට ජනතා පරමාධිපත්‍යය අවස්ථා දෙකකදී ආකාර දෙකකින් ක්‍රියාත්මක වේ. මෙහිදී එක් ජනතා පරමාධිපත්‍යය අනෙක් පරමාධිපත්‍යය සම කිරීමට යාම තුළ

ජනතාවගේ පරමාධිපත්‍යය සම්බන්ධයෙන් ගැටුවකි.

මෙම ප්‍රතිපාදනය 1978 ආණ්ඩුකුම ව්‍යවස්ථාවට ඇතුළත් වී ඇත්තේ මෙම ආණ්ඩුකුම ව්‍යවස්ථාව විසින් ප්‍රමුඛතාව ලබා දී ඇත්තේ විධායක ජනාධිපතිවරයා හා විධායකය මත නිසාවෙනි. විධායකයට විශේෂ වරප්‍රසාද හා බලතල ලබා දෙන ලදී. අනෙක් ආයතන වලට මැදිහත් වීමට බලය ජනාධිපතිවරයාට බලතල ලබා දී කිඹුණුද ඒවා සිමා කිරීම් මගින් තවදුරටත් පාලනය කරයි.

පාර්ලිමේන්තුවට ජනාධිපතිවරයාව පාලනය කිරීමට හැකියාවක් තිබේද?

38(2) ව්‍යවස්ථාවට අනුව දෝෂාහියෝගයක් ගෙන ඒමට පාර්ලිමේන්තුවට හැකියාවක් පවතී. ජනාධිපතිවරයා තමන්ගේ බලය ඉක්මවා කුපුරු කිරීමේදී ජනාධිපතිවරයාට එරහිව දෝෂාහියෝගයක් ගෙන ආ හැකිය.

148 ව්‍යවස්ථාව- රාජ්‍ය මුල්‍ය සම්බන්ධව බලය පාර්ලිමේන්තුව සතුය.

සුද්ධය ප්‍රකාශ කිරීමේ බලය ජනාධිපතිවරයා සතු ව්‍යවද සුද්ධයට යන වියදුම් එසේ තොමැති තම් මූදල් ලබා ගත යුත්තේ පාර්ලිමේන්තුවෙනි. මේ නිසා ජනාධිපතිවරයාට සුද්ධය ප්‍රකාශ කිරීම සඳහා පාර්ලිමේන්තුව සමඟ එකගතාවකට පැමිණීමට සිදු වේ.

පාලනය හා මැදිහත්වීම සම්බන්ධයෙන් විධායකය හා අධිකරණය

126(1) ව්‍යවස්ථාව මගින් පරිපාලනය කියාවක් නිසා මූලික අධිකිවාසිකමක් කඩ වූ විට එම ප්‍රශ්නය විභාග කොට තීරණය ගැනීමට ගේෂ්‍යාධිකරණට බලය පවතී. 140 ව්‍යවස්ථාව මගින් පරිපාලනය ක්‍රියාකාරකම් වලට මැදිහත් වීමේ බලය අධිකරණය සතුව පවතී. එනම් රිට් ආයා නිකුත් කිරීමේ බලය අධිකිරණය මත සිදු කරන බලපෑම 34(1) ව්‍යවස්ථාව යටතේ සිරගත කොට ඇති සිරකරුවෙකු හට සමාව දීමේ බලය ජනාධිපතිවරයා සතු වේ.

අපරාධ නඩු විධාන සංග්‍රහයේ 401 වගන්තිය අනුව නඩු නිවර්තනය කිරීමේ බලය එනම් නඩු නැවැත්වීම සඳහා නීතිපතිවරයාට බලයක් පවතී.

107(1) ව්‍යවස්ථාවට අනුව- ආණ්ඩුකුම ව්‍යවස්ථා සහාවේ නිර්දේශ මත ගේෂ්‍යාධිකරණයේ හා අහියාවනාධිකරණයේ විනිශ්චයකාරවරුන් ජනාධිපතිවරයා විසින් පත් කරයි.

එක්තරා ආකාරයක බලවත් ආයතන 3 ක්, පාලනය හා මැදිහත් වීමක් මත සංවරණයන් හා තුළනයන් මගින් තමන්ගේ බලය තුළ රැඳී සිවේම සිදුවී ඇතු.මේ නිසා බලතල බෙදීම යන සංකල්පය රාජ්‍ය පාලනයට ඉතාමත් වැදගත් වන සංකල්පයකි.මේ නිසා රාජ්‍ය යාන්ත්‍රණය ඉතාමත් කාර්යක්ෂමව සිදු කරගෙන යාමට හැකියාව ලැබේ ඇතු.අවසානයේ දී තනිපුද්ගලයා ගේ නිදහස ආරක්ෂා වීම මෙමගින් සිදු වන වැදගත් කාර්යයක් වේ

MANURAWA 2020

THE UNNOTICED BEAST, ANALYSIS ON THE AIR POLLUTION CAUSED BY THE PORT CITY PROJECT

Hansini Aloka Pallegama*

Introduction

“Oh! Great King, the birds of the air and the beasts have an equal right to live and move about in any part of this land as thou. The land belongs to the peoples and all other beings and thou art only the guardian of it.”

-ArahathMahinda to King Devanampiyatissa, 223BC
(*The Mahavamsa or the Great Chronicle of Ceylon*)

Planet Earth, the only planet capable of harnessing life form in this solar system, consists of an ecosystem suitable for the survival of both humans and other species. Sri Lanka, being an island nation on this blue planet holds many treasures that were given to mankind by nature. The value of these natural resources that we depend on was recognized for its importance not only by ArahathMahinda but many other previous kings, great warriors and people of ancient Sri Lanka. Yet, with the advancements of industrialization, technology and lifestyles, humans have forgotten the importance of the environment given to them by mother nature and continuous overexploitation have taken place around the world as well as in our nation, and over the past few years, overexploitation and pollution have resulted in the phenomenon called ‘Global Warming’ and with the scientific data as well as day-to-day weather changes, it is

clear that this process of global warming is here to stay. Though efforts are being taken to prevent this mass destruction, it is truly questionable whether we have put a full stop to our catastrophic actions.

In Sri Lanka, since recent times, we see the construction of ‘Port City’ or Colombo International Financial City. This construction involves the building of an artificial land by filling up a sea area with soil and sand brought from within the land. This costly process, which once seemed impossible, was successfully carried out by several nations of the world such as, United Arab Emirates (Palm Islands), Singapore and China. One of the main reasons as to why these artificial islands could be stated to be the lack of land area inherent to the country (e.g., Singapore), nevertheless, building of artificial lands (or islands) by nations such as China is mostly political. Though such construction was impossible for a nation such as Sri Lanka, with an aiding hand such as China it became possible. Thus, the project began in the year 2014 and has been continuing despite the many controversies that surround it. Prior to the initialization of this mass project, environmentalists warned authorities of the environmental damage that it may cause to the coastal lines, coastal areas as well as the world. Despite the continuous cries of patriotic and environment loving citizens along with the

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warnings of environmentalists, the project continues day and night. There are many adverse effects that will be caused by the port city project. The project which will reclaim 660 acres of sea (*Colombo International Financial City*n.d.) and 575 acres of land is assumed to cause complexities such as: usage of excessive power; usage of water for the consumption in the city; sewage disposal and solid waste disposal problems; sand requirements; erosion of beaches; threat of increased landslides; increase in pollution in coastal waters due to the change of sea currents; increase in the rate of sedimentation(Corea2016); the construction process causing vibrations and explosions threatening aquatic life forms; air pollution. Even though each of these issues requires individual attention, for the purpose of this study, only the area of air pollution will be discussed.

Air Pollution

The air we breathe daily has a particular composition that allows it to support sustenance of human life. Air pollution occurs where toxic chemicals or compounds (man-made or those with biological origin) present within air are at levels which “lower the quality of air or cause detrimental changes to the quality of life” (*What Is Air Pollution* n.d.). The main cause of the depletion of the Ozone layer is the release of toxic gases to the atmosphere throughout a long period of time, and which, in turn, caused global warming. Moreover, toxicity of air causes lung complications and other respiratory illnesses to humans and all other living beings, which could become life threatening if ignored. The repercussions due to complications in the respiratory

system further became evident with the large number of deaths caused due to the current pandemic; Covid-19. Therefore, even if the pollution of air appears to be very insignificant as we do not immediately face the impact of it, complications that arise due to it occur long term. It is vital that air pollution is reduced and under control to prevent the process of global warming.

Legal Provisions governing Air Pollution in Sri Lanka

The main legal provision that applies for any environmental matter is the *National Environmental Act, No 47 of 1980* (NEA 1980). However, the very first codification of the NEA 1980 did not cover the ground of air pollution by its provisions. It was only through the *National Environmental (amendment) Act, No. 56 of 1988* (Amendment Act) that this legal regime was established.

Section 23J of the Amendment Act states that, “**no person shall discharge or emit waste into the atmosphere** except in accordance with such standards or criteria as may be prescribed under this Act.” This provision is indicative that no person (whether a citizen or not, and can be defined to include not only natural persons, but also legal personnel) can emit waste into the atmosphere. This restriction on the pollution of the atmosphere is then further elaborated by Section 23K (1) as it states that:

“no person shall pollute the atmosphere or cause or permit the atmosphere to be polluted so that the **physical, chemical or biological condition of the atmosphere is so changed** as to make or reasonably be expected

to make the atmosphere or any part thereof unclean, noxious, poisonous, impure, detrimental to the health, welfare, safety, or property or human beings, poisonous or harmful to animals, birds, wildlife, plant or all other forms of life or detrimental to any beneficial use of the atmosphere.”

This provision expresses that a person cannot conduct any form of action that may lead to the physical, biological and chemical alteration of the atmospheric conditions. It is applaudable that this section is broad enough to not only consider the wellbeing of humans, but also animals, birds, wildlife, plants and any other form of life. This stipulates the factor that all life forms should be protected from the consequences of air pollution, therefore valuing all life forms as important living beings.

The section 23K, also touches on any other actions that may contravene a person under commission of air pollution by subsection (2): placing or in any such matter releasing any matter, whether liquid, solid, or gaseous, that is prohibited by or under the Act or any other relevant legislation to the atmosphere [section 23K (2) (a)]; causes or permits the discharge of odours which by virtue of their nature, concentration, volume, or extent are obnoxious or unduly offensive to the senses of human beings [section 23K (2) (b)]; burns wastes otherwise than at times of in the manner or place prescribed by the Act [section 23K (2) (c)]; uses an internal combustion engine or fuel burning equipment not equipped with any device required by the regulations to be fitted to such engine for the prevention or reduction of pollution [section 23K (2)

(d)]; uses or burns any fuel which is prohibited by regulations made under this Act [section 23K (2) (e)]. These actions, which have been prohibited by the Amendment Act in discussion, have covered most of the areas by which air pollution can be caused and are very broad as they can be interpreted to suit any question at hand. Also, it can be used to identify what waste and toxic materials can be if elaborated. This Amendment Act further provides for the conviction of any such act prohibited by section 23K (1) as such action amounts to an offence. Nevertheless, the Amendment Act does not set any conviction for the conduct of actions as set by the subsection 23K(2), thus only acting as a complementary section to Section 23K (1). The failure to keep fit and maintain prescribed control devices which may in turn pollute the atmosphere is also an offence under section 23L of the Amendment Act.

It is very important to note that air pollution is defined by the Amendment Act as “**undesirable change in the physical, chemical and biological characteristics of air** which will adversely affect plants, animals, human beings and inanimate objects” (*National Environmental (Amendment) Act, No. 56 of 1988, s12(a)*). This allows any seeker of legal assistance to clearly understand the definition of air pollution and does not need to look beyond our own legislation for the definition.

Apart from the above discussed Act, there have been Regulations gazetted by the government which regulates the air pollution conditions. These Regulations are:

- Gazette Extraordinary, No. 850/4 of December, 1994 [National

Environmental (Ambient Air Quality) Regulations, 1994].

- Regulations published under the Gazette Notification No. 1295/11 dated 30.06.2003.
- Order published under the Gazette Notification No. 1309/20 dated 10.10.2003.
- Order published under the Gazette Notification No. 1557/14 dated 09.07.2008.
- Regulations published under the Gazette Notification No. 1562/22 dated 15.08.2008.
- Amended Regulations published under the Gazette Notification No. 1887/20 dated 05.11.2014 with the corrected Gazette Notification No. 1895/43 dated 02.01.2015.

Regulations published under the Gazette Notification No. 1295/11 was established to govern the arena of vehicular exhaust emission standards and it illustrates how this factor affects not only the importation of vehicles, but also what fuel standards are for each and every type of combustible fuel. This was later amended by the *Order published under the Gazette Notification No. 1557/14* in the year 2008.

Order published under the Gazette Notification No. 1309/20, elaborates the Section 23W of the Amendment Act which prohibits the use of any material in an industry that may cause harm to the environment. The Order involves a list of substances (such as Trichlorofluoromethane, Dichlorodifluoro methane, Bromotrifluoromethane and etc.) which have been identified Ozone depleting substances and thereby prohibits the use of these substances in any new

process, trade or industry, which would upon usage endanger the environment.

National Environmental (Ambient Air Quality) Regulations of 1994 set forth a permissible ambient air quality standard which expressed the amount of pollutants that could be present in the air as a percentage under different categories of them. This Regulation was then amended by the *Order published under the Gazette Notification No. 1557/14*. Therefore, under this regulation, the permissible amounts of different pollutants are as follows:

Pollutant	Averaging Time	Maximum Permissible Level		+ Method of measurement
		µgm-3	ppm	
Particulate Matter - is less than 10 µm in size (PM 10)	Annual	50	-	Hi-volume sampling and Aerodynamic diameter Gravimetric or Beta Attenuation
	24 hr	100	-	
Particulate Matter - is less than 2.5 µm in size (PM 2.5)	Annual	25	-	Hi-volume sampling and Aerodynamic diameter Gravimetric or Beta Attenuation
	24 hr	50	-	
Nitrogen Dioxide (NO2)	24 hr	100	0.05	Colorimetric using saltzman Method or equivalent Gas phase chemiluminescence
	8 hr	150	0.08	
	1hr	250	0.13	
Sulphur Dioxide (SO2)	24 hr	80	0.03	Pararosaniline Method or equivalent Pulse Fluorescent
	8 hr	120	0.05	
	1hr	200	0.08	
Ozone (O3)	1 hr	200	0.10	Chemiluminescence Method or Equivalent Ultraviolet photometric
Carbon Monoxide (CO)	8 hr	10,000	09.00	Non-Dispersive Infrared Spectroscopy
	1hr	30,000	26.00	
	Any time	58,000	50.00	

These are legislations by which the platform of air pollution is regulated and controlled within Sri Lanka.

Apart from this, it is vital to remember that, at the initiation of any industrial action or construction which may threaten the environment even in the slightest form, to obtain an Environmental Assessment Report as required by the section 23BB of the *National Environmental (Amendment) Act, No. 56 of 1988* and several provisions of it was amended by the *National Environmental (Amendment) Act, No. 53 of 2000*. Section 23BB(1) requires all projects approving agencies to require from any Government Department, Corporation, Statutory Board, Local Authority, Company, Firm or individual who wishes to submit any prescribed project for its approval, to submit within a specified time an initial environmental examination report or an environmental impact assessment report. This is considered as a duty of such project approving agencies.

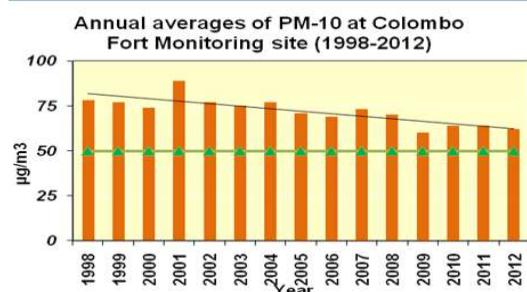
Port City and Air Pollution; What can the Existing Legislations do?

Since Air Pollution involves the emission of toxic materials to the atmosphere that damages it and reduces the air quality, it is important to identify the air pollution that is caused or will be caused in due time by the port city.

Air pollution caused by the port city is anthropogenic (*What Is Air Pollution* n.d.) in nature, meaning that it is caused by the actions and influence of human beings. Anthropogenic air pollution includes

mining and smelting, foundry activities, industrial processes, transportation, construction and demolition, coal power plants, landfill disposal activities, smoking and etc. (*Air Pollution Causes*n.d.). Port city therefore falls under the anthropogenic category of construction and demolition. Construction activities pollute the air with the materials that they may use in the construction process and these may be Volatile Organic Compounds (VOC), other chemicals which may particulate matter and even gaseous forms that may be sent upon exhuming materials such as carbon monoxide, carbon dioxide or nitrogen oxides (*Construction Sites Pollution*n.d.). Further any air which is contaminated by pollutants tends to spread around faster by wind, thereby transferring these pollutant air inwards the country or any state (*Construction Sites Pollution*n.d.). Under this context, it is very clear that the construction that is happening at the port city results in accumulation of debris in the atmosphere, thereby reducing the air quality of Colombo.

Figure 1: Annual averages of PM-10 at



Colombo Fort ambient air quality monitoring Station (1998-2012)

From the years 1998-2012, the level of PM10 annual average ambient level has

remained within the safer levels of 60 to 82 $\mu\text{g}/\text{m}^3$ in Colombo Fort monitoring site (*Annual averages of PM-10 at Colombo Fort ambient air quality monitoring Station (1998-2012) 2012*). When considering the World Health Organization's (WHO) as of 2005, the guidelines for air quality requires it to be:

- PM2.5: 10 $\mu\text{g}/\text{m}^3$ annual mean
25 $\mu\text{g}/\text{m}^3$ 24-hour mean
- PM10: 20 $\mu\text{g}/\text{m}^3$ annual mean
50 $\mu\text{g}/\text{m}^3$ 24-hour mean
(World Health Organization 2005)

Therefore, it is evident that though the air quality standard of Colombo falls within the standards of Sri Lankan legislation, they do not fall under the WHO's expectations. These levels can now increase due to the excessive emission of constructive pollutants by the events of the port city.

Ecologist Dr Ranil Senanayake, at a seminar held by the 'Peoples Movement Against Port City' highlighted that the level of air pollution has increased within Colombo due to the construction process occurring at the port city. He elaborated that "currently, PM2.5 fine particles in the City of Colombo are at levels three times more than what is safe for humans. Once the Port City is built, it would have a large number of high-rise buildings which would lead to the amount of PM 2.5 particles increasing to 25-30 times what is considered safe for humans" (Gunasekara 2018). This expresses the severity of the situation we have at hand. It is important that this amount of air pollution must be reduced and maintained if we do not want the citizens as well as the animals of our country to face respiratory complications in the near future.

So how can we apply the existing laws to the current situation of air pollution resulting from the activities of the port city. As previously mentioned, prior to initiation of any industrialized or construction project, those who aim to carry out such conduct must obtain an evaluation report named the Environmental Impact Assessment (EIA). There also is a subcategory of EIA, which is the Initial Environmental Examination (IEE) which is issued for projects with less environmental complications. This assessment, which is only mandatory for large scale projects or to those which are conducted in environmental sensitive areas. EIA is implemented by the Project Approving Agencies (PAA) and is led by the Central Environmental Authority which also approves or rejects the project at discussion. The procedure of EIA initially involves screening if the necessity of such a report for the project at hand which is to be carried out within six days, and then the scope of the study will be determined by 14 days for IEE and 30 days for EIA. Then the preparation of the time report occurs after which the EIA/IEE is open to the public and expertise for their review within 30 days of a review period. Then the EIA/IEE could be either approved or rejected depending on their impacts on the environment. Finally, when such a project initiates, the authority monitors their activities to maintain the established trustworthiness to not pollute the environment (*Environmental Impact Assessment (EIA) Procedure in Sri Lanka*d.).

The port city project too has EIA reports which are established adamantly, yet the contents in them are assumed to be manipulated by the majority as the CHEC Colombo Port City (Pvt) Ltd, seem to slip

through the accusation by providing the assurance that the EIA report levels them at a safer limit. One such example was from 2017 when they provided answers for an internet article through the statements such as “while ambient air quality measurements were done in the years 2014, 2015 and 2017 for six locations in the port city area, the concentrations of PM10 and PM2.5 always remained much less than the respective maximum permissible level” (Fernando 2017). Despite their positive remarks, the public are doubtful of the accuracy behind these data, and it has been noticed that the EIA itself suggests further analysis on the situation. There exists a suspicion amid the citizens that the report has only covered 300 acres of the entire project whereas the actual project expands over 550 acres (Wijenayake 2015). Even within the last year, an EIA has been reported based on the port city, yet its transparency is questionable as it too allows for the continuation of the port city construction.

Moving on from the EIA, pollution which is caused by the port city is undoubtedly a violation of the right to a healthy and clean environment of citizens of this country. This right which has not been duly recognized in the fundamental chapter of *The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978*, yet applicable under the constitutional provision of Article 27 (14) which indicates that “the State shall protect, preserve, and improve the environment for the benefit of the community.” Also under Article 28(f), which promotes that it is the “duty of every person in Sri Lanka to protect its nature and conserve its riches”. Yet, it is a well-known factor that the breach of the fundamental duties and directive principles of State policy do not impose any legal right or

obligation *The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978*, s29). Nevertheless, personnel can invoke public trust doctrine and public interest litigation along with violation of fundamental rights against the actions of the port city. Unfortunately, all the actions that have been legally taken under this arena have been proved to be unfruitful.

As per the Section 23J of the Amendment Act, the air pollution that is committed by the port city constructors is an offence and can be punishable by Section 23K. Nonetheless, it is doubtful whether any application of this law against this large organization will be successful.

It is evident that despite the legal system lacking a constitutional right to protect the environment, the National Environmental Act along with the judiciaries support, the existing legal provisions are enough to tackle the issue of air pollution by the port city for now. But upon its completion, the port city will be governed by a new legislation as our constitution has no power to control matters of artificial land that are built by the nation and therefore, by that time, it will be too late for any action to be taken against the pollution of air. Therefore, by then, unless the newly codified legal document allows for litigation against factors such as air pollution, the future seems very dark for Sri Lanka.

Conclusion & Recommendation

The best recommendation for the prevention of further occurrence of this air pollution arising from the port city would be to halt its actions and completely shut down the process. But the authorities involved have been fighting very hard to

prevent the closure of the port city project from happening for a few years, and therefore this may be difficult to achieve. Another recommendation would be to reclaim the land constructed and transform it into a natural park. This is a feasible action and has been considered by the CHEC Port City Colombo (Pvt) Ltd as they have expressed their view to create a natural part within the city complex. But, it is unpredictable what the future will hold in store. A new legislation for the governance of environmental hazards that may be caused by artificial islands or reclaiming of sea into land can be proposed as a recommendation, whereby provisions which can cover the air pollution caused by these programs can be monitored and evaluated. Furthermore, in any event of failure of attempts to carry out the above actions, it will be best to institute a transparent organization which could be composed of both Sri Lankan and international experts in the field of Law, Environmental Protection and Engineering. Such an organization can then monitor each step and action of the port city and control the pollution caused by the project.

The environment we have today is a gift of mother nature. Considering the damage, we as humans have caused to it throughout time, it is truly questionable whether we deserve this heavenly Earth which is the only planet we know of and have the capacity to live in. Despite the many attempts by the minority of environmental enthusiasts and scholars, the majority of humankind has continued to pollute and exploit its resources in ways humanly unimaginable. The current trend of exploitation will result in the extinction of species, increase the severity of global warming, and increase the available water

levels, disappearance of small island countries due to the rise in water levels and many more natural disasters. Further, the lockdown of humans within their residence due to the global pandemic has proven that the environment is also capable of healing on its own, as long as human interventions are minute.

In order to protect the world from our own beastly selves, even a small effort would make the life of Earth last one second longer. Therefore, though projects such as the port city are economically beneficial, we must understand that they may cause even greater environmental harm which we would not be able to weigh with the units of currency. Thus, it is important to remember the principle of intergenerational equity where we protect the environment for the future generations as well. Moreover, authorities who govern nations such as ours must remember that:

“The land belongs to the peoples and all other beings and thou art only the guardian of it.”

-ArahathMahinda to King Devanampiyatissa, 223BC (*The Mahavamsa or the Great Chronicle of Ceylon*)

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Order published under the Gazette Notification No. 1309/20 dated 10.10.2003.

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MANURAWA 2020

SITUATIONS LIKE COVID-19 AND STATE RESPONSIBILITIES ON IMPLIED RIGHTS FOR COMMON MAN

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As we all as human being we are facing happiness and sadness together in our life. As because of the world order we must face everything as human. It is impossible one without another. When it comes in case of Corona Panic, it has its own logic. The fact that in the UK, due to the corona virus panic, even rolls of toilet paper disappeared from stores reminds a strange incident with toilet paper from socialist Yugoslavia. Suddenly, a rumor started to circulate that there was not enough toilet paper in the stores. Authorities quickly promised that there was enough toilet paper for normal consumption and, surprisingly, these were not only true, but most people even thought it was true. Same what happened even in our countries super market like Cargills, Keels and all.

However, an average consumer reasoned as follows: I know there is enough toilet paper and the rumor is false, but what if some people take this rumor seriously and, in a panic, start buying excessive supplies of toilet paper, causing a real shortage of toilet paper? So I better go and buy some of it myself. It is the situation regarding a common man regarding purchasing. This is apart. In other hand in case of this scenario their responsibilities impliedly arise for a state on their citizens. Let's discuss one by one in next paragraphs.

Generally, responsibility of the protection of the citizens arises with the government. In case of this government implying lock downs as well curfews. Here curfews or lock downs must be handled in a proper manner. Otherwise it became the reason of another problem. When it come in case of curfew, there are several day by day workers are effecting. And by the way nation's economy also go down. Here is the place where problem is starting. We will discuss it briefly later. Other than this within this situation making social harmony and conciliation is state responsibility. Here media reporting is playing a huge role. Government must make regulations and control regarding this. Because it became the reason of infringe a person's fundamental rights. So It became the reason of violating the articles of fundamental rights of the constitution. Other than that state must have the responsibility to enact proper law and aware People. In Ranjan Ramanayake's recent case Former UNP MP Ranjan Ramanayake who was arrested for violating curfew without a proper pass, was released on bail by the Nugegoda Magistrate's Court yesterday after his lawyer President's Counsel M.A. Sumanthiran argued in court that the curfew imposed island wide to keep people at home had been illegally imposed.

(<https://www.colombotelegraph.com/index.php/sumanthiran-argues-curfew-illegal-gets->

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[ramanayake-released-on-bail/](#) cited on 2020-05-09). So state must act in a proper manner regarding this.

But in other hand if state impose strict curfew, should this rigorous lock-down have continued longer? It is a matter of great concern that while the relaxations to the lock-down flow, there is an alarming continued spurt in the number of new COVID-19 cases across the country. Should the government has acted more cautiously and guardedly to contain the virus?

Batticaloa is in the Green Zone having officially to date not a single COVID-19 death. But there can be no room for complacency as we are fighting an unknown vicious enemy that has devastated the entire mankind across the globe. The Government should take scientific and medical advice and study global trends and actions, not just pander to the whims of big business and rush into ill-judged decisions. Perhaps they could use a simple natural example of a watermelon that sums up our current situation. A watermelon has a green zone on the outside but once cut open it readily displays a red zone.

In Goa it's now all wide open with even the Mining trucks zooming through the borders and the State being now curfew less while that Section 144 is superfluous. Except for the Casinos, Matka and Bullfights it's almost every business as usual and once all this commences too, the Drug and flesh trade will also kick in. The lock down was implemented without a well thought out plan on its implications and the relaxation of the lockdown has even less of a plan.[\(https://www.livemint.com/news/india/\)](https://www.livemint.com/news/india/)

[after-goa-two-more-states-become-coronavirus-free-11587699238229.html](#)
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Even in Sri Lanka Over the last few weeks this unprecedented lock-down caused a lot of hardship and inconvenience to all which the brave people endured in the bigger battle against the raging virus. Let us only hope that all this effort does not go in vain while the looming global pandemic shows no signs of tapering down. There is even warning of a possible second wave of the pandemic occurring if the virus restrictions are lifted too soon. Government has an obligation and duty to protect its people above all else. Yes, the economy is important, but peoples' lives matter more.

Another problem is Protection of women from domestic violence during lockdown. In this case Delhi HC directs central, Delhi government to convene High level meeting. Delhi High Court has directed the Central Government, Delhi Government, National Commission for Women, Delhi Commission for Women, and other concerned authorities to convene a meeting at the highest level to look into the issue of protection of women from domestic violence during the lockdown period. The Division Bench of Justice J R Midha and Justice Jyoti Singh has also directed the said authorities to deliberate on what additional measures can be undertaken in order to curb the instances of domestic violence as well as towards protection of the victims.

The present order has come in a plea seeking enforcement of the provisions of Protection of Women From Domestic Violence Act, 2005, in order to ensure that women who are

victims of domestic violence are getting adequate assistance and are not further victimised due to the lockdown. Appearing for the Central Government, ASG Maninder Acharya informed the court that the Ministry of Women and Child Development, Government of India, has issued an Office Order dated 25.03.2020 taking cognizance of the spike in domestic violence cases on account of lockdown and has noticed in the Order that a quick response mechanism is required due to special circumstances that are prevailing. She further submitted that the Ministry has issued certain directions to the concerned District Collectors/District Magistrates to make suitable duty roster for the concerned officers so that they are able to provide essential services to the affected victims of domestic violence. These District Collectors/District Magistrates, she submitted, have also been directed to undertake appropriate measures to provide transport as well as protective gears and other logistic support to the helpline personnel, enabling them to render help and take requisite measures in case calls are received from the victims.

On the other hand, counsels for the Petitioner argued that certain more effective measures need to be put in place, as it is a matter of record and statistics that the cases of domestic violence are on a rise, on account of the women being confined to their homes. In light of these submissions, the court has directed all the authorities to convene a meeting at the highest level to discuss the concerns raised by the Petitioner and take a decision within 3 days. This decision, and fresh steps taken to protect women from domestic abuse, shall be implemented

immediately thereafter. In Sri Lanka there are lot of NGO's care regarding this matter. But government must intervene to solve out this problem in a proper manner. Because state not only has the governing responsibility but also it has protection of the citizens. Sri Lanka can take a big example from this. So government must take proper mechanisms to mitigate this issue

In other hand people's day to day life activities and maintenance of their family affect because of this pandemic. We can see this under two subtopics as for normal civilians and medical workers and forces safety and fulfil their essential needs. There are lot of cases decided in India regarding this matter. Let's see with some decided cases. (<https://www.barandbench.com/news/litigation> cited on 2020-05-10)

Mustafa Mh v. Union of India [Supreme Court] In this case About 500 Indian citizens from Ladakh, who had gone to Qom, Iran on a pilgrimage, are presently stranded there. About 250 persons who had also proceeded on a pilgrimage to Qom have been brought back to India. Several of the existing batches of 500 persons may have tested positive for Covid-19. Many of them have no funds available for their maintenance. Hence, urgent humanitarian assistance is required to be provided to these persons by the Government of India.

Adityajit Singh Chadha v. Union of India [Punjab & Haryana High Court], here said that Maintaining social distance is a sine qua non to control the disease. The Administration may also solicit opinion of the specialists of infectious/communicable diseases, while taking a decision.

Accordingly, the petition is disposed of with an observation that the Administration may lay down the parameters of social distancing at the time of distribution of essential items and also to monitor and regulate the same by taking stringent actions against the violators.

Another issue when arrest a person he or she may has affected by covid-19. In chance he can spread while in custody to others. So in Suo Motu v. State [Gujarat High Court]case, In case any arrest is made during this period and the accused is lodged in a particular jail without ascertaining whether such accused being taken into custody is clean or is a suspect or infected with the Corona Virus, lodging him into jail where already hundreds and thousands of under trial or convicts are lodged, it would be an imminent peril to all the inmates of the particular jail where any new entry suspected or infected of the Corona Virus is introduced. It may result into disastrous situation where large number of inmates inside the jail may be infected thus defeating the social distancing and the extraordinary measures being taken for control and check of the Corona Virus. Therefore, it would be appropriate to direct the Department of Home, Government of Gujarat to consider this aspect and issue necessary circular / instructions to all the Superintendents of Police / Commissioners of Police throughout the State to ensure that before any accused is arrested and sent to jail, it is confirmed that he is not a suspect or infected with Corona Virus. It is only after such confirmation that an accused be lodged in a particular jail, otherwise the same be avoided for the period of crisis. Even in Sri Lanka there are lot of Navy personal affected because of such kind

of similar scenario. So government must give proper protection and instructions to them.

Other than above those essentials must be provided to medical workers. We can see them by below two cases

Sanicchar Oraony. State [Jharkhand High Court]The RIMS, Ranchi shall provide N-95 masks to all the doctors and para-medical staff across the departments forthwith and to make appropriate arrangement including fully equipped separate (isolation) ward for treatment of the patients being admitted there with suspected case of Corona virus. All preventive measures must be taken by the RIMS Administration so that if at all any patient is found positive of Corona virus infection, the same should not spread to any other person.

Court On Its Own Motion v. Nemo [Jammu and Kashmir High Court]Given the nature of the infection, it is essential to not only anticipate the need for identifying the persons with COVID 19 infections/persons who have been exposed to infection/persons who may be possible carriers of the virus but also to ensure appropriate and adequately equipped isolation and quarantine facilities, as well as make provisions for medication; equipment necessary for treatment; masks for the public and separation kits for medical experts and health workers.

Another issue is media reporting. The media circus must be regulating by the government. Better than never. It is heartening to see all the authorities including the Ministry of Defense calling on the media to regulate themselves when reporting on patients who have contracted Covid-19. We have as a

country suffered the scourge of the pandemic for over a month, and due to the thankless efforts by the front line workers: Our medical staff, nurses, attendants, cleaners and our forces we have been able to contain it. However, during the crisis we witnessed how the media hounded race, religion and the identity of patients creating hate and animosity against one group by the other. It is indeed better late than never that these regulations against the identity of patients are put forth. We need to respect the privacy of each and every human being infected by this disease and that has been our call throughout this time. The disease does not know race, religion, gender or identity of a human being. We need to fight it as one.

Unemployment and labor related issues are another vast issue. Unemployment is rising in China. One day in Guangzhou, more than 500 workers who were laid off by local factories staged the demonstration. The video circulated on Chinese social media immediately removed by the Chinese government. And my good friend who is a local communist party key official told me that his factories are closing down from tomorrow. His factory got around 450 workers, and they will lose their jobs without any compensation or unemployment benefits. ([https://www.bbc.com/news/world-asia-china cited on 2020-05-08](https://www.bbc.com/news/world-asia-china_cited_on_2020-05-08)). The life is getting harder for ordinary people in China with the drop of demands from the US and western countries, and plush withdrawal of Japanese companies from China.. Some American companies will move out of China by August. All this development may trigger popular resentment toward the China that facilitated the corona virus. But the regime

would resort to ultra nationalistic rhetoric to distract the anger from the regime. Some communists' think that this is the great time for the China to invade Taiwan. The life is getting harder for ordinary people also wants to win American leftists and liberals in their fight against the Trump administration. We will see very strange developments in coming days and months.

Even in our country the life is getting harder for ordinary people because of unemployment and loss of their jobs. When it comes to the context of employment employer – employee relationship matters. It defined by the contract of employment. There is an impact of pandemic in employment. So here both parties affect through this Covid-19. As we all know our contract of employment's law is governing by RDL. In RDL there is nothing called frustration but there is supervening impossibility. Here one party need to give notice to other party. If he or she is an employer, employer needs to give prior notice. Likewise, there are several problems there. Normally public sector employees are not going affect that much. But the private sector employees will suffer. It depends on the industry. For an example Hotel industry and tourism industry will get at least one year to get back to normal routine. So here some kind of state intervention is important. As Sri Lanka is a welfare state, it must intervene regarding this matter. Depending on the nature of the industry decision must take. So state can consider what are the frustrations, what are the circumstances and so on. There can be temporary suspension or payment of compensation. By considering the both sides just and equitable decision must be taken.

Finally we can come to a conclusion that by considering the above problems government must intervene above said as it medias or else citizens' day to day maintenance. For an example there are 14 laws in Sri Lanka like termination of employment act and EPF act to balancing the interests in labour law. But there are no proper provisions and laws regarding this unforeseen events and how to get over this events. So parliament must enact laws regarding this. And other scenarios government must regulate them all in a proper manner.

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THE ‘TORT’ OF DEFAMATION

Ashvini Prabakaran*

“Slander, whose whisper over the world’s diameter, as level as the cannon to its blank, transports its poisoned shot”- Williams Shakespeare

Most Sri Lankans are aware of the term ‘Defamation’. We might have heard about it on the news when a politician saying that he or she would sue someone over a million rupees because the latter politician had said something about the former which is offensive or unpalatable. For example, one of the well-known defamation cases is the case by former Defense Secretary and our current Sri Lankan President Hon. His Excellency Gotabaya Rajapaksa who sued “The Sunday Leader” paper for Rupees 2 billion in 2010. The wrong of defamation consists in the publication of defamatory matters concerning another without lawful justification or excuse¹. Thereby, a person or organization whose reputation has been attacked could sue for defamation if the damaging material was published.

Nowadays, social media platforms have captured a premier position in the news limelight. Individuals and entities are criticized, even insulted, on a daily basis on social media, as if there were no repercussions for such acts because it instantly allows to ‘publish’ a statement that reaches millions of people. Even though Facebook or any other social media platforms have imposed its own regulations, these individuals could be

sued, for millions, using centuries-old law; the law of defamation.

The Law relating to defamation in Sri Lanka consists of elements drawn from two legal systems namely Roman Dutch Law and English Law. In Roman Law and early Roman Dutch law, Defamation was considered as a species of *injuria* however with the influence of English Law, one could see that laws pertaining to defamation, ever since its enactment have taken a new dimension. Even though both the Roman Dutch Law and English Law seem to have theoretically different approaches they both seem to be practically identical.

For an example;

English Law distinguishes spoken defamation (slander) from written defamation (libel) whereas Roman Dutch Law makes no distinction between slander and libel.

Also intention is not material in English Law whereas in Roman Dutch Law wrong intent needs to be proven before the defendant is punished.

Earlier in Sri Lanka, defamation was considered as a criminal liability which was regulated by **Section 479 of Chapter XIX of**

Penal Code and Sections 14 and 15 of Press Council Act No. 5 of 1973. During this time these laws were used to threaten and intimidate journalists and media

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¹R.G. McKerron The Law of Delict 7th Edition at 170

activists. We could witness in the past that a couple of Journalists like Former Ravaya Editor Victor Ivan and Editor of Sunday Leader Lasantha Wickremathunge were also convicted for criminal defamation for the content published in their newspapers. Later in 2002 due to the repealing of the Penal Code now defamation is filed under civil actions which outweighed the colonial baggage kept on the statute books for more than a century after independence. Hence, the claim of defamation is filed in District Court where the defendant resides or where the defamatory material was published. Sri Lanka is the first and only country in the South Asian region to have done away with the law of criminal defamation.

However, as a Democratic nation our country has granted citizens the freedom of speech and right to voice their opinion via embracing these natural entitlements in our constitution, **Article 14(a)** which grants permission to citizens of Sri Lanka for any form of speech that assures racial and religious harmony or in relation to parliamentary privileges (**Article 15(2)**). However, this right has triggered a controversial debate, in recent years. It has forced the laws pertaining to this area to strike a balance between right to expression and protection of an individual's privacy hence nowadays this right is subjected to restrictions and violating such restrictions by the ways of contempt of court, defamation and incitement of an offence would be penalized.

The case of *Amaratunga V. Sirimal²* concerns several political parties protesting against the Government through Jana Gosha, a method of noisy protest including the ringing of bells and beating of drums.

The police reacted with assault, tear gas and baton charge against the crowd. Fortunately, the court found this as unjust and as the people's fundamental right of freedom of speech has been infringed. One protestor who was assaulted was awarded with compensation by the state.

In the case of *Mohottige V. Gunathilake³* Justice Bandaranayake declared that "*Freedom of speech and expression includes the right to fairly and within reasonable limits criticize the government*". But who defines those limits? In order to answer this question, the courts have developed four essential requirements which need to be fulfilled, over these years through several judicial precedents for any legal person to file a defamation action against another;

- 1. Statement must be defamatory**
- 2. They must refer to the plaintiff**
- 3. It must be published**
- 4. There must be animus injuriandi on the part of the defendant.**

It is a necessity that in order to prove guilt in a defamation action all the above four requirements should be satisfied.

The first essential is where the **statement should be deemed to be defamatory**, which means that the statement causes to **diminish the esteem of the person** to whom the statement is referred to the eyes of the reasonable prudent citizens in the community cause the person to be taunted by the general public. This could reflect upon the moral character of the plaintiff such as dishonesty, attributing plaintiff has caused a crime or improper conduct. To establish what meanings are conveyed by

² 1993 1 SLR 264

³ 1992 2 SLR 246

the entire published statement should be considered.

Courts when deciding on this requirement have always taken concern to analyze whether it actually creates **contempt or undue ridicule** to the concerned person or organization. For an example in the case of De Villiers V. Vels⁴ it was held that defamation imputes the person as insane, illegitimate, physically deform or affected by certain types of infectious or contagious infection.

In the case of Appuhamy V. Kirihami (1895) the first defendant admits that at a private dinner party he excused himself from sitting down at the same table with the first plaintiff for the reason that the daughter of the latter had run away with a Wahumpura man of low caste. This statement was made in the presence of a large room of people and in the presence of the plaintiff. This was considered a statement which reduced his esteem in society.

But in the case of Thorley V. Kerry⁵ and Fernando V. Fernando⁶ the courts have held that mere language or statement claimed to have caused such reputational damage or mere words of vulgar abuse could not be held actionable.

There are two types of defamatory statements;

- 1. Prima Facie Defamatory** - where the statement in natural and obvious sense conveys a defamatory statement.
- 2. Prima Facie Innocent or Innuendo** - where implied

⁴1921 OPD 55

⁵(1812) 4 Taunt 355

⁶26 NLR 84

defamatory connotations could be derived by reading between lines or by extrinsic information.

According to McKerron, “Words on the face of them innocent may be used in some latent or secondary sense so as to convey to the person to whom they are published. An imputation defamatory of the plaintiff and conversely words on the face of them defamatory may be used in some latent or secondary innocent sense”.

It should be noted that even though the statement is *prima facie* defamatory or not still innuendo could be pleaded through pleadings.

At the instances of innuendo, the plaintiff must prove the **significance of such statements** whereas he is **obliged to allege the special circumstances** which he relies upon as supporting his innuendo. In the case of New Age Press Ltd. V. O'Keefe⁷ The plaintiff was urged by the bench to justify the **particular sense** in which the words deemed to be identified as defamatory.

Meanwhile, there can be false statements which don't institute defamation but can be filed action and can claim compensation if any damages caused due to it. (*Actio Iniuriarum*)

The next requirement is that it **must refer to the plaintiff**; therefore plaintiff must identify himself as the person who is defamed. The **test** to ascertain this is where any prudent man while listening or reading such a defamatory statement should be able to understand that it denotes the plaintiff. A defendant may publish materials in the

⁷(1947) 1 S.A.L.R 311

form of a story or novel that are apparently fictitious characters where a reasonable person would understand that a particular character actually refers to the plaintiff. This is true even if the author states that he intends the work to be fictional.

In the case of Hulton V. Jones⁸, a barrister who was not a church warden filed a defamation case against a newspaper who published an article about a fictitious church warden with the same name. Court held that there were possibilities for people to assume that such an article was about the plaintiff. Here the court stated about the aforementioned test and also said that the intention of the defendant is irrelevant.

This was also discussed in a local case of Felix Dias Bandaranaike V. The State Film Corporation and another⁹. In this case a permanent injunction was sought to restrain the defendant from releasing the film "Ape Rate Wada" for exhibition because the plaintiff had identified it as being defamatory to him. According to him the main character of the film, the minister of the highways was intended to refer and represent the plaintiff and was likely to be identified as him by the members of the public who see the film. The main role of the film was portrayed as a corrupt person who has abused his official benefits. Therefore, he alleged that the main character bears a strong resemblance to him and that he would be identified by the public as the Minister who is responsible for such corrupt acts.

In a situation like this the plaintiff claims that particular words could be understood as referring to him, the defendant is entitled to show that he did not intend the statement

to be so understood but this by itself is not a good defense.

The other essential aspect is that the **statement should be published**. What is meant by 'published' is that the statement was intentionally or negligently communicated by the defendant to some other persons than the plaintiff. In other words, publication should be for at least one person other than the person who is defamed and if the defendant makes a direct statement to the plaintiff in private and if it is not revealed in general public by the defendant the statement is not considered as published. This publication will not be satisfactory unless the third party understands **defamatory significance** that they referred to the plaintiff.

Publication certainly includes traditional forms such as communications which includes books, newspapers, magazines and oral remarks. One of the very crucial cases of Vizetelly V. Mudie's Select Library (1900) one could clearly understand this concept. The case facts - after knowing that there is an article which was with defamatory concern about the plaintiff, the library overlooked the letter which brought this to their attention. Consequently, the courts came up with three defenses for the defendant to prove the innocence;

- Lack of knowledge about defamation.
- No intention to publish such a defamatory statement.
- No negligence on the part of the defendant.

As the defendant could not satisfy these conditions the court held the library liable. Meanwhile, the plaintiff alleged the

⁸(1910) AC 20

⁹(1981) 2 SLR 287

newsboy who distributed this to the customers of that publication also held liable but the courts held that ‘carrying the newspaper is not the same as carrying the fire’-*Emmens V. Pottle*¹⁰and stated that there was **no strict liability** on the part of the newsboy.

This can also be seen in the case of *African Life Assurance Society Ltd. V. Robinson and Co. Ltd.*¹¹and *Huth V. Huth.*¹²

In the case of “unintentional publication” the defendant is not liable if a third party by his own act sees or hears the defamation but if he foresees it, he will be liable.

However, there is a general rule where the words are published of a class of people and there is nothing to show which one was meant, none can sue, unless the statement purports to refer to a small ascertainable class where under particular circumstances one could identify that it refers to one or more individuals.

According to Lord Atkin “A libel published of a large number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was in fact, included in the defamatory statement”.¹³

In the case of *Knupffer V. London Express Newspaper Limited*¹⁴ Lord Porter stated that the size of the class, the generality of the charge and the extravagance of the accusation may well all be elements to be taken into consideration but none of them is conclusive. Each case must be considered according to its own circumstances. For an

¹⁰ (1885) 16 QBD 354

¹¹ 1938 NPD 277

¹² (1915) 3 KB 42

¹³ Alastair Mullis, Ken Oliphant, Torts 4th Edition at 290

example as stated in *Levy V. Moltke*¹⁵ The courts decided that the phrase ‘**all members of jury**’ can be sued because it refers to a definite class of people.

Any Domestic verbal assault is not considered as a publication and therefore no action could lie as mentioned in the case of *Wennhak V. Morgan*¹⁶ communication of defamatory matters among spouses is not considered as defamation but either spouse can file an action for defamation on behalf of the other.

Moving on to the final requirement **there should be an animus iniuriandi of defendant**, according to Roman Dutch Law, there should be an intention on the part of the defendant via publication of the defamatory statement to cause injury to self-esteem of the plaintiff. The onus of proof is on the plaintiff and he or she has to prove on the balance of probabilities that the defendant has published such defamatory material with the motive of injuring the plaintiff.

Since this is a presumption that it is always eligible for rebuttal. Even if the defendant says that he honestly believed the statement is true yet such a statement will be malicious if the belief is unreasonable.

In the case of *Associated Newspapers of Ceylon Ltd. V. Dr. C. H. Gunasekara*¹⁷, a newspaper filed defamatory matters concerning the plaintiff. Defendant tried to prove the absence of animus injuriandi and it was not successful. It was held that defamatory matters might increase the sales

¹⁴ (1994) 1. All. E.R. 495 (HL)

¹⁵ 1934 EDL 269, 315

¹⁶ (1888) 20 QBD 635,639

¹⁷ 53 NLR 481

of the print as the reason why it was included in the paper.

A defamatory claim could be mitigated by issuing a retraction and apology to the concerned individual. In the case of a newspaper article the retraction and apology should have equal prominence as the initial defamatory article.

In addition to general defenses, there are some special defenses exclusively available to defamation. If any or all of these following defenses were proved, they would absolve the defendant from liability.

1. Truth of Justification

Even though truth is considered as a defense in Sri Lanka, this **cannot be taken alone**. Defendant should be able to justify that the alleged defamatory statements were mentioned by him for the **public benefit**.

It was held in a local case of De Costa V. Times of Ceylon¹⁸ that the ingredients of truth and public benefit are essential to sustain pleas of justification and if the statement is true, no amount of malice or bad faith in its falsity will defeat the defence of justification and similarly if the facts are false no amount of good faith or belief in its truth will establish the defence.

One of the aspects of this defence is that it can succeed even when the statement was motivated by malice. This means that a newspaper could deliberately destroy a person's reputation if it could obtain enough materials to do so.

In the case of Chelliah V. Fernando¹⁹ The Defendant stated that the plaintiff was guilty of immoral conduct and that several

men had kept her as a mistress. Soertsz J observed “*Roman Dutch Law requires not only that the words were true in substance and in fact it was for the public benefit that they should be published. Adultery is not an offence under our law and I fail to see how the private morals of a woman can be of public interest or how it can benefit the public to be informed of them*”.

2. Fair Comment

This defence is based on the fact that every person has a right to express an **opinion honestly and fairly** of matters which are of public interest, which enlightens the right of free speech to all. This has been defined as “Criticism of matters of public interest, in the form of comment upon true or privileged statements of facts, such comment being made honestly by a person who did not believe the statement be untrue and was not otherwise actuated by malice”.²⁰

In Kemsley V. Foot²¹ where the courts held that every person has a right to comment fairly, freely and honestly on matters of public. As long as this can serve three important ingredients such as;

- I. a reasonable man can recognize it as a comment and not as a statement of fact.
- II. the comment is fair and bona fide
- III. the facts of the statement are true and accurately stated in order to fulfil the public interest.

For an example; De Costa V. Times of Ceylon

3. Privilege

¹⁸65 NLR 217 (PC)

¹⁹39 NLR 139

²⁰John Murphy, Street on Tort 12th edition (2007) at 422.

²¹(1952) AC 345

Law recognizes some occasions on which freedom of speech without fear as actions for defamation is more important than protection of a reputation of the person. Thus, the presumption of animus injuriandi can easily be rebutted if it can be proven that it was made on a privileged occasion.

Privilege can be either **absolute** such as judicial proceedings, anything said or done by members of parliament during the course of parliament sessions and also broadcast of parliamentary proceedings and the other official reports of the parliament or **qualified** such as publication of report of proceedings in courts of justice or parliament as long as it is fair and substantially accurate.

In absolute privilege no action for defamation can be brought even if the person making the defamatory statement made knowing it to be false and did it with intention to damage the reputation of another but the defense of qualified privilege can be rebutted by proof of malice and the owners ease on the plaintiff to do so.

For an example in the case of Peter V. Neate (1883) which includes a situation where a person has been dismissed from employment and the publication consists of a communication from his employer to his fellow servants of the grounds for such dismissal.

4. Miscellaneous Defences

Miscellaneous defences consist of defences such as jest, mistake , compensation and rixa (provocation). For an example Cantley V. Vanderspaar²²In this case the postscript to a letter written by the defendant

addressed to the firm of Messers. Julius and Creasy were as follows; “is there any truth in the report that Mr. Creasy has turned Muhammadan and married Mrs. Cantley? We would like to send both a present”. The courts held that the mere statement of joke is not sufficient, the circumstances must prove that the hearer was not offended or reasonably felt that such statement was attached to defamatory meaning to the words.

In conclusion, a gentle reminder that according to official police records, traditional street crimes are decreasing but cyber-crimes such as defaming anonymously and verbal assault in online platforms are steadily increasing over the recent years and researches indicated that there are massive gaps in laws and provisions over the cyber-crimes. In some respect, it is understandable given their novelty to the country, but that is not a caveat to not pursue progressive new legislation. It is high time that our legal system takes necessary measures to cover up the burgeoning scope of cybercrime in order to draw level with this rapidly changing social communication system and also as responsible citizens we all must take a stand to only communicate matters relating to others which are assured and keeping the welfare of the society as the paramount concern. As the world's first moral philosopher Socrates once said “**when the debate is lost, slander becomes the tool of the loser**”.

²²1914 NLR 353

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PROMOTING THE RIGHT TO EDUCATION FOR REFUGEE CHILDREN

M. C. Subasinghe*

Abstract

With the increasing number of refugees worldwide, children represent more than half of the refugee population. Though childhood is a critical period of accelerated growth and development, most of the refugee children experience traumatic experiences and disrupted education. As highlighted by the United Nations High Commissioner for Refugees, the education of refugees is in crisis. Nevertheless, it is to be noted that access to quality education for refugee children determine the future of young refugees and has the potential to transform their lives. This paper provides a graphic picture of current situation of education which is a right of refugee children and the challenges encountered by them. As declared under Article 22 of the United Nations Convention on the Rights of the Child, refugee and asylum-seeking children are also entitled to education. Thus, apart from states, international organizations also share a responsibility to ensure the protection, promotion, and fulfillment of rights of all children. Therefore, the main objective of this study is to elaborate on the challenges encountered by refugee children in respect of right to education and to identify the strategies to overcome them successfully. This article will focus on the right to education of refugee children from a

human rights perspective and closes with a few concluding remarks and recommendations.

Key words: Refugee children, Education, Human rights, Social inclusion

1. Refugee Children

1.1 Who is a Refugee?

A refugee is someone who crosses boundaries to get away from persecution or violent contexts because of his/her race, religion, nationality, political opinion, or membership in a particular social group. Globally each year, millions of individuals and families flee their native countries to find safety in other nation states. They escape because their governments do not or are unable to protect them against human rights abuses. As a result of the intolerable situation of their human rights, they are unable to return to their mother countries. Consequently, they are given the status of refugees and they get the correspondent protection of states and international organizations all over the world.

According to the United Nations Refugee Convention signed in 1951, a refugee is defined as a person who, due to fear of persecution, leaves their country of origin and is unable or unwilling to access the protection of that country. Vaghri, Tessier and Whalen (2019) imply that approximately half of the overall refugee population is children under the age of 18 years. Out of them, unaccompanied and

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separated children are among the most vulnerable of refugees.

1.2 Importance of Refugee Education

In brief, education is the key to the future of individuals, communities as well as countries. Education is identified as a basic human right, enshrined in the 1989 Convention on the Rights of the Child and also in the 1951 Refugee Convention. According to UNHCR, it is protective and empowering, giving refugees the knowledge and skills to live productive and independent lives. Moreover, a quality education provides a path to employment and self-sufficiency. It is to be noted that most of the refugee children have experienced violence, isolation, hunger and other stressful situations. Getting access to enjoy child rights including education would be helpful to lead a life of normalcy.

On the one hand, children being displaced and the corresponding loss of education have perhaps the most significant impact when considering human capital. On the other hand, it results in lasting consequences on literacy, academic achievement, employment opportunities as well as socio economic status. Firstly, it is important to identify the reasons why refugee children are excluded from an equal right to access education.

- Most of the time, it is because host countries either do not have the space, capacity, or will to cater education to a large number of refugee children.
- Some other reasons may be due to poverty, gender, disability, age, ethnicity or legal status.
- The historical under-prioritization and underfunding of refugee education.

Whatever the reason, providing access to education improves the mental health and development of the child and provides the opportunity to contribute to society and achieve goals. As mentioned in UNESCO (2019), importance of refugee education can be identified under 4 key areas.

- Education is a refugee child's right and should be prioritized.
- Education helps refugee children cope and hope in their new environments.
- Education will improve their future.
- Ensuring refugee children are educated will help to bring peace and stability.

2. Education as a Human Right

The United Nations High Commission for Refugees recognizes education as a basic human right, enshrined in the 1989 Convention on the Rights of the Child. The education promotes and uplifts the full development of the child's personality, mental and physical potential and also respect for human rights. Because of the important role played by education, in 2015, the United Nations adopted Sustainable Development Goals which explicitly urges governments and civil societies to ensure inclusive and equitable quality education and to promote lifelong learning opportunities for all.

In essence, human rights are interdependent and equal. Nevertheless, in certain situations, the violation of one particular right can lead to a whole series of other rights violations elaborating on the necessity to focus on monitoring and protection efforts on these key rights. Access to education is such a right which is essential to all refugee children. For

instance, if a child is unable to attend primary school education over a five year period of displacement he/ she is unable to recover those lost years. Depriving them from education would ultimately turn a refugee child to a being full of hatred towards fellow human beings. Thus, providing access to quality education protects not only his/her fundamental rights, but also the human rights of the whole world at large.

Fernández (2017) signifies that the right to education for refugees will be key for the development of an understanding and the acquisition of the competences which need to be acquired by them to participate effectively in diverse democratic societies. The author further implies it would be difficult to understand how this learning and growing and participating could take place in the case of violation of their right to education and what the consequences and the impact could be.

Moreover, education provides a platform for social and economic promotion establishing the basis for achieving economic and social freedom which is necessary for many economic and social rights. In addition, it is through education that people will develop their full potential and exercise any other human rights, such as the right to life and health.

3. Social Inclusion

Education has been identified as a way for refugees to become integrated in a new culture and is a process involving social inclusion. When refugee children are included and integrated in the host country's mainstream education system rather than in segregated learning environments, they get an opportunity to meet other children and begin to form identities in the new culture.

Within this context, schools are identified as a key institution in the provision of education and opportunities for social inclusion. As stated by Tørslev and Børsch (2018) interventions delivered at the school setting can successfully support refugee children in reducing a great deal of psychological disorders and other difficulties associated with displacement.

As mentioned previously, schools are one of the best places to facilitate social inclusion of the refugee children. Even though schools are not equipped to deal with the unique and multifaceted challenges of refugee children, creative ways can be developed to include families and communities in a socially inclusive learning environment. It is important to realize that helping refugee students to adapt and thrive in a new learning environment and educational system is challenging. When a particular group has to resume education that has been disrupted others are introduced to formal education for the first time. Nevertheless, the school environment can provide a sense of safety and a sense of self adjustment to cultural expectations, which would provide a path toward opportunity and freedom.

In many of the cases, refugee children and families express a feeling of social exclusion due to the inability to participate in economic, social, and civic activities that directly affect their lives. Therefore, schools can be identified as a critical positive point of contact for refugee children, especially when they feel welcomed. Most importantly, institutions like schools can serve as places of both learning and growth while providing social contacts and guidance in navigating the complexities of a new culture. Because of the use of more inclusive and supportive modes of instruction by the schools, elements of the refugee child's culture and

language will be integrated into the classroom.

4. Challenges in Accessing Education

While examining the situation of recent refugees, the United Nations human rights treaty bodies have identified the barriers encountered by the refugee children as well as the challenges encountered by the host countries.

4.1 Barriers to Education Faced by Refugee Children

Even though education is considered to be one of the top priorities of refugee children, they continue to face numerous barriers that prevent them from both entering school and learning.

1. Psychological wellbeing and its impact on learning

Psychosocial wellbeing matters immensely in the process of both learning and teaching. However, according to UNICEF (2017) psychological support in schools is often lacking to assist teachers and refugee children, who may have difficulties to concentrate and learn in class due to stress and trauma accumulated in countries of origin, in transit or at destination. Moreover, this can also be related with pending family reunification and asylum procedures, as well as significant differences between education systems.

It is to be understood that young refugees will most likely be experiencing a significant period of destabilization and coping with traumatic or distressful memories of the past, as well as concerns about the future once they arrive in first asylum countries. As such, their psychosocial wellbeing will be affected

which would impact their capacity to learn. It is found that the extent to which refugee children and youth are affected by traumatic experiences will vary widely and depend on the type and frequency of their experiences, as well as on their individual coping skills and responses to a disaster or conflict.

The exposure to the traumatic events such as war, loss, fear for life and violence can cause a state of “toxic stress” which would cause direct impact on mental health and wellbeing. For instance, in a Save the Children research study of Iraqi refugee children who lived under ISIS, it was found that exposure to extreme levels of violence and deprivation caused all children interviewed to display clear signs of toxic stress. When a toxic stress response occurs continuously, there can be long-term consequences on a child’s physical and mental health, including impaired learning and academic performance.

2. Language of instruction

Language is a well-recognized challenge faced by the refugee children. There are several important issues which can be identified in respect of language. Most of the time, additional language and cultural mediation support is scarce which is essential to address language barriers and communication challenges. Majority of the refugee children lack sufficient knowledge on the language of the host country or they exhibit a low interest in learning the language of the host country.

According to Fernández (2017) learning the language of the host country is the entrance door to a new culture. In many of the cases, the way the refugees face and resolve language issues determine their stay in the country and their capacity to understand and to communicate. Most importantly, educational performance is closely linked

to good use of language by the refugee children. Similarly, school abandonment, insecurity and incapacity to move forward run parallel to the use of the language.

Therefore, ensuring that refugee children are supported in learning their new language of instruction is essential. It holds the key to whether they will be able to learn faster, keep learning in their new classrooms, and integrate and recover. When refugee children have to learn a new language and new academic content simultaneously a huge gap in academic performance is created automatically. Thus, both teachers and refugee children should be provided with facilities to overcome this challenge successfully.

3. Economic Barriers

Many of the refugee children do not come to school regularly due to financial hardships in the family. Amidst other refugee children, separated children, are the worst-affected, as they could not afford school fees or materials. At the same time, some of the refugees do not support their children either because they are unable to afford their children to attend school or want their children to take part in earning.

Therefore, poverty and child labor are major barriers to refugee children's access to education around the globe. In many of the cases it can be identified that once engaged in child labor, children's chances of re-entering school diminishes significantly. Further, some of the refugee children are likely to suffer health problems, particularly if they are involved in hazardous work. At the same time, they are also more vulnerable to physical, verbal and sexual abuse.

4. Gender, age, disability, ethnicity and legal status

In respect of gender, most of the refugee girls are deprived from education due to early marriages and pregnancies, cultural customs or safety concerns. Nevertheless, the benefits of educating girls are significant and far reaching. Age is also a barrier to education where refugee youth face a lack of secondary schools or vocational training facilities in their communities, along with increased fees and transport costs. At the same time, there is often a lack of specialized services to assist the learning needs of disabled refugee children. Bullying and discrimination have also been reported as two of the most commonly reported problems encountered by refugee children. Often, judgments based on different perceptions at school may lead to discrimination and prejudice against refugee children. Ethnicity, bullying and abuse are all found to negatively affect school performance and educational experiences as they all result in a huge impact on mental health of the refugee children. Continuous bullying and abuse would make them exhibit behavior problems and symptoms of greater anxiety, aggression, loneliness, hopelessness and depression.

4.2 Challenges Encountered by the Host Countries

Not only refugee children, but also the host countries come across specific challenges and issues in relation to providing access to education. It is to be noted that most of the host countries are not economically stable to afford the massive influx of refugees all the time. For instance, Bangladesh being a developing country has suffered substantial damages to its economy with the increasing number of Rohingya refugees from Myanmar. Therefore, some of the major challenges encountered by the host countries can be listed as follows.

1. Legal barriers

The Legal obstacles relate to the fact that refugees rarely have access to their documentation and these documents are a legal requirement to enroll at schools, universities and other educational institutions. Some other legal barriers include lack of clear provisions on compulsory education and when children do not have residence permits or international protection status, it would limit access to education for children outside certain age groups. When it comes to federal countries, like Germany, legal provisions on access to education for newly arrived refugee and migrant children may greatly vary from one region to another. At the same time there are no definite rules on how to decide the education level of refugee children when assigning school grades.

2. Administrative challenges

Inflexible registration deadlines, residence and other personal documentation requirements, are some of the administrative challenges encountered by the host countries. Such challenges cause much impact on early childhood education as well as upper secondary education and vocational training. Frequent movements of refugees and migrants from one type of accommodation to another and insufficient information provision to children and their families about procedures and services available can also seriously impact school enrolment and attendance.

3. Insufficient human and financial resources

Most of the education authorities in the host countries lack sufficient amount of human resources and financial resources. Limited places in schools, budgetary shortfalls and

insufficient training for teachers who work with refugee children have caused various difficulties in providing a quality education for refugee children.

5. Recommendations for Action

Getting access to quality education may be the sole way for a refugee child to gain better living conditions one day. In addition, well-educated refugee children can make a positive impact on the social integrity. Therefore, it is crucial to address the psychosocial, language and inclusion challenges faced by refugee children to ensure their right to quality education.

1. Prioritizing and allowing refugee children to enroll in schools and begin learning as soon as possible. Further, facilitating access to catch-up programmes and accelerated learning opportunities, regardless of their refugee status.
2. Supporting refugee children to recover learn and progress. In other words, fostering an inclusive school climate, this promotes students well-being and belonging and protects against instances of discrimination of refugee children through dedicated resources.
3. Prioritizing and investing in psychosocial support programming, as well as in social and emotional learning approaches in refugee educational settings.
4. Providing teachers with specialized professional development training programmes to implement these approaches effectively and support teacher wellbeing.
5. Strengthening the linkages between schools and other critical public services to ensure that barriers to school enrolment and factors contributing to early school leaving are addressed.

6. Maximizing students' successful transition from learning in their mother tongue to a new language of instruction through bridging or remedial programs.

7. Supporting refugee children's inclusion in education through increased investment in flexible learning opportunities that would meet refugee children's distinct needs. That is because most of them are excluded from education due to poverty, gender, disability, age, ethnicity or legal status. Thus, host countries, implementing agencies and donors have a major responsibility to collectively support the diverse education needs of refugee students and bridge gaps in public provision.

8. Allocating adequate resources at national and international level to ensure quality of relevant data and statistics on refugee children's access to services, including education, through existing databases. This will allow for effective monitoring and timely decision-making for their betterment.

6. Conclusion

Access to receive quality and equitable opportunities for education is one of the key rights of a child despite the fact of being a refugee. The traumatic journey of the resettlement process can cause psychological impacts to them which can be offset by welcoming communities including schools. Depriving refugees from the right to education would not be merely a breach of a human right but results in negative impacts on the whole society at large.

With quality education, refugee children get an opportunity to improve their social status. However, there are many challenges encountered by both refugee children and the host countries in the course of ensuring right to education. As these children are often marginalized in schools due to

language and cultural differences, necessary measures needed to be implemented to ensure their right to education. When schools begin fostering social inclusion, refugee children begin to find a place of support to rebuild their lives. Nevertheless, refugee enrolment in school will not improve without a combined and coordinated effort at all levels of society including governments, businesses, charities and also members of the public.

Within this context, it is crystal clear that providing access to quality education for refugee children is of great importance. They should be treated as a part of the community without discrimination while promoting the best interest of the child.

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ප්‍රතිත්වා බණ්ඩාරනායක*

“Legal pluralism is a central theme in the reconceptualization of the law and society relation.”

- Sally Engle Merry

ශ්‍රී ලංකාවේ නීති පද්ධතිය විමර්ශනය කිරීමේදී පෙනී යන්නේ එය එකිනෙකට වෙනස් නීති පද්ධති රසකින් හෙවත් බහුවිධ නීති පද්ධතියකින් යුතු වන බවයි. මෙම තත්ත්වය පහැදිලිවම දැකගත හැකි වන්නේ ලංකාවේ පවුල් නීතිය තුළයි. ශ්‍රී ලංකාවේ පවුල් නීතියට රටේ සාමාන්‍ය නීතිය මෙන්ම උච්චරට නීතිය, මූස්ලිම් නීතිය සහ තේසවලාමේ යන නීතින් සියල්ලම ඇතුළත් වේ. මෙම නීති අදාළ වීමේදී එම අදාළත්වයෙන් ඉවත් වීමට ශ්‍රී ලංකිකයන් සතුවන්නේ ‘සීමා සහිත නිදහස්කි’. නමුත් සමහර නීතින් පොදුවේ සියල්ලම ශ්‍රී ලංකිකයන්ට අදාළ වන අවස්ථා ද දැකගත හැක. පවුල් නීතියේ පවතින මෙම බහුවිධතාවය පොදු සම්මතයන් බොහෝ අවස්ථාවල දී අනුගමනය කරන තමුත්, සමහර අවස්ථාවල දී රටේ සාමාන්‍ය නීතිය විශේෂ නීති සමග ගැටෙන අවස්ථා ද පවතී. එවත් අවස්ථා පවුල් නීතියේ මූලික සංකල්ප කිහිපයක් ආගුයෙන් සළකා බැලිය හැක.

(1) විවාහය

විවාහය යනු දෙපාරුවයක් අතර ඇතිවන තවත් එක් සාමාන්‍ය ගිවිසුමක් තොවේ. එය සමාජ තත්ත්වයක් ඇතිකරමින්, සමාජය කෙරෙහි සාපුරු ප්‍රතිච්‍රිපාක ඇතිකරන අයිතිවාසිකම් බලාත්මක කරන ගිවිසුමකි. ශිෂ්ටසම්පන්න සමාජයක පදනම විවාහයයි. ශ්‍රී ලංකා නීතිය තුළ විවාහය සම්බන්ධයෙන් බලවත්තා නීතින් වන්නේ,

1.1907 අංක 19 දරණ සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ ආයුජනත

2.ශ්චරටියන්ට අදාළ වන 1952 අංක 44 දරණ උච්චරට විවාහ සහ දික්කසාද පනත

3.මූස්ලිමානුවන්ට අදාළ වන 1951 අංක 13 දරණ මූස්ලිම් විවාහ සහ දික්කසාද පනත

උච්චරට නීතිය

උච්චරට විවාහ සහ දික්කසාද පනතේ 4(1) වගන්තිය මගින් එම පනත යටතේ විවාහ වීම සඳහා අවම වයස සම්පූර්ණ කිරීම අත්‍යවශ්‍යවන බව දක්වා ඇත. 1995 අංක 19 දරණ සංශෝධනයෙන් සංශෝධනය 66 වගන්තිය මගින් විවාහාලේක්ෂිත දෙපාරුවය සඳහාම අවම වයස දහඟට බව දක්වා ඇත. නමුත් තවදුරටත් මෙම පනත තුළ,

1.වයස අවුරුදු දහඟට ට අඩු විවාහවලට අවසර ලබාදෙන 4(2), 4(3) අනු වගන්ති ද,

2.බාල වයස්කාර විවාහයක් දෙමාපිය හෝ වෙනත් අධිකාරියක කැමැත්ත මත සිදුකිරීමට අවසරය ලබාදෙන 8 සිට 15 දක්වා වගන්ති ද,

පැවතීම හේතුවෙන් 1995 සංශෝධනය මගින් විවාහ වීමේ අවම වයස සම්බන්ධයෙන් සිදුකළ පරිසමාප්ත සීමා කිරීම, තෙතිකව අර්ථ ඉන්නය ස්වභාවයක් ගනී. ප්‍රයෝගීකව ගුණරත්නම් එ. රේජස්ට්‍රාර ජෙනරාල් නඩුවෙන් පසුව ලංකාව විවාහ වීමේ අවම වයස වයස අවුරුදු දහඟට බවට පිළිගැනීමක් ලැබුනාද, හරයාත්මක වශයෙන් ඒ සම්බන්ධයෙන් උච්චරට නීතිය තුළ පවතින ගැටීම් අවම කිරීම සඳහා එම වගන්ති සංශෝධනය විය යුතු බව පෙනී යයි.

ගුණරත්නම් එ. රේජස්ට්‍රාර ජෙනරාල්

නීත්‍යානුකූලව විවාහ විය හැකි අවම වයස දහඟට බවට නීතිගත වීමත් සමග, විවාහාලේක්ෂිත දෙපාරුවයම වයස අවුරුදු දහඟටට වැඩි නම් මිස, සිදුකරන කිසීම විවාහයක් වලංගු විවාහයක් තොවේ. විවාහපේක්ෂිත එක් පාරුණුවයක් හෝ වයස අවුරුදු දහඟටට අඩු නම් එවිට දෙමාපිය කැමැත්ත හෝ වෙනත් අධිකාරියක කැමැත්ත මත එම විවාහය සිදුකළ තොහැක.

තේසවලාමේ

සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ ආයුජනතේ දිර්ස නාමය සහ අර්ථ නිරූපණ වගන්තිය එක්ව කියවූ කළ, තේසවලාමේ නීතියෙන් පාලනය වන පුද්ගලයන්ට විවාහ

* අවසන් වසර, ශ්‍රී ලංකා නීතිවිධානය

ලියාපදිංචිය සඳහා අදාළ වන්නේ සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ ආයුජනත බව පෙනීයයි.

ත්‍යාගරාජු එ. කුරක්කල්

තුළුවේ දෙපාර්ශවය හින්දු බ්‍රාහ්මණයන් වූ නිසා, ඔවුන්ගේ වාරිතානුකුල නීතිය අනුව සැම ගැහැණු දරුවෙක්ම යොවනෝදයට (එනම් වයස අවුරුදු දොළහ වීමට පෙර) පත් වීමට පෙර විවාහ වීම අවශ්‍ය වූ බවට ඉදිරිපත් වූ ආයාවනය ප්‍රතික්ෂේප කරම්න් අධිකරණය පැවසුවේ, සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ ආයුජනතේ පැහැදිලිවම දැක්වෙන පරිදි හින්දුන් එම පනතේ විධිව්‍යානවලට යටත් වන බවයි.

එසේමසාමාන්‍ය විවාහ ලියාපදිංචි ආයුජනතේ 41(1) වගන්තිය ප්‍රකාරව විවාහ ලියාපදිංචිය හොඳම සාක්ෂියක් පමණක් ලෙස සැලකෙන නිසා, තේස්සවලාමේ අදාළ වන්නන්ට ස්වකිය වාරිතානුකුල විවාහයන් මේ යටතේ සිදුකර ගත හැක.

වැඩිහිමිමා එ. අන්තමමා

ආයුජනතේ පවතින උපවාරයන්ට අනුතුකුලට සිදු කෙරෙන විවාහයන් අවලංගු විවාහයන් සේ සලකන කිසිදු නීතියක් දැන් නොපවති.

මුස්ලිම් නීතිය

මුස්ලිම් විවාහ සහ දික්කසාද පනත ශ්‍රී ලංකික මුස්ලිම්වරුන්ගේ වෙවාහක සම්බන්ධතාවල දී අදාළ වේ. මුස්ලිම් විවාහ නීතිය සාමාන්‍ය නීතිය සමග ගැටෙන අවස්ථා වන්නේ,

1. මුස්ලිම් විවාහ සහ දික්කසාද පනත ප්‍රකාරව විවාහ වීමේ අවම වයසක් දක්වා නොමැත. නමුත් එහි 23 වගන්තිය ප්‍රකාරව අවුරුදු දොළහෙන් පහළ මුස්ලිම් දැරියන්ට විවාහ කළ හැකිකේ ක්වාසි අවසරය මත පමණකි. නමුත් එසේ විවාහ කරගන්නා වයස අවුරුදු දොළහට අඩු දැරියන් සමග බිරිදි ලෙස හෝ ලිංගික සම්බන්ධතා පැවැත්වීම දැන් නීති සංග්‍රහයේ 363 වගන්තිය ප්‍රකාරව ස්ත්‍රී දුෂ්‍රණ වරදක් වීම ගැටළුවකි.

මුස්ලිම් විවාහ හා දික්කසාද පනතේ 16 වගන්තිය ප්‍රකාරව පෙනී යන්නේ එම පනත විසින් ලියාපදිංචි කළ මෙන්ම නොකළ විවාහ ද වලංගු විවාහ ලෙස සලකන බවයි. ඒ අනුව "ක්වාසි අවසරය ලැබේ නම් අවුරුදු දොළහට

අඩු දැරියක් පවා විවාහ කර දීමට හැක" යන වගන්තිය අදාළ වන්නේ ලියාපදිංචි කරන විවාහ සම්බන්ධයෙන් පමණි. ක්වාසිවරයාගේ අනුදෙනුමක් නොමැතිව වයස අවුරුදු දොළහට අඩු දැරියක් වාරිතානුකුලට විවාහ කරදීම මුස්ලිම් නීතිය තුළ වලංගු වේ.

ගැටළුව වන්නේ මෙවන් ලාභාල වයසක දැරියක් විවාහයෙන් පසුව ඇතිවන වගකීම්, යුතුකම් සහ බැඳීම් ඉට කිරීමට කායිකව, මානයිකව, සමාජීයව සහ ආකල්පමය වගයෙන් සුදානම් ද යන්නයි. මෙය ආණ්ඩුකුම ව්‍යවස්ථාවේ දැක්වෙන සමානාත්මකාවයේ මූලික අයිතිවාසිකම කඩිකිරීමක් ලෙස දැකගත හැක. එසේම අධ්‍යාපනය ලබාගැනීම සඳහා දරුවෙකුට පවතින ලමා අයිතිවාසිකම් සමග ද මෙම ප්‍රතිපාදනය ගැටෙන අවස්ථා දැකගත හැක. ශ්‍රී ලංකාවේ අනිවාර්යය මූලික අධ්‍යාපනය ලැබීමේ අවම වයස සීමාව ද වයස අවුරුදු දහසය වේ. මෙය කිසිදු වෙනසක් නොමැතිව සැම පුරවැසි දරුවෙකු විෂයෙහිම යෙදෙන අතර, ඒ අනුව මෙහිදී මෙම ලමා විවාහ හේතුවෙන් මුස්ලිම් දැරියන් අසාධාරණයට පත්වන බව පෙනී යයි.

තවද එක්සත් ජාතීන්ගේ ලමා අයිතිවාසිකම් ප්‍රයුෂීතියේ පළමු වගන්තිය ප්‍රකාරව වයස අවුරුදු දහඟට අඩු සැම පුද්ගලයෙක්ම දරුවෙකි. එහි 35, 36 වගන්ති ලමා විවාහයන් තරන් කිරීම සම්බන්ධ ප්‍රතිපාදන දක්වයි. මෙවන් දේශීය සහ අන්තර්ජාතික තෙනතික ප්‍රතිපාදන සමග ගැටෙන මෙම වගන්තිය සංශෝධනය සම්බන්ධයෙන් 2010, 2011 CEDAW Country Report, හෙවින් කම්ටුව වාර්තා වැනි නීති ප්‍රතිසංස්කරණ කම්ටුව මගින් ද යෝජනා ඉදිරිපත් වුවත් අදවත් මෙම නීතිය තවදුරටත් ක්‍රියාත්මකව පවතී.

2. මුස්ලිම් විවාහ සහ දික්කසාද පනතන් 17(2) අනු වගන්තිය ප්‍රකාරව විවාහ සහතිකයේ මනාලියට අත්සන් කිරීමට තැනක් නොකිනීම සහ විවාහ උත්සවයට ද මනාලියට සහභාගී විය නොහැකි නිසා ඇගේ කැමැත්ත වාලිවරයා හරහා දැනුමැදිමට සිදුවීම සාමාන්‍ය විවාහ ආයුජනතේ 15 වගන්තියේ දැක්වෙන 'දෙපාර්ශවයේ ස්වාධීන කැමැත්ත' යන සාධකය සම්බන්ධයෙන් ගැටළුවක් ඇතිකරයි.

සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ ආයුජනතේ 15 වගන්තියේ වලංගු

විවාහයකට අත්‍යවශ්‍ය ශක්නුතාවයක් ලෙස දෙපාරුවයේ ස්වාධීන කැමැත්ත දක්වයි. නමුත් මුස්ලිම් නීතිය විවාහයක දී මනාලියගේ සාපුරුණ කැමැත්ත සම්බන්ධයෙන් වැඩි අවධානයක් යොමු නොකරයි. එසේම ඇය විවාහ මංගල්‍යයට සහභාගි වීමක් ද දැකගත නොහැක.

ශ්‍රී ලංකාවේ මුස්ලිම් විවාහයක් සිදුවන්නේ මනමාලයාගේ ඉජාබි (යෝග්‍යතාව) මනමාලියගේ වාලිවරයා (විවාහ භාරකාරයා) විසින් කුඩාල් (ප්‍රතිග්‍රහණය) කිරීමෙනි. මෙහිදී මනමාලයා, වාලිවරයා සහ පූජකයා පමණක් විවාහ උත්සවයට සහභාගි වේ. මනමාලියගේ කැමැත්ත ත්‍යායාත්මකව අත්‍යවශ්‍ය නීසා විවාහ භාරකරු අවම වශයෙන් සාක්ෂිකරුවන් දෙදෙනක් සමග මනමාලිය අසලට ගොස්, ඇගේ කැමැත්ත විමසා එය පූජකවරයාට දක්වයි. පූජකවරයාට අවශ්‍ය නම් වාලිගේ ප්‍රකාශය සාක්ෂිකරුවන් මගින් සනාත කරගත හැක. මින් පසුව විවාහ ලියාපදිංචිය සිදුවේ. ත්‍යායාත්මකව මෙහි ගැටළුවක් නොපෙනුන ද, මනමාලියගේ සාපුරුණ කැමැත්ත පූජකවරයාට දැන ගැනීමට නොහැකි වීම මත ප්‍රායෝගිකව මෙහි දී මනාලියට අසාධාරණයන් සිදු වේ.

3. මුස්ලිම් විවාහ සහ දික්කසාද පනතේ 47(2) අනු වගන්තිය ප්‍රකාරව අත්තනේත්මතික ලෙස විවාහයට අවසර නොදෙන වාලිවරයෙක් සිටි නම් එවිට, මනාලියට ක්වාසිවරයාගේ අවසරය මත විවාහ විය හැක. එහෙත් මෙහිදී දෙවන ජනරජ ආණ්ඩුකුම ව්‍යවස්ථාවේ 12(1), 12(2) යන අනු ව්‍යවස්ථා ද, සැස්ල සම්මුතියේ 16 වගන්තිය ද වැනි අන්තර්ජාතික සම්මුතිවල දැක්වෙන වගන්තින් ද උල්ලංසනය වීමක් දැකගත හැක.

අත්ත නෙතික ප්‍රතිපාදන සියල්ලෙන්ම අපේක්ෂා කෙරෙන්නේ කාන්තාව ද පූරුණයා මෙන්ම නීතිය ඉදිරියේ සමානාත්මකතාවයකින් යුතුව සහ වෙනස්කම්වලින් නොරව සැලකීමට භාජනය විමයි. නමුත් සමස්ථයක් වශයෙන් ඉස්ලාම් නීතිය තුළ දැකගත හැකි සුවිශේෂී ම ලක්ෂණයක් වන්නේ පියාට තම දරුවන්ගේ විවාහයන් සම්බන්ධයෙන් පවතින අසිමිත සහ නීයත බලයයි. මුස්ලිම් කාන්තාවකගේ වාලිවරයා සාමාන්‍යයෙන් ඇගේ පියා හෝ පියා නොමැති නම් එවිට ඇගේ පිතා පාරුණයේ පූරුණයෙක් වේ. ඒ අනුව පෙනී යන්නේ රෝම නීතියේ පැවති පැවුණා පොටෝස්ටා හෙවත් පිතා මුලික බලයට යම් සමානකමක් දක්වන ස්වරුපයක් මෙහි දී පවතින බවයි.

මෙම අහිතකර බලය ආගමික සහ නෙතික සිද්ධාන්ත මගින්ම සිමා කරමින්, මානුෂීය ලෙස ක්‍රියාත්මක කරනු වස් මුස්ලිම් විවාහ සහ දික්කසාද පනතේ 47 (2) වැනි වගන්ති ත්‍යායාත්මකව පවතී. නමුත් ස්වභාවයෙන්ම පූරුණ මුලික සමාජයක් වන මුස්ලිම් ප්‍රජාව තුළ මෙම නෙතික ප්‍රතිපාදනවල ප්‍රායෝගික එලදායීකාවයක් පවතී ද යන්න ගැටළුවකි. විශේෂයෙන්ම මුස්ලිම් සමාජයේ පවතින ආචාර ස්වභාවය, නීත්‍යනුකූල ක්‍රියාමාර්ගවලට එළඹීමේ දී මතුවන ගැටළු, මුස්ලිම් කාන්තාවන් සමාජයට විවාහ වීමට දක්වන පසුගාමී ස්වභාවය මෙන්ම දරිද්‍රතාවය සහ ත්‍යාගත්කම වැනි හේතු මත ප්‍රායෝගිකව 47 (2) වැනි වගන්තිවල ක්‍රියාකාරීත්වය අවම වේ මේ හේතුවෙන් මුස්ලිම් කාන්තාවන් තමන්ගේම විශේෂ නීතිය තුළ දී අසාධාරණයට ලක්වන අවස්ථා බහුවල දැකගත හැක.

4. මුස්ලිම් විවාහ සහ දික්කසාද පනතේ 24 වගන්තිය ප්‍රකාරව මුස්ලිම් පිරිමියෙක් බහු විවාහ සිදුකර ගැනීම වරදක් නොවුණ ද, විවාහජේක්කාවෙන් පමණක් මුස්ලිම් ආගමට හැරැණු පූද්ගලයන්ගේ පෙර වෙවාහක නීති සමග මුස්ලිම් නීතිය ගැලුණ අවස්ථා අතිතයේ දී දක්නට ලැබුණි. **අබේසුන්දර එ. අබේසුන්දර නඩුව** මේ තත්ත්වය සම්බන්ධ සුවිශේෂී ත්‍යා තින්දුවකි.

අබේසුන්දර එ. අබේසුන්දර

මෙම ත්‍යාවේ දී ග්‍රේෂ්‍යාධිකරණ තින්දුව වූයේ, සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ ආයුජපනතේ 18, 19, 35 (1) සහ 35 (2) වගන්ති සියල්ල එක්ව ගත්කළ පැහැදිලිවම පෙනෙන පරිදි, මෙම ආයුජපනත මගින් බහු විවාහයන් තහනම් කර ඇති නීතා වගලන්තරකරු සිදුකළ එකපාරුයේ ඉස්ලාම් ආගමට පරිවර්තනය වීම මගින්, ස්වකිය පූරුව විවාහය සම්බන්ධයෙන් පවතින ව්‍යවස්ථාපිත බැඳීම් සහ වගකීම්වලින් ඔහු නිදහස් නොකෙරේ.

මෙහිදී ග්‍රේෂ්‍යාධිකරණය විසින් නීතිපති එ. රීඩ් සහ රීඩ් එ. නීතිපති යන ත්‍යා දෙක් දී පරිදි, වගලන්තරකරුගේ ඉස්ලාම් ආගමට පරිවර්තනය වීමේ සද්ධාවී වෙනතාව ප්‍රශ්නගත නොකළේය. ඒ වෙනුවට මෙහිදී සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ ආයුජපනතේ 35 (2) වගන්තිය ප්‍රකාරව විවාහව්වෙකුගේ විවාහයේ පවතින ඒකිය

ස්වභාවය සහ තත්වය සම්බන්ධයෙන් අවධානය යොමුකරුණි. එහෙයින් ගත් කළ මෙම නීත්‍යවේ දී ඉස්ලාම් ආගම සත්‍ය වශයෙන්ම සද්හාවී වෙතනාවෙන් යුතුව වැළඳගත්තෙකුට පවා පෙර තමා සිදුකරගන්නා ලද ඒකීය විවාහයෙන් ඇති වූ බැඳීම් සහ තත්ත්වයන් නොසලකා, මුස්ලිම් නීතිය යටතේ බහු විවාහයක් සිදුකරගත නොහැකි බව දැක්වූණි. එසේ සිදු කරගන්නා පුද්ගලයන් දැන්ව නීති සංග්‍රහයේ 362 (ආ) වගන්තිය ප්‍රකාරව ද්වීවිවාහය වරදට වර්ධකරුවන් වන බව තවදුරටත් ප්‍රකාශ කෙරුණි.

(2) දික්කසාදය

දික්කසාදය යනු විවාහය පදනම් කරගෙන ඇතිවන අඩුසැම් සම්බන්ධතාවය සහ ඔවුන්ට කාලානුයන් වශයෙන් හිමිවන වගකීම්, නිසි බලය ඇති අධිකරණයක් විසින් යම් අවස්ථාවක විසිරුවා හැරීමයි. මෙමගින් කාලානුයන්ගේ ජීවිත කාලයන් තුළ දී ඔවුන් අතර සිදු වූ විවාහ සම්මුතිය නෙතික ලෙස බිඳුවැටි. ශ්‍රී ලංකා නීතිය තුළ දික්කසාදය සම්බන්ධව බලපෑවත්නා නීතින් වන්නේ,

1. 1907 අංක 19 දරණ සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ ආදාළත
2. උචිරවීයන්ට අදාළ වන 1952 අංක 44 දරණ උචිරට විවාහ සහ දික්කසාද පනත
3. මුස්ල්මානුවන්ට අදාළ වන 1951 අංක 13 දරණ මුස්ලිම් විවාහ සහ දික්කසාද පනත

උචිරට විවාහ සහ දික්කසාද පනත යටතේ විවාහවුවන්ට පමණක් එම පනත යටතේම දික්කසාද ලබා ගත හැක. මේ යටතේ වන දික්කසාද පදනම් ලෙස,

1. භාර්යාවගේ අනාවාරය
2. සැමියාගේ අනාවාරය සමග එක්ව ව්‍යුහිවාරය හෝ කාර සැලකීම මත
3. වසර දෙකක් තිස්සේ සැමියා හෝ බිරිඳු විසින් ස්වකීය කළතුයාව සම්පූර්ණයෙන්ම අතහැර යාම
4. සතුවින් ජීවත් වීමට නොහැකි වීම හෝ සම්පූර්ණ වසරක කාලයක් කළතුයන් වාසයෙන් සහ සංවාසයෙන් තොර වීම
5. අන්තර් එකගතතාවය

දැක්විය හැක. සාමාන්‍ය නීතියේ එන දික්කසාද පදනම් වන විවාහයෙන් පසු සිදුකරන අනාවාරය විවාහ වන මොහොතේ පවතින සුව කළ නොහැකි ලිංගික බෙලහිනතාවය ද්වීග සහගත අතහැර යාම යන පදනම්වලට සාපේක්ෂව උචිරට නීතිය තුළ පවතින සතුවින් ජීවත් විය නොහැකි වීම හෝ වසරක කාලයක් පුරා සම්පූර්ණයෙන් වාසයෙන් සහ සංවාසයෙන් තොර වීම වැනි පදනම් වඩාත් ප්‍රගතයිලි මූහුණුවරක් ගත්ත ද, උචිරට දික්කසාදයේ දී කාන්තාවට සම අයිතිවාසිකම් හිමි නොවන බව බැඳු බැල්මටම පෙනී යයි. මෙය ආණ්ඩුකුම ව්‍යස්ථාවේ දැක්වෙන සමානාන්තමතාවයේ මූලික අයිතිවාසිකම කඩවන අවස්ථාවක් සේම, CEDAW සම්මුතියේ 15(1), 16(ජ) වැනි වගන්ති සමග ගැටෙන අවස්ථාවක් ලෙස හඳුනාගත හැක.

තේසවලාමේ

වර්තමාන නීතිය අනුව තේසවලාමේ යටතේ සිදුවන දික්කසාදයන් පාලනය වන්නේ සාමාන්‍ය නීතිය යටතේය.

මුස්ලිම් නීතිය

මුස්ලිම් නීතියේ දික්කසාදය සිදුකරන ප්‍රධාන ආකාරයන් වන්නේ,

1. සැමියා විසින් බිරිඳු දික්කසාද කිරීම
2. බිරිඳු විසින් සැමියා දික්කසාද කිරීම
3. දෙපාර්ශවයේම එකගතතාවය මත දික්කසාදයට එළඟීමයි.

එ යටතේ

1. මුබාරක් - සිය විවාහ සම්බන්ධතාවය අසාර්ථකභාවයට පත්ව, තම අඩුසැම් සම්බන්ධතා කඩාකප්පල් වී ඇති බව අඩුපැශීයන් දෙදෙනාටම හැඟී යන්නේ නම් එවිට අනෙක්නා කැමැත්ත මත සිදුකරගත හැකි දික්කසාදය

2. කළාක් - විවාහ බන්ධනය විසිරුවා හළ බවට ස්වාම්පුරුෂයා විසින් ප්‍රකාශ කිරීමෙන් සිදුකරගන්නා දික්කසාදය

3. කුලා - මුස්ලිම් බිරිඳුක් ස්වකීය වෙවාහක දිවිය සම්බන්ධයෙන් අසතුවෙන් සිටින්නේ නම් එවිට, ඇයට දෙවියන් විසින් නියම කළ වෙවාහක යුතුකම් ඉටුකළ නොහැකි තත්ත්වයට පත්වීම මත සිදුකරගන්නා දික්කසාදය

4. ගඟ - සැමියාගේ කැමැත්ත නොමැතිව බිරිද ඉල්ලා සිටින දික්කසාදය

වගයෙන් දික්කසාද කුම හතරක් දක්නට ලැබේ. ශ්‍රී ලංකාව තුළ ප්‍රායෝගිකව ප්‍රධාන වගයෙන්ම භාවිතා වන මූස්ලීම් දික්කසාද කුමය වන්නේ තලාක් කුමයයි. මෙහිදී දැකිය හැකි යුත්වලතා කිහිපයක් පවතී.

1. සැමියාගේ එකගතත්වයක් නොමැතිව බිරිදට දික්කසාදයක් ලබාගැනීමට අපහසු වුවත්, මූස්ලීම් නීතිය තුළ සැමියාට බිරිදගේ එකගතත්වයෙන් නොරව දික්කසාදය ලබාගැනීමට හැකිවිම ගැටුවකි. මූස්ලීම් විවාහ සහ දික්කසාද පනතේ 28 (1) වගන්තිය ප්‍රකාරව, ගඟ විවාහයක දී කාන්තාවකට දික්කසාද වීමට ලබා දී ඇති පදනම්වල දී හරු, වෙනත් කරුණක් හේතුවෙන් ඇය දික්කසාදය ඇයද සිටින්නේ නම් එවිට, ඇයට 28 (2) වගන්තිය ප්‍රකාරව පනතේ තෙවන උපලේඛණයේ පවතින ස්ථියාපනීපාටිය අනුගමනය කිරීමට සිදුවේ.

නමුත් පුරුෂයාට තලාක් කුමය යටතේ දික්කසාදයට එක් තලාක් ප්‍රකාශයක් සැරෙන්.

මොහොමඩ් ගරුක් බාන් එ. මූලින් සහ තවත් අය

තලාක් හසන් කුමය ශ්‍රී ලංකාවේ තලාක් දික්කසාද කුමය ලෙස පිළිගත්ත ද, දෙවන උපලේඛණයේ රිති මාලාවට අනුව එක් තලාක් ප්‍රකාශයක් සිදු කිරීම වුව ද ප්‍රමාණවත්ය.

එසේම ඔහු එක් තලාක් ප්‍රකාශයක් මගින් දික්කසාද වීමේ දී, ඒ බව බිරිදට දන්වා සිටීමේ වගකීමට පවා බැඳී නොමැතු.

මොර් ලේඛිබේ එ. සිතින් මසීඩ්

සැමියා විසින් කරනු ලබන තලාක් ප්‍රකාශන පිළිබඳව බිරිද වෙත දැන්වීමේ වගකීමක් සැමියා මත නොපැවරෙන්නා සේම, බිරිදට එම තලාක් ප්‍රකාශය නොදන්වා වුව ද සිදුකරන දික්කසාදය වලංගු දික්කසාදයක් වේ.

එක්ත නීති පැනවීමේ මූලාශ්‍රමය ස්වභාවය කුමක් වුවත්, අද වන විට ප්‍රායෝගිකව මූස්ලීම් පුරුෂයන් විසින් උක්ත තත්ත්වය අනිසි ලෙස භාවිතයට ගන්නා අවස්ථා බහුලව දැකිගත හැක. සාමාන්‍ය නීතිය තුළ සාමාන්‍ය විවාහ ලියාපදිංචි කිරීමේ 19 (2) වැනි වගන්ති මගින් දික්කසාදයේ දී ස්ත්‍රී පුරුෂ දෙපාර්ශවයට සමාන නීති තත්ත්වයක් ලබාදේතින්, ශ්‍රී ලංකා

ආණ්ඩුකුම ව්‍යවස්ථාවේ දැක්වෙන සමානාත්මකාවයේ මූලික අයිතිවාසිකම සහ CEDAW සම්මුතියේ 16 වගන්තිය වැනි නොතික ප්‍රතිපාදන සුරකින අවස්ථාවක මූස්ලීම් නීතිය මේ සම්බන්ධයෙන් සංශෝධනය විය යුතු බව පෙනී යයි.

2. ගඟ කුමය යටතේ සැමියාගේ කැමැත්ත නොමැතිව දික්කසාදය ලබාගත හැකි පදනම් මූස්ලීම් විවාහ සහ දික්කසාද පනතේ 28 (1) වගන්තියේ දක්වා ඇත. නමුත් හැඳුනුව් නීති එ. මධාර උම්මා නඩුතින්දුවටඳුව ලාභාල විය, නොදැනුවත්කම මත අකමැත්තෙන් විවාහ කරදීම වැනි බැඳු බැඳුමටම සාධාරණ යැයි හැගෙන හේතුන් මත දික්කසාදයක් ඉල්ලා සිටින විට පවා සැමියාගේ කැමැත්ත අවශ්‍ය වන්නේ, එම හේතුන් අදාළ වන්නේ 28 (2) උපවගන්තියට වීම හේතුවෙනි. නමුත් සාමාන්‍ය නීතිය තුළ මෙසේ දික්කසාදය සඳහා සැමියාගේ කැමැත්ත අවශ්‍ය වීමක් දක්නට නොලැබේ.

3. තව ද ගඟ දික්කසාදයක් ලබාගැනීමට නම් එම විවාහය පරිපූර්ණ විවාහයක් බවට පන්ව තිබිය යුතුය. මුදුර මුවුලානා එ. සයිනුල් ගිරිජානවු තීන්දුවේ දැක්වෙන පරිදි විවාහයක් පරිපූර්ණත්වයට පත්වීමට නම් වාසය කර, ලිංගික සම්බන්ධතා පවත්වා තිබිය යුතුය. නමුත් ප්‍රායෝගික තත්ත්වය තුළ දී මෙය ඔප්පු කිරීමේ පවතින යුත්වලතාවයන් මෙන්ම ලිංගික සම්බන්ධතාවයකින් පසුව කාන්තාවකට ඇති විය හැකි අනජේක්ෂිත ගැටු සම්බන්ධව සලකා බැඳීමේ දී මෙම අවශ්‍යතාවය සංශෝධනය විය යුතු බව දැකිවිය හැක.

4. මූස්ලීම් නීතිය යටතේ සැමියා සහ බිරිද යන දෙපාර්ශවයම ආගම් අත්හැරීමේ දී එම විවාහය බල රහිත විවාහයක් බවට වේ. ඒ අනුව විවාහය ආරක්ෂා කරගැනීමේ වෙනතාව වෙනුවෙන්ම පමණක් ඉස්ලාම් ආගම ඇඟිල්මට අයෙකුට සිදුවිය හැක. මෙය ශ්‍රී ලංකා ආණ්ඩුකුම ව්‍යවස්ථාවේ පරිසමාජ්‍ය මූලික අයිතිවාසිකමක් ලෙස සැලකෙන 10 වන ව්‍යවස්ථාවට ද යම් බලපැමක් එල්ල කරන බවට අයෙකුට තර්ක කළ හැක.

නමුත් සාමාන්‍ය නීතිය තුළ විවාහය සම්බන්ධයෙන් ආගම් අදාළත්වය ගැනී සඳහනක් නොමැති අතර, මූස්ලීම් නීතිය යටතේ පවතින ව්‍යතිරේක අවස්ථාව හේතුවෙන් හැර වෙනත් අවස්ථාවන්වල දී ඕනෑම ආගම්කයන් දෙදෙනෙකුට ඒ යටතේ විවාහ වීමට හැක. මේ අනුව යෝජනා

කළහැක්කේ මුස්ලිම් විවාහ සහ දික්කසාද පනතේ 30 වගන්තිය ප්‍රමුඛව ආගමික අභිමතයන් දැක්වෙන වගන්ති සංගේධනය කරමින්, ඒ යටතේ ද මුස්ලිම් නොවන දෙදෙනෙකුට විවාහ වීමට මෙන්ම මුස්ලිම් ආගම අතහැරීම මත විවාහය අවබෝ නොවීමට හැකි වන සේ නෙතික ප්‍රතිපාදන තීර්මාණය විය යුතු බවයි.

(3) දරුවන් කුලවද්දා ගැනීම

දරුවන් කුලවද්දා ගැනීම යනු වැඩිහිටියෙකු හෝ වැඩිහිටියන් දෙපළක් නෙතික සම්බන්ධතාවයක් මත පදනම්ව යම් දරුවෙකුගේ නිත්‍යනුකූල භාරකාරයා වෙමින්, දෙමාපිය වගකීම් ඉටුකිරීමයි. මෙම නෙතික සම්බන්ධතාවය මගින් කුලවද්දාගත් දරුවා කුලවද්දුම්කරුගේ උරුම අනුප්‍රාප්තිකයා බවට පත් කෙරෙන්නේ, ස්වභාවික දෙමාපියන් සමග වන සියලුම නෙතික සම්බන්ධතා අභ්‍යන්තර කරමිනි. මේ සම්බන්ධයෙන් ශ්‍රී ලංකාවේ පවතින නීතින් වන්නේ 1941 අංක 24 දරණ දරුවන් කුලවද්දා ගැනීමේ ආයුපනත 1938 අංක 39 දරණ උච්චරට නීතිය ප්‍රකාශ කිරීමේ සහ සංගේධනය කිරීමේ ආයුපනත 1806 අංක 06 දරණ තේස්වලාමේ රෙගුලාසි

උච්චරට නීතිය

මුල්කාලීන උච්චරට වාරිතානුකූල නීතිය තුළ දේපළ උරුමකාරත්වය වෙනුවෙන් සිදුකළ කුලවද්දා ගැනීම දක්නට ලැබුණි. වර්තමානයේ ද උච්චරට නීතිය ප්‍රකාශ කිරීමේ සහ සංගේධනය කිරීමේ ආයුපනතේ 7(1) වගන්තිය යටතේ මෙන්ම, දරුවන් කුලවද්දා ගැනීමේ ආයුපනතේ 16 වගන්තිය යටතේ ද උච්චරියන්ට දරුවන් කුලවද්දා ගත හැකිය. උච්චරට නීතියේ වැදගත්ම ලක්ෂණය වන්නේ දරුවා කුලවද්දා ගත් බවට ඉල්ලුම්කරු විසින් ප්‍රකාශීතව දක්වා තිබේමයි. මෙහිදී කුලවද්දා ගත් දරුවාට ද ස්වභාවික දරුවෙකු සේ ම සලකා සියලුම දේපළ උරුමකම් හිමි වේ.

තේස්වලාමේ

තේස්වලාමේ රෙගුලාසි යටතේ දරුවෙකු වාරිතානුකූලව කුලවද්දා ගන්නා ආකාරය දක්වයි. නමුත් පසුගිය ගතවර්ෂය තුළවාරිතානුකූල කුලවද්දා ගැනීම් සම්බන්ධ තුළ ඉදිරිපත්ව නැති. දරුවන් කුලවද්දා ගැනීමේ ආයුපනතේ 16 වගන්තිය ප්‍රකාශ තේස්වලාමේ යටතේ දරුවන් කුලවද්දා ගැනීමට අදාළ වන්නේ සාමාන්‍ය නීතියයි.

මුස්ලිම් නීතිය

වියාධිත පවසන පරිදි,

"මුවුපිය බව දරුවෙකු සහ ඔහුගේ දෙමාපියන් අතර සත්‍යවශයෙන්ම ගොඩ නැගෙන්නේ, ඔහු නිත්‍යනුකූල විවාහයකින් උපත ලද දරුවෙකු වන්නේ නම් පමණි."

ඒ අනුව පෙනී යන්නේ මුස්ලිම් නීතිය ස්වභාවික දෙමාපියන්ගේ දෙමාපිය භාවය වෙනකෙකුට ලබාදීම අනුමත නොකරන බවයි. ඒ හේතුවෙන් මුස්ලිම් විවාහ සහ දික්කසාද පනතේ හෝ වෙනත් ප්‍රතිපාදනයක මුස්ලිම් දරුවන් කුලවද්දා ගැනීම සම්බන්ධයෙන් කිසිදු වගන්තියක් නොදැක්වන නමුත්, පනතේ 98 (2) වගන්තිය ප්‍රකාරව 'විවාහයට සහ දික්කසාදයට අදාළ සියලු ගැටළු දෙපාර්ශවය අදාළ වන ඒ එක් එක් නිකායේ නීතිය මත පාලනය වන බව' දැක්වේ. ඒ අනුව පෙනී යන්නේ මුස්ලිම් නීතිය තුළ කිසිසේත්ම දරුවන් කුලවද්දා ගැනීම සම්බන්ධයෙන් නොදැක්වන බවයි.

නමුත් කුලවද්දා ගැනීමේ ආයුපනත යටතේ මුස්ලිම්වරයෙක්ට යම් දරුවෙකු කුලවද්දා ගැනීම තහනම් කර නොමැති. කෙසේ වුවත් මුස්ලිම් අන්තිම කැමැතිපතු රහිත උරුම අනුප්‍රාප්තික ආයුපනතේ 02 වගන්තිය ප්‍රකාරව, 'මරණයට පත්වන අවස්ථාවේ ශ්‍රී ලංකාවේ වාසිකත්වය හෝ දේපළ හිමි මුස්ලිම්වරයෙකු ගේ අන්තිම කැමැති පතු රහිත උරුම අනුප්‍රාප්තිය පාලනය වන්නේ ඔහු අදාළ වූ නිකායේ නීති ප්‍රකාරව බව දැක්වේ. ඒ අනුව යම් මුස්ලිම්වරයෙකු දරුවෙකු කුලවද්දා ගත හොත්, එම දරුවාට සාමාන්‍ය නීතිය යටතේ ස්වකිය ස්වභාවික දෙමාපියන්ගේ උරුම අනුප්‍රාප්තිය අහිම් වන්නා සේම, මුස්ලිම් නීතිය යටතේ ස්වකිය කුලවද්දුම් දෙමාපියන්ගේ උරුමය ද අහිම් වීම ගැටළුවකි.

තවද 1884 අංක 02 දරණ අන්තිම කැමැතිපතු ආයුපනතේ 02 වගන්තිය යටතේ තමාගේ දේපළ තමා කැමති පුද්ගලයෙකු හට කොටස් වශයෙන් හෝ සම්පූර්ණයෙන්ම පවරා දීමට සාමාන්‍ය නීතිය යටතේ යමෙකුට හැකි වූව ද මුස්ලිම් නීතිය යටතේ යමෙකුට පවුලෙන් පිටස්තර පුද්ගලයෙක්ට යමෙකුගේ අන්තිම කැමැතිපතුය යටතේ පවරා දිය හැක්කේ තම දේපලෙන් 1/3ක උපරිමයකට යටත්ව ය. ඒ අනුව පෙනී යන්නේ අන්තිම කැමැතිපතු සහිත අනුප්‍රාප්තියේ ද වූවත්, මුස්ලිම්වරයෙක්

කුලවද්දා ගත්තා දරුවෙකු හට අසාධාරණයක් සිදුවන බවයි.

අස්හාර ගඩ්ස් එ. මොහොමඩ් ගඩ්ස්

මෙහි දී ප්‍රශ්නගත කාරණය වූයේ ලංකාවේ මුස්ලිම් නීතිය කුලවද්දා ගැනීම සම්බන්ධයෙන් නිහඹ නිසා, සාමාන්‍ය නීතියේ එන දරුවන් කුලවද්දා ගැනීමේ ආයුෂපනත යටතේ කුලවද්දා ගත් මුස්ලිම් දරුවෙකු එම කුලවද්දුම් දෙමාපියන්ගේ අන්තිම කැමතිපතු රහිත දේපළ අනුප්‍රාප්තියට උරුමකම් කිව හැක්කේ ද යන්නයි. මෙහි දී අධිකරණ නීත්දුව වූයේ, ශ්‍රී ලංකාවහි මුස්ලිම්වරුන් සියලුළුම් ස්වකිය පෙළදැලික නීතිය වන මුස්ලිම් නීතියෙන් පාලනය වන බවත්, මුස්ලිම් නීතිය තුළ කිසිම හේතුවක් මත දරුවන් කුලවද්දා ගැනීමේ සංක්ලේෂය ප්‍රතික්ෂේප කරන නිසා, දරුවන් කුලවද්දා ගැනීමේ ආයුෂපනත යටතේ කුලවද්දාගත් මුස්ලිම් දරුවෙකුට, ඔහු තමාගේ කුලවද්දුම් දෙමාපියන්ගේ එකම දරුවා වුවත්, ඔවුන්ගේ අන්තිම කැමතිපතු රහිත උරුම අනුප්‍රාප්තිය හිමි නොවන බවයි.

(4) නඩත්තුව

ශ්‍රී ලංකාවේ පරිපෝෂණය සැපයීම සම්බන්ධයෙන් 1999 අංක 37 දරණ නඩත්තු පනත මෙන්ම, රෝ පෙර පනවා ඇති නඩත්තු ආයුෂපනත අදාළ වේ. මෙය මුල්කාලීනව අපරාධමය වගකීමක් පැවරුණ සංක්ලේෂයක් වුවත්, අද වන විට නඩත්තු නොකිරීම සිවිල් වරදකි. ප්‍රමාණවත් වත්කමක් සහිත දෙමාපියන් දෙදෙනාවම ස්වකිය විවාහජ සහ අව්‍යාපිත දරුවන් සම්බන්ධයෙන් වගකීමක් පවතී. නමුත් දරුවන් විසින් දෙමාපියන් නඩත්තු කිරීම සම්බන්ධව අනෙක්නා වගකීමක් පනතේ දක්නට නොලැබෙන අතර, රෝම් ලන්දේසි නීතිය යටතේ ද එම ස්වභාවයම දක්නට ලැබේ.

වැඩිහිටියන් නඩත්තුව සම්බන්ධයෙන් අදාළ වන්නේ 2000 අංක 09 දරණ වැඩිහිටි අධිකිවාසිකම් ආරක්ෂා කිරීමේ පනතයි. නමුත් මේ පනත සම්බන්ධයෙන් සමාජය තුළ පවතින නොදැනුවත් භාවය මත, වැඩිහිටි නඩත්තුව සම්බන්ධයෙන් වැඩි අවධානයක් යොමු නොවේ. නඩත්තු පනතේ 17 වගන්තිය ප්‍රකාරව රෝම් ලන්දේසි පොදු නීතිය යටතේ ගතහැකි සිවිල් ක්‍රියාලාරයන් පනතේ ප්‍රතිපාදන හරහා වැළක්වීමක් සිදුවේ. පෙර ආයුෂපනතේ වූ හිස්තැන් වන ආබාධිත දරුවන් නඩත්තු කිරීම සහ දරුවන් විසින්

දෙමාපියන් නඩත්තු කිරීම සම්බන්ධයෙන් පොදු නීති සංකල්ප යොදාගනු ලැබේ.

උචිරට නීතිය

උචිරටයන් සම්බන්ධයෙන් නඩත්තුව සඳහා අදාළ වන්නේ රටේ සාමාන්‍ය නීතිය වන නඩත්තු පනත සහ නඩත්තු ආයුෂපනතයි. නමුත් උචිරට විවාහයක් දිග විවාහයක් වන්නේ නම්, පුරුෂයාට බිරිද නඩත්තු කිරීමේ සම්පූර්ණ වගකීම පැවරෙන අතර, බිත්ත විවාහයක දී නම් බිරිද පැවුලේ ප්‍රධානීය ලෙස සැලකෙන නිසා සැමියාට ඇයව නඩත්තු කිරීමේ වගකීමක් නොපවති.

තේසවලාමේ

තේසවලාමේ නීතියෙන් පාලනය වන්නන් සඳහා ද අදාළ වන්නේ රටේ සාමාන්‍ය නීතිය වන නඩත්තු පනත සහ නඩත්තු ආයුෂපනතයි.

මුස්ලිම් නීතිය

මුස්ලාම් නීතිය අනුව බිරිද, දරුවන්, සේවකයන් වැනි යැපෙන්නන් නඩත්තු කිරීමේ වගකීම දෙවියන් වහන්සේ විසින් පුරුෂයාට නීයම කළ දේව නීයමයකි. සාමාන්‍ය නීතියේ දී නඩත්තු වගකීම පැවරෙන ආකාරයන් සහ මුස්ලිම් නීතියේ දී නඩත්තු වගකීම පැවරෙන ආකාරයන් අතර යම් යම් වෙනස්කම් නීති ආගුරෙන් සලකා බැලිය හැක. මෙම අවස්ථාවන්වල දී මුස්ලිම් නීතිය සහ සාමාන්‍ය නීතිය සට්ටනය වන බව කිව හැකිය.

1. මුස්ලිම් නීතිය යටතේ පිරිමි දරුවෙකුට නඩත්තුව ලැබිය හැකි වයස් සීමාව සැලකීමේ දී, පිරිමි දරුවෙකු වයෝපූරුණත්වයට පත්වන තෙක් හෝ ඔහු පසලාස් වන වියට පත්වන තෙක් පමණක් නඩත්තු කිරීමේ වගකීම පියාට පැවරේ. ඒ අනුව මුස්ලිම් නීතිය යටතේ පාලනය වන පිරිමි දරුවෙකු වයස අවුරුදු පහලාව වන විට වයෝපූරුණත්වයට පත්ව ඇති බව සාමාන්‍ය පිළිගැනීමයි. මෙහි දී ඇතිවන ගැවඹව වන්නේ, වයස අවුරුදු පහලාවක දරුවෙකුට තනිවම තමාව නඩත්තු කරගත හැකි ද යන්නයි.

සාමාන්‍ය නීතිය යටතේ එන නඩත්තු ආයුෂපනතේ 2(2), 2(3) සහ 2(4) උප වගන්ති මගින් තමාට තමාව නඩත්තු කරගත නොහැකි ලම්යෙකු, වියපත් දරුවෙකු සහ ආබාධිත දරුවෙකුට දෙමාපියන් යටතේ නඩත්තුව ලැබිය හැකි වේ. එම පනතේම 22 වගන්තිය මගින් ඉහත වගන්තිවල දැක්වෙන

පුද්ගලයන් සඳහා අදාළ වන වයස් සීමාවන් දක්වයි. මේ අනුව පැහැදිලිවම තරක කළ හැක්කේ මූස්ලිම් නීතිය මගින් පිරිම් දරුවන්ට යම් අසාධාරණයක් සිදුවන බවයි. බුරුහාන් එ. ඉස්මයිල් නඩුවේදී දැක්වෙන පරිදි මෙම තත්ත්වය හේතුවෙන් දරුවෙකුට තමාගේ අධ්‍යාපනය ලබාගැනීමට පවතින අයිතිවාසිකම පවා මින් කඩ්විය හැක.

එක්සත් ජාතින්ගේ ලමා අයිතිවාසිකම් ප්‍රජාත්තියේ 01 වගන්තිය මගින් වයස අවුරුදු දහැට ඇතු සැම පුද්ගලයෙකුම මෙමයෙකු ලෙස නිර්වචනය කරයි. එස්ම එහි 3(1) වගන්තිය යටතේ ලමයාගේ උපරිම යහපත ද, 6 වගන්තිය යටතේ ලමයාගේ පැවැත්ම සහ සංවර්ධනය ද, 28 සහ 29 වගන්තිවලින් ප්‍රමාණය අධ්‍යාපනය ලැබීමට ඇති අයිතිවාසිකම සම්බන්ධ ප්‍රතිපාදන රසක් දක්වයි. ශ්‍රී ලංකාවේමූස්ලිම් නීතිය මෙවන් අන්තර්ජාතික නෙතික විධිවිධාන සමග පවා ගැටෙන බව දැකගත හැක.

2. නඩුවාන්තු මූදලක් සංශෝධනය කිරීමේ දී එය කළ යුත්තේ එයට ප්‍රබල සහ ප්‍රමාණවත් හේතු ඉල්ලුම්කාර පාර්ශවයන් විසින් ක්වාසිවරයා වෙත ඉදිරිපත් කොට තහවුරු කිරීම මතය. මෙහි දී මතුවන ප්‍රධානම ගැටුවක් නම් ක්වාසිවරයාට නඩුවාන්තු මූදල සම්බන්ධයෙන් ක්වාසි අධිකරණය යටතේ පවතින තනි හා අනානා බලය ප්‍රායෝගික තත්ත්වයන් ආශ්‍රිතව අන්තනේම්තික ලෙස හාවිතයට ගැනීම මත නඩුවාන්තු ගෙවීමට සිදුවන පාර්ශවයට සිදුවන අසාධාරණයයි.

මොහොමඩ් ඉස්මයිල් එ. උම්මා

පියා විසින් සිය දරුවන්ට ගෙවීමට තිබූ නඩුවාන්තු මූදල ඇතු කරන ලෙස ඉල්ලා තිබුණේ තමාගේ ආදායම් තත්ත්වය පහත වැට්ම පිළිබඳව ප්‍රමාණවත් සාක්ෂි ද ඉදිරිපත් කරමිනි. නමුත් ක්වාසිවරයා එම ඉල්ලීම ඉවත දමන ලද්දේ ‘එබදු ඉල්ලීමක් මුල් නඩුවාන්තු නීතෝගය කළ දින සිට වසර හතරක් යනතෙක් කවර පාර්ශවයක් මගින් හේ නොකළ යුතුය’ යන පදනම මත සිටය. නමුත් 1951 මූස්ලිම් විවාහ සහ දික්කසාද පනතේ 47(1) උප වගන්තිය ප්‍රකාරව එස්ස සංශෝධන ඉල්ලීමක් කළ යුතු කාලය පිළිබඳව නීතිමය සීමාවක් දක්වා නොමැත. එමනිසා ක්වාසිවරයාගේ තින්දු සාවදා බවට තීරණය කොට, මුල් නඩුවාන්තු නීතෝගයේ මූදල ඇතුකිරීමට අහියාවනයේ දී තීන්දු කෙරුණි.

3. නඩුවාන්තු මූදලක් වැඩි කර දෙන ලෙස කරන ඉල්ලීමක දී ඉල්ලුම්කාර පාර්ශවය ඉල්ලා සිටින මූදල ඉක්මවා අවස්ථාවට උවිත පරිදි වැඩි මූදලක් ගෙවන ලෙස නීතිම කිරීමට ක්වාසිවරයාට බලතල නොතිබේ ද තවත් ගැටුවකි. මේ නිසා ක්වාසිවරයාට අවස්ථාන්විතව නඩුවාන්තු මූදල වැඩි කිරීමේ අවශ්‍යතාවයක් මතු වුව ද, ඒ සඳහා අවස්ථාවක් හිමි නොවේ. නමුත් 1999 නඩුවාන්තු පනතේ 10 වගන්තිය ප්‍රකාරව මහෙස්ත්‍රාත්වරයාට තමන් සුදුසු යයි සලකන පරිදි එම නීතෝගය අවලංගු කිරීමට හේ දීමනාව වෙනස් කිරීමට බලතල තිබේ. මෙය සාමාන්‍ය නීතිය තුළ පවතින ප්‍රශ්නයිය තත්ත්වයකි.

රයිදින් එ. රැක්කියා උම්මා

ක්වාසිවරයා මේ සම්බන්ධයෙන් දක්වා ඇත්තේ ඉල්ලුම්කාරය ඉදිරිපත් කරන සාක්ෂි මත ඇයට වැඩි මූදලක් ලබා ගැනීමට හැකියාවක් පවතින බවත්, ඉල්ලුම් පත්‍රයේ එම මූදල ඇතුවෙන් සඳහන් කිරීමට හේතු වූයේ ඇගේ තුළ ගැනීම නිසා බවත් ය. අහියාවනාධිකරණයේ දී ප්‍රකාශ වූයේ මූස්ලිම් නීතිය තුළ එස්ස තුළ ගැනීම වැනි සාධකයක් සලකා බලා, අදාළ නඩුවාන්තු මූදල වෙනස් කිරීමේ අවස්ථාවක් ක්වාසිවරයාට හිමි නොවන බවයි.

විල්භකය සහ නිගමනය

ශ්‍රී ලංකාව තුළ නෙතික බහුවිධත්වයක් පැවතීමට හේතු වන්නේ ජාතින් සහ සංස්කෘතින් අතර පෙර සිටම පැවත්තෙන එන විධිත්වය, යටත්විජ්‍යතකරණයේ ප්‍රතිඵලයන් සහ වෙනත් නෙතික හේතුන් වේ. එමනිසා ලාංකේස සමාජය තුළ විවිධ උප සම්භායන්ට අන්තර්ගත කළ හැකි පුද්ගලයෝ සිටිති. මේ අතරින් උප සම්භායන් කිහිපයක් තුළ අතික් උප සම්භායන්ගෙන් සහ රටේ සාමාන්‍ය නීතියෙන් වෙනස් වන, තමාටම ආවේණික නීති පද්ධතියක් පවති. ලාංකේස නීති පද්ධතිය ස්වභාවය ගැනීමේ නායාත්මක පදනම මෙයයි.

නීතිය ද ජාතියක් සේම තුමුහුන් ලෙසින් උපන් සත්ත්වයෙකු නොවේ. විශේෂයෙන්ම ශ්‍රී ලංකාව වැනි එකිනෙකට වෙනස් හර පද්ධතිවලින් සමන්විත බහුවිධ නෙතික තත්ත්වයක් පවතින රටක එකිනෙකින් ස්වායත්ත නීති පැවතීම සාමාන්‍යයෙන් සිදු නොවේ. 1978 ආණ්ඩුවුතුම ව්‍යවස්ථාවේ සඳහන් 10, 14(1)(ඒ), 16(1) වැනි ව්‍යවස්ථා මගින්

ද මෙම විශේෂ නීතිවල පැවැත්ම තහවුරු කර ඇත. එහයින් මෙම විශේෂ නීතින් සහ රටේ සාමාන්‍ය නීතිය අතර සමහර අවස්ථාවල යම් සට්ටනයන් ද සිදු වේ. ඒ අනුව ලංකාවේ පවුල් නීති පද්ධතිය තුළ දැකගත හැකි ගැටළු ප්‍රධාන වශයෙන් කොටස් දෙකකට බෙදිය හැක.

1. සමහර විශේෂ නීතින් හි ප්‍රතිපාදන සහ මූලික අයිතිවාසිකම් අතර සට්ටනයක් පැවතීම
2. විශේෂ නීතින් තමන්ගෙන් පාලනය වන යම් යම් පුද්ගලයන් විශේෂිකරණය කරමින් නීති පැනවීම

මෙම ගැටළු විසඳීමේ පියවරක් වශයෙන් ඒකීය නීති පද්ධතියකට යොමු වීමේ අවශ්‍යතාවය සම්බන්ධයෙන් සමකාලීන කතිකාවතක් ඇති වී ඇත. නමුත් විශේෂ නීති සියල්ල පරිශ්නන් කොට ඒකීය නීති පද්ධතියකට යාම ත්‍යාගාත්මකව මෙම ගැටළු වලට විසඳුමක් විය හැකි නමුත්, අනාදිමත් කාලයක සිට පැවතගෙන ආ හර පද්ධතින් සහ වාරිත්‍රානුකුල නීතින් වෙනස් කිරීමට උත්සහ දැරීම වාර්ගික සහ ආගමික ගැටීම ඇති කිරීමට හේතුවක් විය හැක. එමනිසා සිදුකළ හැකි හොඳම විසඳුම සේ තිගමනය කළ හැක්කේ විශේෂ නීතිය සහ සාමාන්‍ය නීතිය සට්ටනය වන අවස්ථා හඳුනාගනීම්, එම සට්ටනයන් හැකිතාක් අවම වන සේ නීති සම්පාදනයට කටයුතු කිරීමයි.

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A MUCH NEEDED AMENDMENT TO THE TRUST ORDINANCE

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Objectives of this article are,

1. To discuss the requirements to be fulfilled in formation of a Trust,
2. To discuss the Law relating Expressed Trusts in Sri Lanka,
3. To review the practical differences between Law relating Charitable Trusts and Expressed Trusts
4. And, about the important amendments we should look into in the context of charitable trusts.

This letter proposes some of the important amendments we should to look into in the future in the context of charities for animals as well as charitable trusts on plant reservation.

Introduction

The concept of trusts was developed in England, through the concepts of equity. According to the opinion of George W Keeton, the British law professor," Law of Trust is the golden creation of equity". And Lord Lindley has affirmed, "a trust as equitable obligation to deal with the property in a particular way". This concept of law arrived Sri Lanka via English law. The English Law of trust heeds dual ownership of the trust property where the legal title vests with the trustee while the equitable title vests with the beneficiary.

The Trust Ordinance was established in 1917; Act no:9 of 1917. As stated by Mark Corey, "Law of Trust was practiced in Sri Lanka unofficially before the commencement of the ordinance ." According to the Ordinance, section 3 describes what trust is " trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another person, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested in such other person , or in the such other person concurrently with the owner. "For an another definition, Keeton describes the concept of trust as" a trust maybe said to be the relationship which arise, wherever a person called the trustee is compelled in equity to hold the property whether real or personal and whether by legal or equitable title for the benefit of some persons fir some objects permitted by law in such a way that the real benefit of the property accrues not to the trustee but the beneficiaries or other objects of the trust " **Parties to the trust.** There are three parties who engage actively in trusts. The person who reposes or declares the confidence is called the **author of the trust.** The person who accepts the confidence is called the **trustee.** The person for whose

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benefit the confidence is accepted is called **beneficiary**.

General Classification

There are the four types of trusts which are recognized by law in a general classification, namely Express Trusts , Informal / Implied Trusts , Resulting Trusts and Constructive Trusts. We'll be looking into Charitable Trusts in this letter which comes under Express Trusts with slight differences. Section 5(1) describes, subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the author of the trustee , or by a non - testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.

In the above section, it specifically states that, the last will or the non - testamentary instrument by the author of the trust or the trustee should be notarially executed. This term is defined in the section of the trust ordinance to mean that the instrument should be executed in the manner prescribed by the section 2 of the Prevention of Frauds Ordinance. In the decided case of Bernedette Valangberg V Hapuarachchige Anthony (1990 / 1 Slr 190), court has declared the above interpretation.

When we distinguish the charitable trust from the express trust, which is also a form of express trust, it is necessary to consider the essential elements to form a trust. But they do not seem to have much in common.

There are basically five elements to be full filled in formation of a trust. The three persons must have the capacity to enter into the transaction. There must be certainty as the intention to create trust, beneficiary and subject matter, which are known as three certainties of a trust. And trust must not violate the rule of perpetuity. It must be a lawful purpose. Trust property must be transferred to the trustee.

The trustee, settlor and beneficiaries must have the capacity to enter the transaction

Section 7(a) describes, a trust may be created by every person competent to contract. Competent to contract carries the idea of who is of the age of majority or has otherwise acquired the status of majority according to the law to which he is subject, and who is of sound mind and is not disqualified by law from contracting - sec 3(1)

Section 2 and 3 of the Age of Majority Ordinance provides that legal age of majority is 18 years . But for a minor, a trust may create with the permission of the court by or on behalf of a minor - section 7(b).

Capacity of the trustee, section 10(1), every person capable of holding property may be trustee, but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

Capacity of the beneficiary, section 9(1), every person capable of holding property may be a beneficiary.

Every written law whether made before or after the commencement of this ordinance, unless there be something repugnant in the subject or context person includes Anybody of persons corporate or unincorporated-section 2 of the Interpretation Ordinance. Animals can not be the beneficiaries of a trust.

When it comes to Certainties

Knight vs Knight, the famous English case, Lord Lonsdale declared three things were necessary. They are, a) The words employed must be couched that, taken as a whole, they could be deemed to be imperative. b) The subject matter of the trust must be certain. c) The objects or persons intended to be benefited must be certain.

- (a) In Sri Lankan trust ordinance , in section 6 , it has mentioned that subject to the provisions of section 5 and 107 , a trust is created when the author of the trust indicates with the reasonable certainty by any words or acts
 - an intention on his part to create thereby a trust,
- (b) the purpose of the trust ,
- (c) the beneficiary,
- (d) the trust property and (unless the trust is declared by Will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee.

And the ordinance further notices that, the object must be certain, practicable and lawful. Section 4 describes, a trust may be created for any lawful purpose . The purpose of a trust is law full unless it is

- (a) forbidden by law, or
- (b) is of such a nature that, if permitted , it would defeat the provisions of any law , or
- (c) is fraudulent, or
- (d) involves or implies injury to the person or property of another, or
- (e) the court regards it as immoral or opposed to public policy.

Distinguishing Charitable Trusts and Express Trusts

The above mentioned formalities are the very basic and general concerns of express trust. Distinguishing the requirements of charitable trust will become much easier by knowing the basic requirements of an express trust.

When it comes to the Certainties, As cited in the above , section 6 is expressly subject to 107 , it may be argued that 107 accord the court power to ignore the requirement of certainty of beneficiary in relation to the charitable trusts. It is also relevant that most of the decisions have ignored the requirement in the section 6 that beneficiaries must be indicated with certainty in a valid charitable trust.

Thus, when comparing with other trusts, The formalities for creation of charitable trusts are very simple and flexible. Provided there is a charitable intention, the beneficiaries of a charitable trust need not be indicated with certainty. Furthermore, The Perpetuity rules do not apply to charitable trusts.

Charitable Trusts in Sri Lanka

Trust Ordinance of Sri Lanka is the governing law regarding trusts. Various cases have decided on usage of provisions of the Trust Ordinance. Charitable trusts are described in 10th paragraph of the ordinance. From section 99 to section 109 paragraph lasts.

Section 99 states that, the expression charitable trust includes any trust for the benefit of the public or any section of the public within or without Sri Lanka of any of the following categories.

- a) for the relief of poverty , or
- b) for the advancement of education or knowledge , or
- c) for the maintenance of religion or the maintenance of religious rites and practices , ord) for any other purposes beneficial or of interest to mankind not failing within the preceding categories. The preceding categories.

Actually this is an adaptation of Lord Macnagten's classification of charitable purposes with some modification in order to give a wider scope to religious trusts. In the decided case of Income tax commissioner vs Pemsel, Lord McNaughton laid down that, Charity in its legal sense comprises four principal divisions
1) trusts for the relief of poverty 2) trusts for the advancement of education 3) trusts for the advancement of religion and trust for other purposes beneficial to the community , not failing under any of the preceding head.

Trusts for relief of poverty

Trusts for the relief of poverty , the word poverty may mean different things. Sir Raymond Evershed in **Re Coulthurst** 1951 has stated that, Poverty of course does not mean destitution It is a word of wide and indefinite import , and , perhaps , it is not unfairly paraphrased for present purposes as meaning persons who have to go short in the ordinary acceptation of that term , due regard being had to their status in life and so forth.

In **ReRounders** will trust case, justice Herman states that, "working class people will not amount to poor. So the trust was not accepted by the courts ".

In **Oppenheim v Tobacco Securities Trust 1951**, Income of a trust fund was to be used to educate the children of employees and former employees of company and its subsidiary current employees of the company number offer 110000 but as the opportunity to benefit was restricted by a personal Nexus the public aspect was not satisfied.

In Sri Lanka the beneficiaries must not be the relations of the settler. But the Charitable Trust of Vijayawada case is an exception. And in Sri Lanka the public benefit factor must be fulfilled.

Trusts for advancement of education

English law, Trust for advancement of education or knowledge , the test of public benefit has been set aside. But in Sri Lanka the courts had declared that every charitable trust which constitute in Sri Lanka must have

the benefit for the public in the case of Trustees of Wijeyawardena charitable trust v commissioner of Income tax.

For an instance , in the decided case of Commissioner of Income tax vs Abdul Gafoor (1958) the courts had established the fact that "a trust created for the advancement of education but which is not for the benefit of the public or a section of the public is not a charitable trust"

Slade justice has stated in the decided case of McGovern v AG (1981)

A trust for a research will ordinary qualify as a charitable trust if , but only if the subject matter of the proposed research is a useful object of study and ,he public , or a sufficiently important section of the public. In the absence of a contrary context however, the court will be readily inclined to construe a trust for researches importing subsequent dissemination of the results thereof. Furthermore , if a trust for research is to constitute a valid trust for the advancement of education , it is not necessary either that the teacher /pupil relationship should be in contemplation or that the persons to benefit from the knowledge to be acquired should be persons who are already in the course of receiving education in the conventional sense.

For the advancement of religion

In the section 99(1) of the Trust Ordinance in Sri Lanka, subsection (c) describes the trusts in relation with religion. It particularly states that for the advancement of the religion or the maintenance of religious rites and practices; . The last part of the sentence was intended to

accommodate local religious practices some of which might not have satisfied the requirement of the public benefit as understood in England.

This has enabled courts of Sri Lanka to uphold trusts to observe annual Muslim festival, and ask to keep a lamp burning in a Buddhist temple.

In the decided case of Rathgama PagngnasekaraThero v Kaldera, court has affirmed that charitable trust can be made in order to keep the "Dolosmahe pahana" burning. And in the decided case of Mohammadu V Meerakandu, observing of Muslim annual festival was affirmed as a valid trust.

Professor L.J.M Corey further cites that Public Benefit test is irrelevant in trusts with the purpose of advancement of the religion. But, English law states about the factor of public benefit. In the decided case of BILMORE vs COATS 1941, Money was settled on trust for the purpose of supporting a community of cloistered nuns. It was held that the trust's purpose fell within the category of advancement of religion, but the purpose was not held beneficial and so was not charitable; the counsel claimed that the purpose was beneficial on the basis that the nuns' prayers delivered a benefit to the wider public, but this benefit was rejected as incapable of proof

For any other purposes beneficial or of interest to mankind not falling with in the preceding categories

Section 99(1)(d) has given stated on the above trusts. In the decided case of Williams Trusts V IRC, a trust was formed in the purpose of enhancement of the culture of

Wales. But courts have stated it as not valid because of the failing of public benefit test.

We can notice that English law has arbitrarily decided on these type of trusts . For an instance in the decided case of Re moss's case, trust was permitted which was on the purpose of caring animals (cats). And the charitable purposes have listed by the charity commission of UK. They are as follows.

1. provisions of public works and services such as the repair of bridges , ports and the provisions for the water and lightning.
2. Relief of unemployment, the promotion of mental or moral improvement.
3. Preservation of public order
4. Promoting of the sound administration and development of law
5. Rehabilitation of ex - offenders and prevention of crime.

In Sri Lanka, courts have considered the facts of beneficial to mankind and they have limited it to only people not for any other living being or environment. This provides legality in formation of trusts on the benefit for the sports and etc.

Three Certainties of the expressed trust and Charitable Trusts

When creating an expressed trust, the rule of three certainties must be considered. As I mentioned in the above Section 6 of the Trust ordinance has mentioned about four certainties that one should consider when creating a trust. Kandasamy v Kumarasekaran.

Section 6 specifically states that , the rule of certainties are subjected to the provisions of sections 5 and 107. But when it comes to the charitable trusts , we can see that the courts has not keenly concentrated on section 6. But , section 99 of the ordinance states that the charitable intention is much important to create a charitable trust.

However the section 6 is already subjected to the section 107, under section 107, a trust may be arisen even in the absence of a written declaration of trust as required by section 5 , or in the absence of a valid legal conveyance to the trustee as required by section 6 , and such trust may be imposed on a person who never agreed to be trustee.

We can satisfy with the conclusion by considering all three provisions discussed above of the trust ordinance (sections 6 , section 99, section 107) that in creation of charitable trusts certainty of the beneficiary, certainty of the purpose and certainty of the property are not considered much important than the certainty of the intention of the settler. And intention to create a trust is the most important certainty when it comes to charitable trusts.

And that conclusion has stated in the decided case of Trustees of the Gomes charitable

trust vs Commissioner of Inland Revenue.

Where court permitted to a charitable trust on building a church and maintenance of it. Writer of this article suggests for an amendment regarding this topic. As mentioned above, there are three parties to a trust bond. Settler, trustee and the beneficiary. And in the process of formation of a trust beneficiaries are needed to be certain. But as discussed in the above paragraph , this rule will not need to be fulfil when creating a Charitable trust. But beneficiary should be a person. No animals or plants can be the beneficiaries of a trust.

The section 3 (e) of the ordinance describes beneficiary as the person whose benefit the confidence is accepted is called the beneficiary and the section 9(1) states that Every person capable of holding property may be a beneficiary.

The word "person" further interpreted in the section 2 of the interpretation ordinance. It states that, Every written law whether made before or after the commencement of this ordinance, unless there be something repugnant in the subject or context "person" includes anybody of persons corporate or unincorporated.

This concludes as a trust for the maintenance of animals or trust for a preservation of forest or regarding environmental protection are invalid.

But, there is a way that one can create trusts which will indirectly makes animals or plants beneficiaries. For an example, one can create a trust for maintaining a process to prevent community from rabies by keeping an asylum

for street dogs. In a way, that make some impact on animals but the major purpose is public benefit.

The amendment that we should look into

As we all know, animals and plants play a major role in our lives. The equilibrium between animals and plants are the reason that human beings are still exists on this planet. That equilibrium is about to be broken because of the consequences of human activities. Near- sighted people are destroying the food chains and habitats of other species, extinction of them cannot be prevented. That eventually effects this generation as well as generations to be born.

The point is, if humans are not taking necessary actions to preserve them who else does that job. Creating trusts making plant and animal species as beneficiaries is one of the best ways to protect them. Because it has the legal protection which strictly bind the trustees to get the job done. Even though the settler is no more, the process will be continued

So, we have to look in to an amendment that makes animals and plants as the legal beneficiaries of charitable trusts. That'll be a huge leap forward in Sri Lankan Law Of Trusts as well as Sri Lankan environmental law.

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මරණ දැඩුවම ක්‍රියාත්මක කිරීමෙන් බල අපරාධ අවම වේද?

සංජීව විමුක්ති මීගහවත්ත*

අපරාධ නීතිය හා 'දැඩුවම' යන සංකල්පය

නීතිය අපරාධ නීතිය හා සිවිල් නීතිය ලෙස ප්‍රධාන වගයෙන් කොටස් දෙකකට බෙදා දැක්විය හැකිය. මෙම වර්ගීකරණය අතිනයේ සිටම පැමිණෙන අතර ප්‍රථමයෙන් අපරාධ නීතිය කෙටුම්පත් කරන ලද්දේ සුමෙරියානු ගිෂ්වාවාරයේ හඳුරාන් විසින් "Hammurabi Code of Laws"¹ ලෙස හැදින්වූ නීති 282 කින් සමන්විත වූ එම අපරාධ නීතියෙහි මුළුක හරය වූයේ ඇසට - ඇසක්, දතට - දතක් යන සංකල්පයෙනි.

පළවන ජ්‍යෙෂ්ඨයෙන් සිවිල් නීතියේ ප්‍රථම කෙටුම්පත්කරු (The Codex Justinianus)² ලෙස සලකන අතර අපරාධ නීතියේ සිවිල් නීතිය සම්බන්ධයෙන් තුනන වර්ගීකරණය පිළිබඳ මූල්‍ය සාක්ෂිය හමුවන්නේ එංගලන්තය නොමැත්වරුන්ගේ ආක්‍රමණයට හාජනය වූ කාලයේ දිය. යුරෝපයේ, 'අපරාධය සඳහා වූ දැඩුවම' යන සංකල්පය මුළුන්ම පැන තැගුනෙන් පැරණි ස්පාංශ්‍ය ද්‍රාගනයක් වන Scholasticism³ තුළිනි. මෙම ද්‍රාගනයට අනුව

* අවසන් වසර, ශ්‍රී ලංකා නීති විද්‍යාලය

¹Biography. 2020. *Hammurabi*. [online] Available at: <<https://www.biography.com/political-figure/hammurabi>> [Accessed 3 May 2020]

²ThoughtCo. 2020. *The Code Of Justinian*. [online] Available at: <<https://www.thoughtco.com/the-code-of-justinian-1788637>> [Accessed 3 May 2020].

³2014. *Law And The Religion*. [ebook] USA: www.v-r.de. Available at: <<https://books.google.lk/books?id=WHqaBAAA>>

දැඩුවම දෙවියන් විසින් ලබා දෙන දේව දැඩුවමක් (Poena aeterna) වූ අතර එය කෙනෙකු මත පටවන ලද්දේ ඔහුගේ මනසට දැඩුවම කිරීමය. පසුව කාලයත් සමග මෙය මුළුක නීති සමග සම්මිගුණය වී අවසානයේ ආමික බලපෑමකින් තොර වූ අපරාධ නීතියක් නිර්මාණය විය.

විවිධාකාර වූ බල සීමා තුළ, විවිධාකාර බල ව්‍යුහයන් තුළ, ක්‍රියාත්මක වන දීන්ඩන නීතිය හෙවත් අපරාධ නීතියෙහි පොදු මෙන්ම විශේෂිත වූ ලක්ෂණය වන්නේ නීතිය කඩ කළ විටදී හෝ නීතිය අනුගමනය කිරීමට අසමත් වූ විටදී යුත්තිය ක්‍රියාත්මක කිරීමේ යාන්ත්‍රණය හරහා දැඩුවම පැනවීමයි. අපරාධයක් සඳහා ලබාදෙන දැඩුවමක් ප්‍රධානවගයෙන් එම අපරාධයේ ස්වභාවය හා දැඩුවම පැනවීමට යම් ව්‍යුහයකට පටරා ඇති බලය මත තීරණය වේ. මෙලස දීන්ඩන කුමවේද තුළින් අපරාධ අවම කිරීමට උත්සාහ කිරීම 'රාජ්‍ය' සංකල්පය බෙහිවීමත් එහා ඇත අතිනය දක්වා විහිදී යයි. වසර දෙදහස් හයසීයකට පෙර බුදුරජ්‍යන් වදාලේ ඕනෑම පුද්ගලයෙකු අපරාධ වලින් වැළැකෙනුයේ 'හිරි ඔතප්' නිසා බවය. එනම් අපරාධයක් කළ බව අනාවරය වීමෙන් ඇති වන ලඟ්ඡාව හා දැඩුවමට ඇති ඩිය නිසා බවය. කෙසේ ව්‍යවද සමාජයක අපරාධ අවමකිරීම සඳහා විවිධ බලව්‍යුහයන් මගින් අපරාධකරු වෙත විවිධ දැඩුවම පනවනු ලැබේ. උදාහරණ ලෙස මරණීය දීන්ඩනය, පොද්ගලික නිදහස

QBAJ&pg=PA169&lpg=PA169&dq=crime+and+punishment+concept+in+Scholasticism&source=bl&ots=TSjKBn_EuW&sig=ACfU3U3gDuwjZacvC0gwvQpe9k-PQDe_QA&hl=en&sa=X&ved=2ahUKEwj7tLynZfpAhX3yTgGHenFDUcQ6AEwCXoECAwQAQ#v=o nepage&q=crime%20and%20punishment%20concept%20in%20Scholasticism&f=false> [Accessed 3 May 2020].

අහිමි කිරීම, රාජ්‍ය නිරීක්ෂණයට හානිය කිරීම (පරිවාස හාරය සහ පොරොන්දු පිට ලබා දෙන තිදහස) දැක්විය හැකිය.

අපරාධයක් සඳහා දැඩුවම් ලබා දීම මගින් මූලික කරුණු රක් සපුරා ගැනීමට අපේක්ෂා කරයි. කෙසේ වුවද මෙවා මත පනවා ඇති විවිධාකම් විවිධ තීක්ෂණ පද්ධති තුළ විවිධාකාර අයන් ගෙනි.

Retribution(විපාකය)

'අපරාධකරුවන් කුම්න ආකාරයකින් හෝ විද්‍යාත්‍ය යුතුය' යන්න මෙම සංකල්පයේ මූලික හරය වේ. අපරාධකරුවන් ලබා ගන්නා තීක්ෂණ විරෝධී වාසියක් හෝ වෙනත් අයෙකුගේ අයිතින් භාක්ති විදීමට විරුද්ධව සිදු කරන අනිසි බලපෑමක් පහ කිරීමට ප්‍රතික්‍රියාව ලෙස වූදිතයා මත ඒ හා සමාන වූ අවාසියක් හෝ බලපෑමක් තීක්ෂණ මගින් පනවනු ලබයි⁴.

Deterrence(නිවර්තනය)

මෙහි මූලික හරය වන්නේ අපරාධකරුගේ අපරාධයට සරිලන ආකාරයේ තීයමාකාර දැඩුවමකට ඔහු ලක් කිරීමය. මෙමගින් අපේක්ෂා කරන ලබන දෙයක් වනුයේ වරක් අපරාධයක් කළ පුද්ගලයෙකු තැවත එම අපරාධයම කිරීම සඳහා ඇති ඉඩකඩ අසුරා අධේර්යමත් කිරීම මගින් සමාජය ආරක්ෂා කිරීමයි. වකාකාරව අනෙකුත් පුද්ගලයන් අනාගතයේ දී එවැනි අපරාධ සිදු කිරීම වළක්වාලීමට අනුබලයක් ලබා දීමද සිදුවේවි⁵.

⁴Team, C., 2020. *Retribution - Definition, Examples, Cases, Processes*. [online] Legal Dictionary. Available at: <<https://legaldictionary.net/retribution/>> [Accessed 3 May 2020].

⁵Team, C., 2020. *General Deterrence - Definition, Examples, Cases, Processes*. [online] Legal Dictionary. Available at: <<https://legaldictionary.net/general-deterrence/>> [Accessed 3 May 2020].

Incapacitation(අයෝග්‍යාචාවයට පත් කිරීම)

මෙමගින් මූලිකව අපේක්ෂා කරනු ලබන්නේ සහ සිදු කරනු ලබන්නේ සමාජයේ යහා පැවැත්මට බාධාවක් වන පුද්ගලයන්ගෙන් සමාජය ආරක්ෂා කර ගැනීම පිණීස අපරාධකරුවන්ට සමාජයෙන් කෙටිකළකට හෝ සඳහම ඉවත් කිරීමයි. එය සිර දැඩුවම හෝ මරණ දැඩුවම වැනි දැඩුවම තුළින් සාක්ෂාත් කර ගැනේ.⁶

Rehabilitation(පුත්‍රුස්ථාපනය)

මෙමගින් අපේක්ෂා කරනුයේ අපරාධයක් සිදු කරන ලබන තැනැත්තෙකු සමාජයට වගකියන යහපත් පුරවැසියෙකු බවට පත් කිරීමය. මෙම ක්‍රමවේදය තුළින් අපරාධය සිදු කරන ලද පුද්ගලයාට වැරදි ක්‍රියාවේ ආදිනව හා අහිතකර සමාජ බලපෑම අවබෝධ කර දී මහු එවැනි වැරදි ක්‍රියාවලින් වලක්වා ගැනීමට අදහස් කරයි.⁷

Restitution(ප්‍රතිසංස්ථාපනය)

මෙමගින් අපරාධයට ලක්වූ තැනැත්තාට වන්දී ලබා ගැනීමට හෝ අපරාධය වීමට පෙර අපරාධ වින්දිතයා සිරී ස්ථානයේ නැවත පිහිටුවාලීම කරනු ලබයි. මුදල් සම්බන්ධ අපරාධ වලදී මෙම ක්‍රමය මගින් අසාධාරණයට ලක්වූ තැනැත්තාට සාධාරණය ඉටු කිරීමට පහසුයයි.⁸

⁶US Legal, I., 2020. *Incapacitation [Sentencing]* Law And Legal Definition | Uslegal, Inc.. [online] Definitions.uslegal.com. Available at: <<https://definitions.uslegal.com/i/incapacitation-sentencing/>> [Accessed 3 May 2020].

⁷Law.jrank.org. 2020. *Rehabilitation - What Is Rehabilitation?*. [online] Available at: <<https://law.jrank.org/pages/1933/Rehabilitation-What-rehabilitation.html>> [Accessed 3 May 2020].

⁸Streicker, S., 2020. *Restitution Law For Victims Of Crime*. [online] www.nolo.com. Available at: <<https://www.nolo.com/legal-encyclopedia/restitution-law-victims-crime.html>> [Accessed 3 May 2020].

මරණ දඩුවම පිළිබඳ සමාජ කතිකාවත

යම් අපරාධයකට දඩුවම තියම කිරීම මගින් සමාජමය පණිවිධියක් ද දෙනු ලබයි. ඒ ආකාරයේ අපරාධ සිදු කිරීමෙන් අන්වන දඩුවම සමාජයට පෙන්වා දීමට අපේෂ්පා කරති. මරණ දඩුවම පැමිණවීමෙන් සමාජය අපරාධ සඳහා බිඟ ඇති වී අපරාධ වලින් ඇත් වනු ඇතැයි ඇතැම්බූ අපේෂ්පා කරයි. සමාජයේ දැඩි අවධානයට පාතු වූ සිද්ධින් හි දී මරණ දඩුවම ගැන කතිකාවතක් ඇති වන්නේ එබැවිනි. මැත ඉතිහාසය දෙස බැලීමේදී, සරත් අභිජිතිය මහාදිකරණ විනිසුරු සාතන සිද්ධියේදී (*Attorney General Vs Potta Naufer and others*)⁹වරදකරුවන්ට මරණ දඩුවම පැමිණවිය යුතු යැයි සමාජ කතිකාවතක් නිර්මාණය විය.

2015 වර්ෂයේදී සිදු වූ සේයා සයදෙව්මි නම් දුරිය දූෂණය කර මරා දීමේ සිද්ධියේදී ද මහත් සමාජ කැළඳීමක් ඇති වූ අතර බොහෝ පුද්ගලයේ එම අවස්ථාවේදී ද වරදකරුවන්ට මරණ දඩුවම දී මරා දුමිය යුතු බව ප්‍රකාශ කළහ. මෙම අවස්ථා දෙකේදීම සැකසුරුවන්ට නිතියි තියෝගනය ලබා ගැනීම පවා දූෂකරකාරයයක් විය. මත්දව්‍ය උවදුර මැඩලිම පිළිස, මත්දව්‍ය වැරදි සඳහා මරණ දඩුවම ලබා සිටින වැරදිකරුවන් කිප දෙනෙකු හෝ එල්ලා මරා දුමිය යුතු බවට හිටපු ජනාධිපති මෙත්පාල සිරසේන මහතා ඉකුත් වසරේදී ප්‍රසිද්ධ වේදිකාවක කළපකායය සමඟ මරණ දඩුවම පිළිබඳ කතිකාවත නැවත කරලියට පැමිණි අතර සමාජයේ මේ පිළිබඳව නැවතත් විවාදයක් ඇති විය.

'සැබැවින්ම මරණ දඩුවම පැනවීමෙන් අපරාධ අවම වේද?' යන්න තොරතුරු මත පදනම් ව තාර්කිකව එලැංජිය යුතු නිගමනයක් විනා දෙනුන් දෙනෙක් එල්ලුවාත් නම් අපරාධ අඩු වේචිසි නිතුවක් මත එලැංජිය යුතු නිගමනයක් නොවේ.

⁹THE ATTORNEY-GENERAL v. POTTA NAUFER AND OTHERS (AMBEPITIYA MURDER CASE)[2007] 2 SLR 144

මරණ දඩුවම පිළිබඳ ශ්‍රී ලංකාවේ ඉතිහාසය හා නිතිමය තත්ත්වය.

අතිතයේදී අලි ඇතුන් ලවා පැශ්වීම, උල තැබීම, තෙල් කටාරම වල දුම්ම මෙන්ම හිස ගසා දුම්ම මගින් මරණ දඩුවම තියාත්මක කළ අතර, 1777 සැප්තැම්බර් මස 23 වන දා ප්‍රාණය තිරැදීද වන තුරු එල්ලා මැරීමේ කුමවේදය හඳුන්වා දෙන්නේ අනෙක් සියලු අමානුශික වූ දඩුවම කුම අහෝසි කරමිනි. මුල්වරට 1812 පෙබරවාරි මස 12 වන දින දී ඉංග්‍රීසි ජාතිකයෙකු සාතනය කිරීමේ වරදකට ඉංග්‍රීසියේ කුල පැපු නැමැති පුද්ගලයෙකුට පැලියගාඩ නගරයේ කොස් ගහක ආධාරයෙන් සැකසු එළිමහන් පෝරකයක් ආධාරයෙන් මරණ දඩුවම තියාත්මක කළ දා පටන් 1976 ජුනි 23 දා තිස්සමහාරාමයේ ගොවියෙකු වූ ජයසිංහ මාංනවිවිග් වන්දුයාස හෙවත් හොඳ පපුවා¹⁰ එල්ලා මරා දමන තුරු මරණ දඩුවම සකියව තියාත්මක කෙරුණි. ඒ වැළිකඩ් සහ බෝගම්බර යන හිර ගෙවල් තුළදිය. 1812 පටන් මේ දක්වා පුද්ගලයන් 2173 ක් සඳහා මරණ දඩුවම තියාත්මක කර ඇත. ගැටුව වන්නේ මේ අතර නිවැරදිකරුවන් කිසිවෙකුත් නොසිටි බවට 100% සහතිකයක් අප කාටවත්ම දිය නොහැකි වීමය.

ශ්‍රී ලංකාවේ පවත්නා නිති ප්‍රතිපාදන අනුව දැන්වනීති සංග්‍රහයේ වැරදි කිපයක් සඳහා මෙන්ම 1986 අංක 26 දරණ පනතින් සංශෝධිත 1929 අංක 17 දරන විෂ වර්ගහා අඩ් අන්තරාදායක මාංශර ආදාළනත¹¹ යටතේ වැරදි සඳහාද මරණ දඩුවම පැමිණවිය හැකිය. ඒවායින් ඇතැම් වැරදි සඳහා මරණ දඩුවම පැමිණවිය යුතුය.

¹⁰Dailymirror.lk. 2020. Death Row Inmates Shudder At News Of Death Penalty. [online] Available at:

<http://www.dailymirror.lk/breaking_news/Death-row-inmates-shudder-at-news-of-death-penalty/108-170075> [Accessed 3 May 2020].

¹¹The Poisons, Opium, and Dangerous Drugs Ordinance No 17 of 1929.

දැන්ඩ නීති සංග්‍රහයේ VI වන පරිවිෂේෂයේ යටතේ 114 වන වගන්ති¹² ප්‍රකාරව රජතුමාට (රජයට) විරැදුළව කුමන්තුණය කිරීම හෝ අනුබල දීම.

VII වන පරිවිෂේෂය යටතේ 129 වන වගන්ති¹³ ප්‍රකාරව හමුදාව තුළ කැරල්ලක් ඇති කිරීමට කටයුතු කිරීම හෝ අනුබල දීම.

XI වන පරිවිෂේෂය යටතේ 191 වන වගන්ති¹⁴ ප්‍රකාරව මරණයෙන් දඩුවම කළ වරදකට වරදකාරයා කරවීමේ අදහසින් බොරු සාක්ෂි දීම හෝ සැදීම මගින් නිරදේශී තැනැත්තෙකු වරදකාරයා වී ඔහුට මරණ දඩුවම දෙන ලද නම්,

XVI වන පරිවිෂේෂය යටතේ 296 වගන්ති¹⁵ ප්‍රකාරව අයක් මිනි මැරීමේ වරද සිදු කර තිබේ නම් හා 299 වන වගන්ති ප්‍රකාරව සිය පණ හාති කර ගැනීමට අනුබල දී තිබේ නම් යන වරදවල් සඳහා මරණ දඩුවම්න් දඩුවමක් කරන ලැබේය හැකි බව දැන්ඩ නීති සංග්‍රහයේ සඳහන්ය.

296 හා 299 වගන්ති යටතේ අධිවේදනා ගොනු කරනු ලැබ වරදකරු වූ විට අනිවාරයයෙන්ම මරණ දඩුවම්න් දඩුවම කළ යුතුය. මිට අමතරව, 1986 අංක 26 දරණ පනතින් සංශෝධනයේ 1929 අංක 17 දරණ විෂ වර්ග, අඩ් හා අර්ථරාදායක මාෂධ ආපදා පනත යටතේ, හෙරායින් 2g ට වැඩියෙන්, කොකේන් 2g ට වැඩියෙන්, මෝරීන් 3g ට වැඩියෙන් හා අඩ් 500g ට වැඩියෙන් ලග තබා ගැනීම හා ජාවාරම් කිරීම සඳහාද මරණ දඩුවම පැනවිය හැකිය.

ඉහත සඳහන් සියලුම වැරදි සඳහා අධි වේදනා ගොනු කරනුයේ මහාධිකරණයේ බැවින්

¹² Section 114, Chapter VI of PENAL CODE

¹³ Section 129, Chapter VII of PENAL CODE

¹⁴ Section 191, Chapter X of PENAL CODE

¹⁵ Section 296, Chapter XVI of PENAL CODE

දැන්ඩන වැඩි කිරීම සඳහා වූ අනියාවනා තීන්දුවක් ප්‍රකාශයට පත් කිරීම වැනි විශේෂ අවස්ථාවකදී හැරෙන්නට සාමාන්‍යයෙන් මරණ දඩුවම ප්‍රකාශයට පත් කරනුයේ මහාධිකරණ විනිශ්චයකාරතුමන්ලා විසිනි. අපරාධ නඩුවිධාන සංග්‍රහ පනතේ¹⁶ 13 වන වගන්තිය අනුව ලිඛිත නීතියෙන් නියමිත දඩුවමක් හෝ වෙනත් දැන්ඩනයක් මහාධිකරණය විසින් නියම කරනු ලැබේය හැකිය. එහිදී දඩුවම ප්‍රකාශ කිරීමට ප්‍රථම විනිශ්චකරු හට ඕනෑම ප්‍රකාශයක් සිදු කිරීමට ඉඩ ලබා දේ. Allocutusලෙස හඳුන්වන මෙය අපරාධ නඩු විධාන සංග්‍රහ පනතේ 280 වන වගන්ති ප්‍රකාරව සිදු කරනු ලබයි. ඒ අනුව වරදකරු ඔහුට මරණ දඩුවම ලබා නොදීමට හේතු දක්වීය යුතු අතර මරණ දඩුවම ක්‍රියාත්මක කරන දිනයකදී ජනාධිපතිවරයා එම ප්‍රකාශය සලකා බලනු ඇති. විනිශ්චකරු කියු දෙයක් අනියාවනයේදී ඔහුගේ වාසියට යොදාගත නොහැකි වුවත් එය අනියාවනයේදී එරහි සාක්ෂියක් ලෙස හාවිතා කළ හැකිය. මේ තත්ත්වය ***Periyambalam V. The Queen 74 NLR515***

NLR515¹⁷ නඩුවේදී තීරණය කර ඇත. පසුව විනිශ්චකාරවරයාද නඩුව සම්බන්ධව ජනාධිපතිවරයාට වාර්තාවක් ලබා දිය යුතු අතර මරණ දඩුවම පැමණවීම නිවැරදි වන්නේ ඇයිද යන්න පිළිබඳ ඇගයිම් වාර්තාවක් ද ඒ සමග යැවිය යුතුය. 1978 ආණ්ඩුවම ව්‍යාවස්ථාවේ¹⁸ 34 වන ව්‍යාවස්ථාව ප්‍රකාරව නඩුව අසනු ලැබූ විනිශ්චයකාරවරයාගේද, නීතිපතිවරයාගේද, අධිකරණ අමාත්‍යවරයාගේද නිරදේශ රහිතව මරණ දඩුවම ක්‍රියාත්මක කිරීම සඳහා බන්ධනාගාර අධිකාරීවරයාට නියෝග කළ නොහැකි අතර ජනාධිපතිවරයාගේ නියෝගය රහිතව මරණ දඩුවම ලැබූ වරද කරුවන් එල්ලා මැරීම සිදු කළ නොහැකිය. එම නිසා ක්‍රියාත්මක නොවුනහොත් මරණ දඩුවම පිවිතාත්තය දක්වා සිරදුවුවමක් බවට පරිවර්තනය වේ.

¹⁶ Section 13 of The Code of Criminal Procedure Act No. 15 of 1979.

¹⁷ *Periyambalam V. The Queen 74 NLR515*

¹⁸ Art 34 of The Constitution of the Democratic Socialist Republic of Sri Lanka.

දඩුවම ලැබෙනුයේ වැරදි කරුවන්ට පමණක්ද?

අපරාධ යුක්තිය පිළිබඳ කතා මිනැං කරම තිබේ. ඒ අතර නිවැරදිකරුවන් වැරදිකරුවන් වූ අවස්ථා ද එමටය.

1887 දී හඩ්ස්පෙත් (Hudspeth)නැමැත්තෙකු සහ ජෝර්ජ් වොට්කින් (George Watking)නැමැත්තාගේ බිරිදී අත්අඩංගුවට පත් වන්නේ වොට්කින් (Watking) ගේ අතුරුදෙන් වීම සම්බන්ධවයි. දීර්ස ප්‍රශ්නකිරීම් වලට අනතුරුව වොට්කින් (Watking) ගේ බිරිදී පවසන්නේ හඩ්ස්පෙත් (Hudspeth) විසින් සිය සැම්ලියා සාතනය කළ බවයි. ඔහුව මරා ඔවුන් දෙදෙනා විවාහ වීමට එසේ කළ බව ඇය පැවසුවාය. ඒ අනුව 1892 දේසැම්බර් 30 වන දින හැරිසන් (Harrison, Arkannas) වලදී හඩ්ස්පෙත් (Hudspeth) ව එල්ලා මරා දමනු ලැබේය. නමුත් පසුව 1893 දී සාතනයට ලක් වූවා යැයි පැවසුන වොට්කින් (Watkin) නිරුපදිතව සිටිය දී නමු විය.¹⁹

නිවැරදිකරුවෙක් වැරදිකරුවෙකු වූ බවට ඇති හොඳම සාක්ෂිය වන්නේ එංගලන්තයේ 1950 දී වූ තිමති එවන්ස් (Timothy John Evans) නැවුවයි.²⁰ සිය දියණියෙන් සාතනය සම්බන්ධයෙන් වැරදිකරු වූ තිමති එවන්ස් (Timothy John Evans) එල්ලා මරා දමනු ලැබේය. පසුව එම තටුවු නිවාසයෙහිම පිවත් වූ ජෝන් ක්‍රිස්ටී (Johne christe) නැමැත්තෙකු අත්අඩංගුවට පත් වන්නේ ඔහු විසින්

¹⁹2020. [online] Available at: <<https://m.martianherald.com/10-people-who-were-wrongly-sentenced-death/page/2>> [Accessed 4 May 2020].

²⁰Api.parliament.uk. 2020. TIMOTHY JOHN EVANS (Hansard, 15 June 1961). [online] Available at: <<https://api.parliament.uk/historic-hansard/commons/1961/jun/15/timothy-john-evans>> [Accessed 4 May 2020].

මිනිමැරුම ගණනාවක් සිදු කළ බවට සැකපිටය. එහිදී ජෝන් ක්‍රිස්ටී (Johne Christe) විසින් තිමති එවන්ස්ගේ (Timothy Evans) දියණියෙන් මරණය ද ඔහු විසින්ම කළ එකක් බවට පාපොච්චාරණය කළ අතර එය සාක්ෂි මගින්ද හෙළි විය. ඉදින් අර එල්ලා මරන ලද තිමති එවන්ස් (Timothy Evans) හට නැවත යුක්තිය ඉටු කරනුයේ කෙලෙසද?

මැතකදී විභාග වූ නඩු විභාග 2 කදී උතුරු අයර්ලන්තයේ ගර්ල්ලා සංවිධාන 2ක සම්පිකයන් සිවි දෙනෙකු (Guildsord – Four)²¹ හා භත් දෙනෙකු (Naguire – Seven)²² ඔවුන්ගේ අපරාධේව්චාරණ මත පමණක් පදනම් ව වැරදිකරුවන් කරන ලදී. වසර ගණනාවකට පසුව හෙළි වූයේ එම පාපොච්චාරණ දෙකම බලෙන් ලබා ගත් බවයි. වාසනාවකට මෙන් ඒ වන විට මහා බ්‍රිතාන්තයේ මරණ දඩුවම ක්‍රියාත්මක නොවන නිසාවෙන් ඔවුන්ට නිදහස ලැබුණි.

රුසියාවේ 1994 දී ඇත්තේව් විකිලේලෝ (Andrei Chikatilo) නැමැත්තෙකු අත්අඩංගුවට ගත් අතර ඔහු දාම මිනිමැරුම 50කට ආසන්න සංඛ්‍යාවක් සිදු කර තිබුණි. ඉන් එක් මිනිමැරුමක් සම්බන්ධවෙනත් නිරදෝෂී පුද්ගලයකු එල්ලා මරා දමා තිබුණි.

ඉහතින් සඳහන් කරන ලද්දේ සිය ගණනක් වූ එවැනි සිද්ධීන් අතරින් ප්‍රසිද්ධ නඩු විභාග කිපයක් පමණි. අපට මෙම උදාහරණ වලින් පෙනී යන්නේ නිවැරදිකරුවන් එල්ලුම් ගහට හෝ විදුලි පුවුවට නොයවා මරණ දුවුවම

²¹History TV. 2020. History TV. [online] Available at: <<https://www.history.com/this-day-in-history/guildford-four-are-cleared>> [Accessed 4 May 2020].

²²BBC News. 2020. The Maguire Family's Lasting Trauma. [online] Available at: <<https://www.bbc.com/news/uk-northern-ireland-46255575>> [Accessed 4 May 2020].

100%ක් නිවැරදිව අපරාධකරුවන්ට පමණක්ම ක්‍රියාත්මක කිරීම ප්‍රායෝගිකව කළ නොහැකි දෙයක් බවයි.

ජාත්‍යන්තර සංවිධාන හා ලෝකයේ අනෙක් රටවල ආකල්පය

මරණ දුෂ්ච්‍රවම ලබා දීමෙන් අපේක්ෂා කරනුයේ අපරාධ අවම කිරීම වූවද බොහෝ සමීක්ෂණ වාර්තා දෙස බැඳීමේදී පෙනී යන්නේ මරණ දුෂ්ච්‍රවම පනවන රටවල හෝ ප්‍රාන්තවල අපරාධ අවම වී නොමැති බවයි.

FBI Uniform Crime report නම් වර්තාව²³ අනුව ඇමරිකාවේ 1990 වසරට සාපේශ්‍රව 2017 වසරේ ආසන්නව අඩ්‍රින් පමණ අපරාධ සනත්වය අඩුව ඇත. නමුත් ඒ 1990 වන වැනි මරණ දුෂ්ච්‍රවම ක්‍රියාත්මක වූ ප්‍රාන්ත ගණනාවක්ම මරණ දුෂ්ච්‍රවම ක්‍රියාත්මක නොකරන පසුබිමකය.

2008 වසරදී RT Strategies ආයතනය ඇමරිකාවේ පොලිස් ප්‍රධානීන් 500 දෙනෙකු යොදාගෙන කරන ලද සමීක්ෂණයකදී අති බහුතරයක් පවසා සිටියේ බල අපරාධ අවම කිරීමට මරණ දුෂ්ච්‍රවම හේතුවක් නොවන බවයි. තවද කොලරාබේ බෝල්බර සරසවියේ සමාජ විද්‍යායේ මහාචාර්ය මයිකල් රුඩ්ලේවි ඇමරිකාවේ සිටි අපරාධ විද්‍යාඡ්‍යයන් යොදාගෙන කරන ලද පරීක්ෂණයකදී ඔවුන්ගේ 88.2% ක්ම කියා සිටියේ මරණ දුෂ්ච්‍රවම බල අපරාධ වලට තිබාරකයක් නොවන බවය.

මරණ දුෂ්ච්‍රවම අපරාධ අවමකිරීමට ප්‍රබලම තිබාරකය වන්නේ නම් මරණ දුෂ්ච්‍රවම ඉතා දැඩිව ක්‍රියාත්මක කරන රටවල බල අපරාධ සනත්වය අඩුවිය යුතුය. වසරකට වැඩිම අපරාධකරුවන් සංඛ්‍යාවක් මරා දමන රාජ්‍ය

වන්නේ වීනයයි.²⁴ වීනය ඉතා දැඩි ප්‍රතිපත්ති අනුගමනය කරන අතර වෙඩි තබා මරා දුම්ම මගින් මරණ දුෂ්ච්‍රවම ක්‍රියාත්මක කරනු ලබයි. එහිදී එම උණ්ඩයේ පිරිවැය පවා රාජ්‍ය මගින් නොදැරීම විශේෂතය. මෙත් වඩා අමානුශික අන්දමකට මරණ දුෂ්ච්‍රවම ක්‍රියාත්මක කරන අරාබිකරයේ රටවල් බොහෝමයක් හිජ්ට සමාජය ප්‍රතික්ෂේප කරන ලද හිස ගසා දුම්ම, ගල් ගසා මරා දුම්ම, අත් පා කපා දුම්ම වැනි ක්‍රියා මගින් දුෂ්ච්‍රවම ක්‍රියාත්මක කළද බොහෝ ජාත්‍යන්තර සංවිධාන හා මානව හිමිකම් ක්‍රියාකාරීන් පෙන්වා දෙන්නේ ඔවුන් ලොවට සත්‍ය තොරතුරු වසන් කරන බවත් අරාබි රටවල් වල අපරාධ අනුපාතය ඔවුන් නිකුත් කරන තොරතුරු වලට වඩා බොහෝ සෙසියින් වැඩි බවත්ය. ඇශ්‍රේනිස්ප්‍රානය, පාකිස්ප්‍රානය, සිරියාව, නයිපිරියාව වැනි මරණ දුෂ්ච්‍රවම ක්‍රියාත්මකව පැවතියදී දිනෙන් දින අපරාධ වැඩි වන රටවල් මරණ දුෂ්ච්‍රවම හා අපරාධ සනත්වය අතර ඇත්තේ ස්වායන්ත සම්බන්ධයක් බව ඔප්පු කර ඇත.

සැම මනුෂ්‍යකුටම ජීවත් වීමේ අයිතිය ඇත. අපරාධ වින්දිතයාට මෙන්ම අපරාධකරුටද එය වලංගුය. මරණ දුෂ්ච්‍රවම යනු ඉතා පැහැදිලිව මිනිසෙකුගේ ජීවත්වීමේ අයිතිය අහිමි කරන දුෂ්ච්‍රවමකි. 1948 දී, හිටපු ඇමරිකානු ජනාධිපතිවරයා වූ ග්‍රෑන්ක්ලින් ඩීරුස්වෙල්ට්වෙගේ බිරිද වූ එලනෝර් රුස්වෙල්ට් ගේ ප්‍රධානත්වයේ සකසන ලද මානව හිමිකම් පිළිබඳ විශ්ව ප්‍රකාශනයේ පැහැදිලිව දක්වා තිබෙනුයේ සැම පුද්ගලයෙකුටම ජීවත් වීමට අයිතියක් ඇති බවය.

“Every Individual has a right to life, liberty and security of his person”²⁵

²³Death Penalty Information Center. 2020. *FBI Crime Report Shows Murder Rates Stable In 2017*. [online] Available at:<<https://deathpenaltyinfo.org/news/fbi-crime-report-shows-murder-rates-stable-in-2017>> [Accessed 4 May 2020].

²⁴Death Penalty Information Center. 2020. *Executions Around The World*. [online]

Available at:

<<https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world>> [Accessed 4 May 2020].

²⁵Un.org. 2020. *Universal Declaration Of Human Rights*. [online] Available at:

1998 රෝම ප්‍රයුජ්‍යිය²⁶ අනුව බිහිවූ අන්තර්ජාතික අපරාධ අධිකරණය (ICC) 2002 ජූලි 1 වන දින සිට අධිකරණ කටයුතු ආරම්භ කරන විට රටවල් 60 ක්ද මේ වන විට රටවල් 120ක් ද විසින් පිළිගෙන ඇති. ICC විභාග කරන වර්සසාතනය, මනුෂත්වයට එරෙහි වැරදි, යුද අපරාධ හෝ ආත්මණ වැනි විය හැකි දරුණුම ගණයේ අපරාධ සඳහා පවා ඔවුන් මරණ දඩුවම නොපමුණුවති. ජාත්‍යන්තර අපරාධ අධිකරණයට බලය ඇත්තේ වසර 30 සඳහා දීර්ඝ වූ සිර දඩුවමක් හෝ අවශ්‍ය විටෙක පිවිතාන්තය දක්වා සිර දඩුවමක් පැනවීමට පමණි.

ලෝක වෛද්‍ය සංගමය (WMA) 1977 දී සේවාක්ෂේප්ම හිදි නිකත් කළ ප්‍රකාශයෙන් සංශ්‍යුතම මරණ දඩුවම අමානුශික හා කෘෂර දඩුවමක් බව කියා සිටියන.²⁷

1966 දෙසැම්බර 19 වන දින එක්සත් ජාතින්ගේ මහා මණ්ඩලයේ දී සම්මත වූ 1976 මාරුතු 23 දා පටන් බලාත්මක වූ UNICCPR ගිවිසුම මගින් මරණ දඩුවම සීමා කිරීමට ඉදිරි පියවර රාජ්‍යක් ගන්නා ලදී. ජිවත් විමෙ අයිතිය සුරක්ෂිත කිරීම සම්බන්ධයෙන් එහි 6 වන වගන්තිය වැදගත් වේ.²⁸

<<https://www.un.org/en/universal-declaration-human-rights/>> [Accessed 4 May 2020].

²⁶Icc-cpi.int. 2020. [online] Available at: <<https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>> [Accessed 4 May 2020].

²⁷Google.com. 2020. [online] Available at: <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj2qt-bgJrpAhWozzgGHSe8DRIQFjAAegQIAhAB&url=https%3A%2F%2Fsljfmsl.sljol.info%2Farticles%2F10.4038%2Fsljfmsl.v9i1.7799%2Fgalley%2F5934%2Fdownload%2F&usg=AOvVaw0I2oCYdKVVLG54Cr77rh0Z>> [Accessed 4 May 2020].

²⁸Ohchr.org. 2020. OHCHR | International Covenant On Civil And Political Rights. [online] Available at:

6 (1) වගන්තිය අනුව සියලුම මිනිසුන්ට ජිවත් විමේ අයිතිය තහවුරු කර ඇත. නමුත් 6 (2) වගන්තිය මගින් මරණ දඩුවම පැනවීම නිසි බලය ඇති අධිකරණයකින් පමණක් සිදු කළ යුතු බව සඳහන් වන අතරම මරණ දඩුවම දරුණුතම අපරාධ සඳහා පමණක් සීමා කළ යුතු බව සඳහන්ය.

මෙවැනිම ඇකාරයේ සර්වනයක් ශ්‍රී ලංකාවේ ආණ්ඩුකුම ව්‍යවස්ථාව තුළද දැකගත හැකිය.

එහි 11 වන ව්‍යාචස්ථාව²⁹ අනුව කිසිම පුරුවැසියකු වද තිස්සා වලට හෝ කෘෂර අමානුශික හෝ අවමන් සහගත සැලකිල්ලකට තැනැහැත් දඩුවමකට යටත් නොකළ යුතුය.

නමුත් 13 (4) ව්‍යාචස්ථාව³⁰ යටතේ නියම කරන ලබන කාරිය පටිපාටියට අනුකූලව නිසි අධිකරණයක් විසන් කරන ලැබු ආයුවකින් මිස කිසිම තැනැත්තෙකුට මරණ දඩුවම ලබා නොදිය යුතුය.

එමෙන්ම UNICCPR හි 5 වන වගන්තිය තුළින් වයස 18ට අඩු දරුවන්ට හා ගරහනී කාන්තාවන්ට මරණ දඩුවම ලබා නොදිය යුතු බව දක්වයි. ශ්‍රී ලංකාවේ අපරාධ නඩු විධාන සංග්‍රහයේ 281 වන වගන්ති ප්‍රකාරව³¹ වයස 18 ට අඩු තැනැත්තෙකු සම්බන්ධයෙන් කටයුතු කළ යුතු අතර එවිට දැන්ව නීති සංග්‍රහයේ 53 වන වගන්තියේ විධිවිධාන සලස්වා ඇති දැන්වන නියමය ඒ තැනැත්තා විෂයෙහි ප්‍රකාශ කළ යුතුය. එමෙන්ම මරණීය දැන්වනයෙන් දඩුවම කළ යුතු තැනැත්තිය ගරහනී ස්ත්‍රීයක් බව කියා සිටින අවස්ථාවකදී අපරාධ නඩු

<<https://www.ohchr.org/en/professionalinterests/ccpr.aspx>> [Accessed 4 May 2020].

²⁹ Art 11 of The Constitution of the Democratic Socialist Republic of Sri Lanka.

³⁰ Art 13(4) of The Constitution of the Democratic Socialist Republic of Sri Lanka.

³¹Section 281 of The Code of Criminal Procedure Act No. 15 of 1979

විධාන සංග්‍රහයේ 282 වගන්ති ප්‍රකාරව³² කටයුතු කළ යුතුය.

ඉහත කි සම්මුතින් හා ජාත්‍යන්තර සංවිධාන වලට අමතරව, ජාත්‍යන්තර සංවිධානය,³³ මරණ දඩුවමට එරෙහි ලෝක හමුල,³⁴ වැනි සංවිධානද මෙම මරණ දඩුවම අහෝසි කිරීමේ සටනේ පෙරමුණේ සිටී.

මරණ දඩුවම සමබන්ධයෙන් ශ්‍රී ලංකාව ජාත්‍යන්තර වශයෙන් දරන මතයද නැවත මරණ දඩුවම ක්‍රියාත්මක කිරීමට මං අනුරයි. මත්ද 2007 සිට එක්සත් ජාතින්ගේ සංවිධානයේදී මරණ දඩුවම තිබෙන රට්ටලවද එය ක්‍රියාත්මක නොකළ යුතු යැයි කියන යෝජනාවට ශ්‍රී ලංකාව ජන්දය ලබා දී තිබේ. මත්ද රාජපක්ෂ මහතා ප්‍රමුඛ කැබිනට් මණ්ඩලය මෙන්ම 2015 දී පටන් මෙම්පාල සිරසේන මහතා ප්‍රමුඛ කැබිනට් මණ්ඩලය පමණක්ද නොව 2018 දී පත් වූ දින 52 ආණ්ඩුවේ කැබිනට් මණ්ඩලයද එක්සත් ජාතින්ගේ සංවිධානයේ දී එකම ස්ථාවරය දරන ලදී. ඒ අනුවද නැවත රටක් වශයෙන් ජාත්‍යන්තරය හමුවේ දෙධාන්‍ය පිළිවෙතක් අනුගමනය කිරීමට අපහසුය.

මරණ දඩුවම පිළිබඳ සාකච්ඡා කිරීමේදී මේ පිළිබඳව සුප්‍රසිද්ධ නඩුවක් වන දකුණු අඩුකානු ව්‍යවස්ථා අධිකරණයේදී විභාග *the state Vs. T Makwanyane and M Mchunu*³⁵ නඩුවේ තීත්දුව ප්‍රකාශයට පත් කරමින් ලන්ගා

³²Section 282 of The Code of Criminal Procedure Act No. 15 of 1979

³³Amnesty.org. 2020. Amnesty International Home. [online] Available at: <<https://www.amnesty.org/en/>> [Accessed 4 May 2020].

³⁴Idpc.net. 2020. The World Coalition Against The Death Penalty (WCADP). [online] Available at: <<https://idpc.net/profile/wcadp>> [Accessed 4 May 2020].

³⁵The state Vs. T Makwanyane and M Mchunu (CCT3/94) [1995] ZACC 3

විනිශ්චයාරවරයා පැවසුවේ මරණ දඩුවම එරට ව්‍යාවස්ථාව පටහැනි බවයි.

“....It follow from the remarks above that as a ‘Punishment’ the death penalty is a violation of the right to life. It is cruel, Inhuman and degrading....”³⁶

මෙම නඩු තීත්දුව අනුවද පෙනී යන්නේ කිසිදු පුරවැසියක් පිවිතය අහිමි කිරීමට රාජුකට ව්‍යවද අයිතියක් තොමැති බවයි.

විවාදයේ අවසන් නිගමනය

මරණ දඩුවම පිළිබඳ විවාදය ඇත අතිතයේ පටන් මේ දක්වාම නොකඩවා පවතින්නකි. ක්‍රි.ප්‍ර 427 දී ප්‍රජාතනත්ත්වාදයේ තිබිරිගෙය වූ ඇතැන්ස් පාර්ලිමේන්තුවේදී (Athenian Assembly) ලියෙන් හා බියෝඩ්ටස් අතර ඇතිවූ විවාදයෙන් පසු මිතිලින් නගර වාසීන්ට මරණ දඩුවම නොපමුණුවා සංවාධ දීමට තීරණය කරන ලදී.³⁷

ශ්‍රී ලංකාවේ දේශපාලන ඉතිහාසය කුළුද මරණ දඩුවම අහෝසි කිරීමට වූ බොහෝ විවාද හා උත්සාහයන් දැකිය හැකිය.

මරණ දඩුවම අහෝසි කළ යුතු බවට පළමු වරට යෝජනාවක් ගෙනාවේ, මහාමානා ඩී. අයේ. සේනානායක මහතාය. ඒ 1928 දිය. එට පසුව ජන්ද 19ක් හා විපක්ෂව 7ක් ලැබුණු විකල්ප දඩුවමක් යෝජනා නොවීම නිසා ඉංග්‍රීසින්ගේ බලපැම මත ප්‍රතික්ෂේප විය. පසුව 1936 දී පානදුර මත්තී සුසන්ත ද ගොන්සේකා යළිත් මරණ දඩුවම අහෝසි කිරීමට යෝජනාවක් ගෙනෙනුයේ දිවි ඇතිතෙක් සිර කර තැබීම විකල්ප දඩුවමක් ලෙස දක්වමිනි.

³⁶The state Vs. T Makwanyane and M Mchunu (CCT3/94) [1995] ZACC 3

³⁷Spot.pcc.edu. 2020. The Mytilenian Debate. [online] Available at: <http://spot.pcc.edu/~rflynn/HST_101/Online%20Readings/Mytilenian_Debate.html> [Accessed 4 May 2020].

එයද ක්‍රියත්මක නොවිණි. 1942 මැයි 21 වනදා මන්ත්‍රී ඒ. පී. ද සෞයිසා යෝජනා කරනුයේ ජුරු සහාවේ එකමතික තීරණයක් නොමැතිව මරණ දැඩුවම ලබා දිය නොහැකි වීමට නීති සැකසිය යුතු බවය. එම යෝජනාවද අවලංගු වූ අතර, ආචාරය කොල්වීන් ආර් ද සිල්වා පාර්ලිමේන්තුවේදී 1956 දී කියා සිටියේ රාජ්‍යයට ඕනෑම දෙයක් ලබාගෙන එය ආපසු ලබා දිය හැක. නැතහොත් වන්දි ලබා දිය හැක. නමුත් ආපසු දිය නොහැකි එක් දෙයක් පවති. ඒ නම් පිවිතය බවය.

“...Of all things that the state may take away from a man, there is one thing that which, If you take away you can not only not return, but can never compensate him for and that is his life...”³⁸

හිටපු අග්‍රාමාත්‍යවරයෙකු වූ එස්. ඩ්බ්ලූ. ආර්. ඩී බණ්ඩාරනායක මහතා මරණ දැඩුවම අභ්‍යාසි කිරීමට යෝජනා කළ අතර සෙනටි සහාවේ දී සම්මත නොවුවද දෙවන වර කියවීමේදී එකවිෂ්ටයෙන් සම්මත විය. දෙදෙවයේ සරදමකට මෙන් එලෙස අත්‍යිය කරන ලද මරණ දැඩුවම බණ්ඩාරනායක මහතාගේ සාතනයේ වැරදිකරුවන්ට දැඩුවම දීමට නැවත 1962 දී ක්‍රියත්මක කළ අතර එය අවසන් වන්නේ 1976 දැක්වා තවත් වරදකරුවන් 89 දෙනෙකු එල්ලා මරා දම්මිනි.

කෙසේ වුවද 1976 සිට මේ දක්වා වසර 44 ක් තිස්සේ කිසිම මරණ දැඩුවම ලැබුවෙක් එල්ලා නොමැති බැවින් එය අපේ රටේ ‘භාවිතය’(state practice) බවට පත්ව ඇත.

ඉහත සැම කරුණක් දෙසම බලන කළ අපට පෙනී යන්නේ අපරාධ අවම කිරීමට මරණ දැඩුවම හේතු නොවන බවත් අපි ද මරණ දැඩුවම ඩුදු නීති පොත් වලට පමණක් සිමා කර (de facto) තැබීම හේ අවශ්‍ය නම් තවත්

පියවරක් ඉදිරියට ගොස් අභ්‍යාසිකර දුම්ම හේ කළ යුතු බවයි.

දැඩුවම යනු දීර්ස අපරාධ යුත්ති ක්‍රියාදාමයක අවසාන අදියරයි. සත්‍ය වශයෙන්ම දැඩුවම ගැන සාකච්ඡා කිරීමට ප්‍රථම වැඩි අවධානයකින් සලකා බැලිය යුතු පුරුව අවධි කිහිපයක් ඇතේ. අපරාධය නිසි ලෙස විරෝධනය කිරීම, අපරාධකරුවා අල්ලා ගැනීම, ඉක්මනින් නඩු පැවරීම, නඩුව ඉක්මනින් විභාගයට ගැනීම, සාර්ථක ලෙස නඩුව මෙහෙයුම්, වරදකරු කිරීම සහ දීජ්ඩ්බනය යන දීර්ස ක්‍රියාවලියේ දීජ්ඩ්බනය යනු අවසන් අංගයයි. එම නිසා පෙර පියවර එකක් හේ අසාර්ථක වුවහොත් අවසන් අංගය වන දීජ්ඩ්බනය සාර්ථක වන්නේ නැතු. එහෙයින් වඩාත් වැදගත් වන්නේ එම පුරුව පියවරයන් නිවැරදිව සහ සාර්ථකව සම්පූර්ණ කිරීමයි. එසේ නොමැතිව අවසාන අංගය වන දැඩුවමෙහි එල්ලී සමාජයක අපරාධ අවම කිරීමට සාකච්ඡා කිරීම එල රහිත දෙයක් බව අව්‍යාදාත්මකය. ඉහත කි දීර්ස ක්‍රියාදාමය අසාර්ථක වීමට විවිධ හේතු රාජියක් බල පා ඇතේ. විමර්ශන නිලධාරීන් හට අවශ්‍ය කරන තාක්ෂණික දැනුම, පුහුණුව හා උපකරණ නොමැති වීම, නීතිඥවරුන්ගේ අකාරුණුස්මකාව, නීතිය වර්ධනයේ හා යාවත්කාලීන වීමේ දුර්වලතා මෙන්ම නඩු කටයුතු ප්‍රමාදයට නිසි පිළියම් නොයෙදීම ඒ අතර ප්‍රධාන වේ. එම හේතු වලට නිසි පිළියම් යොදා යුත්තිය පසිදිලීමේ යාන්ත්‍රණය ගක්තිමත්, කාරුණ්‍යම කිරීමෙන් ඕනෑම සමාජයක අපරාධ අවම කර ගත හැකි බව බොහෝ යුරෝපීය හා සේකුන්ධිනේවියානු රටවල් ඔප්පු කර පෙන්වා ඇතේ.

ආක්‍රිත ලේඛන

- The Code of Criminal Procedure Act No. 15 of 1979
- The Constitution of the Democratic Socialist Republic of Sri Lanka
- The Penal Code

³⁸Daily News. 2020. Colvin The Fighter. [online] Available at: <<http://www.dailynews.lk/2020/02/18/features/211718/colvin-fighter>> [Accessed 4 May 2020].

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CONTEMPORARY ISSUES IN TRADEMARK LAWS IN RELATION TO THE INTERNET (DOMAIN NAMES) WITH REFERENCE TO BRITISH JURISDICTION

Nethmie Yuwanika Ranasinghe*

Introduction

The introductory chapter will provide you a basic idea on the definition of Trademarks and its infringements with reference to the British laws. Along with this idea this article will take lead to provide an idea about the contemporary issues raised along with the globalization in relation to the Trademark laws. Further this area is narrated focusing the infringements that happen through the internet (domain names) and the law is based on the British jurisdiction.

‘Trademark’ means any sign which is capable of being represented in the register in a manner which enables the registrar and other competent authorities and the public to determine the clear and precise subject matter of the protection afforded to the proprietor, and of distinguishing goods or services of one undertaking from those of other undertakings. A trademark may, in particular, consist of words (including personal names), designs, letters, numerals, colours, sounds or shape of goods or other packaging.¹ Trademark infringement happens when the trademark is used in the course of trade.² When the competitor’s trademark is identical or similar in the same cause of trade and when the trademark is used for the unfair commercial gain, in

other words the intention of the trader is to confuse an average consumer and to gain unfairly, and then we could say that the trademark of the original owner is infringed.³

Along with this basic idea of infringements of Trademarks laws and policies, this article will further discuss the Trademark infringements that happen through the internet (domain names). The main objective of choosing this area is to make awareness in Sri Lanka where as the author observed that Sri Lankan perspective on Intellectual property rights are not wide as the world sees it along with the digitalization and globalization.

Therefore, this article is based on the British Jurisdiction and will revolve around the area which was chosen by the author specifying the trademark infringements on the internet. For the content of the article, the author will focus on the areas which are connected to internet as trademark infringements through domain names. Under this each topic where the author intendeds to cover, author will focus and discuss about the method of disputes resolutions when a trademark infringement happen through the internet and the relevant case law judgments.

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¹Trademarks Act 1994

²Trademarks Act 1994

³ Waeld,C, Brown,A, Kheria,S, & Cornwell,J, 2013, *Contemporary Intellectual Property Law and Policy*, United Kingdom.

Trademarks and Internet

Author's main focus is the trademarks violations happen through the internet. As you know internet is something which developed drastically throughout the last decade where now there is a grey area in the Intellectual property laws as the laws are not amended as fast as the technology develop. Intellectual property is a wide area where it covers copyrights, trademarks, industrial designs, and patents, geographical indications etc. Therefore our study is narrowed to the trademark infringements through internet (Domain names).

Trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises which are protected through intellectual property rights.⁴This is the basic idea of the trademarks in the World Intellectual Property Organization (WIPO) website. Contemporary issues in trademark laws are connected to the internet and we only focus on the three areas based on the internet as domain names.

There is a common principle in trademark laws which we should always remember throughout the article is that, trademark laws are subjected to the 'principle of territoriality'. The principle of territoriality means, a trademark is protected under a specific class⁵ for goods and services only under the jurisdiction that the trademark is registered. Therefore, any infringement happen outside the registered jurisdiction is not a valid infringement.⁶If the trademark

owner or the businessmen wanted to protect their trademark in other jurisdictions as well, then they have to register their trademark in that jurisdiction as well. This seems to be impractical to some extent and it is very expensive method. Therefore, to overcome this situation there are WIPO treaties such as Madrid protocol, where the jurisdictions that have signed and entered to this protocol are protected accordingly. Therefore, for a person to register his trademark could register under this protocol and he will get his trademark protected in all the jurisdictions where this protocol is applied. In this way the system has become more easy and faster yet, there are disadvantages as well because this is a very expensive method where small scale businessmen face uncomfortable with the situation. Therefore, it is very essential to move forward keeping this principle in our minds since the topic is revolving around trademarks and internet which contradicts with each other.

As you all know, internet is something anyone can access worldwide with the connection and it is a question and a grey area in law to overcome each and every dispute happening across the borders. Therefore, along with this topic, the author will further revolve around the dispute resolution mechanism as well for a better knowledge along with reference to the British jurisdiction and laws.

⁴<https://www.wipo.int/trademarks/en/>

⁵<https://www.wipo.int/classifications/nice/en/>

⁶ Dinwoodie, G.B, 2005, 'trademarks and Territoriality: Detaching Trademark law from the Nation-state', Journal article in Houston law

review, pp. 891-907, viewed 5th May 2020,

Research Gate,

https://www.researchgate.net/publication/228175737_Trademarks_and_Territory_Detaching_Trademark_Law_from_the_Nation-State

Trademarks and Domain Names, Its Disputes, Resolution Methods and Laws

Domain names got its public attention along with the globalization and digitalization. The clash between domain names and traditional intellectual property laws are one of the first ever clashes happened in this field and the rise of new technologies.⁷ Therefore there was a clear dispute between the two in cross-border litigation since trademark laws are always bound to the principle of territoriality while the domain names are available global. In this scenario the Alternate dispute resolution methods came up for the dispute resolution mechanisms.⁸

Having this concept in mind, the author will drag your attention to the definition of the domain name. Domain name is part of the address of the location of a site on the internet.⁹ And the registration of a domain name could be registered as a trademark. This could be the same word mark of the registered trademark where again conflicts will occur. Therefore for the registration of a domain name is wholly based on first come first serve basis. Yet, for an infringement of a trademark to happen, it should be identical or similar and the class should be same. This is further explained later in this article.

Disputes between Domain names and Trademarks

These disputes between domain names and trademarks happen due to various reasons. As a major dispute, author states that non-internet based businesses or companies are now willing to develop their businesses and they wish to use the same name on the internet; but the issue that will come up is that the domain name will be global where another person can also have a domain name as your business, while the trademark is limited to a specific jurisdiction that it is registered. The case *Prince v. Prince Sports Group Inc.*[1998] FSR 21 showed that as no two domain names could be identical, only business can have a particular name. This means, two domain names cannot be identical, but a domain name and a business name or a registered trademark could be identical. Though a trademark and a domain names are similar or identical, an infringement won't happen. There are other sections and cases laws too where it mentions that we should look in to several other factors too in law before deciding whether a domain name has infringed a trademark. These external factors and laws are discussed later in this article.

Another dispute may occur due to the intention of the competitors are not necessarily to confuse an average person but to drag the internet users to their website. This is commonly known as 'cyber-squatting'¹⁰ finally the dispute may

⁷ Waeld,C, Brown,A, Kheria,S, & Cornwell,J, 2013, *Contemporary Intellectual Property Law and Policy*, United Kingdom.

⁸ Waeld,C, Brown,A, Kheria,S, & Cornwell,J, 2013, *Contemporary Intellectual Property Law and Policy*, United Kingdom.

⁹Ibid.

¹⁰<https://en.wikipedia.org/wiki/Cybersquatting>

occur due to ‘reverse domain name hijacking’,¹¹

Resolution of the above mentioned disputes could be mainly resolved through ICANN UDRP system.¹² Secondly, through the Judicial system. The case, ***BT v. One in a Million*** [1999] RPC 1 showed us that the practice of law clearly disapproved the cyber-squatting.

For the disputes mentioned above, it is needed to focus on the British case laws at this stage when discussing dispute resolution method along with the globalization and determine the external factors or other laws specifically before justifying whether a domain name has infringed a trademark.

Resolution of Disputes under the British Laws

Section 10(1) of the Trademarks Act 1994 states that ‘a person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.’¹³ It was mentioned in the case laws that for anyone who claims that their trademark is infringed through by the use of a domain name and relying on this section, then the specification of goods and services in connection with the registered trademark is going to have to be identical with that used in the connection with the domain name, and if not there will be no infringement under section 10(1) of the Trademarks Act.¹⁴ According to the case ***Avent Inc v Isoact Limited*** [1998] FSR 16

it was concluded that ‘it was not providing advertising and promotional service within the class 35, but as class 42.’ Therefore, the services provided were different and therefore, no infringement happened under the section 10(1) of the Trademark Act 1994. As we can see, the infringement of a trademark by a different domain name is not only based on by infringing section 10(1) but, other specified factors too matters in law for an infringement.

Author will now drag your attention to the remaining subsections of the section 10 of the Trademarks Act 1994.

Section 10(2) of the Trademarks Act 1994 states that ‘A person infringes a registered trade mark if he uses in the course of trade a sign where because; the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.’¹⁵ To explain the related laws, author cites the case, ***Phones 4U Ltd v Phone4u.co.uk Ltd*** [2006] EWCA Civ 244, [2007] RPC 5. In this case as the external specification to decide that the section is not infringed, the judge stated that when registering the relevant domain name, it was subjected to certain limitations. These limitations are subjected to the Trademarks Act 1994.¹⁶ Accordingly, *section 13 of the Trademark Act 1994* states

¹¹[https://icannwiki.org/Reverse Domain Name Hijacking](https://icannwiki.org/Reverse_Domain_Name_Hijacking)

¹²<https://www.icann.org/resources/pages/help/dndr/udrp-en>

¹³Trademarks Act 1994, s.10(1)

¹⁴*Avent Inc v Isoact Limited* [1998] FSR 16

¹⁵Trademarks Act 1994, s.10(2)

¹⁶Trademarks Act 1994, s.13

that, ‘An applicant for registration of a trade mark, or the proprietor of a registered trade mark, may; disclaim any right to the exclusive use of any specified element of the trade mark, or agree that the rights conferred by the registration shall be subject to a specified territorial or other limitation; and where the registration of a trade mark is subject to a disclaimer or limitation, the rights conferred by section 9 (rights conferred by registered trade mark) are restricted accordingly. Provision shall be made by rules as to the publication and entry in the register of a disclaimer or limitation.’

Therefore, in the above case they have added a limitation when registering because without a limitation the trademark was not distinctive. Accordingly, the court stated that ‘rights in the logo mark were limited to the colours red, white and blue and as a result there were no infringement in the section 10(2) by the registration of the domain name Phone4u.co.uk Ltd.

The fact we should drag our attention is that if there is no limitation imposed on the trademark when registering, then this section could have been violated by the domain name.

Section 10(3)of the Trademarks Act 1994 states that, ‘A person infringes a registered trade mark if he uses in the course of trade (in relation to goods or services), a sign which is identical with or similar to the trade mark, where the trade mark has a

reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.’¹⁷The main landmark cases for this section are *BT v One in a Million*¹⁸and *Global Projects management LTD v Citigroup Inc. and others*.¹⁹Author of this article will not go into the deep explanations and discussions of the above cases yet, it is essential to keep in mind that these two cases are a major when discussing the section 10(3) of the Trademarks Act. Accordingly, the proper measurement to identify how this section is infringed is in doubt. Even the above mentioned cases under section 10(3) do not specify clear grounds on what specifications that this section will be infringed. Therefore, is it clear that we could identify this is an area where the laws should be developed with the technology.

Resolution of Disputes under ICANN UDRP system

ICANN UDRP²⁰ is the reason for not having number of cases in the courts. Because most of the disputes are referred and solved through alternative disputes resolution systems.²¹The ICANN UDRP applies to domain names registered in gTLDs.²²*Article 4*of the procedure and rules mentions the important part of dispute resolution when you are a registered domain name owner and that is contested by the complaint.²³Accordingly, the

¹⁷*Trademarks Act 1994*, s.10(3)

¹⁸ [1999] 4 All ER 476, [1999] RPC 1.

¹⁹[2006] FSR 39, [2005] EWHC 2663 (Ch).

²⁰<https://www.icann.org/resources/pages/help/dndr/udrp-en>

²¹https://en.wikipedia.org/wiki/Alternative_dispute_resolution

²² Waeld,C, Brown,A, Kheria,S, & Cornwell,J, 2013, *Contemporary Intellectual Property Law and Policy*, United Kingdom.

https://en.wikipedia.org/wiki/Generic_top-level_domain

²³ Waeld,C, Brown,A, Kheria,S, & Cornwell,J, 2013, *Contemporary Intellectual Property Law and Policy*, United Kingdom.

applicable disputes are, if ‘your domain name is identical or confusingly similar to a trademark or service mark in which complainant has rights; and you have no rights or legitimate interests in respect of domain name; and your domain name has been registered and is being used in bad faith.’

Under the above mentioned applicable disputes, the claimants could go for arbitration under the available procedure on ICANN UDRP system.

Each domain name registered person should sign up for this dispute resolution process. Therefore, when an infringement occurs in between a domain name and a trademark, then the arbitration clause will apply as the domain name owner has signed and agreed on the UDRP.

Conclusion of the article

Accordingly, we could conclude the above facts stating that, the most recommended dispute resolution method when a trademark is infringed from another jurisdiction and through the internet is the online arbitration process by World Intellectual Property Organization (WIPO). As discussed above, the courts too solved the disputes yet; there is a grey area in law where that is doubtful and arguable and the laws should develop more to overcome these gaps that arise due to the rapid development of the technology.

RIGHT TO EDUCATION AS AN ECONOMIC, SOCIAL, CULTURAL RIGHT IN SRI LANKA

Maldini Herath*

Abstract

This report explores the economic, social, cultural Right to Education in Sri Lanka. The report begins with an analysis of the Right to Education in the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Then the report analyses the Right to Education as an ESCR in the South African and Colombian jurisdictions followed by an analysis of the Right to Education in Sri Lanka. Subsequently the report focuses on the international obligations undertaken by Sri Lanka pertaining to ESCRs and the judicial activism in incorporating international standards pertaining to the Right to Education in Sri Lanka.

Right to Education in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights

The Vienna Declaration and Program of Action² adopted by consensus by 171 States

participating in the World Conference on Human Rights held in Vienna in June 1993 declared that ‘All human rights are universal, indivisible and interdependent and interrelated’.³ Article 22 of the UDHR stipulates that everyone’s rights to social, economic and cultural rights are “indispensable” for the “free development of his personality”.⁴ The United Nations General Assembly proclaimed the years 1995-2004 as the World Decade for Human Rights Education.⁵ The Universal Declaration of Human Rights declares the Right to Education while the International Covenant on Economic, Social and Cultural Rights further states that the State is the main actor responsible for implementing this right.⁶

In the exact words of Eleanor Roosevelt⁷, “UDHR is not a treaty; it is not an international agreement. It is not, and does not purport to be a statement of law, or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the

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² Vienna Declaration and Programme of Action

³‘Need to incorporate economic, social and cultural rights in Sri Lanka’s future Constitution’ Daily Mirror (Colombo, 25 October 2016)

⁴ Art 22 UDHR

⁵ Richard Pierre Claude, ‘The Right to Education and Human Rights Education’ (2005) 2 SUR - Int'l J on Hum Rts 37

⁶ Kate Halvorsen ‘Notes on the Realization of the Human Right to Education’ (1990) 12 Human Rights Quarterly <<https://www.jstor.org/stable/762529>> accessed 14 February 2020

⁷ Chair of the UN Commission on Human Rights during the drafting of the Declaration

General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.” Principles initially considered by the international community to be “only” goals or aspirations can develop into binding norms over time, if they become accepted as customary international law.⁸ Thus, many of the Universal Declaration’s provisions have become incorporated into customary international law which is binding on all states. Article 26 of the UDHR does not only refer to primary education. It states that technical and professional education must be made generally available and higher education too on the basis of merit.⁹

The articles of the UDHR paved the way for the ICESCR.¹⁰ Everyone is equally entitled to the Right to Education irrespective of race, ethnicity, gender, age, nationality, religion, socio-economic condition, health status, disabilities and sexual orientation.¹¹ The exercise of the Right to Education enables the individual to experience the

8 Hurst Hannum , ‘The UDHR in National and International Law’ (1998) 3 Health and Human Rights, Fiftieth Anniversary of the Universal Declaration of Human Rights

<<https://www.jstor.org/stable/4065305>>

accessed 14 February 2020

9Tristan McCowan, ‘Reframing the universal right to education’ (2010) 46 Comparative Education

<<https://www.jstor.org/stable/25800021>>

accessed 14 February 2020

10 Global Citizenship Commission, The Universal Declaration of Human Rights in the 21st Century in Gordon Brown (ed), Book Subtitle: A Living Document in a Changing World Book (Open Book Publishers 2016) <<https://www.jstor.org/stable/j.ctt1bpmb7v.12>>

benefit of other rights, including both economic, social and cultural rights, and civil and political rights.¹² Yet social and economic rights are dependent on the availability and distribution of resources unlike civil and political rights.¹³

CESCR is the body of independent experts that monitors implementation of ICESCR by State parties.¹⁴ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) was entered into force on 5 May 2013.¹⁵ It allows the CESCR to receive and consider communications from individuals or groups who are victims of violations of any ESC rights of the ICESCR under the jurisdiction of a State party to the Covenant.¹⁶ The Committee will only consider a communication after all available domestic remedies have been exhausted, unless domestic remedies are unreasonably prolonged.¹⁷ The Human Rights Council

11 'Interim Report on the Right to Education' (2006) 7 Asia-Pac J on Hum Rts & L 110

12 Ibid

13 Global Citizenship Commission, The Universal Declaration of Human Rights in the 21st Century in Gordon Brown (ed), Book Subtitle: A Living Document in a Changing World Book (Open Book Publishers 2016) <<https://www.jstor.org/stable/j.ctt1bpmb7v.12>>

14 Handbook on International Covenant on Economic, Social and Cultural Rights (2015) Published by PWESCR (Programme on Women’s Economic, Social and Cultural Rights)

15 Ibid

16 Ibid

17 Ibid

appoints Special Rapporteurs to address specific country situations.¹⁸

Right to Education as an ESCR in South African and Colombian jurisdictions

South Africa

The South African Constitution states that “everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible.”¹⁹

In *Governing Body of the Juma Musjid Primary School v. Juma Musjid Trust*²⁰ the Court identified that the right to basic education imposes on private parties, a duty to respect, and not interfere in its exercise. The Court also distinguished the constitutional right to basic education from higher education, stating that unlike the right to higher education, which the State is obligated to make progressively available, the right to basic education is “immediately realizable.” While in *Madzodzo et al v. Minister of Basic Education et al* the Court identified that the right to basic education is also “an empowerment right”. The High Court ordered the government to ensure that all schools identified in an audit as having furniture shortages to be provided adequate age and grade appropriate furniture which would enable each child at the identified schools to have his or her own reading and writing space.

Furthermore, in *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa & Government of the Province of Western Cape*²¹ the complaint alleged that the educational needs of children with severe and profound intellectual disabilities were not being adequately met by the South African and Western Cape governments. Here the Court considers both the positive and negative dimensions of the Right to Education and concludes that the State policy violated children's rights in both respects. In fact, the Court discovered that the State's policy infringed on the rights of the severely disabled children in respect to their Right to Education, right to equality and right to dignity.

Colombia

The Colombian Constitution describes education as an “individual right” and states that “education will be free of charge in the State institutions...” and that “it is the responsibility of the State...to guarantee an adequate supply of the service, and to guarantee for minors the conditions necessary for their access to and retention in the educational system.”²² Article 67 defines “education as compulsory for children between five and fifteen years of age and it is free unless parents are able to pay.” In addition, the Constitution of 1991 requests the Ministry of Education to present a national educational plan every 10 years to be implemented across the country.²³

¹⁸ Ibid

¹⁹ Constitution of the Republic of South Africa, Art 29.

²⁰ [2011] ZACC 13

²¹ Case no: 18678/2007

²² Constitution of Colombia, Art 67.

²³ Cabrera Pena, Juliana, "Education in Post-Conflict Colombia" (2018).Master's Theses. 1061.

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Julio David Pérez vs. Mayor's Office of Montería²⁴ was a writ requesting the appointment of a sign language interpreter to enable students with hearing disabilities to continue their studies. This case led to a review of public policy regarding inclusive education in Colombia. The Constitutional Court concluded that the Right to Education was violated, and granted protection to the fundamental right to inclusive education. In

Piedad Cristina Peña, on behalf of her daughter, María Alejandra Villa, vs. Entidad Promotora de Salud (EPS) Coomeva²⁵ the Court made reference to Colombia's obligations under Article 12 of the ICESCR and Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD). The Court ruled that the State must ensure that persons with disabilities are not excluded from educational opportunities on the basis of their disability. The Constitutional Court resorted to international human rights law instruments to highlight the interrelationship between the rights to health and to education in order to protect the rights of persons with disabilities.

Moreover, **Decision C-376/10 of the Colombian Constitutional Court** restates that human rights treaties and comments by bodies regarding economic, social and cultural rights are part of the Colombian legal system. The plaintiffs filed a constitutional claim arguing that Law 115 of 1994 did not comply with international

human rights standards by allowing for the option to charge fees on primary education. The Court found this law to be unenforceable, considering that fees may not be applied to official primary education, but only to secondary and higher education levels. According to the Court, charging fees in the primary education level could become a barrier to accessing the education system.

Right to Education as an ESCR in Sri Lanka

Sri Lanka has a history of having socio-economic welfare systems in place, without it being necessarily in the constitution.²⁶ Although economic, social and cultural rights are not constitutionalized, citizens have access to free education, which signifies that the State recognizes ESC rights.²⁷ Socio-economic rights are also 'rights'.²⁸ The Right to Education is both guaranteed by Article 13(2) of ICESCR and Article 28(1) of Convention on the Rights of the Child (CRC).

Through the CRC, the Committee on the Elimination of Discrimination against Women (CEDAW) and other covenants, there has been considerable reinforcement of the justiciability of ESC rights over the years. Social and economic rights are dependent on the availability and distribution of resources, unlike civil and political rights.²⁹ In addition, social and

²⁴File T-2650185

²⁵File T-2.500.563

²⁶ Amra Ismail, 'Constitutionalising economic, social and cultural' Daily Mirror (Colombo, 25 April 2017)

²⁷ Ibid

²⁸Amal De Chikera, 'Are Socio-economic rights, rights?' (Groundviews, 4 December 2017)

<<https://groundviews.org/2017/04/12/are-socio-economic-rights-rights/>> accessed 8 April 2020

²⁹ Global Citizenship Commission, The Universal Declaration of Human Rights in the

economic rights are linked to civil and political rights because respect for human dignity requires that both be upheld.

These rights entail both positive and negative obligations.³⁰

Justiciability of the Right to Education is inseparable from the justiciability of other rights, such as the right to non-discrimination and the right to information.³¹ The Right to Education has been recognized by the Sri Lankan judiciary through the wide interpretation of the right to equality.³² Yet some argue that Courts lack the institutional capacity required to effectively adjudicate these rights.³³ School admissions and university admissions have been challenged before Court on the basis of violation of the right to equal treatment before the law. Sri Lanka is a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) since 1980. But as stated by the monitoring UN Committee on Economic, Social and Cultural Rights in its concluding observations of 2010, “the Covenant has not been given full effect in the domestic legal order and although some of its

provisions are justiciable before the Supreme Court, they are rarely invoked.”³⁴

International obligations undertaken by Sri Lanka pertaining to ESCRs

The Constitution reform process was a great opportunity for ESC rights to be made enforceable. The Public Representations Committee’s (PRC) report clearly showed the aspirations of the people in relation to the various dimensions of rights. Accordingly, not only did people want their civil and political rights guaranteed, but they also wanted other rights such as the access to education ensured.³⁵ Under Chapter 12 titled ‘Fundamental Rights’, the PRC report recommends the inclusion of education among other ESC needs into the new constitution.³⁶ The Sub-Committee on Fundamental Rights of the Constitutional Assembly of Sri Lanka in its recently published report also emphasizes the relevance of introducing justiciable economic, social and cultural rights in the national constitution.³⁷

²¹st Century in Gordon Brown (ed), Book Subtitle: A Living Document in a Changing World Book (Open Book Publishers 2016) <<https://www.jstor.org/stable/j.ctt1bpmb7v.12>>

³⁰ Amra Ismail, ‘Constitutionalising economic, social and cultural’ Daily Mirror (Colombo, 25 April 2017)

³¹ ‘Interim Report on the Right to Education’ (2006) 7 Asia-Pac J on Hum Rts & L 110

³² Mario Gomez, Conor Hartnett and Dinesha Samaratne ‘Constitutionalizing Economic and Social Rights in Sri Lanka’ (2016) CPA Working Papers on Constitutional Reform No. 7

³³ Ibid

³⁴ ‘Sri Lanka Urged to Recognise Economic, Social and Cultural Fundamental Rights’ (Sri Lanka BRIEF, 13 January 2017) <<https://srilankabrief.org/2017/01/sri-lanka-urged-to-recognise-economic-social-and-cultural-fundamental-rights/>> accessed 8 April 2020

³⁵ Amra Ismail, ‘Constitutionalising economic, social and cultural’ Daily Mirror (Colombo, 25 April 2017)

³⁶ PRC report on FR

³⁷ ‘Sri Lanka Urged to Recognise Economic, Social and Cultural Fundamental Rights’ (Sri Lanka BRIEF, 13 January 2017)

The most fundamental critique of the inclusion of social and economic rights in the Constitution is the argument that social and economic rights being ‘positive’ rights, are not rights. Hence should not be recognized by the state.³⁸ A positive right compels the provision of a service by the government. A group of legal professionals have been campaigning against the incorporation of the ESCR in the proposed new Constitution.³⁹ Legal and other professionals who oppose the incorporation of the ESCR in the proposed new Constitution argue that the ESCR should be realized through directive principles of state policy rather than enshrining them as justiciable rights in the Constitution.⁴⁰

The PRC Report on Public Recommendations on Constitutional Reform advocates the inclusion of several economic and social rights in the new constitution, including the ‘Right to Education’⁴¹ The PRC’s proposal includes a right to “a primary, secondary and tertiary education at the cost of the State.”⁴² Yet the limited resources in Sri Lanka are a challenge to the fulfillment of all social and economic rights. Non-Governmental Organizations and other civil society

groups are effective actors in holding States accountable for human rights obligations.⁴³ Reference to ICESCR and General Comments by human rights activists will also help to promote advocacy.⁴⁴

Activism of the Supreme Court in incorporating international standards pertaining to the Right to Education in Sri Lanka

In *Samarakoon v UGC*⁴⁵ it was held that the petitioner’s fundamental rights guaranteed by article 12(1) of the Constitution were violated due to the denial of admission of the petitioner to the Medical Faculty based on the policy in the UGC handbook. Here, through the wide interpretation of the right to equality enshrined in Article 12(1) of the Constitution, the Court has recognized the right to access to education, which is not expressly recognized in the Sri Lankan Constitution. In the University admission cases, the Court has also relied on the concept of legitimate expectation in addition to the UDHR and the Directive Principles of State Policy in recognizing a

<<https://srilankabrief.org/2017/01/sri-lanka-urged-to-recognise-economic-social-and-cultural-fundamental-rights/>> accessed 8 April 2020

³⁸ Mario Gomez, Conor Hartnett and Dinesha Samaratne ‘Constitutionalizing Economic and Social Rights in Sri Lanka’ (2016) CPA Working Papers on Constitutional Reform No. 7

³⁹ Muttukrishna Sarvanathan, ‘Including economic, social and cultural rights in the new Constitution’ The Sunday Times (Colombo, 8 October 2017)

⁴⁰ Ibid

⁴¹ Mario Gomez, Conor Hartnett and Dinesha Samaratne ‘Constitutionalizing Economic and Social Rights in Sri Lanka’ (2016) CPA Working Papers on Constitutional Reform No. 7

⁴² PRC Report (n 48) 101

⁴³ *Handbook on International Covenant on Economic, Social and Cultural Rights* (2015) Published by PWESCR (Programme on Women’s Economic, Social and Cultural Rights)

⁴⁴ Ibid

⁴⁵ [2005] 1 Sri LR 11

violation of the right to equality where the state is found to have acted arbitrarily.⁴⁶

In Kaviratne v Pushpakumara, Commissioner General of Examinations, Department of Examinations⁴⁷ the Court observes that the Court has from ‘time to time’ recognized the Right to Education by reference to Article 12(1) of the Constitution. The Court makes reference to the Right to Education as described in the UDHR, as well as the obligation to eradicate illiteracy under the Directive Principles of State Policy, in supporting the argument that the right to equality includes the Right to Education. This case suggests that the Court upholds a Right to Education. The recognition of a Right to Education involves very specific substantive obligations on the part of the State as described under the ICESCR which Sri Lanka has acceded to.⁴⁸ The Convention allows rights to be ‘progressively realized.’ This requires signatories to take concrete steps to fulfill such rights while acknowledging that constraints in resources hinder immediate realization.

In Kaviratne v Pushpakumara, Commissioner General of Examinations, Department of Examinations, and the Supreme Court makes reference to the Right to Education, which is illustrated by Article 26 of the Universal Declaration of Human Rights (UDHR).⁴⁹ The Court quotes Article 26(1) of the UDHR which states that “Everyone has the Right to

Education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” And the Court observes that Article 27(2)(h) of the UDHR which refers to the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to Education at all levels has been provided under the Chapter on directive principles of State policy in the Constitution.⁵⁰ Moreover, the Court also observes that by way of application of Article 12(1) of the Constitution, the Court had upheld the Right to Education.⁵¹

Accordingly, in many decisions the Supreme Court had made order not only with regard to the admission of children to Government Schools, but also to National Universities. Therefore, it can be said that the said right has been accepted and acknowledged by Sri Lankan Courts through the provisions embodied in Article 12(1) of the Constitution, although there is no specific provision dealing with the Right to Education in the Constitution, as in the Universal Declaration of Human Rights.

Furthermore, in De Soyza v Minister of Education⁵²(HIV/AIDS Case) the Court highlighted article 27(2)(h) of the Constitution, and recognized that the State should ensure the right to universal and

⁴⁶ Mario Gomez, Conor Hartnett and Dinesha Samaratne ‘Constitutionalizing Economic and Social Rights in Sri Lanka’ (2016) CPA Working Papers on Constitutional Reform No.

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⁴⁷ S.C. (FR) Application No.29/2012

⁴⁸ Dinesha Samaratne, ‘Recent Trends in Sri Lanka’s Fundamental Rights Jurisdiction’ (2016) XXII The Bar Association Law Journal

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

⁵² SC(FR) 77/2016, SC Minutes 14 March 2016

equal access to education at all levels, since it is a directive principle of State policy.

Conclusion

ESCRs transform needs into rights. And in a century where the gap between the rich and the poor is widening, ESCRs are a mechanism for upholding social justice. The situation arisen from the Corona virus pandemic in 2019/2020 is a vivid example of the ‘digital divide’ between developed nations and developing nations, which alludes to this gap. Not every student has access to the internet and digital apparatuses to engage in online learning. And approximately 1.2 billion students are affected by school closures worldwide due to this pandemic.⁵³ As the Guardian articulates it, “When the world changes in nine minutes, it rarely changes equally.”⁵⁴ And, the most economically aggrieved in society will be the most at risk.⁵⁵ Hence all children should be provided with technology to learn outside school.⁵⁶ And, it is a violation of the Right to Education to deprive certain categories of students from the access to education perpetrated by the ‘digital divide’ during a pandemic which requires the lockdown of society.

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1796 බ්‍රිතාන්‍ය කිරීටයට ලංකාව යටත් වීමේ සිට 1917 දක්වා වූ ගත වර්ෂයකටත් අධික කාල පරිච්ඡේදය කුළ ඉංග්‍රීසි භාර නීතිය දිවයිනට හඳුන්වා දීමේ අනුතුමික ක්‍රියා පිළිවෙළෙහි ප්‍රධාන

ක්‍රියාකාරකම දෙකක් දැකිය හැකි. එනම් අධිකරණයේ ක්‍රියාකාරිත්වය සහ ව්‍යවස්ථා මගින් භාරයේ ආනුරූපික කරුණු වලට නෙතික වලංගුතාවක් ලබා දීමයි. 1801 අධිකාර පත්‍රයේ 39 වගන්තිය අනුව ශ්‍රී ලංකා ගේෂ්‍යාධිකරණයට, මහා බ්‍රිතාන්‍යයේ වාන්සරි මහාධිකරණ අනුරූප වන අයුරින් කටයුතු කරන සාධාරණත්වයේ අධිකරණයක් වශයෙන් ක්‍රියාත්මක කිරීමට බලය පැවරීම භාර නීතිය මෙරට පැමිණීමේ මූලාරම්භය වේ¹. 1833

පුදුප්තියේ 27 වන වගන්තිය මගින් අන්තිම කැමති පත්‍ර අවස්ථාවල දී භාර ඇති වන බැවින් පොල්ම්සරුවන් හා අද්මිනිස්ත්‍රාත් බලපත්‍ර සම්බන්ධයෙන් දිස්ත්‍රික් අධිකරණයට බලය ලබා දීම භාර සංකල්පය ශ්‍රී ලංකාවට ප්‍රවිෂ්ට වීමට හේතු විය. තවද 1871 දේපල හා භාරකරුවන්ගේ ආයා පනත² භරණ ද භාර නීතිය ශ්‍රී ලංකාවට ප්‍රවිෂ්ට විය.

Carimjee v. The Municipal Council³ නඩු තීරණය ශ්‍රී ලංකාවට භාර නීතිය හඳුන්වා දීම සම්බන්ධව වැදගත්ම නඩු තීරණයක් ලෙස සඳහන් කළ හැකි බව මහාචාර්ය එල් ජේ එම් කුරේ මහතා දක්වයි⁴. 1909 කාල වකවානුවේ තීරණය වූ **Mahamado V. Ussen⁵** නඩු තීරණයේදී මේවැවන් විනිසුරුතුමන් දක්වූයේ 1893 ඉංග්‍රීසි භාර පනත ශ්‍රී ලංකාවේ නීතිය තොවුවද රාජකීය ව්‍යවස්ථා මගින් ගත හැකි වැදගත් මූලධර්ම ලංකාවට හඳුන්වා දීම උච්ච බව පැවසිය. තවද භාරකරුවකුට භාර දේපල සම්බන්ධව යය හිමියන්ගේ යය පියවීමේ අධික්‍රියා සික්මක් හිමිකර දුනි. ඒ අනුව තරක කළ හැකිකේ ඉංග්‍රීසි භාර නීති සංකල්ප මස්සේ මෙරට භාර නීතිය සංවර්ධනය වී ඇති බවයි.

මෙලෙස වර්ධනය වූ ශ්‍රී ලංකා භාර නීතිය 1916 භාර කෙටුම්පත රාජකීය සභාවට නීතිපතිවරයා විසින් හඳුන්වා දීමෙන්⁶ පසු 1917 අංක 9 දරණ

* අවසන් වසර, නීති පියා, කොළඹ විශ්වවිද්‍යාලය

¹L.J.M Cooray,'The Reception in Ceylon of the English Trust' (first published, Cambridge University publishing

1971) p.19

²The property and Trustees Ordinance ,1871

'Section 2 and section 3'

³(1905) 1 Bala.Rep.75

⁴ibid 1 , p.24

⁵(1909) 1 CLR 53

⁶(1916) Ceylon Hansard 247/8

භාර ආදා පනත ලෙස භාර නීතිය 1918 අප්‍රේල් 16 දින සිට ක්‍රියාත්මක වීම ආරම්භ වුනි.⁷

1917 න් පසු භාර සංකල්පයේ යෙදීම භා සංවර්ධනය

භාර ආදා පනත එංගලන්තයේ අධිකරණ තිර්මාණය කරන ලද නොතික සිද්ධාන්ත සංග්‍රහ ගත කොට සකසා ඇති. මේ හේතුව නිසා ව්‍යවස්ථා අර්ථ නිරුපණය කිරීමේද ඉංග්‍රීසි නඩු තීන්දු වලට විශාල අනුතායන බලයක් ඇති. නමුත් නීතිය සංගෘහීත වූ පසුව එහි ප්‍රහාරය කුමක් වුවත් ඒ නීතිය අවසාන මූලාශ්‍රය වන නිසා අදාළ නඩු තිරණ අනුගමන සේ සැලකිය නොහැකිය.

භාර ආදා පනතේ 2,100,111 වගන්ති වලින් ඉංග්‍රීසි නීතිය අදාළ කර ගැනීමට විධිවිධාන සලසා ඇති. විශේෂයෙන් භාර ආදා පනතේ හිස්තැන් පිරවීමට ඉංග්‍රීසි නීතිය යොදා ගැනීම පිණිස ඉන් ඉඩ සලසා ඇති. මේ අතරින් 2 වන වගන්තිය කෙරෙහි විශේෂ අවධානයක් යොමු කළ යුතුවේ.

"මේ ප්‍රයුෂ්ථියේ හෝ වෙනයම් ප්‍රයුෂ්ථියක කිසිම නිශ්චිත විධිවිධානයක් නොමැති භාරයකට සම්බන්ධව නැතහොත් නීතියේ ව්‍යංගයෙන් හෝ සම්පූර්ණක්තියෙන් උද්ගතවන හෝ හටගන්නා භාරයක ස්වරුපයක් ගත් බව බැඳීමකට සම්බන්ධ සියලුම කරුණු එංගලන්තයේ මහාධිකරණයේ තත්කාලයේ බල පවත්නා සාධාරණත්ව මූලධර්ම මගින් නිශ්චය කළ යුතුය."

මෙහිදි එංගලන්තයේ තත්කාලයේ බල පැවැත්වෙන සාධාරණ මූලධර්මයන වචන වලට අනුව 2 වන වගන්තියේ විධිවිධාන ප්‍රකාර ලංකා භාර නීතියට ඇතුළත් කළ හැකි වන්නේ භාරවලට සීමා වූ හෝ අදාළ වූ සාධාරණත්ව මූලධර්ම පමණි. මෙහි සාධාරණත්ව මූලධර්ම යන්නෙන් කුමක් අදහස් වේද? එහිදි සාධාරණත්ව මූලධර්මයක් පසුකාලීනව ලිඛිත වී ඇත්තම් එය තවදුරටත් සාධාරණත්ව මූලධර්මයක් නොවේ. ලිඛිත නීතියකි. ලිඛිත

දෙයක් තවදුරටත් සාධාරණත්ව මූලධර්මයක් ලෙස මෙරට නීතියේ හිස්තැනක් පිරවීමට යොදා ගත නොහැකි බවට තර්ක කළ හැකිය. ඒ අනුව භාර ආදා පනතේ දෙවන වගන්තිය හරහා ඉංග්‍රීසි සාධාරණත්ව මූලධර්ම බල පැවැත්වීමට ඉඩ සලසා ඇති.

ඒ අනුව Muttalib v. Hameed⁸, D.A.perera v. Scholastica⁹ ආදී නඩු තිරණ තුළින් මෙම දෙවන වගන්තියේ ප්‍රායෝගික ක්‍රියාකාරීත්වය දැකිගත හැකි වූවද මැත කාලීනව තිරණය වූ නඩු තීන්දු තුළ එවැනි තත්ත්වයක් දැක ගත නොහැකි.

ශ්‍රී ලංකාවේ භාර නීතියේ යෙදීම ප්‍රධාන වගයෙන් ප්‍රකාශිත, අනුමිත භාර හා පූජ්‍ය භාර යන සංකල්ප අනුසාරයෙන් ගොඩනැගී ඇති. භාර ආදා පනතේ 90 වගන්තියේ විග්‍රහ වන අනුමිත භාර සංකල්පය ඉඩම් භා ණය වංචා සම්බන්ධ නීතියේද යොදා ගනී. වංචාවක් සිදුකර අපුතු ලාභයක් ලබා විශ්වාසනිය සම්බන්ධතාවක් උල්ලංසනය කර ඇති විට අධිකරණය මැදිහත් වීමෙන් මෙම භාර සකසයි.¹⁰

ණයකරු විසින් සම්පූර්ණ මුදල ගෙවා නීම කළ විට දේපළ නැවත ඔහු වෙත පවරා දෙන බවට වාචික පොරොන්දුවක් ගෙව හිමියා ලබා දෙයි. එහෙත් එකි නිශ්චිල දේපළ එහි මුල් අයිතිකරු හෙවත් ඣයකරු වෙත නැවත පවරාදීම ගෙහිමියා ප්‍රතික්ෂේප කළහොත් බලවත් අසරණ තත්ත්වයට පත්වෙන්නේ ඣයකරුය. රීට හේතු වන්නේ මුදල ගෙවු පසු දේපළ ආපසු පවරා දෙන බවට කිසිදු ලියවිල්ලක් ගෙවා නීම නොමැති සාක්ෂි ආදා පනතේ 92 වගන්තියේ භා වංචා වැළක්වීමේ ආදා පනතේ 2 වන වගන්තියේ ප්‍රතිපාදන ඣයකරුට අවාසි සහගත වේ. එහිදි ඣයකරුට අධිකරණයේ පිහිට පැනීමට සිදුවේ.

⁸[1950] 52 NLR 97

⁹[1955] 57 NLR 265

¹⁰D.J. Hayton, 'Fundamental principles of law: the Law of trust' (first published, sweet & Maxwell 2003) p.22

එමෙන්ස ආසාධාරණයකට ලක් වූ අයෙකුට තමා සත්හාවයෙන් එකී දේපල විකිණීමක් සිදු නොකරන ලද බවත්, එකී දේපලෙහි එල ප්‍රයෝග්තන ලැබේමේ අයිතිවාසිකම තමන් වෙත රදාවා තබාගෙන තිබූ බවත්, සත්‍යය ලෙසම අත්සන් කරනු ලැබූ විකුණුම්කයරට අමතරව ව්‍යංග නැතහොත් වාචික උකස්කරයක් පාරුගවකරුවන් අතර තිබූ බවත්, වාචික සාක්ෂි ඔස්සේ අධිකරණය සැකිමකට පත් කළ හැකි නම් අදාළ දේපල තැවතන් අදාළ කොන්දේසි වලට යටත්ව ගෙකරු වෙත පැවරිය යුතු බවට ගෙනිමියාට එරහිව තියෙයාගයක් ලබා ගැනීමට ගෙකරු වෙත අයිතිවාසිකමක් පවතී. මේ තත්ත්වය සාකච්ඡා කරන ප්‍රධාන මූලධර්මය අනුමිත හාර පිළිබඳ මූලධර්මයයි.¹¹

Gould v. Innasitamby¹² නැවුවේදී මිඩිල්ට්‌න් විනිසුරුතුමාගේ තීරණය වූයේ “අනුමිත හාරයක් ඇති කළ තැනැත්තාට නඩුවේ අවස්ථානුගත කරුණු අනුව නොතාරිස් ඔප්පුවක් නොතිබුණ ද සහන ලැබේමට හිමිකමක් ඇත.” ඒ අනුව හාර නීතිය අවස්ථානුගත සිද්ධීමය කාරණාවලට උචිත පරිදි යොදා ගැනීමට හැකියාව පවතී.

මැත කාලීනව අනුමිත හාර සංකල්ප යොදා ගැනීමේ වර්ධනය අවස්ථාවක් ලෙස 2017 වර්ෂයේ දී තීරණය වූ **Senadheerage Chandrika Suarshani v. Somawathi**¹³ නැඩු තීරණය දැක්විය හැක. එහිදී ගරු අධිකරණය,

“It should be mentioned here that, a perusal of the many decisions which have examined whether a Constructive Trust has arisen will demonstrate that there are many types of ‘attendant circumstances’ which could arise for consideration when a Court

¹¹වතුර අමරතුංග, ‘අනුමිත හාර සිද්ධාන්තය සහ එය ශ්‍රී ලංකාවේ නීතියට අදාළ වන ආකාරය’ නීතිය 24 කළුපය, 2015 ,නීතිය පදනම ප්‍රකාශනය) පිටු 140

¹²[1904] 9 NLR 177

¹³SC Appeal No. 173 / 2011

determines whether a Constructive Trust has arisen.”

යනුවෙන් අනුමිත හාර පිළිබඳව අර්ථවිග්‍රහයක් ලබා යුති. ඒ අනුව මැත කාලීනව හාර සංකල්පයේ යෙදීම නඩු තීරණ ඔස්සේ වර්ධනය වී ඇති බව පසක් වේ.

පූණ්‍ය හාර සංකල්පයේ යෙදීම

මෙරට ආවේණික සමාජ ආර්ථික සහ සංස්කෘතික ගති ලක්ෂණ මත පදනම් වෙමින් හාර ආදාළ පනතේ⁹⁹ වගන්තියේ සිට 109 දක්වා පූණ්‍ය හාරවලට අදාළ ප්‍රතිපාදනවලට අධිකරණය විසින් සපයා ඇති අර්ථ විවරණය මගින් ශ්‍රී ලංකාවේ පූණ්‍යහාරවල ව්‍යසරිය පැහැදිලි ලෙස තීර්වවනය කර ඇත.

එහිදී හාර ආදාළ පනතේ⁹⁹ වගන්තිය අනුව ශ්‍රී ලංකාව තුළ හෝ පිටත ජනතාවගේ හෝ ජනතාවගෙන් කොටසක අර්ථලාභය පිණිස දිරිඳකාව යුරු කිරීම, අධ්‍යාපනය නාග සිවුවීම, ආගම දියුණු කිරීම හා මෙම වර්ගයන්ට අදාළ නොවන්නා වූද මුළු මුළු වර්ගයාගේ එලදායි හා අර්ථලාභය පිණිස පූණ්‍ය හාර ඇති කළ හැකිය.

The commissioner of inland revenue v.

Cross Raj chandra¹⁴ නැඩු තීරණය අනුව දිලිඹුගැහැණු ලමයින් සඳහා දැවැනි ලබාදීමට ඇති කරන ලද හාරයක් පූණ්‍ය හාරයක් බව අධිකරණය තීරණය කර ඇත. ශ්‍රී ලංකාවේ 1907 සාමාන්‍ය විවාහ නීතිය අනුව ‘දැවැන්ද’ යන සංකල්පය ශ්‍රී ලංකා නීතිය තුළ පිළිනොගත් සංකල්පයක් වුවද පූණ්‍ය අරමුණක් වෙනුවෙන් නීත්මාණය කළ දැවැන්දක් හාර ආදාළ පනත යටතේ පූණ්‍ය හාර යන්නට ගැනෙන බව අධිකරණය අර්ථකතය කිරීමෙන් ගම්‍ය වන්නේ සමාජ, ආර්ථික කරුණු මත පදනම් වෙමින් හාර ආදාළ පනතේ පූණ්‍ය හාර ප්‍රතිපාදන අර්ථ විවරණය කර ඇති බවයි.

මෙහිදී 99 වගන්තියේ දැක්වෙන ආගමික වතාවත් හා ආගමික පරිවාරන් එංගලන්තයේ අධිකරණ අර්ථකතය යටතට නොවැවෙයි.

¹⁴[1965] 67 NLR 174

මන්ද *Gilmour v .Coals*¹⁵ තීන්දුව අනුව පූණු කටයුත්තකට පොදු ජන යහපත අඩංගු වන නිසා ඩුදෙක් පුද්ගලික අභිලාෂයෙන් කරන ආගමික වතාවන් හෝ ආගමික පරිවයන් එංගලන්ත නීතිය අනුව පූණු කටයුත්තක් නොවේ. ශ්‍රී ලංකාවේ අධිකරණ භාර ආයා පනතේ 99 වගන්තිය යටතේ පූණු කටයුතු අර්ථකථනය කිරීමේදී, තීමරු රිතියේ දැක්වෙන පොදු ජන යහපතට වඩා ලංකාවේ පවතින යථාර්ථය සැලකිල්ලට ගෙන ඇත. එනම් ශ්‍රී ලංකාවේ සංස්කෘතික වපසරිය හා ආගමික ආයතන නඩත්තුව සඳහා ඇති මාර්ගයක් ලෙස භාර නීතිය බව අධිකරණය අර්ථවිවරණය කර ඇත.

භාර සංකල්පය යෙදෙන විවිධ පනත්

භාර සංකල්පය ආයතනයක සේවකයන්ගේ විශ්‍රාම වැටුප් කළමනාකරණය කිරීම සඳහා යොදා ගනී.¹⁶

ශ්‍රී ලංකාවේ 1980 අංක 46 දරන සේවා තියුක්තිකයන්ගේ භාර අරමුදල් පනත අනුව රජයේ විශ්‍රාම වැටුපට සූදුසුකම් නො ලබන සේවකයන්ගේ සූබසාධනයට මේ පනත ඉවහල් වීම¹⁷, භාර නීතියේ යොදා ගැනීම සංවර්ධනය වූ අවස්ථාවකි. මෙම පනතේ 24 වගන්තිය අනුව¹⁸ අභින්තාවක් නිසා සේවා තියුක්තිය

¹⁵[1949] AC 426

¹⁶Kaushani Pathirana, Modern use of trust in commercial transactions :possible reforms in the Sri Lankan trust law<<http://www.cmb.ac.lk>> accessed 10 April 2020

"The rust can be used by an employer to arrange a pension scheme for his employee. The benefit of using the trust structure for a pension fund is that if the employer comes into financial difficulty there is a separation of money of pension fund"

¹⁷Employees trust fund board

<<https://www.Etfb.lk>> accessed 10 April 2020

¹⁸1980 අංක 46 දරන සේවා තියුක්තික භාර අරමුදල් පනත.

අවසන් කරනු ලැබූ විට ප්‍රතිලාභ ගෙවීම පනතේ සාධනීය ලක්ෂණයක් වන අතර ඒ තුළින් භාරය පිළිබඳ සේවක විශ්වාසය ඇති කිරීමට හැකි විම භාර නීතියේ සංවර්ධනයට ඉවහල් වන බවට තරක කළ හැකි ය.

2009 අංක 51 දරන ශ්‍රී ලංකාවේ විදේශ මුස්ලිම් අධ්‍යාපන භාරය (සංස්ථාගත කිරීමේ) පනතේ ප්‍රජාවිතාව මෙසේ ය.

"එකී භාරය පිහිටවනු ලැබූයේ යම් පරමාර්ථ සහ කාරණා සඳහා ද , ඒ පරමාර්ථ සහ කාරණා මෙතෙක් කළ එකී භාරය විසින් සාර්ථක ලෙස තියාත්මක කර සහ ඉවුකර ඇති හෙයින් ද එකී භාරය සංස්ථාගත කරන ලෙස ඉල්ලා ඇති බැවින් ද ඒ ඉල්ලීම ඉටු කිරීම මහජන යහපත පිණිස වන හෙයින් ද ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ ප්‍රජාමෙන්තුව විසින් මෙසේ පනවනු ලැබේ"

ල් අනුව 'මහජන යහපත පිණිස' ¹⁹ පනත පැනවීමේ අරමුණ දැක්වීම , භාර ආයා පනතේ 99 (1) (ඇ) විධිවිධානය ගම්මා වේ. මෙම පනතේ 3 (ආ) වගන්තිය අනුව²⁰ අධ්‍යාපනය දියුණු කිරීම පොදු පරමාර්ථයක් වන බව දැක්වීම යනාදිය තුළින් පූණු භාර සංකල්පය මෙරට භාවිතාව හා වර්ධනය සිදු වී ඇති බව පසක් නො වේ ද?

එමෙන්ම, මහජන යහපත අරමුණු කර ගනීමින් 2010 අංක 3 දරන හැම්පේටන් විලේප් ශ්‍රී ලංකා භාරය (සංස්ථාගත කිරීමේ) පනත, 2006 අංක 28 දරන ජාතික රක්ෂණ භාර අරමුදල පනත, මෙරට තියාත්මක වීම ශ්‍රී ලංකාවේ භාර නීතියේ භාවිතය හා සංවර්ධනය භාර ආයා පනතට පමණක් සීමා නො වූ බව තරක කළ හැකි ය. භාර සංකල්පය තුළ බඳු සම්බන්ධ රිති යෙදෙනු ඇති.²¹ එහිදී ශ්‍රී ලංකාවේ 2017 අංක 24 දරන

¹⁹2009 අංක 51 දරන ශ්‍රී ලංකාවේ විදේශ මුස්ලිම් අධ්‍යාපන භාරය (සංස්ථාගත කිරීමේ) පනත

²⁰ibid

²¹Dr. Kanagisvaran to speak on Trust Law in Sri Lanka (Daily Mirror, Sri Lanka 7 Feb

දේශීය ආදායම් පනතේ 57 වගන්තිය²² අනුව භාර මත බඳු පැනවීමේ හැකියාව පවති සි. තවද බඳු නීතියට අදාළ ව වාසිකත්ව රිතිය (Residence rule) යටතේ භාරයක වාසිකත්වය දේශීය ආදායම් පනතේ ආමන්තුණය කර ඇත. එහි දී 'භාරයක්' තක්සේරු වර්ෂයක් සඳහා ශ්‍රී ලංකාවේ වාසිකයෙකු වන බව දැක්වේ.²³ මේ අනුව ගම් වන්නේ බඳු සැලසුම්කරණ උපක්‍රමයක් ලෙස භාර සංකල්පය යොදා ගන්නා බවත් එය භාර නීතියේ සංවර්ධනයට පමණක් නොව ශ්‍රී ලංකාවේ සමස්ත ආර්ථික සංවර්ධනයට ඉවහල් වන බව නො වේ ද? මේ තුළින් භාර ආදා පනත පමණක් ම නොව මෙරට ව්‍යවස්ථාදායකය සම්මත කරන ලද වෙනත් පනත් ද භාර සංකල්පයේ යෙදීම හා සංවර්ධනයට ඉවහල්වන බව පැහැදිලි වේ. මෙලෙස වර්ධනය වූ භාර සංකල්පය යොදා ගැනීම වර්තමානයේ 2018 අංක 6 දරන භාර (සංගේධන) පනත හරහා යම් වර්ධනයක් වුවද, එය සමස්ත භාර සංකල්පයේ ප්‍රගමනයට හේතු වූයේ ද යන්න විමර්ශනය කළ යුතු වේ.

2018 අංක 6 දරන භාර (සංගේධන) පනත

සියවසකටත් වචා පැරණි භාර ආදා පනත සංගේධනය කිරීම පිළිබඳ ව ඉදිරිපත් කළ යෝජනාව 2018 මාර්තු 20 වන දින ශ්‍රී ලංකා පාර්ලිමේන්තු හැන්සාංචී නිල වාර්තාවේ සඳහන්වේ. ඒ අනුව භාර ආදා පනත සංගේධනය කිරීමේ අරමුණු මෙසේ ය.

2019)<<http://www.pressreader.com>> accessed 11April 2020

"The income tax rules applicable to trusts witnessed a complete overhaul with enactment of the new inland revenue Act recently"

²²2017 අංක 24 දරන දේශීය ආදායම් පනත

57 (1) වගන්තිය : "2 උප වගන්තියට යවත්ව, භාරයක් එහි අර්ථලාභීන්ගේ වෙන් ව බද්ද අයකරනු ලැබේමට යවත් විය යුතු ය"

²³2017 අංක 24 දරන දේශීය ආදායම් පනත 69 (3) වගන්තිය

" භාරකරුවන්ගේ ආරක්ෂකයන්ගේ සහ භාරයේ අර්ථලාභීන්ගේ අනනුෂතාව සම්බන්ධයෙන් භාරකරුවන් විසින් ප්‍රමාණවත් නිරවදා සහ කාලීන තොරතුරු ලබා ගැනීම සහ පවත්වා නො යාමට මේ තුළින් භාරකරුවන්ට නීයම කරනවා... මුදල් විශුද්ධිකරණය සහ තුස්තවාදය සඳහා මුදල් සැපයීම සම්බන්ධ අපරාධ වැළැක්වීම..."²⁴ භාර තොරතුරු යාවත්කාලීන කිරීම, මුදල් විශුද්ධිකරණය හා තුස්තවාදයට මුදල් සැපයීම වැළැක්වීම සංශෝධනයේ අරමුණ වුවද මෙම සංශෝධනය භාර නීතියේ සංවර්ධනයට ඉවහල් වූයේ ද යන්න එහි ප්‍රතිපාදන ඇසුරින් වීමිය යුතු ය.

2018 වර්ෂය තෙක් ප්‍රකාශිත භාර සම්බන්ධ නිශ්චිත නිරවචනයක් නො තිබුණි. මෙම පනත හරහා භාර ආදා පනතේ 3 වගන්තියට එක් කළ (ඡ) උප වගන්තිය²⁵ අනුව ප්‍රකාශිත භාර අර්ථ දැක්වීම භාර නීතියේ සාධනීය ලක්ෂණයකි. මෙහි 19 (ඇ) වගන්තිය අනුව භාරකරුවකු විසින් ප්‍රකාශිත භාරයක් සම්බන්ධයෙන් තොරතුරු වාර්තාවක් තබා ගත යුතු බව දැක්වේ. ඒ තුළින් පනතේ මූලික අරමුණක් වන මුදල් විශුද්ධිකරණය හා තුස්තවාදයට මුදල් සැපයීම වැළැක්වීම සඳහා මෙම විධිවානය හේතු වන බවට තරේක කළ හැකි ය. මන්ද, 19 (ඇ) (1) වගන්තිය අනුව ප්‍රකාශිත භාරයක භාරකරුවන්ගේ යම් තැනැත්තකු පිළිබඳ ව තොරතුරු ලබා ගැනීමේ අයිතිය ඇදාළ අධිකාරීන්ට පවතින බැවිනි.

තවද, ප්‍රකාශිත භාරයක් ඇති කිරීමේ දී ඒ භාරයේ භාරකරු තමා ලග ඇති තොරතුරු වාර්තාව මාස තුනකට වරක් යාවත්කාලීන කළ

²⁴2008 මාර්තු 20, හැන්සාංචී වාර්තාව, 538

පි.<<http://www.parliament.lk>>accessed 10 April 2020

²⁵2018 අංක 06 දරන භාර (සංගේධන) පනත (ඡ) වගන්තිය

"ප්‍රකාශිත භාරය යන්නෙන්, භාරයේ කර්තා විසින් භාරයේ අරමුණ නිශ්චිත ව දක්වම්න් සාමාන්‍යයෙන් ලිඛිත වූ සාධන පත්‍රයක් මින් ඇති කරනු ලබන භාරයක් අදහස් වන අතර එහෙත් එට අනුමත භාරයක් හේ තත්වාකාර භාරයක් ඇතුළත් නො වේ"

යුතු වේ.²⁶ එමගින් ප්‍රකාශිත හාර සම්බන්ධයෙන් යම් සංවර්ධනයක් හාර නීතියට මෙම විධිවිධාන හරහා සිදු වුව ද ප්‍රායෝගික ව හාරකරුවන් මේ සඳහා යොමු විමෝ දී හාරකරුවන්ගේ උත්තන්දුව හා කාර්යක්ෂමතාවය සම්බන්ධ ව ප්‍රායෝගික ගැටළ මත වේ. ඒ අනුව තර්ක කළ හැකිකේ හාර සංකල්පය සම්බන්ධ ව නියෝග ගැසට් කිරීමේ දී ප්‍රායෝගික ව යොදා ගැනීම සම්බන්ධ ව අවධානය යොමු කළ යුතු බවත්, මුදල් වැළැක්දිකරණය හා තුස්කවාදයට මුදල් සැපයීම වැළැක්වීමේ අරමුණට බාධා වන බැවින් මෙම ප්‍රතිපාදන තවත් ගක්තිමත් කළ යුතු බව නො වේ ද?

සමස්තයක් ලෙස හාර සංශෝධන පනත කුළ ප්‍රකාශිත හාර සම්බන්ධයෙන් අවධානය වැඩි වශයෙන් යොමු කර, තුස්කවාදයට මුදල් සැපයීම හා මුදල් වැළැක්දිකරණය වැළැක්වීමේ අරමුණට පමණක් සීමා වී ඇති අතර හාර ආයුර පනතේ පවත්නා මූලික ගැටළ සඳහා විසඳුම් ආමත්තුණය කිරීමට ව්‍යවස්ථාපායකය උත්සුක නොවීම මෙහි ප්‍රධාන දුරවලතාවකි. මෙම තත්ත්වය හාර සංකල්පය මෙරට යොදා ගැනීම සම්බන්ධ ව යම් සාධනිය තත්ත්වයක් ඇති වුව ද, එමගින් ශ්‍රී ලංකාවේ වර්තමානයේ හාර සංකල්පය යොදා ගැනීමේ සමස්ත වර්ධනයක් ඇති වී නොමැති බවට තර්ක කළ හැකි ය.

එංගලන්ත අධිකරණ පාත්‍රතාව සමග සංසන්දිතය

මෙරට හාර ආයුර පනතට 2018 ගෙනෙන ලද සංශෝධනය සඳහා එංගලන්තයේ **The money laundering, terrorist financing and transfer of funds (Information on the payer) Regulations 2017²⁷** හි ආභාෂය ලැබේ

²⁶2019 ජනවාරි 28, අංක 2018/10 අතිවිශේෂ ගැසට් පත්‍රය

²⁷The money laundering, terrorist financing and transfer of funds (information on the payer) Regulations

ඇති බව තර්ක කළ හැකිය. මත්ද මෙම රෙගුලාසියේ විධිවිධානන්හි 44 වගන්තිය²⁸ සංශෝධනය හාර ආයුර පනතේ 19 වගන්තියේ දැක්වන හාරකරුවකු තොරතුරු වාර්තා තබා ගැනීම පිළිබඳ විධිවිධානයන්, හාරය පිළිබඳ තොරතුරු සපයා ගැනීමට අදාළ අධිකාරීන්ට පවත්නා බලය පිළිබඳ විධිවිධාන සමාන වේ.

ඒ අනුව මෙරට හාර නීතියේ සංවර්ධනය සිදු කිරීමේදී එංගලන්තයේ හාර නීතියේ සංවර්ධනය අවස්ථා උපයෝගී කර ගැනීම සාධනිය කරුණක් වුවද, මෙරට හාර නීතිය සංශෝධනය සඳහා මෙරට පවත්නා දුරවලතාවන් හඳුනා ගනීමින්, එංගලන්ත නීතිය ආභාෂ කර හාර නීතිය සංවර්ධනය කළ යුතු නොවේද?

එංගලන්තයේ **Knight v. Knight²⁹** තුළ නීත්‍යාලුවේදී හාරයක් සංස්ථාපනය වීමට අවශ්‍ය නිශ්චිතතාවන් ලෙස දැක් වූ හාරයේ අරමුණ නිශ්චිත විය යුතු වීම, හාර දේපල නිශ්චිත විය යුතු වීම, අර්ථලාභියා නිශ්චිත විය යුතු වීම යන කාරණා ත්‍රිත්වය ලංකාවේ හාර ආයුර පනතේ 6 වන වගන්තියට සමාන වේ.

2017<<http://www.legislation.gov.UK>>sccessed 11 April 2020

²⁸44-(1) The trustees of a relevant trust must maintain accurate and up-to-date records in writing of all the beneficial owners of the trust, (5) the trustees of a relevant trust must on request provide information to any law enforcement authority - (a) about the beneficial owners of the trust, and (b) about any other individual referred to as a potential beneficiary in a document from the settlor relating to the trust such as a letter of wishes.

(6) information requested under paragraph (5) must be provided before the end of such reasonable period as may be specified by the law enforcement authority.

²⁹[1840] 49 ER 48

මහාචාර්ය මාක් කුරේ මහතාගේ අදහස අනුව ලංකාවේ හාරකරුවන්ගේ සේවාවන් කුම කුමයෙන් අඩු වී ගෙන යයි³⁰. එංගලන්තයේ 20 වන ගතවර්ෂය වන විට, රස්ම සංස්ථා හා බැංකු හාරකරුවන් වීමට හේතු වූයේ වේගයෙන් වර්ධනය වන ආර්ථික සංවර්ධනයට රැකුලක් වශයෙනි. හාරකර්තා විසින් කුලියට හාරකරුවන් වශයෙන් බැංකු පත් කළ ද බැංකු එම වගකීම පිළිනොගන්නා තත්ත්වයක් පවතී³¹. මෙම පසුව්ම ශ්‍රී ලංකාවේ හා එංගලන්තයේ හාර නීතිය යොදා ගැනීම හා එහි සංවර්ධනයට ප්‍රධාන බාධාවක් ලෙස සැළකිය හැකි ය.

ඉන්දියාවේ අධිකරණ පාත්‍රතාව සමග සංස්න්දනය

ශ්‍රී ලංකාවේ හාර ආදා පනතේ 6 වන වගන්තිය හා නිදසුන් ඉන්දිය හාර ආදා පනතේ 6 වන වගන්තියේ³² අනුපිටපතක් ලෙස සැළකිය හැක. ඒ අනුව ලංකාවේ හා ඉන්දියාවේ හාරයක් සංයුත්ත වීමට සැපිරිය යුතු අවශ්‍යතා සමාන වීමෙන් පැහැදිලි වන්නේ දෙරවෙහිම එකම නීතිය යෙදෙන බවයි. නමුත් ලංකා හාර ආදා පනතේ 2, 99, 100, 110 වගන්ති ඉන්දිය හාර ආදා පනතේ අඩංගු වී නොමැත. විශේෂයෙන් ශ්‍රී ලංකා හාර ආදා පනතේ 2 වන වගන්තිය හරහා ශ්‍රී ලංකාවට ඉංග්‍රීසි නීතිය හඳුන්වා දීම සිදු විය. නමුත් මෙම 2 වන වගන්තියේ අර්ථය ඉන්දිය හාර ආදා පනතේ නොමැත³³.

³⁰L.J.M . cooray, 'The Reception in Ceylon of the English Trust' (fiest published, Cambridge University publishing, 1971,) p. 236

³¹George G. Bogert, "A project for improvement of trust law"<<http://www.jstor.org>> accessed 11April 2020

³²Indian Tr̄st Act,
1882<www.agritech.tiu.ac.in>accessed 11 April 2020

³³U.L.Abdul Majeed,'Equity and the law of trusts'(fiist ed,author publishing,2018)p.69

ඒ අනුව තර්ක කළ හැක්කේ ශ්‍රී ලංකාවේ හාර නීතිය සංවර්ධනයේදී ඉංග්‍රීසි නීතිය ප්‍රබල බලපැමක් කළ ද, ඉන්දියාවේ හාර නීතිය සංවර්ධනයට ඉංග්‍රීසි නීතියේ ආභාෂය පමණක් ලබා ඇති බවයි.

තවද ශ්‍රී ලංකාවේ හාර ආදා පනතේ 99 සිට 109 දක්වා වගන්ති මගින් ප්‍රණා හාර සංකල්පය විගුහ කළ ද එය ඉන්දිය හාර ආදා පනත හා සැපදිමෙදී ඇතුළත්ව නොමැත³⁴. ඒ අනුව ශ්‍රී ලංකාවේ හාර ආදා පනත ඉන්දියාවේ හාර ආදා පනතට වඩා සාධනියත්වයක් ඇති බව තර්ක කළ හැකි ය. ඉන්දියාවේ හා ලංකාවේ හාරයන්ට යටත් දේපලක් මත තවත් හාරයක් සංයුත්ත කළ නො හැකි වූවද එංගලන්තයේ හාරයන් මත හාරයන් පැවතිය හැකිය.³⁵

විශේෂයෙන් එංගලන්තයේ ආරම්භ වූ සාධාරණත්වයේ අයිතිය පිළිබඳ විශේෂනය ඉන්දියාවේ හා ලංකාවේ ත්‍රියාත්මක නො වන්නට ප්‍රතිලාභියාට ලැබෙන අයිතිවාසිකම් සාධාරණත්ව මූලධර්ම මත නොව ව්‍යවස්ථාමය වශයෙන් සපයා ඇති අයිතිවාසිකම් මත පදනම් වීම නිසා බව තර්ක කළ හැකි ය. ඒ අනුව ව්‍යවස්ථාමය වශයෙන් වර්ධනය වූ ශ්‍රී ලංකාවේ හාර නීතිය මෙම රටවල් ද්විත්වයේම හාර නීති සංකල්ප ඇසුරින් සංවර්ධනය වූ බව පසක් නො වේ ද?

මෙරට හාර නීතියේ සංවර්ධනයට යෝජනා

භාර ආදා පනතේ තුන්වන වගන්තිය යටතේ හාරය අර්ථ නිර්පණය වන ආකාරය ආදා පනතේ 99 වගන්තිය යටතේ ප්‍රණා හාරවලට නොයෙදෙන බව තර්ක කළ හැකි ය. මන්ද තුන්වන වගන්තිය යටතේ ප්‍රතිලාභියා පුද්ගලයකු විය යුතු අතර ප්‍රණා හාරයකිදී පුද්ගලයකු වීම අවශ්‍ය නො වේ. ප්‍රණා හාරයක්

³⁴ibid

³⁵L.J.M . cooray, 'The Reception in Ceylon of the English Trust' (fiest published, Cambridge University publishing, 1971,) p. 86

අප්‍රාණික අරමුණක් (ලදා:- දැනුම වර්ධනයට) සඳහා සංපූක්ත කළ හැකි ය. එබැවින් 2018 භාර සංගේධන පනතින් හඳුනා තොගත් මෙවැනි දුර්වලතා ආමත්තුණය වන පරිදි අර්ථතිරුපත් වගන්තිය සමස්ත භාර ආදා පනතට අදාළ වන පරිදි සංගේධනය කළ යුතු ය.

The Hague Convention on the Law Applicable to Trust³⁶ සම්මුතියේ දැක්වෙන ප්‍රතිපාදනවල ආහාරය ඇසුරින්, මෙරට භාර නීතිය කාලීන අවශ්‍යතාවලට අනුරූපව සංගේධනය කිරීම වැදගත් ය. භාර සංකල්පය පෙෂාදැලික හා ප්‍රමුලේ බඳු සැලසුම්කරණය සඳහා යොදා ගැනීම එලදායි වුවද, එය ශ්‍රී ලංකාවේ භාවිතය කළාතුරින් සිදු වේ. අනාගතයේ දරුවන්ගේ අධ්‍යාපනය හා නඩත්තු වියදීම වෙනුවෙන්, දෙමාපියන් විසින් සිය වත්කම් භාරයක් ලෙස සංස්ථාපනය කළ හැකි වන පරිදි අවශ්‍ය විධිවාන සැකසීම කාලෝචිත වේ.

ශ්‍රී ලංකාව මෙන් දික්කසාදය සම්බන්ධයෙන් දී, භාර නීතිය මෙරට ක්‍රියාත්මක කිරීම වඩා උචිත වේ.

ශ්‍රී ලංකාවේ සතුන් සම්බන්ධ ව කෙතෙක් නීති සැකසුව ද සතුන් වෙනුවෙන් භාර සංකල්පය යෙදෙන පරිදි නීති සැකසී තොමැත්. එබැවින් භාර නීතිය සංවර්ධනය කිරීමේ දී ඒ කෙරෙහි අවධානය යොමු කළ යුතු ය.

ශ්‍රී ලංකාවේ සිරුකරුවන්ට භාර සංස්ථාපනය කිරීමට අදාළ ප්‍රතිපාදන තොමැත්. එබැවින් ඔවුන් වෙනුවෙන් ද භාර නීතිය සංවර්ධනය විය යුතු ය. තවද භාරයක තොනික ගක්නුතාවය සම්බන්ධයෙන් ගිවිසුමට ඇතුළත් වීමේ හැකියාව හා බලය පිළිබඳව පැහැදිලිවම තීරුවනයක් තොමැත් බැවින් පොදු නීතිය, ගිවිසුම නීතිය ආදි අනෙකුත් ව්‍යවස්ථාපිත නීති සිරිත් සම්පූදායන් බැලීමට සිදු වේ. එබැවින්

³⁶Convention on the law applicable to trusts and their recognition<www.uhdigm.adalet.gov.tr>accessed 11 April 2020

භාර නීතිය සංවර්ධනය කිරීමේදී මේ කෙරෙහි අවධානය යොමු කළ යුතු වේ.

නිගමනය

සියවසකටත් අධික කාලයක් ශ්‍රී ලංකාවේ නීති දේහය හා සම්බන්ධ වී ඇති භාර නීතියට කළ එකම සංගේධනය වූයේ 2018 අංක 6 දරන භාර (සංගේධන) පනතයි. නමුත් මෙම සංගේධිත පනත හරහා භාර නීතියේ සංවර්ධනයට මූලික පියවරක් තැබුව ද, එකී පනත තුළින් ශ්‍රී ලංකාවේ සමස්ත භාර නීතියේ පවත්නා ගැටළු ආමත්තුණය කළ තො හැකි විය. එංගලන්තයේ 2017 මුදල් විශුද්ධිකරණය හා තුස්තවාදයට මුදල් සැපයීම පිළිබඳ රේගුලාසියේ ආහාරය මෙරට භාර සංගේධිත පනතට ලැබේ අති බවට තරක කළ හැකි වුවද, භාර නීතියේ සංවර්ධනය සඳහා ප්‍රායෝගික ගැටළු ආමත්තුණය වන පරිදි උක්ත යොෂනා අනුසාරයෙන් භාර ආදා පනත සංගේධනය කිරීමට කටයුතු කිරීමෙන් භාර සංකල්පයේ යෙදීම හා සංවර්ධනයට එය පිටිවහලක් වනු තො අනුමාන ය.

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එරංගා දිසානායක*

හැදින්වීම

අමා අයිතිවාසිකම් පිළිබඳ ජාත්‍යන්තර සම්මුතියට අනුව වයස අවුරුදු 18 ට අඩු සැම පුද්ගලයෙක්ම “ලමයා” යන තත්ත්වය යටතේ හඳුනාගනී. එවන් අයෙකුට අත්‍යන්තරයෙන්ම හිමිවිය යුතු අමා අයිතිවාසිකම් සුරක්ෂිත කොට තහවුරු කරදීම රාජ්‍යන්ගේ වගකීම බව සම්මුතිය තවදුරටත් දක්වයි. මානව හිමිකම් පිළිබඳ විශ්ව ප්‍රකාශනයේ 23වන ව්‍යවස්ථාව යටතේ සියලු දෙනාට තමා කැමති වෘත්තියක නියුත්ක්ත වීමට අයිතිය ලබාදී තිබේ. ශ්‍රීලංකා ආණ්ඩුතුම ව්‍යවස්ථාවේ 14(ල) වගන්තිය ඔස්සේස්ද එය මූලික අයිතියක් ලෙස හඳුනාගනී. එසේ වුවත් ලම්යෙකුගේ අධ්‍යාපන හා වෙනත් අයිතින් බණ්ඩනය වන පරිදි ඔවුන් සේවයේ නියුත්ක්ත කිරීම නීතියෙන් තහනම් කර තිබේ.

අමා ගුමය, ලමයින් අපයෝගනයේ හා සුරාකුමේ වඩාත් හානිකම පැනිකාඩ වේ. අමා ගුම්කියන් බිජි වීමට මූලිකම හේතුව දැඩි ආර්ථික ගැටළ වලට මුහුණ දීමට සිදු වීම බව පැහැදිලිව පෙනෙන කරුණකි. ඒ අනුව ලමයින් තම පවුලේ ආර්ථිකයට ගක්තියක් වීම සඳහා පවුලේම ව්‍යාපාර හෝ කෘෂිකර්මාන්ත වල නියැලීම, කුඩා පරිමාන කර්මාන්ත වල හෝගාහ සේවයේ නිරත වීම බහුලය. වතු හා නාගරික මුළුක්කා ආග්‍රිත දරුවන් අඩු වයසින් රැකියා වල නිරත වීමේ වැඩි ප්‍රව්‍යතාවයක්ද දක්නට ලැබෙන බව සම්ක්ෂණ හඳුනා ගෙන තිබේ. අන්තර්ජාතික කම්කරු සංවිධානයට අනුව ආයියාව, අප්‍රිකාව ඇතුළව දියුණු වෙමින් පවතින බොහෝමයක් රාජ්‍යයන්වල අවුරුදු 5 ත් 14 අතර ලමයින් මිලයන 250කට ආසන්න පිරිසක් මෙම තත්ත්වයට ගොදුරුවේ. (Ekanayake,2018) මෙලෙස අවිධිමත් හා නීත්‍යනුකූල තොවන පරිදි රැකියා ක්ෂේත්‍ර තුළ

අමා ගුම්කයින් සේවයේ යොදවා ගැනීම හරහා ප්‍රමාණයකු යන තත්ත්වය යටතේ හිමි වන සියලු අයිතිවාසිකම් බණ්ඩනය වන බව පැහැදිලිවම පෙනේ. එයට පිළියමක් ලෙස අන්තර්ජාතික කම්කරු සංවිධානය සිසින් විවිධ සම්මුතින් හරහා නෙතික ප්‍රතිපාදන ස්ථාපිත කර තිබේ. එවායේ මූලික පර්‍යාර්ථය, විවිධ වෘත්තින් අරල නිරුපණය කිරීම හා සේවාවය හඳුනා ගැනීම, එවාට අවම වයස ආදි විශේෂතත්ත්ව හඳුන්වාදීම හා එම මූල්‍යයේ යාන්ත්‍රණයකට නිරදේශ ඉදිරිපත් කිරීමයි.

එම සම්මුතිතුළ අන්තර්ගත මූලික ප්‍රමාණින් විශ්වීය වන අතර එවා මානව හිමිකම් සමග සහසම්බන්ධ වන ලෙස තහවුරු කර තිබේ. (Sarvesvaran,2010) අමා අයිතිවාසිකම් පිළිබඳ ජාත්‍යන්තර සම්මුතියේ 32 වන ව්‍යවස්ථාවයටතේ අන්තර්භායක ආකාරයේ වෘත්තින්හි නිරත වීම හරහා දරුවන්ට සිදුවන ආපදාවන්ගෙන් ආරක්ෂා වීමට අයිතියක් ඇති බව හඳුනා ගෙන ඇති අතර ලමයින්ගේ අධ්‍යාපනයවලක්වන හෝ ගාරිඹික, මානසික, ආධ්‍යාත්මික, සඳාචාර්යාත්මක හා සමාජීය සංවර්ධනය වලක්වාලන වෘත්තින්හි නියැලීම තහනම් කර තිබේ. මානව හිමිකම් පිළිබඳ විශ්ව ප්‍රකාශනයේ 25 වගන්තියට අනුව දරුවන් විශේෂ ආරක්ෂාවක් හා මගපෙන්වීමක් යටතේ සිටිය යුතු අතර අමා ගුම්කයෙකු වීම හරහා එකී අයිතිය මෙන්ම එම ප්‍රකාශනයේ 26 වනව්‍යවස්ථාවේ දක්වා ඇති අධ්‍යාපනයට ඇති අයිතියද එමගින් බණ්ඩනයවේ. ආර්ථික, සමාජීය හා සංස්කෘතික අයිතිවාසිකම් පිළිබඳ ජාත්‍යන්තර සම්මුතියේ 10(3) ව්‍යවස්ථාව ප්‍රකාරව අමා ගුම්කයින් තහනම් කර තිබෙන අතර නීතියේ සීමාවන්ට අනුව අමා ගුම්කයින් සඳහා නිසි ප්‍රතිපත්ති සම්පාදනයට රාජ්‍යයන්ට වගකීමක් පවතී. සිවිල් හා

* අවසන් වසර, නීති පියා, කොළඹ විද්‍යාලය

දේශපාලන අයිතිවාසිකම පිළිබඳ අන්තර්ජාතික සම්මුතියේ 8වන ව්‍යවස්ථාව භරහා වහල්හාවය, බලහත්කාර සේවය තහනම්කර තිබෙන අතර මේ යටතේ ලමා ගුම්කයින්ද අදාළ කරගත හැකිවේ.

ලමා ගුම්ය හා ලමා අයිතින් බණ්ඩනය

2016, ලමාත්‍රියාකාරකම්පිළිබඳ සම්ක්ෂණ වාර්තා අනුව 5 – 17 අතර පළමයින්ගෙන් 2.3%ක් කුමන හෝ ආර්ථික කටයුත්තක නියුලෙන බව පෙනේ. එමත්ම ලංකාවේ ලමා ගුම්ය විධීමත් හා අවිධීමත් යන ක්ෂේත්‍ර ද්විත්වයම ඔස්සේ හඳුනාගතහැක. රාජ්‍ය අංශයේන් පෙෂද්ගලික අංශයේ පිළිගත් ආයතන වලත් මෙය නැති තරමය. නමුත් දියුණු වෙමත් පවතින රාජ්‍යයක් ලෙස ලංකාවේ ලමා ගුම්ය ඉතා අවිධීමත් ලෙස විවිධ ක්‍රමවේද ඔස්සේ හාවිත වන අවස්ථා බහුලවම හමුවේ. කෘෂිකාර්මික අංශ, දේවර කරමාන්තය, ගෘහ සේවය, සංචාරක මග පෙන්වන්නන් ලෙස, නිවෙස් වලට ගොස් හෝ වාහන අසලට ගොස් වෙළඳාමේ යෙදීම, ගණකාධිකාරීන් විසින් මත්ද්‍රවය වෙළඳාම වැනි නීති විරෝධී රැකියාවල දරුවන් යොදා ගැනීම, ගොඩනැගිලි ඉදිකිරීම වලදී අත් උද්විතුවන් ලෙස යොදා ගැනීම, හිජමන් යැදීම බොහෝමයක් තුළ ලමා ගුම්ය හාවිත වේ. රතික්කා, මල් වෙශී වැනි වෙශී බෙහෙත් නීත්පාදන ආශ්‍රිතව බහුලව ලමා ගුම්ය යොදා ගන්නා බව සුලබ කරුණකි.

ලමා ගුම්ය නීති විරෝධී ලෙස යෙද්වීම නිසා පළමයින්ගේ උල්ලසනය වන අයිතින් විවිධාකාරයෙන් වර්ග කළ හැකි වේ. මේ භරහා කඩවන මූලිකම අයිතිය අධ්‍යාපනයට ඇති අයිතියයි. 2016ලමා ත්‍රියාකාරකම් පිළිබඳ සම්ක්ෂණ දත්ත වාර්තා අනුව ලංකාවේ අවුරුදු 5 – 17 පළමයින්ගෙන් 9.9% ක් පාසල් නොගොස් ආර්ථික කටයුතුවල නිරතවේ. එයින් බහුතරය වාර්තාවනුයේ නාගරික ප්‍රදේශ වලිනි. දත්ත අනුව එමප්‍රමාණය 72% කි. එයින්ද 44% ක් නුපුරුණු හා වැටුප් රහිත ලමා ගුම්කයින්වේ. ලංකාවේ මූල්කාලීනව අනිවාර්ය අධ්‍යාපනය වයස අවුරුදු 14 තෙක් සීමා විය. නමුත් පසුව එය වයස අවුරුදු 16 දක්වා දීර්ඝ කරන ලදී. (Regulation of Compulsory

Education, 2016) කම්කරු නීතිය යටතේ ලමා ගුම්කයෙකු විම වළක්වාලනු ලබන්නේ වයස අවුරුදු 14 සීමාව තෙක් පමණි. ඒ අනුව මෙම නීති තත්ත්වයන් එකිනෙකට ගැටෙන බව පෙනේ. වයස 14 ත් 16 ත් අතර පුද්ගලයන් පිළිබඳ සාකච්ඡා නොවීම කම්කරු නීතියේ හිස්තැනක් ලෙස හඳුනා ගත හැක. මෙක් අයිතින් තුළනය කිරීම සඳහා අධ්‍යාපනයට ඇති අයිතිය සීමා කළ නොහැකි වූවත් ගුම්කයෙකු විය හැකි වයස 16 දක්වා සංගේධනය කළ හැකි බව පෙනෙන කරුණකි. අධ්‍යාපනයට ඇති අයිතිය හැරුණුකාටලමා කාලය ගත කිරීමට ඇති අයිතිය, උසස් අධ්‍යාපනය හා වෘත්තීය පුහුණුවක් කිරීමට ඇති අයිතිය යනාදී අයිතින් අහිමි විම, දරුවන්ට සමාජය පිළිබඳව ඇති අඩු අවබෝධය නිසා විවිධාකාරයෙන් අපයෝජනයන්ට ලක් විම, අනාගතයේ වැදගත් රැකියාවක නිරත විමට ඇති අයිතිය අහිමි විම, අන්තරුදායක අනතුරු පිළිබඳ දැනීමක් නොමැතිකම නිසා මානසික හා ගාරීරික වශයෙන් දරුවන්ට හානි විම, ඇතැම් අවස්ථා වලදී සමාජයෙන් කොන් විමට සිදු විම ආදිය සිදු වේ.

ජාත්‍යන්තර කම්කරු සංවිධානය පනවා ඇති බොහෝමයක් සම්මුතින්හි පාර්ශවකාර රාජ්‍යයක් වන ශ්‍රී ලංකාව ද්විත්ව නායාජ්‍යවාදී රාජ්‍යක් ලෙස එම සම්මුති අපරානුමත කරනිබේ. එමනිසා සම්මුති මගින් ප්‍රවර්ධනය කර ඇති ප්‍රධාන නෙතික මූලධර්ම සහ කම්කරු අයිතිවාසිකම් තහවුරු කිරීමට වගකීමෙන් බැඳී සිටි. 1995 ජාතික ගුම්කයින් පිළිබඳ ප්‍රජාප්‍රතිඵලයේ 7 වන අනු කොටස ප්‍රකාරව ලමයින් සේවයේ යෙද්වීම වැළක්වීම සඳහා නිසි පියවර ගන්නා බවට ලංකාව එහි පාර්ශවකාර රාජ්‍යක් ලෙස වග වන බව දක්වා තිබේ. (Ekanayake, 2018) ඒ අනුවලමා ගුම්යපිටු දැනීම සඳහා බොහෝමයක් නෙතික ප්‍රතිපාදන ශ්‍රී ලංකා නීති පද්ධතිය තුළ දක්නට ලැබේ. රටේ මූලිකම නීතිය වන ආණ්ඩුකම ව්‍යවස්ථාවේ 27 (13) අනු ව්‍යවස්ථාව ප්‍රකාරව ලමයින් හා යොවනයන් කායික හා මානසික වශයෙන්, සඳාවාරාත්මක වශයෙන්, ආගමික වශයෙන්, සාමාජික වශයෙන් පුර්ණ වර්ධනයට

පත් වන බවට වග බලා ගැනීමටත් ඔවුන්ගේ සුහ සිද්ධිය වෙනුවෙන් විශේෂ පරිග්‍රූහකින් යුත්තව කටයුතු කිරීමටත් රාජ්‍යයට වගකීමක් පවතී. මෙම ප්‍රතිපාදනය ලමා ගුම්කයන් සම්බන්ධව එතරම් සාධනිය ප්‍රවේශයක් නොවුවත් උමයෙක් ගුම්කයෙකු විමෙන් අන්වන අයහපත් තත්වයන්ගෙන් මුදවා ගැනීමට රාජ්‍යයට ව්‍යාග වගකීමක් ඇති කර තිබේ.(Sarvesvaran,2010)

ඊට අමතරව අන්තර්ජාතික කමිකරු සංවිධාන සම්මුති අතරින් උමා ගුම්කයන් සම්බන්ධව ප්‍රධාන වගයෙන් හඳුනා ගෙන නිබෙන සම්මුති දෙකටම ශ්‍රී ලංකාව පාර්ශවකාර රාජ්‍යයක් වේ. එස්ථුව 1973 වසරේදී සම්මත වූ අන්තර්ජාතික කමිකරු සංවිධානයේ 138 සම්මුතිය හරහා ගුම්කයෙකු විය හැකි අවම වයස පිළිබඳව දක්වයි. 2000 වසරේදී සම්මත 182 සම්මුතිය හරහා අන්තර්ජායක සේවයන් පිළිබඳව දක්වා තිබේ.

අවමවයස්සීමාව

2000 දී ලංකාව අපරානුමත කළ අවම වයස පිළිබඳ සම්මුතියේ (138සම්මුතිය) වයස අවුරුදු 15 ට අඩු කිසිවෙකු සේවයේ යෙද්වීම තහනම් කර තිබේ. (Article 2.3 of Convention No.138, 1973) නමුත්මේ සඳහා ව්‍යතිරේකයක් ලෙස ආර්ථිකවගයෙන් තවමත් ස්ථාවර නොවන හා අධ්‍යාපන පහසුකම් ප්‍රමාණවත් ලෙස සංවර්ධනය වී නොමැති රාජ්‍යයන්ට මෙමසීමාව අවුරුදු 14 දක්වා අඩුවේ. (Article 2.4of Convention No.138, 1973) එමෙන්ම යම් වෘත්තීයක් උමයෙකුගේ සෞඛ්‍ය, ආරක්ෂාව හා සඳහාවරය විනාශ කරන්නක් නම් වයස අවුරුදු 18 ට අඩු යම් කෙනෙක් එවායේ නිරන්තර වීම මෙම සම්මුතියෙන් වළක්වන බව තවදුරටත් දක්වා තිබේ.(Article 3.1of Convention No.138, 1973) එමෙන්ම වයස අවුරුදු 18 ට වඩා අඩු ලමයින් අවදානම්කාරී වෘත්තීන්හි යෙදීම තහනම් බව මෙම සම්මුතිය තුළ දක්වයි. නමුත් අදාළ අන්තරායන් වළක්වා ගැනීමට සම්පූර්ණ ආරක්ෂාවක් ලබා දී ඇත්තාම හෝ අන්තරායන්ගෙන් වැළක්මට මෙන්ම වෘත්තීයේ නියුලීමට අදාළව නිසි උපදෙස්

මාලාවක් හා වෘත්තීය ප්‍රහුණුවක් දී ඇත්තාම පමණක් එම වයස් සීමාව 16 දක්වා අඩු වේ.

කාන්තාවන්ගේ තරුණයින්ගේ හා ලමයින්ගේ සේවා නියුක්තිය පිළිබඳ පනත (13 සහ 14 වගන්ති), සාජ්පු හා කාර්යාල සේවක පනත (10(1) වගන්තිය) සහ අවම වැටුප් පිළිබඳ ඉන්දියානු ගුම්කයින්ගේ ආභා පනත (4වගන්තිය)යනාදී සියලු තෙනික ප්‍රතිපාදන තුළද්වයස අවුරුදු 14ට අඩු දරුවන් සේවයේ යෙද්වීය නොහැකි බව දක්වා තිබේ. කාන්තාවන්ගේ තරුණයින්ගේ හා ලමයින්ගේ සේවා නියුක්තිය පිළිබඳ පනතේ 9(1) වගන්තිය ප්‍රකාරව වයස අවුරුදු 15 ට අඩු දරුවන් යාත්‍රා, ඔරුආග්‍රීත සේවයේ යෙද්වීම තහනම් කර තිබේ. එම පනතේම වයස අවුරුදු 18ට අඩු යම් කෙනෙක් තමාගේ ජීවිතයට අවදානමක් ඇති පොදු ක්‍රියා තුළ නිරන්තර වීම තහනම් කර තිබේ. කරමාන්තගාලා, සාජ්පු, වතු ආග්‍රීත රැකියා, පදික වෙළඳාම, පොදු හෝ පෙෂද්ගලික කාර්මික ව්‍යාපාර වල නියුලීමේ අවම වයස් සීමාව අවුරුදු 14 වේ. දේවර ආග්‍රීත රැකියා අවම වයස අවුරුදු 15 ට සීමා වන අතර රාත්‍රී කාලයේ රැකියා වල නියුලීම් අවුරුදු 18 ට ඉහළ පමණක් වලංගු වේ. ගැහැණු ලමයින් සඳහා කිසිදු අකාරයේ බර වැඩ හෝ පතල් කරමාන්තය ආදිභුගත වැඩ වල නියුලීම් තහනම් වේ.(Ekanayake,2018)

කාන්තාවන්ගේ තරුණයින්ගේ හා ලමයින්ගේ සේවා නියුක්තිය පිළිබඳ පනතේ 2 (1), සාජ්පු හා කාර්යාල සේවක පනතේ 10 (2), කරමාන්තගාලා පිළිබඳ ආභා පනතේ 67 (b) යනාදිවගන්ති යටතේ වයස අවුරුදු 18ට අඩු ලමයින් රාත්‍රී කාලයේ සේවයේ යෙද්වීම තහනම් කර තිබේ. කරමාන්තගාලා පිළිබඳආභා පනතේ 68 (1) වගන්තිය ප්‍රකාරව වයස අවුරුදු 16ත් 18 ත් අතර අතිකාල සේවයේ යෙදෙන්නාන්ගේ සේවා කාලය මාසයකට පැය 50ක් නොඟ්මවිය යුතු වේ. දැනට නීතියේ දක්නට ලැබෙන නොතික ප්‍රතිපාදන ප්‍රකාරව වයස අවුරුදු 14 ත් පසු උමා ගුම්ය නීත්‍යානුකළ වූවත් එකී සේවය අන්තරායක නම් වලංගු නොවන බව පෙනේ. කෙසේ වෙතත් ලමයින්ගේ අවම වයස යන නීත්‍යානුකළ වූවත් වැඩ හෝ තාක්ෂණික කාර්යන්

මෙන්ම දරුවන්ගේ සෞඛ්‍යට හෝ සංචරිතයට හානි තොවන ආකාරයේ වැඩ හා අධ්‍යාපනයට බාධාවක් තොවන ඒවා අදාළ වේ. ඉහත දැක් වූ සියලු ප්‍රතිපාදන ජාත්‍යන්තර කම්කරු සම්මුතින් වලට ලංකා නීතියේ අනුගත වීම මතාව පෙන්නුම් කරයි.

අවදානම් සහගත වංත්තීන්

2001දී ශ්‍රීලංකාව අපරානුමත කරන ලද අමා ගුමය ආග්‍රිත අවදානම් සහගත ක්‍රියා පිළිබඳවන සම්මුතියේ 1වන ව්‍යවස්ථාව අනුව වයස අවුරුදු 18ට අඩු සියලු පුද්ගලයින්ට අන්තරාභායක ආකාරයේ සේවයන්හි නිරතවීම තහනම් කර තිබේ. එහිදී දරුවන් වහල් සේවයේ යෙද්වීම, දරුවන් විකිණීම හා භෞරජාවරමේ යෙද්වීම, බලහන්කාරයෙන් සේවයලබාගැනීම, දරුවන් ගණකාධිකා සේවයේ හා අසහා දරුණන නිර්මාණකරණයේ යෙද්වීම, මත් ද්‍රව්‍ය ජාවාරම් වැනි නීති විරෝධී කටයුතුවල යෙද්වීම මෙන්ම දරුවන්ගේ සෞඛ්‍ය ආරක්ෂාව හා සඳාවාරයට හානියක් වන ආකාරයේ සේවයන්හි යෙද්වීම තවදුරටත් 3වන ව්‍යවස්ථාව ඔස්සේ තහනම් කර තිබේ. වයස අවුරුදු 18ට අඩු පුද්ගලයින් අන්තරාභායක සේවයේ යෙද්වීම තහනම් කිරීම සඳහා කාන්තාවන්ගේ තරුණයින්ගේ හා ලමයින්ගේ සේවා නියුක්තිය පිළිබඳ පනත 2006 දී සංගේධනයට ලක් විය. (Section 9(1) of EWYPC Act, 1956) එහිදී අන්තරාභායක ලෙස වංත්තීන් 51ක් හඳුනා ගෙන තිබේ. නමුත් මෙහි ඇති දුර්වලතාවය වන්නේ එම ලැයිස්තුව තුළුලයින් ගෘහාග්‍රිත සේවයේ යෙදිමෙදී සිදු වන අන්තරාභායක සේවයන් අන්තරුගත තොවීමයි. එබැවින් මෙම පනත නැවත වරක් කාලෝචිතව සංගේධනය වීම අත්‍යවශ්‍ය කරුණකි.

වයස අවුරුදු 18ට අඩු දරුවන් අන්තරාභායක සේවයේ යෙද්වීම හා වහල් සේවය (ද.නී.ස 358A වගන්තිය), බලහන්කාර සේවය ලබාගැනීම (ද.නී.ස 358A වගන්තිය), සන්නද්ධ ගැටුම් තුළ සිදුවන දරුවන්ගේ අනිවාර්ය බදවාගැනීම (ද.නී.ස 358A වගන්තිය), අමා ගණකාධිකා වංත්තීය (ද.නී.ස 360A, 360 B, 360C, 363 වගන්ති), අසහා දරුණන හා ක්‍රියාකාරකම්

නිර්මාණය සඳහා දරුවන් යොදවාගැනීම (ද.නී.ස 286A වගන්තිය) හා නීති විරෝධී ක්‍රියාවන්හි දරුවන්ව යොදවාගැනීම (ද.නී.ස 288B වගන්තිය), ලංකා නීතිය තුළ තහනම් කිරීමේ අභිමතාර්ථය සහිතව ලංකාවේ දැන්ව නීති සංග්‍රහය 1995, 1998 හා 2006 යන වසර තුළ සංගේධනයට ලක් කරන ලදී.

ලිංගික ගුම්කයින් වීම හරහා දරුවන් ලිංගික සම්ප්‍රේෂණ රෝග වලට ගොදුරු විය හැකි අතර අනාගතයේ යහපත් වංත්තියකට ඇති අවස්ථාද මග හැරේ. එමනිසාගණකා වංත්තිය සඳහා කාන්තාවන් හා ලමයින් මිනිස් ජාවාරමේ යෙද්වීම වැළක්වීම හා තුරන් කිරීම පිළිබඳ සම්මුතියට අදාළව පනතා ඇති පනත යටතේ යම් පුද්ගලයෙක් දරුවන්ව ගණකා වංත්තියේ යෙද්වීමේ අරමුණින් යම් ස්ථානයක් පවත්වාගෙන යාම පවා වරදක් බව දක්වා තිබෙන අතර දරුවන් ලිංගික ගුම්කයින් ලෙස සේවයේ යෙද්වීම නීතිය මගින් තහනම් කර තිබේ. (පනතේ 2(1) වගන්තිය) එමෙන්ම මෙම පනත හරහා විදේශ සේවය මුවාවෙන් දරුවන් විදේශ මිනිස් ජාවාරමට හසු වීම වැළක්වීමට නිසි පියවර ගැනීම වෙනුවෙන් අමාත්‍යවරයාට වගකීමක් ඇති කර තිබේ. (පනතේ 12(d) වගන්තිය) 2013 වසරේදී අවුරුදු 17 ක දියැණියක් වන රිසානා නගික් සෞදි අරාබියේ ගෘහ සේවයේ යෙදෙන අතරතුර මිනීමැරුමක් සම්බන්ධයෙන් මරණ දැන්විනය ලැබීම මැතකාලීනව වාරතා වූ බේදනියම සිද්ධියක් වේ. (bbc.com, 2013)

සේවා ස්ථානයේ නිසි තත්වයන් පවත්වාගෙන යාම

සේවා නියුක්තිකයින් සඳහා සේවා ස්ථානයේ යෝගා වටුපිටාවක් පවත්වාගෙන යාම අත්‍යවශ්‍ය වේ. ඒ අනුව සේවකයින් සඳහා නිසි පරිදි විවේක වේලාවන් ලබාදීම වැදගත්වේ. එමෙන්ම ලමා ගුම්කයින් සඳහා නමායිලි වේලාවන් සේවය සඳහා ලබාදීම වැදගත්වේ. කාන්තාවන්ගේ තරුණයින්ගේ හා ලමයින්ගේ සේවා නියුක්තිය පිළිබඳ පනතේ 4(1) වගන්තිය ප්‍රකාරව සේවකයින් සඳහා වැඩුම් දෙකක් අතර පැය 13ක ඒකාකාරී විවේකයක්

ලබාදිය යුතුවේ. නමුත් අවධිමත් වෘත්තීන්හි එලස විවෙක හිමිවේද යන්න ගැටළු සහගතය. එම පනතේම3(4) හා 3(5) යන වගන්ති ප්‍රකාරව අමාත්‍යවරයාගේ අනුමැතිය සහිතව තරුණ පුද්ගලයන් සඳහා රාත්‍රී7සිට රාත්‍රී11 දක්වා සේවය කිරීමට අවස්ථාවහිමිවේ. රාත්‍රී කාලයේ සේවයේ යෙදීමේ අවම වයස් සීමාව අවුරුදු 18 වේ. නමුත් පවුලේ ව්‍යාපාර යන්න එහි ව්‍යතිරේකයක් ලෙස සලකනු ලබයි. මෙහිදී රාත්‍රී කාලය යන්න හටස 6 සිටපසුදා උදේ 6 දක්වා ලෙස නිරවචනය කර තිබේ. වයස අවුරුදු 16 ත් 18 ත් අතර පුද්ගලයන් සඳහා සාධාරණ හේතු සහිතව රාත්‍රී කාලයේ සේවය කිරීමට අවසර ලබා දීම සඳහා අමාත්‍යවරයාට බලත්ල තිබේ. ඒඅනුවදවසකට පැය 9ක කාලයක් සඳහා සේවය සීමා කර තිබේ.

දේශීය නීතියේ හඳුන්වා දී ඇති සීමාවන්ට යටත්ව නීත්‍යානුකූලව සේවයේ යෙදෙන ප්‍රමාදීන් සඳහා විශේෂ ආරක්ෂණ විධිවිධාන හඳුන්වා දී තිබේ. ඒ අනුව හයානක යන්තු යුතු ක්‍රියා කරවීම නිසි උපදෙස්, ප්‍රමාණාත්මක ප්‍රහුණුව හා දැඩි අධික්ෂණය යටතේ ප්‍රමණක්සිදු විය යුතු වේ. එමෙන්ම අවුරුදු 16 ට අඩු කරමාන්ත්‍යාලා ආශ්‍රිත සේවයේ යෙදෙන්නන් සඳහා ගිරිර යෝගනා සහතිකයක් ඉදිරිපත් කළ යුතු වේ.ප්‍රහුණු වීම් ආශ්‍රිත සේවා නියුත්තිය පිළිබඳ සැලකීමේදීවයස අවුරුදු 14 ට අඩු ප්‍රමාදීන් සඳහා පාසල් අධ්‍යාපන ආයතනවල හා තාක්ෂණික හෝ වෘත්තීය ප්‍රහුණු වීම් වල නියැලිය තැකි වේ. නමුත් එම සේවා නියුත්තිය මහජන අධිකාරියක් මගින් අනුමත කර අධික්ෂණය කළ යුතු වේ. විනෝදාස්වාද ක්‍රියාකාරකම් හා රහජැම්, ප්‍රසාග ආදිය සඳහා වෘත්තීය වගයෙන් ල්‍යමයින් හාවත කිරීම සඳහාද නොතික සීමාවන් තිබේ. එහිදී ප්‍රේක්ෂකයන්ගෙන් මූදල් අය කරන සැම විනෝද ප්‍රසාගයක් හෝ ක්‍රියාකාරකමක නියැලිමට තැකි අවම වයස අවුරුදු 14 වේ. සරකස් වැනි ජීවිතයට අවබ්‍යන්තිකාරී ඉදිරිපත්කිරීම සඳහා අවම වයස 18ක් වේ. පාසල් හෝ තාට්‍ය සමාජ කේන්ද්‍ර කරගනීමින සිදු කරන අධ්‍යාපන හා ප්‍රණාශධාර ක්‍රියා මෙම සීමාවන්ට ව්‍යතිරේකවේ.(Goonasekere,1993)

පවුල ආශ්‍රිත රෝගා හා ගෘහ සේවය

කෘෂිකාර්මික හා දිවර කටයුතු ආශ්‍රිත රෝගා සිදුකරන පවුල්වල දරුවන්ද ඒවායේ නිරතවීම බහුලව දක්නට ලැබේ. දරුවාගේ උපරිම යහපත යන සංකල්පය මෙහිදී උල්ලංසනය වන බව පෙනෙන්.තම පවුලේම සාමාජිකයන් විසින් පවත්වා ගෙන යනු ලබන සැහැල්ල කෘෂිකාර්මික හා ගෙවතු වග කටයුතු වල පාසල් කාලයට පෙර හා පසු නිරතවීමට අවස්ථාව නීතියෙන් ලබාදෙන නමුත් පවුලේ ආර්ථික කටයුතුවලට උද්වි විගයෙන් වත් ලමයින්ට ගැහුරු මුහුදේ දිවර කටයුතුවල නියැලීම මෙන්ම දුම්කාල ආශ්‍රිත ක්‍රියා තහනම් කරතිබේ.(Ekanayake, 2018)

1844 වන විට ලංකාව සියලු ආකාරයේ වහල් සේවය නීතියෙන් තහනම් කර තිබේ.(අර්නොල්චි, 1907) 2006 දී ලංකාවේ දැන්ව නීති සංග්‍රහයට එකතු වූ සංගේධනය හරහා වහල් සේවය තහනම් කිරීමට අදාළ නොතික තත්වය තව දුරටත් ගක්මීමත් කරනලදී.(ද.නී.ස. සංගේධිතපනතේ 358A වගන්තිය, 2006)එ අනුව දරුවන් වහල් සේවයේ යෙද්වීමද අපරාධමය වගකීමක් ජනිත කරන බව මෙමයින් ව්‍යංශව පැහැදිලි වේ. ඇතැම් අවස්ථාවල වැටුප් වෙනුවට ආහාර හා තවාතැන් ප්‍රමණක් ලබාදී විවිධ හිංසන, තාචන පිඩින යටතේ සේවය ලබාගන්නා අතර කිසිදු විවේකයක් නොමැතිව නොනවත්වාම සේවය ලබාගැනීමද දක්නට ලැබේ. (Sarvesvaran,2016) මෙවැනි තත්ත්ව වලදී ගෘහස්ථ හිංසනය යටතේ ප්‍රතිකරීම ලබාගැනීම මට නොහැකිවේ. ගෘහස්ථ හිංසනය පිටු දැකීමේ පනතේ 23 වන වගන්තිය යටතේ ගෘහ සේවකයින්ට සිදුවන ගෘහස්ථ හිංසනය හඳුනා ගෙන නොමැති වීම නීතියේ විශාල අඩු පාඩුවක් වේ. එලස හඳුනා ගෙන තිබුනා නම් ගෘහ සේවයේ යෙදෙන ප්‍රමාදීන්ට සිදු විය තැකි අමානුෂික වදහිංසා වැළක්වීම සඳහා අදාළ ප්‍රතිපාදනය මෙස්ස්ත්‍රාත්වරයාට නිරමාණයීලි ලෙස අර්ථ නිරුපණය කිරීමට තිබුණි. (Sarvesvaran,2016)

ශුදමය තත්වවලදී පළමාගුමය

ශුදමය කටයුතු සඳහා සොල්දායුවන් ලෙස පළමයින් යොදාගැනීම, පළමා ගුමය භාවිතයේ තවත් ආකාරයක් වේ. එක්සත් ජාතියෙන්ගේ පළමා අයිතිවාසිකම පිළිබඳ සම්මුතියේ 38(3) වගන්තිය ප්‍රකාරව වයස අවුරුදු 15ව අඩු පළමයින් යුද කටයුතු වලට බදවා නොගත යුතුව දක්වා තිබේ. වයස අවුරුදු 15න් 18න් අතර කෙනෙකු බදවා ගන්නේ නම් වයස වැඩි අනුපිළිවෙලට එය සිදුකළ යුතුවේ. එක්සත් ජාතියෙන්ගේ පළමා අයිතිවාසිකම පිළිබඳ සම්මුතියට 2000 වසරේ ගෙන ආ ප්‍රාගෝකාලයේ පුරුවිකාවේ සන්නද්ධ ගැටුම්වලදී දරුවන් සොල්දායුවන් ලෙස භාවිතය තහනමිකර තිබේ. එමෙන්ම එහි පළමුවන ව්‍යවස්ථාව දක්වන පරිදි පළමා ගණිකාවන් ලෙස හා අසහා නිර්මාණකරණය සඳහා දරුවන් යොදා ගැනීම තහනම වේ. ජාත්‍යන්තර වාරිතානුකූල නීතියේ 136 වන රිතියට අනුවද පළමයින් සන්නද්ධ ගැටුම්වල සේවය සඳහා බදවා ගත නොහැක. 137වන රිතිය යටතේ සන්නද්ධ ගැටුම් පවතින අවස්ථාවල දරුවන් ඔත්තකරුවන්, මුරකරුවන් හා ලියුම් ඩුවමාරු කරන්නන් ලෙස සේවයේ යෙද්වීම තහනම කර තිබේ. ජීනිවා සම්මුති වලට අදාළ පළමුවන අතිරේක සන්ධානයේ 77(2) ව්‍යවස්ථාව අනුව අන්තර ජාතික සන්නද්ධ ගැටුම් වලදී පළමයින් සොල්දායුවන් ලෙස බදවා නොගතයුතු බව දක්වා තිබේ. 182 වන සම්මුතිය යටතේද වයස අවුරුදු 18ට අඩු දරුවන් යුද කටයුතු සඳහා යොදා ගැනීම තහනම වේ.

ශ්‍රී ලංකාව ඉහත සම්මුති අපරානුමත කර ඇති නිසා වසර30ක් පැවති සිවිල් යුද්ධය තුළ පළමා ගුමය භාවිතය තහනම විය. නමුත් තුළේන් පළමයින්ට අව්‍යුත්‍යුතුව ලබාදීම හා සොල්දායුවන් ලෙස භාවිත කිරීම බහුලව දක්නට ලැබේ. 2008 – 2009 කාලවකවානුව තුළ උතුරු තැගෙනහිර පළමයින්ගෙන් 90% ක් යුද සේබලින් ලෙස සේවයේ නිරතවිය. (Ekanayake,2018) එමනිසා ඔවුන් යුද සමයේ දී ප්‍රමාණවත් අධ්‍යාපනයක් නොලැබූ අතර එහි

ප්‍රතිඵල ලෙස මෙවන විට දැඩි ද්‍රීකරණ වලට මුහුණුපා සිටී.

ප්‍රායෝගික යාන්ත්‍රණය

ලංකාවේ ප්‍රායෝගික තත්වය තුළ කමිකරු නිලධාරීන්ට පළමා ගුම්කයින් හා සම්බන්ධ නීති කඩ කරන්නන්ට එරෙහිව නඩු ගොනු කිරීමට බලය හිමි වේ. පළමා ගුම්කයින් සම්බන්ධව කමිකරු දෙපාර්තමේන්තුවට යම් පැමිණිල්ලක් ලැබුණු විට කමිකරු නිලධාරියෙකු, පොලිස් නිලධාරියෙකු හා පරිවාස නිලධාරියෙකුගෙන් සමන්විත සෝදිස් කණ්ඩායමක් පිටත් කරනු ලබයි.(Ekanayake,2018) පොලිස් නිලධාරීන්ට අදාළ සිද්ධිය සම්බන්ධයෙන් පියවර ගැනීමට හෝ විමර්ශනය කිරීමට කිසිදු අධිකාරී බලයක් හිමි නොවේ. ඒස්දහා අපරාධ නඩු විධාන සංග්‍රහයේ 122 (2) වගන්තිය ප්‍රකාරව පොලිසිය විසින් පළමුව අධිකරණයෙන් හෝ භාරකරුවන්ගෙන් අවසර ලබා ගත යුතු වේ. මෙම ක්‍රියාවලි තරමක් ප්‍රමාදකාරී විය හැකි අවස්ථා වලදී පළමා අයිතිවාසිකම සුරක්ෂිත කිරීමේ අඛේක්ෂිත ප්‍රතිඵලයට ලඟා විය නොහැකි අවස්ථාද පවතී. මෙහිදී පරිවාස නිලධාරියාගේ වගකීම විය යුත්තේ අදාළ දරුවාට ආරක්ෂාව සපයමින් ඔහුව වඩාත් සුරක්ෂිත ස්ථානයකට රහෙන යාමයි. මෙම ක්‍රියාවලියේ සාර්ථකත්වය උදෙසා මෙකී ආයතන හා නිලධාරීන් අනෙක්නාවමනා අවබෝධයෙන් ක්‍රියා කිරීම වැඳගත් වේ.(Goonasekere,1993)

යම පළමයෙක් පළමා ගුම්කයෙකු ලෙස දැඩි කෘත්වයට හා අමානුෂීකසැලකීමකටමුහුණ දෙන්නේ නම් ඒ සඳහා ගත හැකි නොතික ප්‍රතිපාදනයක් නීතියේ වෙනමම අන්තර්ගත නොවේ. පොලිස් නිලධාරීන්ට හැකියාව ඇත්තේ දණ්ඩ නීති සංග්‍රහයට එකතු කරන ලද සංගේධනයේ වගන්ති හරහා සාධනීය උත්සාහයක් ගෙන තිබේ. කාන්තාවන්ගේ තරුණයින්ගේ හා පළමයින්ගේ සේවා නියුත්තිය පිළිබඳ පනතේ 2

සිට 12 වන වගන්ති දක්වා ශ්‍රී ලංකාවේ ලමා උසාව් පද්ධතියක් ස්ථාපනය කිරීමට අදාළ නොතික ප්‍රතිපාදන අත්තර ගත කර තිබේ. නමුත් අද වන විට ප්‍රායෝගිකව ක්‍රියාත්මක වන්නේ බමෙලපිටියේ පිහිටි ලමා අධිකරණය පමණකි.(Ekanayake,2018) ප්‍රායෝගික තත්ත්වය තුළ ලමයින්ගෙන් නිවැරදි සාක්ෂි ලබා ගැනීම තරමක් අපහසු කර්තවාක් වන අතර ඇතුම් අවස්ථා වලදී සේවා ස්ථානයේ ස්වාමියා විසින් ලමයින්ව සාක්ෂි ලබා නොදෙන ලෙස නොමග යැවීම හෝ තර්ජනය කිරීම ආදිය සිදු කළ හැකි වේ. ලංකාවේ ලමා ගුම්කයන් සම්බන්ධ නීති තත්ත්වය මෙන්ම ලමා අධිතිවාසිකම පිළිබඳ අවබෝධය හා දැනුවත්බව මදි කමක් ලාංකිය සමාජය තුළ දක්නට ලැබේ. මෙනිසා බොහෝමයක් සිද්ධීන් වාර්තා නොවන බව පෙනේ. එමෙන්ම මෙවැනි සිද්ධී වලදී භාරකාර පාර්ශවයන් ගෙන් ඉවුවිය යුතු වශයෙන් හා සහයෝගය ලබාදීම නිසි පරිදි ඉවුවන්නේද යන්න සැක සහිතය.

නිගමනය

ඉහත කරුණු අනුව ලමා ගුම්ය හා අදාළ වන ශ්‍රී ලංකාවේ නොතික තත්ත්වයතුළසාධනීය මෙන්ම නීගේධනීය ලක්ෂණද හඳුනා ගත හැකිය. ජාත්‍යන්තර කම්කරු මූලධර්ම හා ප්‍රතිපත්ති සියලුළුකටම පාහේ අනුගත වී දේශීය නීතියට ඒවා අදාළ කර ගැනීමටලත්සාහ කරතිනීම සාධනීයවේ. නමුත් එම නීති ක්‍රියාත්මක වන යාන්ත්‍රණයේ පවතින අඩුපාඩු, ප්‍රායෝගික ද්‍රූෂ්කරණ හා ආතුම් නීතියල් පැන ගෞස්තිනීම ආදිය නීතා නීතියේ හිස්තැන් නිරමාණයවන බව හඳුනා ගැනීමට මෙහිදී උත්සාහ කර තිබේ. විශේෂයෙන්ම ලමාගුම්යනිසා ලමා කාලය තුළ ලමයින්ටහිමි විය යුතු අධිතිවාසිකම බාධාවට ලක්වන අතරම අනාගත යහපත් සංවර්ධනයට තිබිය යුතු පදනම නිසි පරිදි නොලැබේ ඉඩකඩ ඇතිරි යයි. එමනිසා සියලු අධිතින් තුළනාත්මකව බලාත්මකවන පරිදි නීති තවදුරටත් ගක්තිමත් කිරීම ඉතා වැදගත්වන බව පෙනේ. ලමා ගුම්කයින් හා සම්බන්ධ බොහෝ දත්ත වෙනත්රටවලට සාපේක්ෂව ලංකාවේ අඩු

අගයක් ගත්තද බොහෝමයක් සිද්ධීන් වාර්තා නොවන බව මතක තබා ගත යුතු කරුණකි.

සේවය කිරීමට අදාළ කොන්දේසි මාලාවක් හා තත්ත්වයන් ඉදිරිපත් කිරීම, අධිතින් බලාත්මක කිරීමට යාන්ත්‍රණයක් සැකසීම හා ඒවා කඩ කරන්නත්ට දඩුවම කිරීමේ නිසි තුමෙවැයක් සැකසීම රාජ්‍ය වශයෙන් වේ. ලංකාවේ වසර තිහකට අධිකව පැවති සිවිල් යුතු වාතාවරණය, සුනාම් වැනි දරුණු ගණයේ ස්වාහාවික ආපදා, අපරාධ රැලි නිසා සිදු වූ සමාජ පිරිහිම් භේත්ත්වන්පැහු ගිය දශක කිහිපය තුළ ඇති වූ ලංකාවේ ආර්ථික කඩවැට්මහා සමාජ හා ආර්ථික ප්‍රගමනය තුළ සිදු වූ වෙනස්කම ලංකාවේලමාගුම්ය පිළිබඳ තත්ත්වයට බලපෑ බව හඳුනාගත හැක. වර්තමානයේ උද්ගතව ඇති ගෝලීය කොරෝනා වසංගත තත්ත්වය නිසා ඇති වන ආර්ථික පසු බැසීම හමුවේ ලංකාවේ පමණක් නොව ගෝලීය වශයෙන් ලමා ගුම්කයින් ප්‍රමාණාත්මකව ඉහළ යාමේ අවදානමක් පවතී.

2003 අංක 8 දරණ කාන්තාවන්ගේ තරුණයින්ගේ හා ලමයින්ගේ සේවා නියුත්තිය පිළිබඳ සංගේධන පනත හරහාහඳුන්වා දී තිබෙන දඩුවම්වලටඛනුව අවම වයස උල්ලංසනය කළහොත් රුපියල් දස දහසක දැඩියක් හෝ මාස 12ක සිරගත කිරීමකට යටත් වේ. නමුත් අද වනවිට මෙම දඩුවම් කාලෝචිතව ප්‍රමාණාත්මකද යන ගැටුව පැනනගි. එමනිසා බොහෝමයක් පනත්වල දඩුවම් කාලෝචිතව සංගේධනය කිරීම අවශ්‍යතාවයක්වී තිබේ. ලමා ගෘහ සේවකයින් ආවරණය වන පරිදි කිසිදු නොතික ප්‍රතිපාදනයක් අත්තරගත නොවීමද දුරවලතාවයක් වේ. අනිවාර්ය අධ්‍යාපනයට ඇති අවම වයසකීමාව හා ලමා ගුම්යට අදාළ වයස් සීමාව එකිනෙක ගැටීම නීතිය මගින් ආමන්ත්‍රණය කළයුතු නීතියේ තවත් හිස්තැනකි. වර්තමානයේ තාක්ෂණික දියුණුව හමුවේ බොහෝමයක් ලමයින් අත්තරජාල ආශ්‍රිත රැකියාවලට යොමුවීමේ සැලකිය යුතු ප්‍රවණතාවයක් දක්නට ලැබේ. විශේෂයෙන්ම අඩු වයසින්ම අත්තරජාල ආශ්‍රිත මුදල්ඉපසීම්, යුතුවූ වැනි සමාජ ජාල හරහා කරන නීත්‍රමාණ

ଭିଜେବେ ମୁଦଳେ ଉପହିମ ଆଧି ନାଵ ଲାଗ୍ନିନୀରେ ଅଧ ବିନ
ବିଠ ତୁଟେମାନୁବ ନିବେ. ଲିଖିନୀ ଦେଖି ହରହା ଲମ୍ବେକୁଠ
ଛିଣ୍ଡିଯ ହୈକି ଅଭିନକର ବେଲପ୍ରାମୀ ଅନିବିଶାଳ୍ୟ.
ଲମ୍ବିଙ୍ଗ ମେମ କେତେବ୍ରଦ୍ଧ ଅନାଗନ୍ତଯେଦେ ନୀତିଯ
ହରହା ଆମନ୍ତେବ୍ରଣ୍ୟ କାଳ ଫ୍ରାନ୍ତ ପ୍ରାତିକବ ଲେଜ
ଭଲନ୍ତାଗନ ହୈକିଯ. ବୁନତ ଦକ୍ଷିଲା ଆତି ନୀତିଯେ
ଅବିପୁବ୍ଲ ପକ୍ଷପାତର ପଥନିନ ନୀତିଯ ତଲିଣ୍ଟରତନ୍ୟ
ଅକ୍ଷତିମନ୍ କିରିମ ହା ଲମା ଗ୍ରମ୍ୟ ପିଲିବଦ୍ଧ ସମାଜ
ଦୂନୁହିଲାବ୍ୟ ବୈଚି କରିମନ୍ ଲାଙ୍କାଲେ ଲମା
ଗ୍ରମ୍ୟ ଆଶ୍ରିତ ନୀତିଯେ ପ୍ରଗମନ୍ୟର ସାଧନୀଯ
ପାଲେଇଯକେ ଗତ ହୈକିଲେ.

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හක්ගල රක්ෂිතයේ ඉරණම නීති විද්‍යාත්මක ඇසින්

එම්. ඩී. කාංචිනා ජෙජානි*

යම භූමියක් දැඩි ස්වභාවික රක්ෂිතයක් ලෙසට තම් කරනුයේ එහි ඇති අධි සංවේදීතාව, පාරිසරික වැදගත්කම සහ ජේව විද්‍යාත්මක පොහොසත්කම නිසාය. ඒ අනුව හක්ගල රක්ෂිතය ආවේණික සත්ත්ව හා ගාක ගණනාවක් ඇතුළුව විශාල ජේව ප්‍රජාවකට වාසස්ථාන සපයන සංවේදී කළාපයකි. 1937 අංක 2 දරන වන සත්ත්ව හා වෘක්ෂලතා ආරක්ෂක ආදා පනත¹(FFPO) යටතේ නීතුත් කරන ලද 1938/02/25 දිනැති අංක 8356 දරන ගැසට් පත්‍රය මගින් දැඩි ස්වභාවික රක්ෂිතයක්(SNR) ලෙසට තම් කරන ලද මෙම භූමිය හෙක්වයාර 1142 කින් යුත්ත වන අතර එමගින් FFPO මගින් ආරක්ෂිත ප්‍රදේශ ලෙසට තම් කර තිබෙන භූමි ප්‍රදේශවලින් 0.12% ක ප්‍රමාණයක් ආවරණය වේ.

ඒ අනුව මෙම ලිපිය මගින් අරමුණු කෙරෙන්නේ හක්ගල භූමිය සම්බන්ධව වර්තමානයේ පවත්නා වූ නෙතික ගැටළු පිළිබඳව නීති විද්‍යාත්මක විග්‍රහයක යෙදීමය. එහි ඉස්මතු වි තිබෙන පාරිසරික සහ පරිපාලනය ගැටළු නීති ගුරුකුල දැඩිවේක්ණ තුළින් අධ්‍යයනය කොට පාරිසරික සංක්ලේෂ මෙන්ම යහපත් පරිපාලන මූලධර්ම සමාජ පද්ධතිය තුළ තහවුරු කිරීමේ කාර්යයෙහිදී හරයාත්මක සහ

කාර්යපටිපාටික නීතිය තුළ පවතින හිඛිස් සහ තවදුරටත් එම නෙතික පද්ධතිය ගක්තිමත් කොට යුත්තිය කරා සැමට ප්‍රාග්ධන යෝජනා ද දක්වමින් විශ්ලේෂණාත්මක විග්‍රහයක් සිදුකිරීමට අපේක්ෂා කෙරේ.

නීතිය යනු කුමක්ද යන කාරණය සම්බන්ධයෙන් ප්‍රධාන වශයෙන් ස්වභාවික නීති විද්‍යා ගුරුකුලය ඇසුරින් සළකා බලන කළ පැහැදිලි වනුයේ ඔවුන් මූලිකවම සඳාවාරය මත පදනම් වන බවයි. එහිදී Fuller විසින් දක්වන ආකාරයට නීතිය සමාජයේ සඳාවාරාත්මක ආකල්ප මත රඳා පවතින අතර නීතිය හඳුනාගැනීමට තම් එහි අරමුණ දෙසට අවධානය යොමුකළ යුතු වේ. ඒ අනුව නීතිය එක් දිගාවකට පමණක් ගළායන දෙයක් නොවන හෙයින් එහි අරමුණ වනුයේ පාලකයා සහ පුරවැසියා අතර අනෙකුත්තාබව² ඇතිකිරීම වේ. එහෙයින් ස්වභාවික නීති විද්‍යාවට අනුව මෙම ගුණාංගයන් දැකිය නොහැකි නීති පද්ධතියක් මගින් බිජිකරනුයේ නීතියක් නොවේ.

ඒ අනුව පරිසර නීතිය සහ පරිපාලන නීතිය යන නීති ද්විත්වය තුළ ඉහත ගුණාංගයන්ගෙන් පෝෂිත වූ බවක් පෙනෙන්නට තිබෙන අතර එමගින් සාධාරණත්වය සහ අයිතිවාසිකම් විශාල ලෙස ආමන්තුණය කරනු ලැබේ. මූලිකවම පරිසර නීතිය තම්

* නීති ශිෂ්‍ය, අවසන් වසර, ශ්‍රී ලංකා විවෘත විශ්වවිද්‍යාලය

¹ 1964 අංක 44, 1970 අංක 01, 1993 අංක 49 සහ 2009 අංක 22 දරන පනත්වලින් සංගේධිත

² Ratnapala S. (2013), *Jurisprudence*, New York, 2Ed, Cambridge University Press, p191

ගොඩනැගිල්ල රඳා පවතිනුයේ අයිතිවාසිකම් තුළය නම් පාදම මත වේ. එනම් නීතිය මගින් අයිතිවාසිකම් නිර්මාණය තොකරයි. නමුත් නීතිය විය යුත්තේ කෙසේද යන්න තීරණය කරනුයේ අයිතිවාසිකම් මගින්ය.³ මූලික පාරිසරික සංකල්පයන් මෙම ගොඩනැගිල්ලේ කුලුණු ලෙසට භූජනාගත හැකි අතර මෙම සියලුබන්ධනයන් ගිලිහි ගිය දිනක පරිසර නීතිය අරුත් සූත් නීතියක් බවට පත් වනු තිසුකයි.

එසේම පරිපාලන නීතිය තුළ පදනම වනුයේ යහපත් පරිපාලන මූලධර්මයන් වේ. එනම් පොදු අධිකාරීන් විසින් තමන්ට ව්‍යවස්ථාව මගින් ලබා දී තිබෙන අභිමත බලය භාවිත කළ යුතු වන්නේ සාධාරණව, සමානාත්මකවයෙන් සහ කාර්යපරීපාරික යෝග්‍යතාවයෙන් යුතුව වේ. නමුත් බලයේ සිවිකොණ ඉක්මවා යමින් එක් පාර්ශවයක අයිතිවාසිකම්වලට අගතියක් සිදු කරමින් තවත් පාර්ශවකට ප්‍රතිලාභ ලබා දෙන ලෙසට තීරණ ගැනීම ස්වාධාවික නීති මූලධර්මයනට පටහැනී විමකි.

ඒ අනුව මෙහිදී හක්ගල රක්ෂිතය සම්බන්ධයෙන් රටේ පවත්නා වූ පාරිසරික ව්‍යවස්ථාවන්ට පටහැනීව සමානාත්මක වැසියා මෙන්ම පොදු අධිකාරීන්ද කටයුතු කර ඇති බවක් දැකිය හැකි වේ.⁴ එනම් කළක පටන් රක්ෂිතය තුළ පාරිසරික පනත්හි ප්‍රතිපාදන කඩකරමින් මානව

³Hobbes T. (1946), *Leviathan or the matter, form and power of a commonwealth ecclesiastical and civil*, Basil Blackwell, Oxford. p83

⁴ FFPO හි 4 සහ 6 වගන්තීන්

කියාකාරකම් ඉහළ ගොජ් ඇතේ. ඒ අනුව මෙම රක්ෂිතය තුළ අනවසර පදිංචිවීම් සමග වගා කටයුතු සහ තණපිටි සඳහා රක්ෂිතය එළිපෙහෙලි කිරීමත්, මාරුග නිර්මාණය වීමත් සහ රක්ෂිතය හරහා විදුලි රහැන් ඇදීමත් සිදු වී ඇතේ. මෙහි ඇතැම් පදිංචිකරුවන් සඳහා අවසරපත්‍ර වැළැම්බ සහ තුවර එළිය දිස්ත්‍රික් ලේකම් කාර්යාලවලින් සහ ඉඩම් කොමසාරිස් විසින් නීතුත් කර ඇති අතර ලංකා විදුලි බල මණ්ඩලය විසින් එම ඉදිකිරීම් සඳහා විදුලි රහැන් ලබා දීමද සිදු කොට ඇතේ.

මෙසේ රජයෙන් අවසරලත් මෙන්ම අවසර තොලත් පදිංචිකරුවන් විසින් එහි පැවති ගාක හා පැලැටී විනාශ කොට එළිපෙහෙලි කරගත් රක්ෂිත හුමිය මත හෙල් මලු කුමයට වගාකොට ඇති අතර මහවැලි ගැගහි එක් අතු ගෘගාවක් වන උමා ඔයෙහි උල්පතට මොවුන් විසින් තැන ගොදා තම වගා කටයුතු සඳහා අවශ්‍ය ජලය ලබාගැනීම සහ තම දර අවශ්‍යතාව සපුරාගනුයේද රක්ෂිතයේ ගාක මගින්ය. මේ හේතුවෙන් රක්ෂිතය තුළ වියලිකලාපයක් ඇතිවන අතර වනාන්තරය එළි වීම නිසා පස නිසරු විමත් සිදු වේ. තවද ඇතැම්විට රක්ෂිතයේ සතුන් දඩියම් කිරීමද මොවුන් විසින් සිදු කරයි. තම වගාවන් සඳහා යොදාගනු ලබන කෘමිනාගක සහ වල්නාගක හේතුවෙන් රක්ෂිතයේ වන ජ්වී ගහනයට මෙන්ම පරිසර පද්ධතියටද විශාල අභිතකර බලපෑමක් ඇතිව තිබේ.ඒ අනුව මෙම පදිංචිකරුවන්FFPOහි ප්‍රතිපාදන.⁵ සහ ජාතික පාරිසරික පනතේ ප්‍රතිපාදනයද

⁵1937 වන සත්ව හා වැක්ෂලතා ආරක්ෂක (සංශෝධන) ආයා පනතේ 3 වන වගන්තිය

උල්ලංසනය කරමින් කටයුතු කර ඇති බව වඩාත් පැහැදිලිව පෙනෙන කරුණකි.⁶

එසේම 1940 දී රජය විසින් හක්ගල රක්ෂිතයේ ඇතැම් බ්‍රිතියා කොටස් අභිවේල ගොවීපොල පිහිටුවේම සඳහා වෙන් කරන ලදී. මෙම ගොවීපොලහි එක් කොටසක්SNRතුළත්, තවත් කොටසක් එහි සිමාන්තරික කලාපය(Buffer Zone)තුළත් පිහිටා ඇත.

පසුව 1947 රජයේ ඉඩම් ආයා පනතේ⁷ප්‍රතිපාදන ප්‍රකාරව අභිවේල ගොවීපොල වසර 50ක් සඳහා කෘෂිකාර්මික සහ වාණිජමය අරමුණු සඳහා බදු ගිවිසුම් 2ක් යටතේ පෙළද්ගලික ආයතනයකට බද්දට ලබා දී ඇති නමුත් ආයා පනතෙහිම දක්වන ආකාරයට රජයට රක්ෂිත ප්‍රදේශයක් පෙළද්ගලික අංශයට බදු දීම හෝ විකිණීම කළ නොහැක. එයද වාණිජමය අරමුණු සඳහා හක්ගල රක්ෂිතයේ බිම කොටස් බදු දීම පනතේ ප්‍රතිපාදනවලට පටහැනි වේ.

එසේම මෙම ගොවීපොල රජය විසින් ආරම්භ කිරීමට පෙරFFPOප්‍රතිපාදනවල අනුකූලව මූලික පාරිසරික සම්ක්ෂණ වාර්තාවක්(IEE Report)හෝ පාරිසරික බලපෑම් පිළිබඳ තක්සේරු වාර්තාවක්(EIA Report)ඉදිරිපත් කර නොමැති අතර⁸ එවකට පැවති කෘෂිකර්ම අමාත්‍යාංශය මගින් මෙම ගොවීපොල පිහිටුවා ඇත.එනම් පනත මගින් අරමුණු කරගත් පාරිසරික

⁶1988 ජාතික පාරිසරික (සංගේධන) පනතේ 23 (ක) වගන්තිය

⁷1947 රජයේ ඉඩම් ආයා පනතේ 2 වගන්තිය

⁸1947 රජයේ ඉඩම් ආයා පනතේ 2 වගන්තිය

සංකල්පයන්ට එරෙහිව ගොස් රජය විසින් මෙම ගොවීපොල ස්ථාපනය කර තිබෙන බව පැහැදිලි වේ.

කෙසේ වුවද මෙම අභිවේල ගොවීපොල මගින් සාපු සහ සාපු නොවන ලෙස සේවකයන් 800 කට පමණ රකියා සැපයෙන අතර අදාළ බදු ගිවිසුම් යටතේ රජයට වාර්ෂිකව විශාල ආදායමක් හිමි වේ.නමුත් රටක ආර්ථික සංවර්ධනය සැම විටම පරිසර හිතකාම් ලෙස සිදු කළ යුතු අතර කොතෙක් දුරට අදාළ ක්‍රියාකාරකම් හේතුවෙන් ආර්ථික ප්‍රතිපාදනයන් ලැබුණු, එයින් සිදුවන පරිසර භාතිය වර්තමාන මෙන්ම අනාගත පරම්පරාවලටද බලපාන්තේනම් එය අසාර්ථක සංවර්ධනයකි.

ඉහත තෙනතික ප්‍රතිපාදන තුළ ගැබිව පවතින ප්‍රධානතම සිද්ධාන්තය වනුයේ තිරසර සංවර්ධනය සහ පරම්පරා අතර සමානාන්මතාව වේ.Hungary v.

Slovakia [1997]⁹නඩු තීරණයේදී විරමන්තී විනිසුරුතුමා ශ්‍රී ලංකාවේ ජලාශීත ශිෂ්ටවාරය උදාහරණයට ගනිමින් පෙන්වා දුන්නේ සංවර්ධනය සැමැවිම පරිසරය හා ඒකාබද්ධව සිදු විය යුතු බවය. ඒ අනුව මිනිසා විසින් තම ජ්වන අරගලය තුළදී වාසස්ථාන පිහිටුවේමේ කාර්යයේදී පරිසරයට භාති කරමින් ඉදිරියට යා නොහැකි බවත්, එම දෙකාරයයම සමතුලිතව පවත්වා ගත යුතු බවට පනත මගින් ව්‍යාජයයන් දක්වා සිටිය.

මේ සම්බන්ධයෙන් 1980 ජාතික පාරිසරික පනත මගින්ද ප්‍රතිපාදන දක්වන අතර එහි 15(ආ) වගන්තිය මගින්ද දක්වනුයේ සම්පත් භාවිතයේදී ජාතියේ අවශ්‍යතා සහ සම්පත් අතර

⁹[1997] 4(4) SAELR 197

අසම්බරතා ඇතිවීම වැළක්වීම පිණිස ඒ සම්පත් ප්‍රයාගේට ලෙස උපයෝගී කරගැනීම සහ සංරක්ෂණය කිරීම සහ 17 වගන්තියට අනුව ස්වභාවික සම්පත් භාවිතය අනාගත පරපුරට ප්‍රතිඵල ගෙන දෙන පරිදි සිදු කළ යුතු බවත් දක්වා ඇත.¹⁰ ඉහතදී සාකච්ඡා කරන ලද්දේ රක්ෂිතය තුළ පදිංචිය සඳහා අවසරල් මෙන්ම අනවසර පුද්ගලයන් සම්බන්ධයෙන් පොදුවේ අදාළ වන නීතිය වේ. එහිදී අනවසර පදිංචිකරුවන් සම්බන්ධ නීතිය තවදුරටත් මෙසේ සාකච්ඡා කළ හැක.

රජයේ ඉඩම් යනු නීත්‍යනුකූලව රජයට සහ රාජ්‍ය ආයතන වලට හිමිකම් ඇත්තා වූ හෝ සහ බද්ධ හෝ අනුබද්ධ සියලු අධිතිවාසිකම් සම්බන්ධයෙන් භාවරප්‍රසාද සමග රජය විසින් බැහැර කරනු ලැබේය හැකි ඉඩම් වේ.¹¹ ඒ අනුව 1981 රජයේ ඉඩම් නියෝග මාලාවේ 178 නියෝගයට අනුව රක්ෂිත භුමිගැනෙනුයේ රජයේ ඉඩම් යටතට වේ. එම නිසා හක්ගල රක්ෂිතයේ අනවසර භුක්තිකරුවන් සම්බන්ධයෙන් රජයේ ඉඩම්වලට බලපාන තෙතික තත්ත්වය සලකා බැලිය යුතුය.

එනම් යම් රජයේ ඉඩමක් යම් ලිඛිත නීතියකට අනුකූලව රජය විසින් ප්‍රධානය කරන කරන ලද වලංගු ප්‍රදාන පත්‍රයක්, වලංගු බලපත්‍රයක් හෝ වෙනත් වලංගුව පවතින වෙනත් ලිඛිත අධිකාරියක් මත එම ඉඩමේ සන්තකය දැරීම හෝ පදිංචිව සිටීම හැර අන් සැම ආකාරයකම සන්තකය දැරීමක් හෝ පදිංචිව සිටීමක් සිදු කරන හෝ රජයේ ඉඩමකට යුතු ලෙස ඇතුළු වී

¹⁰ 1980 ජාතික පාරිසරික පනතේ 15(ආ) සහ

17 වගන්තිය

¹¹ 1979 ඉඩම් (සන්තකය ආපසු ලබාගැනීමේ) සංශෝධන පනතේ 18 වගන්තිය

සන්තකය දරන හෝ පදිංචිව සිටීන සැම තැනැත්තේකුම අනවසර භුක්තිකරුවෙකු වේ.¹²

ඒ අනුව රජයේ ඉඩමක අනවසර භුක්තිකරුවෙකු සම්බන්ධයෙන් නීතිය, FFPO වලට අමතරව 1979 රජයේ ඉඩම් (සන්තකය ආපසු ලබාගැනීමේ) පනත¹³ මගින්ද නියාමනය කරනු ලැබේ. එයන් සමග 1981 ඉඩම් නියෝග මාලාවේ නියෝග සහ රෙගුලාසි සහ 1840 අංක 12 දරන ඉඩම් බලෙන් අල්ලා ගැනීමේ ආයා පනතද මෙහිදී වැදගත් වේ.

රක්ෂිතය තුළ මේ වන විට අනවසරයෙන් පදිංචිව සිටීන පුද්ගලයන් සම්බන්ධයෙන් මෙම ප්‍රතිපාදන අදාළ වුවද , රක්ෂිතය තුළ සිටීන ප්‍රදාන ලත් භුක්තිකරුවන් සම්බන්ධයෙන් අදාළ වනුයේFFPOහි ඉහතින් සාකච්ඡා කළ ප්‍රතිපාදන බවට පැහැදිලි වේ. මන්ද **Senanayake v. Damunapola [1982]¹⁴** නැඩු තීරණයට අනුව මෙම පනත යටතේ අදාළ භුක්තිය ප්‍රශ්නගත වීමට නම් අදාළ ඉඩම් රජයේ ඉඩමක් වීම සහ භුක්තිකරු අනවසර භුක්තිකරුවෙකු ද යන්න තහවුරු වී තිබිය යුතුය.

මෙලෙස සාමාන්‍ය පුරවැසියා මෙන්ම පොදු අධිකාරීන් විසින්ද අත්තනෝමතිකව නීත්‍යනුකූල තොවන අයුරින් ක්‍රියාකර තිබෙන අවස්ථාවකදී නීතියේ කාර්යභාරය විය යුතු වන්නේ

¹² Herath K., (2012), 'රජය එදිරිව අනවසර භුක්තිකරු', Neethiya Journal, Volume 22,

p74

¹³ 1979 අංක 07 දරන ඉඩම් (සන්තකය ආපසු ලබාගැනීමේ) පනත

¹⁴ [1982] 2 SLR 621

එමගින් ස්වභාවයෙන්ම ගැටෙන අයිතිවාසිකම් තුලනය කිරීම සහ අනෙකුත්තාව පැවතිය හැකි මට්ටමට එම බැඳියාවන් ගෙන එම වේ. මේ සම්බන්ධව සමාජ විද්‍යාගුරුකුලයේ ඇසින් පහත ආකාරයට විග්‍රහ කළ හැක.

එනම් අයිතිවාසිකම් යනු නීතිය මගින් හඳුනාගත්, නීතිය මගින් ආරක්ෂා කරනු ලබන සහ නීතිය මගින් බලගත්වනු ලබන බැඳියාවන් වේ. Poundට අනුව සමාජයක් තුළ ප්‍රධාන වශයෙන් ගැටෙන අයිතිවාසිකම් වර්ග ත්‍රිත්වයක් හඳුනාගත හැක. එනම් තනි පුද්ගල අයිතිවාසිකම්, රාජ්‍ය අයිතිවාසිකම් සහ සමාජ අයිතිවාසිකම් වේ. ඒ අනුව ප්‍රථමයෙන් මෙම භූමිය සම්බන්ධයෙන් මත්වන්නා වූ ඉහත දැක්වන ලද අයිතිවාසිකම් කවරක්ද යන්න හඳුනාගත යුතු අතර ඉන් පසුව සමාජ ඉංජිනේරුවාදය යස්සේ එම අයිතිවාසිකම් තුලනය කරන ආකාරය සලකා බැලිය යුතුය.

ඒ අනුව මෙම නඩුවේ හක්ගල රක්ෂිතයේ එක් කොටසක තම ගොවීපොල පවත්වන පොද්ගලික ආයතනයට අදාළ බඳු ගිවිසුම මගින් එම දේපොල සම්බන්ධයෙන් පවතින අයිතිවාසිකමත්, පරිපාලන නිලධාරීන්ගේ අත්තනෝමතික ක්‍රියා හේතුවෙන් රක්ෂිතයේ තවත් කොටසක ස්ථීර පදිංචිය සඳහා ලද ප්‍රදාන තුළින් එම පදිංචිකරුවන්ට ලැබෙන අයිතිවාසිකමත් තනි පුද්ගල අයිතිවාසිකම් ලෙසට මෙහිදී හඳුනාගත හැක. අනික් අතට පාරිසරික සංකල්ප තුළින් ගම්‍යමාන වන වර්තමාන පරම්පරාවට මෙන්ම අනාගත පරම්පරාවටද රාජ්‍යයේ සම්පත්වලින් එල ප්‍රයෝගන්

ලොගැනීමට ඇති අයිතිවාසිකම් සමාජ අයිතිවාසිකම් ලෙසට දැක්විය හැක.

ඉහත අවසරලත් පුද්ගල කොට්ඨාගයන් විසින් පාරිසරික ව්‍යවස්ථා මගින් තහනම් කර තිබෙන ක්‍රියා රක්ෂිතය තුළ සිදු කර ඇති බවට පැහැදිලිව පෙනෙන්නට තිබෙන අවස්ථාවකදී සමාජ අයිතිවාසිකම් පරයා ඔවුන්ට එම භූමිය සම්බන්ධයෙන් හිමිකමත් සමග ලැබෙන අයිතිවාසිකම් ප්‍රතික්ෂේප කොට පසෙකලිය නොහැක. එනම් දේපොල හිමිකමත් සමග යම් පුද්ගලයෙකුට

- භුක්ති විදිමට තිබෙන අයිතිය
- හාවිත කිරීමට හා එල ප්‍රයෝගන ලැබීමට තිබෙන අයිතිය
- පවරාදීමට තිබෙන අයිතිය
- විනාශ කිරීමට තිබෙන අයිතිය යන අයිතිවාසිකම් ද හිමි වේ.¹⁵

එනම්*cuius est solum, eius est usque ad coelum et ad inferos*යන ආජ්‍යාතයට අනුව පසෙහි අයිතිය ඇති තැනැත්තාට ඉහළ සිට පහළට තෙක් ඇති සියල්ලෙහි(hell to heaven)අයිතියක් ලැබෙන බවයි. එස්ම ගොවීපොල සම්බන්ධයෙන් පොද්ගලික පාරිග්‍රාමයට තමන් කැමති රැකියාවක නිරත වීමේ අයිතියද මෙහිදී ඉස්මතු වනු ඇත. නමුත් මෙම අයිතින් අතුන්ත අයිතින් නොවන අතර ව්‍යවස්ථාපිත සීමා කිරීම ගණනාවකට ලක්වීමට සිදු වේ. මෙයට හේතු වී තිබෙනුයේ සමාජ විද්‍යා ගුරුකුලය මගින් දැක්වන බැඳියාවන් තුළනය වේ. එනම් මෙම නඩුවේ දේපොල දැරීමේ අයිතිය ඉහතින් දැක්වූ පාරිසරික සංකල්ප හේතුවෙන් සීමා

¹⁵ AG v. Herath [1960] 62 NLR 145

කිරීමකට ලක්වේ. ඒ අනුව මෙහිදී තනි පුද්ගල අයිතිවාසිකම් හා සමාජ අයිතිවාසිකම් සට්ටනය වීමෙදී නීතිය මැදිහත් වී අවම හානියක් වන පරිදි මෙම තුළනය කිරීම සිදු කළ යුතුය.

ඒ අනුව Pound විසින් මෙම ගැටෙන අයිතිවාසිකම් සංසන්ධනය කොට ප්‍රමුඛතාව ලබාදිය යුතු අයිතිවාසිකම් හඳුනාගැනීම සඳහා නෙතික සත්‍ය මූලයන්(Jural Postulates)නම් සංකල්පය ඉදිරිපත් කරන ලදී.¹⁶ මෙමගින් සමාජයක් තුළ පවතින අයිතිවාසිකම් සහ බැඳියාවන් පිළිබඳ නෙතික හේතුවාදය පුර්වේක්ෂණය කළ හැකි වේ.

මොහු තවදුරටත් දක්වනුයේ නව අයිතිවාසිකම් ස්ථාපනය කිරීමටනම් ඒ හා සමාන අයිතිවාසිකම් ප්‍රථමයෙන් හඳුනාගෙන තිබිය යුතු බවයි. එසේම සත්‍ය මූලයන් සමාජය හා බැඳි පවතින බැවින් සමාජයත් සමග ඒවාද වෙනස් වේ. ඒ අනුව රක්ෂිතය තුළ හුක්තියේ සිටින පුද්ගලයන් සේම රාජ්‍යයේ ස්වභාවික සම්පත්වල හාරකුවන් වන පාලකයන් විසින් ද එම හුමිය පිළිබඳව ඉහත ආකාරයට අනුව කටයුතු කරයි යන්න නීතිය විසින් පුර්වේක්ෂණය කරනු ඇත. ඒ අනුව සැබැවින්ම සමාජයක පැවැත්ම තහවුරු වීමට නම් නීතිය මගින් මෙම අයිතිවාසිකම් තුළින් පිළික්ඩු වන සමාජ අවශ්‍යතා සහ ඉල්ලීම් තුළ යුතුය. එහිදී එම පිළිගැටෙන අයිතිවාසිකම් තුළනය කළ

හැකිවන්නේ ප්‍රතිලාභ ලබාදීම සහ බල කිරීම මගින් වේ.

නෙතික සත්‍ය මූලයන් පිළිබඳ සංකල්පයට අනුව යම් රාජ්‍යයක බලයන් පාලකයා විසින් අයිතිවාසිකම් තිරමාණය වීමටත් පෙර සමාජයේ පැවැත්මට හානිදායක වන එවැනි උග්‍රතාවන් පුර්වේක්ෂණය කිරීමට හැකිවිය යුතු අතර සමාජය තුළින් අවශ්‍යතා මතුවීමට ප්‍රථමයෙන් පෙර අවස්ථාවන්වලදීම හඳුනාගෙන එම අවශ්‍යතා සපුරාලීම සඳහා කටයුතු කළ යුතුය.¹⁷ එනම් සමාජ විද්‍යා ගුරුකුලය තුළ මූලික හරය වනුයේ නීති ප්‍රතිසංස්කරණ තුළ තව ප්‍රවණතා සහිත සංවර්ධනයක් ඇති කිරීම වේ.

එහෙයින් අදාළ පොදු අධිකාරීන් විසින් තම අහිවාද්‍යිය තකා රාජ්‍යයේ ස්වභාවික සම්පත් මෙලෙස වෙනත් පාර්ශවයන්ගේ පෙළද්‍රලික කටයුතු සඳහා අත්තනෝමතික ලෙස බැහැර කිරීමට ප්‍රථමයෙන් ඇතිවිය හැකි තනි පුද්ගල සහ සමාජ අයිතිවාසිකම් සට්ටනය විවක්ෂණයීලිව සහ දුරද්‍රියිව පුර්වේක්ෂණය කළ යුතුව තිබුණි. එසේ සිදු කොට නිසි අයුරින් ක්‍රියා කර තිබුණේ නම් රාජ්‍යයේ වර්තමාන මෙන්ම අනාගත පුරවැසියන්ගේද අයිතිවාසිකම් ආරක්ෂා වනු ඇත.

එම නිසා මෙම අයිතිවාසිකම් තුළනය සම්බන්ධයෙන් රාජ්‍යයක ප්‍රධාන වගකීම පැවරෙනුයේ ව්‍යවස්ථා සම්පාදකයන් වෙතය. මන්ද පොදු අධිකාරීන් වෙත බලය පැවරෙනුයේ ව්‍යවස්ථාවන් මගින් වන අතර ඔවුනට ඒ තුළින් පුළුල් අහිමතයක් ලබා දීම මෙන්ම එම බලය විමර්ශනයට ලක් කිරීම සඳහා ප්‍රතිපාදනය එමගින්

¹⁶ibid

¹⁶Nalbandian E. (2011), 'Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests and Jural Postulates', Mizan Law Review, Volume 5 Number 1, p141-148

සැලස්ය යුතු බැවිනි. මන්දයත් බලය දූෂිත වන අතර අසීමිත බලය අසීමිත ලෙස දූෂිත වේ. මේ තුළින් අයහපතත් බලපෑමක් ඇතිවනුයේ සමාජයේ පැවැත්මට වේ.

එහිදී ප්‍රයෝගික තත්ත්වය සලකා බලන කළ පැහැදිලි වනුයේ මෙම ගැටළුව ඇතිවීමට ප්‍රධානතම හේතුව වනුයේ පොතේ තිබෙන නීතිය සහ ක්‍රියාවට තැබෙන නීතිය (law in books and law in action) අතර වෙනස වේ. එම නිසා නිසැකයෙන්ම බැදියාවන් තුළනය සම්බන්ධයෙන් ව්‍යවස්ථාදායකයට මෙන්ම අධිකරණය සතුවද විශාල වගකීමක් වේ. එනම් **Senerath v. Kumaratunga [2007]**හිදී අධිකරණය ගෙනහැර දැක්වූ ආකාරයට Being the custodian of executive power should exercise that power in trust for the People and where in the purported exercise of such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek declaration from this court as it to the infringement of the fundamental right to equality before the law.¹⁸ මෙන් ගම්‍ය වනුයේ පොදු අධිකාරීන් විසින් තම අහිමතය ක්‍රියාත්මක කිරීමේදී පනතේ අරමුණ තැකිනම් පාර්ලිමේන්තුවේ වෙතනාව සපුරා තිබේද යන්න විමර්ශනය කිරීමේ බලය පවතිනුයේ අධිකරණය සතුව වන බවයි.

එ අනුව Pound යෝජනා කර සිටින පරිදි ගැටෙන බැදියාවන් තුළනය කළ හැකි තවත් එක් ක්‍රමයක් වනුයේ එම බැදියාවන් පිළිබඳ පැහැදිලි අවබෝධයකින් සහ ප්‍රතිඵා යුතානයකින් යුතු විනිශ්චරුවරයෙකු මත විශ්වාසය තැබීම වේ.¹⁹ එනම් මනා සමාජ පාලන ක්‍රමයක් කරා ලාභ වීමේදී ව්‍යවස්ථාදායකය මෙන්ම අධිකරණය සතුවද යම් කාර්යභාරයක් පවතී. ඒ අනුව නීතියට ජීවමය ගුණය එක් කරන්නා වූ අධිකරණයේ ක්‍රියාවලිය ඇමරිකානු තත්වාකාරවාදී ගුරුකුලය තුළින් මෙහි ගෙනතික ගැටළු අනතුරුව විමසා බැලිය යුතුය.

මේ තුළින් නීතියේ ක්‍රියාවලිය තැක්නම් නීතිය ක්‍රියාත්මක විය යුත්තේ කෙසේද යන කරුණෙන් ඔබිබට ගොස් නීතියේ ප්‍රතිඵල දෙසට අවධානය යොමු කරමින් නීතිය වඩා හොඳ තත්ත්වයක් කරා ගෙන යන ආකාරය පිළිබඳව සලකා බලනු ලබයි.

එ අනුව මෙහිදී අධිකරණයේ කාර්යය වනුයේ පරිපාලන නිලධාරීන්ගේ අසාධාරණ සහ අත්තනෝමතික තීරණ හේතුවෙන් ඇතිවන සාමාජයිය බලපෑම පළමුව වත්හා ගැනීම වේ. මන්ද මෙහි පොදු නීති දෙවර්ගයක් හේතුවෙන් හටගත් මෙම ගෙනතික ගැටළුවලට අධිකරණය විසින් ලබා දෙන තීන්දුව තුදෙක් පෙන්ගැලිකව පමණක් අදාළ නොවන අතර වර්තමාන මෙන්ම අනාගත පරම්පරාවටද බලපානු බෙන ප්‍රතිඵලයකි. එම නිසා නීතිය සැමවිටම

¹⁹Nalbandian E. (2011), 'Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests and Jural Postulates', Mizzan Law Review, Volume 5 Number 1, p141-148

¹⁸[2007] SC FR 503/2005

යාවත්කාලීන කරමින් සමාජය හා සමාන්තරව පවත්වාගැනීමේ වගකීම අධිකරණය සතු වේ. මෙය Llewellyn විසින් මනාව පැහැදිලි කරනුයේ Society is always in flux, so law is ever catching up the society. The probability is that any portion of law needs re-examination to determine how far it fits the society it purports to serve.²⁰ ලෙසයි.

මේ වන විට හක්ගල දැඩි ස්වාභාවික රක්ෂිතය ජාතික අභය භූමියක් ලෙස තම කිරීමේ යෝජනාවක් පොද්ගලික පාර්ශවයන් විසින් ඉදිරිපත් කර ඇත. මන්දFFPOහි ප්‍රතිපාදන අනුව ජාතික අභය භූමියක් තුළ රජයේ ඉඩම් මෙන්ම පොද්ගලික ඉඩම්ද පැවතිය හැකි බැවින් එවිට ඉදිරියටත් රක්ෂිතය තුළ ඉදිකිරීම් සහ පදිංචිවීම් එමෙසම පවත්වාගෙන යා හැකි වනු බැවිනි. මෙවැනි අවස්ථාවකදී අධිකරණයේ වගකීම වනුයේ හක්ගල භූමිය දැඩි ස්වාභාවික රක්ෂිතයක් ලෙස තම කිරීමේ ව්‍යවස්ථාදායකයේ අරමුණ පැහැදිලිව වටහා ගෙන එය සාක්ෂාත් කරගැනීම සඳහා නීතිය නිසියාකාරයෙන් අර්ථ නිරුපණය කිරීම වේ.

එහිදී අධිකරණය විසින් තම අභිමත බලය තුළදක් ව්‍යවස්ථා සහ නීති වාර්තා තුළට පමණක් කොටු කරමින් සාධාරණත්වය සහ සමානාත්මකාව වැනි මූලික සංකල්පයන්ගෙන් මිදි කියාත්මක කළ නොහැක. මේ සම්බන්ධයෙන් මග පෙන්වීමක් කරන

බැංගලෝර් සංකල්පයන් තුළින් දක්වන්නේද අධිකරණ කියාවලියේ මූලික හරයාත්මක වට්නාකම්වලට අනුව විනිශ්චරුවරයා කටයුතු කළ යුතු බවයි. එනම් විනිශ්චරුවරයාගේ කාර්යභාරය පිළිබඳව අදහස් දක්වනවිරමන්ත් විනිශ්චරුතුමා පෙන්වාදෙන්නේ,

'A judiciary of undisputed integrity is the bedrock of democracy and the rule of law. Even when all other protections fail, the judiciary provides a bulwark to the public against any encroachments on rights and freedoms under the law.'²¹

එම නිසා මෙහිදී වන සමුහයක් වන නීතිය ප්‍රයෝගික තලයකට ගෙන යමින් පරිපාලන නිලධාරීන්ගේ අභිමතය පාලනය කිරීම සහ රිට් ප්‍රතිකර්ම සම්බන්ධයෙන් වන හරයාත්මක සහ කාර්යපටිපාටික නීතිය පරිසර නීතිය සමග මූසු කරමින් පුද්ගල අධිතිවාසිකම් ආරක්ෂා කිරීමේ වැදගත් මෙහෙයක් අධිකරණය විසින් සිදු කළයුතු බව වේ. මින් සපා වන කාරණය වනුයේ රාජ්‍යයක ව්‍යවස්ථාදායක, විධායකය සහ අධිකරණය යන ආයතන ත්‍රිත්වයම නෙතිකඟාවය ගැබේ පවතින්නා වූ මූලික සංකල්පයන්ගෙන් බැඳී සිටින අතර එවැනි රාජ්‍යයක නීතියේ ආධිපත්‍ය ද ආරක්ෂා වී ඇති බව වේ.²² අනතරුව තැවතත් ස්වභාවික නීති විද්‍යා ගුරුකුලයේ වැදගත්

²⁰Llewellyn K. (1962), *Jurisprudence: Realism in Theory and Practice*, Chicago,

University of Chicago Press, p55

²¹ibid

²²Dworkin R. (1984), *Taking Rights Seriously*, p14-45

සංකල්පයක් වන සමාජ සම්මුතිවාදය මගින් මෙහි නෙතික විෂය පථය සාකච්ඡා කිරීමට මෙහිදී අදහස් කෙරේ. එහිදී සමාජ සම්මුතිවාදය තුළ ජනතාව විසින් සමාජ එකතුතාවකට පැමිණ පාලකයෙකු පත් කරගනු ලබන අතර එමගින් තම අධිතිවාසිකම ක්‍රියාත්මක කරවාගැනීම සඳහා යාන්ත්‍රණයක් ඇති කරගනු ලබයි. එනම් තම පැවැත්ම තහවුරු කරගැනීම සඳහා රාජ්‍යය නැතහොත් පාලකයා සමග ජනතාව ඇතිකරගන්නා ගිවිසුම හරහා පාලකයාට බලය පවරා දීමක් සිදු වේ. නමුත් මෙය පරම බලයක් ලෙස හැඳින්විය නොහැකි වනුයේ එම බලයේ උල්පත මහජනතාව වන බැවිනි.

එනම් ශ්‍රී ලංකා ආණ්ඩුක්‍රම ව්‍යවස්ථාවට අනුව පරමාධිපතා බලය ජනතාව සතුවන අතර එම බලය අත්හළ නොහැක. මෙම බලය ව්‍යවස්ථාදායකය, විධායකය සහ අධිකරණය ඔස්සේ ක්‍රියාත්මක වේ.²³ ඒ අනුව පැහැදිලිවනුයේ නෙතික අධිකාරීත්වය ජනතාව සතු වන අතර තම සමාජයේ, ආර්ථිකමය සහ දේශපාලනික නිදහස හැකි විදිමේදී හටගත හැකි අධිතිවාසිකම සට්ටනයට විසඳුමක් ලෙස මෙම සමාජ සම්මුතිය ඇති කරගත් බවයි.

ඒ අනුව මෙහි වැඩි දියුණු කරනලද අවස්ථාවක් නැතහොත් වර්ධනීය අවස්ථාවක් ලෙසට මහජන හාරය පිළිබඳ සංකල්පය(Public Trust Doctrine)හඳුනාගත හැක. මේ පිළිබඳව **Sugathapala Mendis v. Chandrika Kumaratunga (2008)** නිදි

ගිරාණි තිලකවර්ධන විනිශුරුවරිය පෙන්වා දෙනුයේ,

Public Trust doctrine is based on the concept that the powers held by organs of government are, in fact, powers that originate with the people, and are entrusted to the legislature, the executive and the judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the people of Sri Lanka.²⁴

එම නිසා සමාජ සම්මුතිවාදය තුළින් පත්වන පාලකයාට අසීමිත බලයක් නොමැති අතර මහ භුදේක් තමාට නෙතිකව ලද බලය ජනතා යහපත උදෙසා ක්‍රියාත්මක කළ යුතු වේ. එනම් Poundක්වන ආකාරයට රජය සහ නීති ජනතාවගේ පොදු කැමැත්ත නිරුපනය කළ යුතු අතර අත්තනෝමතික නොවිය යුතුය.

ඒ අනුව යම් අයුරකින් පාලකය තම වගකීම් නිසියාකාරව ඉටු නොකරන්නේ නම් ජනතාවට එම සම්මුතිය අවසන් කාට මුල්කාලීනව තමාට පැවති බලය තැවත ආරෝපණය කරගත හැකිය. අනතුරුව තවදුරටත් තම අධිතිවාසිකම් තහවුරු කරගැනීම සඳහා තව සම්මුතියක් ඇති කර ගත හැකිය. මෙය Lockතම මතවාදය තුළින් මනාව නිරුපණය කරයි.

The legislative being only a fiduciary power to act for certain ends, there remains still in the people a

²³ 1978 ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 3 සහ 4 ව්‍යවස්ථා

²⁴ [2008] 2 Sri LR 352

supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.²⁵

එහෙයින් රක්ෂිතයේ සිද්ධීමය කාරණාවලට අනුව විධායකයේ කොටසක් වන පරිපාලන තිබාරීන් හට ව්‍යවස්ථා මගින් ලබා දී තිබෙන බලය භාවිත කළයුතු වන්නේ පොදු මහජන සුභසිද්ධීය උදෙසා විය යුතුය. එනම් රාජ්‍යයේ ස්වභාවික සම්පතක් වන හක්ගල රක්ෂිතය භාරයක් ලෙස දරමින් ජනතාවගේ අර්ථලාභය උදෙසා සංරක්ෂණය කොට ආරක්ෂා කිරීමේ පරම යුතුකමින් පරිපාලන අධිකාරය බැඳී පවතී.

තවද මේ සඳහා පොදු අධිකාරීන්ට වගකීමට යටත් කරන්නා වූ මූලධර්ම සමුදායක් ලෙසට රාජ්‍ය ප්‍රතිපත්ති මෙහෙයුමේ මූලධර්ම පෙන්වා දිය නැක. ඒ අනුව 27(14) ව්‍යවස්ථාව මගින් ජනතාවගේ යහපත උදෙසා පරිසරය සුරක්ෂිත කොට ආරක්ෂා කිරීමේ වගකීම රජය වෙත පවරා ඇත. මේ තුළ ගැබේ ඇති පාරිසරික සංකල්ප සහ මහජන භාරය පිළිබඳ සංකල්පය මනාව පැහැදිලි වේ.

කෙසේවුවද ආණ්ඩුකුම ව්‍යවස්ථාව තුළ රාජ්‍ය ප්‍රතිපත්ති පිළිබඳ පරිච්ඡේදයක් අන්තර්ගත වුවද එයට අධිකරණය බලාත්මකභාවයක් ලබා දී නොමැත. මෙය පරිපාලන තීතිය මෙන්ම පරිසර තීතිය සම්බන්ධයෙන් ගැටුලු හමු වූ විටකදී ඉස්මතු වි පෙනෙන ප්‍රබල හිස්තැනක් වේ. මන්ද රාජ්‍යයේ

ස්වභාවික සම්පත් ආරක්ෂා කිරීමේ වගකීම පාලකයන් වෙත පවරා තිබුණු ඔවුන් එම වගකීම පැහැර හැර සිටින විටකදී රට එරෙහිව අධිකරණයුදිරියට යාමේ අයිතිවාසිකමක් මහජනතාවට නොවේය. එනම් 29 ව්‍යවස්ථාවට අනුව රාජ්‍ය ප්‍රතිපත්ති මගින් කිසීම අයිතිවාසිකමක් හෝ නෙතික බැඳියාවක් ඇති නොකරන අතර එම විධිවිධානවලට අනුකූල වීම අධිකරණයකට ප්‍රශ්නගත කළ නොහැකි.²⁶

නමුත් මෙම තත්ත්වය වෙනස් කරමින් තීති විද්‍යා ඉතිහාසය තුළ වැදගත් නඩුවක් වන **Ravindra Gunawardena Kariyawasam v. CEA & others**

[2019]²⁷හි තීන්දුව පෙන්වා දිය නැක. එනම් එහිදී අධිකරණය දැක්වුයේ, පරිසර දුෂ්ඨයෙට හෝ එවැනි භානියකට තුළ දෙන හෝ එවැන්නකට අවසර ලබා දෙන්නා වූ ඕනෑමනීත්‍යානුකූල නොවන අත්තනේමතික විධායක හෝ පරිපාලන ක්‍රියාවකට හෝ නොකර හැරීමකට ලක් නොවී සිටීමේ මූලික අයිතිවාසිකම පුරවැසියන්ට හිමිවිය යුතු අතර එය 27 (14) ව්‍යවස්ථාව යටතට වැටෙන පරිදි 12(1) ව්‍යවස්ථාව තුළින් දැක්වීය යුතු බවයි.

මේ අමතරව එප්පාවල පොස්ගෙවී තීතිය තුළ තීරණයේදී [2000] මහජන භාරය පිළිබඳ සංකල්පයෙන් ඔබිබට ගොස් අමරසිංහ විනිසුරුතුමා විසින් දක්වන ලද පොදු ආරක්ෂකත්වය පිළිබඳ මූලධර්මය(Public Guardianship)පිළිබඳවද මෙහිදී අවධානය යොමු කළ යුතුය. එනම්,

²⁵Lock J. (1960), *Two Treaties of Government*, Cambridge, Cambridge University Press, p385

²⁶1978 ආණ්ඩුකුම ව්‍යවස්ථාවේ 29 ව්‍යවස්ථාව

²⁷SC/ FR 141/2015

'The organs of the State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the schemes of government set out in the constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development...',²⁸

මෙහි විශේෂත්වය වනුයේ පොදු ආරක්ෂකයන්ට හාරකරුවන්ට මෙන් රාජ්‍යයේ සම්පත් සම්බන්ධයෙන් පූර්ණ වූ බලතළ නොලැබෙන බැවින් සීමිත වූ අහිමත බලයක් යටතේ එම සම්පත් ආරක්ෂා කොට සංරක්ෂණය කළ යුතු වීමයි.

ඒ අනුව රක්ෂිතයෙන් කොටසක් තුළ ස්ථාපනය කර තිබෙන ගොවීපොල මගින් රටේ ආර්ථිකයට කොතරම් ප්‍රතිලාභ ලැබුණද මෙහි වැදගත්ම සාධකය වනුයේ එය නොවන අතර රාජ්‍යයේ හාරකරුවන් වන පාලකයන් අවධානයට යොමු කළ යුතු වන්නේ තැවත යථා තත්වයට පත් කළ නොහැකි ලෙස එමගින් විනාශ වන රාජ්‍යයේ ස්වභාවික සම්පත පිළිබඳව වේ. මේ සම්බන්ධයෙන් පාලකයන් විසින් කටයුතු කළ යුතු ආකාරය පිළිබඳව ජෙව් විවිධත්ව සම්මුතිය මගින් පැහැදිලිව පෙන්වා දෙනුයේ'Humans have to learn how to use biological resources in away that minimize their deplation. The

challenge is to find economic policies that motivate conservation and sustainable use by creating financial incentives for those who would otherwise over-use or damage the resource'²⁹මේ අනුව රාජ්‍යයක් විසින් තම ස්වභාවික සම්පත් ආරක්ෂා කරගත හැකි ආකාරයෙන් දුරදර්ඝී ලෙස සැලසුම් කොට තම ආර්ථික ප්‍රතිපත්ති නිර්මාණය කරගත යුතු වේ.

තවදුරටත් මෙම ගැටුලුවට අදාළව තීතියේ දෙවගන විසින් යුත්තිය පසිදිලීමේ කාර්යයේදී ශ්‍රී ලංකාවේ පවත්නා තීති ක්‍රමය තුළ සැමට එම යුත්තිය කරා එක සේ ප්‍රවේශ වීමට හැකියාව පවතිද යන්න සැක සහිත වේ. මෙයට පත්ති හේදය, වත්කම් සහ තරාතිරම් යන සමාජයීය සාධක වලට අමතරව ප්‍රමාදය ද එක් විශාල ගේතු සාධකයකි. මන්දJustice delayed, justice deniedවේ. ඒ අනුව ප්‍රමාද වී ලැබෙන යුත්තිය තුළ යුත්තියක් සෞයාගත නොහැක.

ඒ අනුව මෙම ගැටුලුව දෙකයකටත් වඩා අධික කාලයක් මුළුල්ලේ අධිකරණයේ විහාර වීම තිසා තැවත යථා තත්ත්වයට පත් කිරීමට නොහැකි ලෙස සෙමින් සෙමින් විනාශ වනුයේ රාජ්‍යයේ ප්‍රධාන දැඩි ස්වභාවික රක්ෂිතයක් වන අතර මෙම ප්‍රමාදය තිසාම කෙදිනක හෝ යුත්තිය ලැබුණද, එය සැබවින්ම යුත්තිය ඉෂේය

²⁹Convention of Biological Diversity 1992 Available at:
<http://www.cbd.int/convention/guide/default.shtml?id=action> accessed on 3rd September 2019

²⁸[2000] 3 Sri LR 243

ව්‍යවක් ලෙස සැලකිය නොහැක. එම නිසා තනි පුද්ගල අයිතිවාසිකම්මෙන්ම සමාජයේ අයිතිවාසිකම් ද ආරක්ෂා කරගනු පිණිස අධිකරණ ක්‍රියාවලිය ශිෂ්ටගාමී කිරීමට පවත්නා නීතිය ප්‍රතිසංස්කරණ කළ යුතු වේ. මේ සඳහා ඉන්දියාවේ මෙන් පරිසර ආරක්ෂණය සම්බන්ධ තබූ කටයුතු සඳහා පමණක් සේපාපනය කරන ලද විනිශ්චත සහාවන් ශ්‍රී ලංකාවේ අධිකරණපද්ධතිය තුළටත් යෝජනා කළ හැකි අතර මෙමගින් කාර්යක්ෂම අධිකරණ ක්‍රියාවලියකට මුළුලේ තැබිය හැකි අතර ප්‍රමාදයකින් තොරව ගැටෙන බැඳියාවන් තුළනය කළ හැක.

ජනතාව විසින් තම පරමාධිපත්‍ර බලය භාවිත කොට පත් කරගනු ලබන පාලකයන් වෙතට රාජ්‍යයේ ස්වභාවික සම්පත් භාර දෙනුයේ ස්වකීය අනිවාද්‍යීය සඳහා නොවන අතර වර්තමාන සහ තුළපත් පරපුර වෙනුවෙන් එම සම්පත් වර්ධනය සහ ආරක්ෂා කොට සංරක්ෂණය කිරීමටය. තමුත් සැබුවින්ම සිදුවනුයේ මෙහි අනෙක්පස වන අතර පරිපාලන අධිකාරීන්ට ද එවැනි අවස්ථාවකදී භමුවන අහියෝග හමුවේ ස්වාධීනව සහ නීතියෙන් නීතිම කරන ලද කාර්යපටිපාරියට අනුව කටයුතු කිරීමේ නොහැකියාවක් පෙනෙන්නට ඇත.

එම නිසා සමාජය තුළ සැබැවටම පවතින ගැටු ආමන්ත්‍රණය කරන පරිද්දෙන් මූලාශ්‍රයන් තුළ පවතින නීතිය ප්‍රායෝගික තාලයකට රැගෙන යමින් ගැටෙන අයිතිවාසිකම් තුළනය කරමින් සහ සාධාරණත්වය සහ සමානාත්මකාව වැනි විශ්වීය මූලධර්මයන්ට ගරු කරමින් කටයුතු කළ යුතු බවට රාජ්‍යයේ ආයතන

ත්‍රිත්වය මතම වගකීමක් සහ බැඳියාවක් ඇති කළ යුතුය. මේ සම්බන්ධව සිවිල් සහ දේශපාලනික අයිතින් පිළිබඳ අන්තර්ජාතික ප්‍රයුත්තියේ හි 47 වන ව්‍යවස්ථාව මගින්ද දක්වනුයේ තමන්ගේ ස්වභාවික දිනය හා සම්පත් සම්පූර්ණයෙන් ද නිදහසින් යුතුවද භක්ති විදීමෙහි හා ප්‍රයෝගනයට ගැනීමෙහිලා සියලු ජාතින් සතුව තෙසරුගික අයිතියක් ඇති බවයි. ඒ අනුව රාජ්‍යයේ ස්වභාවික සම්පත්වල ප්‍රතිලාභය සියලු පුරවැසියන්ට සමාන ලෙස අත්විදීම සඳහා ඇති අයිතිය ආරක්ෂා විය යුතුය. එමන්ම මෙම අයිතිය සේම සැමට පොදු වූ වගකීම වනුයේ තිරසර සංවර්ධනයේ එල තෙලාගැනීමට හැකි වන අයුරින් අනාගත පරපුර සඳහා ද රාජ්‍යයේ ස්වභාවික සම්පත ආරක්ෂා කොට සංරක්ෂණය කරගැනීම වේ.

ජාත්‍යන්තර කමිකරු සංවිධානයේ හරයාත්මක ප්‍රඥප්තීන්හි ප්‍රතිපත්ති කෙතෙක් දුරට ශ්‍රී ලංකික කමිකරු නීති හා සෙසු ගුම ප්‍රමිතීන්හි අන්තර්ගත ද ?

අස්ථර බිජේර*

ජාත්‍යන්තර කමිකරු සංවිධානය (ILO) විසින් සම්මුති හා නිරදේශ ස්වරූපයෙන් ජාත්‍යන්තර කමිකරු ප්‍රමිතීන් නියම කරයි. ඉන් නීති සම්පාදනය, අධිකරණ තීරණ, සාමූහික ගිවිසුම හා භාවිතයන් ඇතුළ විවිධ යාන්ත්‍රණ මගින් ජාතික මට්ටමින් ප්‍රමිතීන් වැඩි දියුණු කිරීමට සාමාජික රාජ්‍යන්ට ඒන්තු ගන්වයි. ජාත්‍යන්තර කමිකරු සංවිධානය විසින් සම්මුතීන් 189ක් හා නිරදේශ 203ක් සම්මත කරගෙන ඇත. මෙම සම්මුතීන් 189න් සම්මුතීන් 8ක් හරයාත්මක සම්මුතීන් නොහොත් මූලික ප්‍රඥප්තීන් ලෙස ජාත්‍යන්තර කමිකරු සංවිධානයේ පාලන ව්‍යුහය මගින් භූතාගෙන ඇත.¹ ඒවා මූලික ප්‍රතිපත්ති හා සේවක අයිතිවාසිකම් ලෙස භූතාගෙන භැංකි විෂය ක්ෂේත්‍රයක් ආවරණය කරනු ලබන බැවින් ඒවා මූලික/හරයාත්මක සම්මුති ලෙස භූතාගෙන ගනී. ඒවා නම්,

- 1948 අංක 87 දරන එක්ස්වීමේ නිදහස හා සංවිධානයවීමේ අයිතිය සුරකීමේ සම්මුතිය.
- 1949 අංක 98 දරන සංවිධානය වීමේ අයිතිය හා සාමූහික කේවල කිරීමේ අයිතීන් පිළිබඳ සම්මුතිය.
- 1930 අංක 29 දරන බලහත්කාරයෙන් සේවයේ යෙද්වීමේ සම්මුතිය.
- 1957 අංක 105 දරන බලහත්කාරයෙන් සේවයේ යෙද්වීම අවසන් කිරීමේ සම්මුතිය.
- 1973 අංක 138 දරන අවම වයස පිළිබඳ සම්මුතිය.

- 1999 අංක 182 දරන ලමා කමිකරු සේවයෙහි වඩාත් අයහපත් ආකාරයන් මූලිකුප්‍රඟා දැමීමේ සම්මුතිය.
- 1951 අංක 100 දරන සමාන පාරිගුමික සම්මුතිය.
- 1958 අංක 111 දරන වෙනස් ලෙස සැලකීම (රකියාව හා වෘත්තිය)

මෙම සම්මුතීන් මගින් සියලුම සාමාජික රාජ්‍යයන් විසින් අදාළ කරගත යුතු අවමප්‍රමිතීන් ඉදිරිපත් කරන අතර ඉන් රකියාවට සම්බන්ධ මානව හිමිකම් ප්‍රමිතීන්ට අදාළ ප්‍රතිපත්ති ප්‍රවර්ධනය කරයි. මෙම සම්මුතීන් 8 කොටස් 4කට වෙන් කර දැක්විය නැතිය. එම කොටස් 4 ජාත්‍යන්තර කමිකරු සංවිධානයේ රකියාව තුළ ඇති මූලික මූලධර්ම හා අයිතීන් පිළිබඳ ප්‍රකාශනය (Declaration on fundamental principles & rights at work) ති පවතින හරයාත්මක කමිකරු ප්‍රමිතීන් (four-core labour values)වේ.² ඒවා නම්,

- සමාගමයේ නිදහස හා සාමූහික කේවල කිරීමේ අයිතිය එලදායී ලෙස පිළිගැනීම. (Freedom of association & the effective recognition of the right to collective bargaining)
- සියලු ආකාරයේ බලහත්කාර හෝ අනිවාරයුගුමයතුරන්කිරීම. (The elimination of all forms of forced or compulsory labour)
- ලමා ගුමය එලදායී ලෙස අහෝසි කිරීම. (The effective abolition of child labour)

* නීති ශිෂ්ටය, අවසන් වසර, ශ්‍රී ලංකා විවෘත විශ්වාසය

1ilo.org. Conventions and Recommendations. [Online] Available at:

<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>
2ibid

- වෘත්තීය හා රකියාව සම්බන්ධයෙන් වෙනස් කොට සැලකීම තුරන් කිරීම。
(The elimination of discrimination in respect of employment & occupation)

1948ද ජාත්‍යන්තර කමිකරු සංවිධානයේ සාමාජිකත්වය ලබාගත් ශ්‍රී ලංකාව එහි සියලුම මුලික/ හරයාත්මක සම්මුතින් අපරානුමත (ratify) කර ඇත. ජාත්‍යන්තර කමිකරු ව්‍යවස්ථාවේ 19වන ව්‍යවස්ථාවේ දක්වනු ලබන ආකාරයට සාමාජික රාජ්‍යයන් විසින් කමිකරු සංවිධානයේ සම්මුතින් සහ යෝජනාවන් සඳහා ජන්දය ලබා නොදුන්නද අනුමත අධිකාරිය මගින් අපරානුමතිය සඳහා මාස 12-18 දක්වා කාලයක් තුළ එහි බලපෑවැන්ම පිළිබඳ වාර්තා කළ යුතුය. ඒ අනුව අනෙකුත් ජාත්‍යන්තර සම්මුතින් මෙන් නොව කිසිදු රටකට ජාත්‍යන්තර කමිකරු සංවිධානයේ සම්මුතින් අපරානුමත නොකර සිටිය නොහැක.

එම අනුව ශ්‍රී ලංකා රජය ද මෙම සම්මුතින් අපරානුමත කර ඇති බැවින් ඒවා කමිකරු නීතිභා ප්‍රමිතින්ට අදාළ කරගැනීමේ සම්මත බැඳීමකට (normative obligation) යටත් වේ. ශ්‍රී ලංකාව ද්විත්වනාජයවාදී රටක් වන බැවින් කමිකරු සංවිධානයේ සම්මුතින් අපරානුමත කළ පමණින් එය ශ්‍රී ලංකාව තුළ අදාළ නොවේ. *Nallarathnam Singarasa v. AG*³ නඩුවෙදී තීරණය වූයේ ජාත්‍යන්තර නීති ශ්‍රී ලංකාව තුළ අදාළ කරගැනීමට නම් ඒවා හැකිකරවන ව්‍යවස්ථා මගින් ලංකාවේ නීතියට ඇතුළත් කළ යුතු බවයි. එනම් ශ්‍රී ලංකාව තුළ ILO සම්මුතින් අදාළ වීමට නම්, ඒවා ලංකාවේ කමිකරු නීති, ප්‍රමිතින් හා ප්‍රතිපත්ති තුළට අන්තර්ගත කර තිබීම අවශ්‍ය වේ.

ජාත්‍යන්තර කමිකරු සංවිධානයේ රකියාව තුළ ඇති මුලික මුලධර්ම හා අයිතින් පිළිබඳ ප්‍රකාශනයහි පවතින හරයාත්මක කමිකරු ප්‍රමිතින් හා ශ්‍රී ලංකාවේ කමිකරු නීති හා ගුම ප්‍රමිතින්.

1. සමාගමයේ නිදහස හා සාමූහික කේවල් කිරීම.

එක්රස්වීමේ නිදහස හා සංවිධානයේමේ අයිතිය සුරකීමේ සම්මුතියෙහි (සම්මුති අංක 87) අරමුණ වන්නේ සේවකයන්ගේ හා සේවයේෂකයන්ගේ අභිමතය අනුව බාධාවකින් තොරව, නිදහසේ සංවිධානයේමේ අයිතිය ස්ථාපිත කිරීම වේ. ගැරී පෙන්වා දෙන ආකාරයට නිදහසේ සංවිධානය/ එක්රස් වීම යනු,

“a claim of the individual to be permitted to establish relations with others of his own choosing for the purpose of obtaining for the whole group usually as against individuals outside the group some special strength or advantage in the pursuit of a common end”,⁴

මෙම සම්මුතිය මගින් සේවා නියුක්තිකයින්ට හා සේවායේෂකයන්ට වෘත්තීය සම්ති වැනි සම්ති ඇරඹීමට හා ඒවාට බැඳීමට ඇති අයිතිය තහවුරු කරන අතර එම සම්මුතියට අදාළ කාර්යයන් ඉටුකිරීමට ද අවස්ථාව ලබා දේ. මෙම සම්මුතියේ 3වන වගන්තිය මගින් දක්වන්නේ ආරම්භ කරන වෘත්තීය සම්තිවල සාමාජිකයන්ට එම සම්තියට අදාළ ව්‍යවස්ථාවන් හා රිතින් නිර්මාණය කිරීමට හා ඔවුන්ගේ නියෝජිතයන් තෝරාගැනීමට ඉඩ සලසා දී ඇති බවයි.

සංවිධානයේමේ අයිතිය හා සාමූහික කේවල් කිරීමේ අයිතින් පිළිබඳ සම්මුතිය (සම්මුති අංක

3Nallarathnam Singarasa v. AG , S.C. SpL (LA)No. 182/99

4Goodpaster, G. (1967). Social dimensions of law & justice by Julius stone. Indian Law

Journal, [online] 43(1). Available at:<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2392&context=ilj>

98) යන්න ILO ව්‍යවස්ථාවන්ට අනුව මූලික අයිතියකි. සාමූහික කේවල් කිරීම යන්න සාධාරණ පාරිග්‍රැමයක් ලබා ගැනීමට, සේවායෝජකයන් හා වෘත්තීය සම්ති අතර සාකච්ඡා පැවැත්වීම යනාදිය සම්බන්ධයෙන් වැදගත් වන අයිතියකි. මෙම සම්මුතිය මගින් සාමූහික කේවල් කිරීම අර්ථනිරුපණය කරනුයේ,

“Voluntary negotiation between employers or employers' organizations and workers; organizations with a view to the regulation of terms and conditions of employment by collective agreement.”

මෙම අයිතින් ආරක්ෂා කිරීමට ශ්‍රී ලංකා නීතිය තුළ මෙම මූලධර්ම අන්තර්ගත වන්නේ ද බැඳීම වැදගත් වේ. 1978 ආණ්ඩුනුම ව්‍යවස්ථාවේ මූලික අයිතිවාසිකම පරිවිෂේෂයේ 14(ඇ) ව්‍යවස්ථාව මගින් “සැම පුරවැසියකුටම වෘත්තීය සම්ති පිහිටුවීමේ හා වෘත්තීය සම්තිවලට බැඳීමේ නිදහස” ලබාදීම තුළින් සංප්‍රව්‍ය ශ්‍රී ලංකාව තුළ වෘත්තීය සම්ති වලට තෙතික වලංගුහාවයක් ලබාදී ඇත. තවදුරටත් 14වන ව්‍යවස්ථාවේ සඳහන් වන හාජුණයේ නිදහස, සාම්කාම්ව රස්වීමේ නිදහස හා සමාගමයේ නිදහස මගින් වෘත්තීය සම්ති පිළිබඳ අයිතින් ගක්තිමත් කර ඇත.

1935 අංක 14 දරන වෘත්තීය සම්ති ආදාපනාත්‍ය අර්ථනිරුපණය කරන ආකාරයට සම්තියක් යනු,

“ a combination of workmen or employers temporarily or permanently with its objects being one of the more of the following, the regulation of their relationship, or their representation in trade disputes or the imposing of restrictions on the conduct of any trade or business, also the organizing or financing of strikes and lock outs in any trade or business.”⁵

5Section 2 of Trade union ordinance no. 14 of 1935.

ශ්‍රී ලංකාවේ ගුම බලාකාය රාජ්‍ය, පොදුගලික හා අරධ-රාජ්‍ය අංශය ලෙස කොටස් තුනකින් සමන්විතවේ. ආණ්ඩුනුම ව්‍යවස්ථාවේ මූලික අයිතිවාසිකම යටතේ ඇති වෘත්තීය සම්ති පිළිබඳ විධිවිධාන මගින් සියලුම ශ්‍රී ලාංකික පුරවැසියන් ආවරණය වුවද මූලික අයිතිවාසිකම පෙන්සමක් මගින් මෙය අනියෝගයට ලක් කළ හැකිකේ විධායක හා පරිපාලන ක්‍රියාවකින් මෙම අයිතිය කඩ වූ විට පමණි. එයට හේතුව නම් මූලික අයිතිවාසිකම, විධායක හා පරිපාලන අධිකාරියකින් කඩකළ විට පමණක් සහන ලබාගත හැකි ආකාරයට නිර්මාණය කර තිබේයි.

1999 ද කාර්මික ආරවුල්පනාතට (IDA) ගෙනෙන ලද සංයෝධනය මගින් පොදුගලික අංශයේ සේවා නියුත්තිකයන්, අරධ-රාජ්‍ය ආයතන සේවකයන් මෙන්ම විදේශීකයන් ද ඇතුළත් වන ආකාරයේ වෘත්තීය සම්ති වලට බැඳීමේ අයිතිය ආරක්ෂා කරන ලදී. කාර්මික ආරවුල් පනතේ 32(A) වගන්තීය මගින් සේවකයන් විසින් වෘත්තීය සම්ති නිර්මාණය කිරීම, එවාට බැඳීම හා වෘත්තීය සම්තිවල කටයුතු වලට සහභාගී විම වැළැක්වීමට සේවයෝජකයාට තොහැකි බවට දක්වා ඇත. එසේම වෘත්තීය සම්ති ක්‍රියාමාර්ගයකට සහභාගී විම හේතුවෙන් සේවකයකු සේවයෙන් ඉවත් කිරීම ද නීතිවිරෝධී වන බවට *Ariyapala Gunaratne v. The Peoples Bank*⁶ නැඩුවේදී පිළිගන්නා ලදී. මින් වෘත්තීය සම්ති ආදා පනත මගින් තෙතිකතන්වය පමණක් දක්වන නමුත් IDA මගින් කම්කරුවන්ට වෘත්තීය සම්තියකට බැඳීමට තිබෙන අයිතියාරක්ෂා කරන බව පෙනේ.

එසේම වෘත්තීය සම්ති ආදාපනාත හා ආණ්ඩුනුම ව්‍යවස්ථාවේ විධිවිධාන සියලුම ශ්‍රී ලාංකික ගුම්කයන්ට අදාළ වුවද, IDA පනත මගින් රාජ්‍ය සේවකයන් ආවරණය තොකරයි. ඒ අනුව පවතින සියලුම නීති මගින් අරධ-රාජ්‍ය සේවකයින් ආවරණය වන බව මනාව පැහැදිලි වේ.

IDAහි 32වන වගන්තීය මගින් පොදුගලික අංශයේ සේවා නියුත්තිකයන් හා අරධ-රාජ්‍ය

6Ariyapala Gunaratne v. The Peoples Bank(1986) 1 SLR 338.

ආයතන සේවකයන් පමණක් ආවරණය කර තිබු මගින් පෙනී යන්නේ රාජ්‍ය සේවකයන්ට වංත්තීය සමිතිවලට බැඳීමට ඇති අයිතිය ඉන් ආවරණය නොකරන බවයි. රාජ්‍ය සේවය තුළ එය කවරාකාරයෙන් හැඳුනාගෙන තිබුනිද, එය ILO ප්‍රමිතින්ට අනුකූල වීමට තරම් ප්‍රමාණවත් නොවේ. එලෙස අනුකූල වීමට නම්, රජය විසින් කාර්මික ආරඩුල් පනතහි අසාධාරණ කමිකරු පරිවයන් රාජ්‍ය සේවකයන්ට ද අදාළ වන ආකාරයට සංශෝධනය කළ යුතුය. මන්ද, සම්මුති අංක 87 හි 2වන හා 5වන වගන්ති මගින් රාජ්‍ය සේවකයන්ට ද වංත්තීය සමිති වලට බැඳීමට අවසර ලබා දී ඇති බැවිනි.⁷

1935 අංක 14 දරන වංත්තීය සමිති ආදාළනතේ 20වන වගන්තීයේ දක්වා ඇති ආකාරයට ශ්‍රී ලංකාවේ ආරක්ෂක නිලධාරීන්, ත්‍රිවිධ හමුදා සාමාජිකයන් හා බන්ධනාගාර නිලධාරීන්ට වංත්තීය සමිතිවලට බැඳීමට ඇති අයිතිය පිළිනොගනී. එය මෙම සම්මුතියට පහැනි ක්‍රියාවක් නොවේ. මන්ද, ආරක්ෂක නිලධාරීන්ගේ වංත්තීය අයිතින් සම්බන්ධයෙන් රාජ්‍යයන්ට තීරණ ගැනීමේ නිදහස මෙම සම්මුතියෙන් ලබාදී ඇත.

සේවායෝජකයන් විසින් සාමූහික කේවල් කිරීම සඳහා වංත්තීය සමිතියක් පිළිගැනීමට නම් එහි 40%කට නොඅඩු සාමාජික සංඛ්‍යාවක් සිටිය යුතු බවට IDAහි 32(A)g වගන්තීය මගින් දක්වයි. මෙම ප්‍රතිපාදනය මගින් වංත්තීය සමිතියක සාමාජික සංඛ්‍යාව 40% අඩු වූ විට සේවායෝජකයන් විසින් ඔවුන් සමග කේවල් කිරීම සිදු නොකරන බවට මින් නොහැගවේ. එහෙත් 40% යන්න ප්‍රකාශිතව පැවතීම මත ඇතුළු අවස්ථා වලදී එමගින් අසාධාරණයක් විය හැකි බවත් මෙම අගය ඉතා ඉහළ අගයක් වන බවත් සමහර වංත්තීය සමිතින් මැසිවිලි නගයි. එම නිසා මෙම ප්‍රතිගතය අඩු කිරීම එලදායීවනු ඇත.

⁷Ilo.org.Convention C087 – Freedom of association and protection of the right to Organize Convention, 1948(No.87). [online] Available at:
<https://www.ilo.org/dyn/normlex/en/f?p=NO>

නිශ්චිත කාලීන සේවකයකු, පරිවසිකයකු, තාවකාලික සේවකයකු ඇතුළ ඕනෑම සේවා නියුත්තියකුට වංත්තීය සමිතියකට බැඳීමට අයිතිය ඇති බවට *Ceylon Mercantile Union v. Ceylon Cold Stores*⁸ නඩුවේදී විජේත්‍රි විනිශ්චිතවරයා විසින් පවසන ලදී.

IDAහි 5-10 දක්වා වගන්තීවල, වංත්තීය සමිතිආදාළනතෙහි හා ආයුධිකම ව්‍යවස්ථාවේ 14(1) හා 15 යන වගන්තීවල සාමූහික කේවල් කිරීම (collective bargaining) සම්බන්ධ ප්‍රතිපාදන හා නොතික තත්ත්වයන් දක්වා ඇත. ඒ අනුව IDA මගින් සාමූහික ගිවිසුම යන්න “as an agreement between and employer or employers, and workmen or any trade union or trade unions of workmen, and which relates to the terms and conditions of employment or relating to the manner of settlement of any industrial dispute” යන්න ලෙස අරථනිරුපණය කර ඇත.

IDA පනත මගින් රාජ්‍ය සේවකයන් ආවරණය නොකරන බැවින් මෙහි ප්‍රතිපාදන ඔවුන්ට අදාළ නොවේ. එබැවින් IDAහි ප්‍රතිපාදන සංශෝධනය කිරීම මගින් හෝ නව ව්‍යවස්ථා පැනවීම මගින් රාජ්‍ය සේවය තුළ ද සාමූහික කේවල් කිරීම ප්‍රවර්ධනය කිරීම හා රාජ්‍ය සේවකයන්ගේ සමිතිවලට ද සාමූහික ගිවිසුම පැනවීමට අවස්ථාව ලබා දීම කළ හැක. එමගින් රාජ්‍ය සේවය තුළ කමිකරු ආරඩුල් අවම කිරීමට උපකාරී විය හැක.

ILO සම්මුතින් තුළ වර්ණනය කිරීමේ අයිතිය ප්‍රකාශිතව දක්වා නොමැති ව්‍යවද සම්මුති අංක 87 මගින් දක්වා ඇති අරථනිරුපණ මගින් ව්‍යාග්‍රහ එම අයිතිය ලබා දී ඇති බවට පෙනීයයි. එලෙසම ශ්‍රී ලංකාව තුළ ද වංත්තීය සමිති ආදාළනත මගින් ප්‍රකාශිතව වර්ණනය කිරීමට ඇති අයිතිය සඳහන් නොකළ ද වර්ණනය

⁸RMLEXPUB:12100:::NO:12100:P12100 ILO_C
ODE:C087:NO

8Ceylon Mercantile Union v. Ceylon Cold Stores(1995) 1 SLR 261.

යන්ත, “the cessation of work by a body of persons employed in any trade or industry acting in combination, or a refusal under a common understanding” ලෙස අර්ථනිරූපණය කිරීමෙන් ව්‍යාගව මෙම අයිතිය ලබා දී ඇති බවට කිව හැක.

2. සියලුප්‍රංශකාරයේබලහන්කාරහෝඅනිවා රයග්‍රමයතුරන්කිරීම.

බලහන්කාරයෙන් සේවයේ යෙද්වීම යනු, යම් පුද්ගලයකු තර්ජනය කිරීමෙන් හෝ අපයෝජනය කිරීමෙන්, හෝ ආහාර, ඉඩම හා වැළුජ අත්හිටුවීම මගින් හෝ ඔවුන් සිරකරත්වා ඔවුන් සේවයේ යෙද්වීම හෝ ඔවුන්ගෙන් සේවාවක් ලබා ගැනීමයි. මෙය බහුලව ගෘහස්ථ සේවකයන්ට සිදුවීම දක්නට ලැබේ.

මේ සම්බන්ධයෙන් අදාළ වන ILO සම්මුතින් දෙකක් නම්, බලහන්කාරයෙන් සේවයේ යෙද්වීම පිළිබඳ සම්මුතිය (අංක 29 දරන සම්මුතිය) හා බලහන්කාරයෙන් සේවයේ යෙද්වීම අවසන් කිරීම (අංක 105 දරන සම්මුතිය) වේ. අංක 29 දරන සම්මුතිය මගින් එය අපරානුමත කරන ලද රාජ්‍යයන්ට හැකි ඉක්මනින් බලහන්කාරයෙන් සේවයේ යෙද්වීම අවසන් කිරීමට කටයුතු කරන ලෙසට බලකරනු ලබයි.

ශ්‍රී ලංකාවේ නීතිය කෙරෙහි අවධානය යොමු කිරීමේදී ශ්‍රී ලංකාව බලහන්කාරයෙන් සේවයේ යෙද්වීම තුරන් කිරීමට විවිධ ක්‍රියාමාර්ග ගෙන ඇත. එනම්, 1844 අංක 20 දරන වහල්හාවය තුරන් කිරීමේ ආදාපනත මගින් 1844 දී වහල්හාවය තුරන් කරන ලදී. එසේම දැන්වී නීති සංග්‍රහයහි 361 හා 362 යන වගන්ති මගින් වහලුන් මිලදී ගැනීම හා ඔවුන් සම්බන්ධයෙන් ගනුදෙනු කිරීම තහනම් කර ඇති අතර එය උල්ලාසනය කරන්නන් හට දසුළුම් පනවා ඇත. මින් බලහන්කාරයෙන් සේවයෙහි යෙද්වීම සම්බන්ධයෙන් ශ්‍රී ලංකාවේ නීති ශක්තිමත් කරයි.

එසේම ගණිකා වෘත්තිය සඳහා කාන්තාවන් සහ ලමුන් යෙද්වීමේ ජාවාරම වැළැක්වීම සහ ඒවාට එරෙහිව සටන් කිරීම පිළිබඳ සම්මුති පනත (The

convention on preventing and combating trafficking in women and children for prostitution Act) මගින් කාන්තාවන් හා ලමුන් ජාවාරම කිරීමේ අරමුණින් රද්වා තබා ගැනීම හෝ ඒ සඳහා දේපලක්/ ගොඩනැගිල්ලක් පවත්වාගෙන යාම වරදක් ලෙස දක්වා ඇත. මින් අමාත්‍යවරයා හට විදෙස් රැකියා මුවාවෙන් සිදුවන ජාවාරම සම්බන්ධයෙන් සුදුසු ක්‍රියාමාර්ග ගැනීමට වගකීම පැවරනු ලැබේ. එසේම මින් කාන්තාවන් හා ලමුන් ලිංගික වහල්ලුන් බවට පත්කිරීම වැළැක්වීම මගින් බලහන්කාරයෙන් සේවයේ යෙද්වීම වැළැක්වීමට කටයුතු කරන බවට පැහැදිලිවේ.

භාණ්ඩාගාර වකුලේබ අංක 67 (Treasury Circular) මගින් රජයේ ආධාර/ ශිෂ්‍යත්ව මගින් විදෙස් රටවල අධ්‍යාපන කටයුතු සඳහා හෝ පුහුණුවීම සඳහා යන රාජ්‍ය සේවකයන්හට අනිවාරෝයෙන් ඒ වෙනුවෙන් රජයට යම් කාලපරිච්ඡයක් තුළ සේවා සැපයීම කළයුතු බවට දක්වා තිබීම මෙම සම්මුතිය හා යම්තාක් දුරට පටහැනි වන්නේද යන මතය ඉදිරිපත් කළ හැකි වුවද මෙතෙක් මෙම ව්‍යවස්ථාව මගින් බලහන්කාරයෙන් සේවා ලබා ගැනීමක් වාර්තා නොවීම මත මෙය පටහැනි නොවන බවට තර්ක කළ හැක.

මෙලස බලන කළ ශ්‍රී ලංකාව තුළ බලහන්කාරයෙන් සේවයෙහි යෙද්වීම සම්බන්ධයෙන් පුරවැසියන් ආරක්ෂා කර ඇති බව පෙනුන ද ශ්‍රී ලංකික කාන්තාවන් මැදපෙරදී සේවය කිරීමේදී ඔවුන්ගෙන් සමහර කාන්තාවන්ට මුහුණ දීමට සිදුව ඇති සිදුවීම බලන කළ ඔවුන් බලහන්කාරයෙන් සේවයේ යෙද්වීමක් සිදුවන බවට පෙනීයයි. එබැවින් එවැනි සිදුවීම වැළැක්වීමට කටයුතු කළ යුතුය.

3. ලමාග්‍රමයඒලදායීලෙසඅහෝසිකිරීම.

ලමියින් කායිකව හා මානසිකව තම ලමා කාලය තුළ වර්ධනය වීම වැදගත් වේ. ලමියින් සේවයේ යෙද්වීම අවසන් කිරීම යන්නෙන් අරමුණු කරනුයේ ලමියින්ගේ අධ්‍යාපනයට හා වර්ධනයට බාධා ඇති කරන රැකියාවල නිරතවීම තැබුන්වීමයි. එහෙන් ඉන් ලමුන් සිදු

කරනු ලබන සියලුම රකියා නැවැත්වීම අදහස් නොකරයි. ජාත්‍යන්තර කමිකරු ප්‍රමිතින් මගින් විවිධ වයස් සීමාවන් හා විවිධ වර්ධන මට්ටම වල පසුවන ලමුන්හට සුදුසු හා තුසුදුසු රකියා කුමක් ද යන්න වෙන්කර දැක්වීමට සාමාජික රාජ්‍යයන්ට ඉඩ ප්‍රස්ථාව ලබා දී ඇත.

අවම වයස පිළිබඳ සම්මුතිය (සම්මුති අංක 138) යටතේ අවම වයස ලෙස අවු.15 දක්වමින්, රාජ්‍යයන්ට රකියාවේ නියුත්ක්ත විය හැකි අවම වයස නිර්ණය කිරීමට නිදහස ලබා දී ඇත. යම් නිශ්චිත කාලයක් සදහා පමණක් දියුණුවෙමින් පවතින රටවල් වලට අවම වයස් සීමාව ලෙස අවු.14 යොදා ගැනීමට හැකියාව ලබා දී ඇත. එසේම අවු. 13-15 දක්වා වූ වයස් සීමාවල පසුවන්නන් හට ලිඛිල් හා පහසු රකියාවල නිරතවීමට අවස්ථාව සලසන නීති පැනවීමට ද අවස්ථාව ලබා දී ඇත. එහෙත් සෞඛ්‍යයට අවධානම හෝ අන්තරාදායක රකියාවල නිරතවීමට නම් අවම වයස අවු.18ක් විය යුතු බව මින් දක්වා ඇත.

අයුතු ලෙස ලමා ගුමය යොදාගැනීම ඉක්මනින් අවසන් කිරීම සම්බන්ධ සම්මුතිය කෙටියෙන් අයුතු ලෙස ලමා ගුමය යොදාගැනීම පිළිබඳ සම්මුතිය (සම්මුති අංක 182) ලෙස හඳුන්වනු ලබයි. මෙම සම්මුතිය මගින් “worst form of child labour” ලෙස කාණ්ඩ ගත කර ඇති සමහර රකියා වයස අවු.18ට අඩු සැම පමණකුටම නොගැලපෙන බැවින් ඔවුන් නොයෙද්විය යුතු බවට මෙහි දක්වා ඇත. එනම්, ගණිකා වෘත්තීයේ යෙද්වීම, අගේහන ලිංගික විතුපට හා වායාරුපකරණය, බලහන්කාරයෙන් හමුදාවට බඳවා ගැනීම, මත්දුවා ජාවාරම් වලට යෙද්වීම යනාදිය උදාහරණ ලෙස දැක්විය හැක. තවද ලමුන්ගේ සෞඛ්‍යයට, ආරක්ෂාවට හෝ සඳහාවරයට හානි කළහැකි අන්තරාදායක සේවාවන් සම්බන්ධයෙන් කමිකරුවන් හා සේවායෝජක සංවිධාන සම්ග සාකච්ඡා

9Minimum Wages (Indian Labour) Ordinance, No. 27 of 1927 (amended) sec 4.

10Employment of Women, Young person and Children act, No. 47 of 1956(amended) sec 13 & 34.

කරමින් රජය විසින් ඒවා තක්සේරු කළයුතු බවට එහි සදහන් වේ.

අවම වැටුප් (ඉන්දිය කමිකරු) ආදාපනත,⁹ස්ත්‍රීන්, තරුණ අය හා ප්‍රමාදයෙහි සේවයෙහි යෙද්වීම පිළිබඳ පනත¹⁰, හා සාජ්පු හා කාර්යාල සේවක (සේවය හා වැටුප් සම්බන්ධ රෙගුලාසි) පනත¹¹, යන පනත් තුනෙන්ම වයස අවුරුදු 14ට අඩු ප්‍රමාදයෙහි සේවයෙහි යෙද්වීම තහනම් කරයි. ILO සම්මුතියට අනුකූල වීමට මෙම අවම වයස් සීමාව අවු.15 කළ යුතුය. කරමාන්තකාලා ආදාපනතහා සාජ්පු හා කාර්යාල සේවක පනත මගින් අවු.16-18ත් අතර ලමුන් රාජ්‍ය සේවයෙහි යෙද්වීම (පෙ.ව. 6 - ප.ව. 6 අතර පමණක් සේවය කළ හැක) තහනම් කර ඇත. එසේම ඔවුන්කරමාන්තකාලා ආදාපනතෙහි (සංශෝධිත)68(1) වගන්තිය මගින් සේවයෙහි යෙද්විය හැකි උපරිම කාලය ලෙස මසකට පැය 50ක් නොඉක්මවිය යුතු බව දක්වයි.

Mines & Minerals law No. 4 of 1973 මගින් අවු.16 ට අඩු ලමුන් පතල් වැනි බිම මට්ටමට පහල ස්ථානවල සේවයෙහි යෙද්වීම තහනම් කර ඇති අතර 16-18 අතර ලමුන්ට පතල්වල වැඩ කිරීමට 2010දී කමිකරු අමාත්‍යාංශය විසින් නිකුත් කරන ලද අන්තරාදායක වෘත්තිය සම්බන්ධ රෙගුලාසියේ දක්වා ඇති අවශ්‍යතාවයන් හා සුදුසුකම් සපුරාන්නේ නම් පමණක් වැඩ කිරීමට අවසර ලබා දෙයි.

ශ්‍රී ලංකා නීතිය මගින් සතුන් මැරිම, කෘෂිකාගක නිෂ්පාදනය හා හාවිතා කිරීම, මත්පැන් හා මත්දුවා නිෂ්පාදනය හා බෙදාහැරීම, මත්පැන් අලෙවිසැල් හා සුදුසැල් (කැසිනෝ) සේවය, ප්‍රපුරන ද්‍රව්‍ය නිෂ්පාදනය ප්‍රවාහනය හෝ විකිණීම, ගැසුර මුහුදේ මසුන් ඇල්ලීම, පතල් කැණීම, මගින් හා බර ද්‍රව්‍ය ප්‍රවාහනය හා රාජ්‍ය කාලයේ වැඩ කිරීම, යනාදි රකියා හා රකියා

11Shop and office employees (regulation of employment and remuneration) act, Sec 10(1).

ක්‍රේඛ්‍රවල අවු. 18ට අඩු පෙමුන් වැඩ කිරීම අන්තරාදායක වන බවට ශ්‍රී ලංකා නීතිය මගින් දක්වයි. ඒවා ස්ත්‍රීන්, තරුණ පුද්ගලයන් හා පෙමුන් සේවයේ යෙද්වීම පිළිබඳ පනත, සාප්පු හා කාර්යාල සේවක පනත හා 2010දී පනවන ලද අන්තරාදායක වංත්තින් සම්බන්ධ රෙගුලාසිය මගින් ප්‍රකාශිතව දක්වා ඇත.

දෑක්ඛ නීති සංග්‍රහයට ගෙනෙන ලද සංශෝධනය මගින් අවු. 18ට අඩු පෙමුන්, ගණිකා වංත්තියේ යෙද්වීම, අශේෂන පළකිරීම (production of pornography or pornographic performances), වහල්හාවය, බලහන්කාරයෙන් සේවයේ යෙද්වීම හා නීතිවිරෝධ ක්‍රියා වලට පෙමුන් යෙද්වීම යනාදී ලෙස ප්‍රමා ගුමය අයුතු ආකාරයට (Worst form of child labour) යෙද්වීම තහනම කර ඇත. එසේම ප්‍රමා හා තරුණ පුද්ගලයන් පිළිබඳ ආදාළුපනතනි (CYPO) 72 වගන්තිය මගින් ද පෙමුන් ගණිකා වංත්තියේ යෙද්වීම තහනම කර ඇත.

ඉහත සාකච්ඡා කළ පනත් මගින් ශ්‍රී ලංකාව තුළ අයුතු ලෙස ප්‍රමා ගුමය යොදාගැනීම සම්බන්ධයෙන් එලදායි නීති රාමුවක් ඇති බවට පෙනීයයි.

- වංත්තියහාරිකාවසම්බන්ධයෙන්ව නස්කොටසැල්කීමතුරන්කිරීම.

Oxford ගබඳකේෂය මගින් වෙනස්කොට සැල්කීම අර්ථ දක්වනුයේ, “The unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age or sex.”¹² ලෙසයි.

ලොව වටා පුද්ගලයන් බහුලව මුහුණපාන ගැටලුවක් ලෙස තම සමේ වර්ණය, ආගම, කළය, ස්ත්‍රී පුරුෂහාවය, වයස යනාදී

12Lexico Dictionaries/ English.discrimination/
Definition of discrimination in English by
Lexico Dictionaries. [online] Available at:
<https://www.lexico.com/en/definition/discrimination>

13Equal Remuneration Convention, no. 100 of
1951. Article 2.

තොයෙකත් කරුණු මත රැකියාවක නිරතවීමට ඇති අයිතිය සීමාවීම දැක්විය හැක. මෙලෙස සිදුවන වෙනස්කම තැනි කිරීම තුළින් රැකියාවන්ගෙන් නිසි ප්‍රතිලාභ ලබා ගැනීමට හා වැඩි සේවා නිශ්චකයන්ගෙන් යුත් රැකියා ක්‍රේඛ්‍ර බිජිවීමත් සමග සමාජ ස්ථාවරත්වය ලෙස කරගැනීමට හැකියාව ලැබේ.

සමාන පාරිග්‍රූහික සම්මුතිය මෙහිදී අදාළ වන ප්‍රධාන සම්මුතියයි. එහි ප්‍රධාන අරමුණ වන්නේ, සියලුම සේවකයන්ට සමාන පාරිග්‍රූහික් සඳහා අවස්ථාව උදාකර දීමයයි.¹³ එහි දී පාරිග්‍රූහිය යන්න තුවට සාමාන්‍ය වැටුප, මුලික වැටුප හෝ අවම වැටුප, සාප්ත හෝ වතුව ගෙවිය යුතු අමතර දීමනා යනාදිය ඇතුළත් කිරීම මගින් පාරිග්‍රූහිය යන්න ප්‍රථ්‍යාව අර්ථනිරුපණය කර ඇත.¹⁴

මෙහි දී අවධානය යොමු කළයුතු අනෙක් සම්මුතිය නම්, වෙනස් කොට සැල්කීම (රැකියාව හා වංත්තිය) පිළිබඳ සම්මුතිය වේ. මෙම සම්මුතියේ 2 වන වගන්තිය තුළින් සියලුම වංත්තින් හා රැකියාවලට ගරු කරමින් සමානව සැල්කීම හා සමානව නව අවස්ථාවන් (Opportunities) වලට ඔවුන්ට ඉදිරිපත් වීමට අවස්ථාව ලබා දීම කළයුතු බවට සඳහන් කරයි. එසේම තම රටේ හාවිතාවන්ට හා පරිවයන්ට ගැලපෙන ආකාරයට තම ජාතික ප්‍රතිපත්ති තුළින් මේවා පිළිගැනීමට සම්මුතිය මගින් අපරාධුමත කළ රාජ්‍යයන්ට බලපෑම කරයි.

ශ්‍රී ලංකාවේ ආණ්ඩුවෙනුම ව්‍යවස්ථාවේ 12 වන ව්‍යවස්ථාව හා රාජ්‍ය ප්‍රතිපත්ති වල 6 වන ව්‍යවස්ථාව මගින් වෙනස්කොට සැල්කීම සම්බන්ධයෙන් විධිවිධාන සලසා ඇත. 12 වන

14International Labour Organization ,
'International Labour standards on equality of
opportunity and treatment' (In, 1996)
<https://www.ilo.org/global/standards/subject-s-covered-by-international-labour-standards/equality-of-opportunity-and-treatment/lang--en/index.htm>

ව්‍යවස්ථාව ශ්‍රී ලංකාකිකයන්ට හා රාජ්‍ය අංශයේ සේවකයන්ට පමණක් අදාළ වේ.¹⁵

ප්‍රජාපාලක ආභාපනත හා සාජ්පු හා කාර්යාල සේවක පනත මගින් වෙතන සම්බන්ධයෙන් විධිවිධාන දක්වයි. එහි දක්වා ඇති ආකාරයට වංත්තිය, සේවා ක්ෂේත්‍රය හා සේවා සපයන කළාපය යනාදිය මත සේවකයන්ට ලබාදිය යුතු අවම වෙතන ප්‍රමාණය වෙනස් වේ. එහෙත් 2016 දි පනවන ලද National minimum wage for workers act මගින් කර්මාන්ත ක්ෂේත්‍රය ඇතුළු ඩිනැම ක්ෂේත්‍රයක සේවකයෙකුගේ අවම මාසික වැටුප ලෙස රු.10,000ක් ද අවම දෙදෙනික වැටුප රු.400ක් ලෙස ද දක්වීම මගින් සේවයේෂකයාට අත්තනෝමතික ලෙස වැටුප් අඩු කිරීමට තිබූ හැකියාව සීමා කරන ලදී. මෙය පුද්ගලික අංශයට පමණක් අදාළ වේ. රාජ්‍ය සේවකයන්ගේ අවම වැටුප මෙයට වඩා ඉහළ අගයක් ගැනීම මත මෙහිදී මෙම අංශ අතර විෂමතාවක් දක්නට ලැබේ.

සාජ්පු හා කාර්යාල සේවක පනත හා ප්‍රසුතිකාධාර ආභාපනත යන පනත් දෙකෙන්ම දරු ප්‍රසුතියකදී මුදලින් ආධාර හා නිවාඩු ලබාදීමන් දරු ප්‍රසුතියෙන් පසු සේවයෙහි යෙදීමේදී ඇයට හා දරුවට සුරක්ෂිතතාව ලබාදීම සම්බන්ධ විධිවිධාන දක්වා ඇත.

මෙම පනත් දෙක මගින් ප්‍රසුත නිවාඩු දින ගණන හා feeding hours/intervalsසම්බන්ධයෙන් විෂමතාවක් දක්නට තිබුණි. එහෙත් 2018 දි මෙම පනත් දෙකට ගෙනෙන ලද සංශෝධනයන් මගින් මෙම නිවාඩු දින ගණන පනත් දෙකෙන්ම ආවරණය වන්නන්ට සමාන කරන ලද අතර සාජ්පු හා කාර්යාල සේවකයන්ට feedinghours ද ලබා දෙන ලදී.¹⁶එමගින් එනෙක් පැවතී විෂමතාව දුරු කරන ලදී.

ආබාධිත පුද්ගලයන් සම්බන්ධ පනත (Persons with Disabilities Act)මගින් ආබාධිත

පුද්ගලයන්ට ආබාධිය සේතුවෙන් වෙතන සම්බන්ධයෙන් වෙනස්කාට සැලකීම තොකල යුතු බවට දක්වා ඇත. 1988 අංක 3 දරු පරිජාලන වතුලේඛය (Administration Circular)මගින් පොදු සේවයේ හා පොදු ආයතන වල සේවක පුරුජ්පාඩු වලින් 3%ක් ආබාධිත පුද්ගලයන් හට ලබාදිය යුතු බවට දක්වා ඇත.

මෙම අනුව කිව හැකි වන්නේ ශ්‍රී ලංකාව තුළ යම් යම කාරණා සම්බන්ධයෙන් ILO සම්මුතින්ට අනුකූලව කමිකරු නීති හා ප්‍රතිජාන සකස් කර ඇත්තා වුව ද සමහර කරුණු සම්බන්ධයෙන් රාජ්‍ය හා පොදුගලික යන අංශ අතර විෂමතා පැවතීමක් දක්නට ලැබේ. එය වෙනස් කිරීම මගින් එම තත්ත්වය තුරන් කළ හැක එබැවින් ඒ සඳහා සංශෝධනයක් ඇති කිරීම අවශ්‍ය වේ.

මෙයට අමතරව අද කමිකරු ක්ෂේත්‍රයේ පවතීන වෙනත් ගැටළු ද නිරාකරණය කිරීමට වෙනත් රටවල මෙන් ශ්‍රීලංකා කමිකරුපනත් ද සංශෝධනය කිරීම යෝගාවේ. එහිදී දරු ප්‍රසුතියකදී පිතා නිවාඩු ලබා දීම, පොදුගලික අංශයටද වැශ්‍යවැටුප් ක්‍රමයක් හඳුන්වාදීම, සේවායේෂකයන් අතින්වන වැරදි වලට අදාළ ද්‍රී මුදල් වැඩිකිරීම, පනත් රාකියකින් නියාමනය වන කමිකරු නීති එක් පනතකින් නියාමනය වන ආකාරයට ඒවා සංග්‍රහ ගතකිරීම, ලිංගික අපයේෂන (sexual harassment) කමිකරු නීතිතුලද වරදක් ලෙස නම් කර දැඩිවම නියම කිරීම, ලුමුන් බලෙන් සිගමන් යැදිමට යොදවන්නන් සම්බන්ධයෙන් කමිකරු නීති පැනවීම, සමහර රැකියාවල නිරතවීම මත සේවකයන්ට විවිධ රෝග (Chronical Disease) ඇතිවන බැවින් ඒවා ආවරණය කරමින් කමිකරු රක්ෂණ ක්‍රමයක් හඳුන්වාදීම, බොහෝ රටවල්වල අදවනවිට කමිකරු නීතිය යන්නෙන් ඔබුදට ගෙස් කමිකරු අයිතින් පිළි ගෙන ඇති බැවින් ශ්‍රී ලංකාවද කමිකරු අයිතින් හඳුන්වාදීම, කාන්තා

15Second Republic Constitution of Sri Lanka, 1978, Article 17 & 126.

16Employers.lk. (2019). AMENDMENTS TO THE LAW GOVERNING MATERNITY BENEFITS.

[online] Available at:

<https://www.employers.lk/efc-news/686-amendments-to-the-law-governing-maternity-benefit>

පාරිභෑය රකියාවලට පැමිණියදී පසුව ප්‍රාග්
දරුවන් හා රකියාව සමඟ කිරීමට ඇති
අපහසුතාව මත රකියාව අත්හැරීම
දක්නටලැබේ, එබැවින් එය අවම කිරීමට ILO හි
1981 අංක 156 දරන Family Responsibilities
Convention හි අදාළ විධිවිධාන ත්‍රිලංකාව
තුළද ඇතිකළ හැක, එසේම LGBT යන
කාණ්ඩයටද වෙනසක් කමිකරුනීනි තුළ ඇති
නොකරන ආකාරයේ නීති හා ඔවුන්ගේ
අවශ්‍යතා පිළිගනිමින් නීති සම්පාදනය කිරීම හා
බොහෝ සේවකයන් තම සේවය තුළ ඉතා
පිඛාවට (stress) පත්ව ඇති බැවින් කමිකරු
නීති මගින් සේවකයන්ගේ මානසික වර්ධනයට
අවශ්‍ය උපදේශන (counseling) ලබාදීමට
අදාළ නීති පැනවීම යනාදී තව කරුණු ද අප
කමිකරු නීතියට ඇතුළත් වන ආකාරයට නීති
සංගේධනය කිරීමට යෝජනා කළ හැක.

A TEST OF LEGITIMACY: THE VALIDITY OF THE PRINCIPLE OF CONSTITUTIONAL AUTOCHTHONY IN CONTEMPORARY CONSTITUTION MAKING WITH SPECIAL REFERENCE TO SRI LANKA

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Introduction

‘Autochthony’ can be identified as an exception to the generally unpredictable experiment of constitution making which came up with the desire of the dominions following Ireland or newly independent countries to be completely free from the political and legal clutches of the British Empire and create their own constitutions (Delan 1957). Political leaders of these countries with the influence of lawyers who perceived true independence to be the Constitution having homegrown roots promulgated autochthonous constitution making procedures in their countries. However, comparative experience of autochthony reveals mixed results of its success in application within countries; many had to face an added series of socio-economic and political chaos. In this backdrop, this study aims to review the validity of the divided position of the scholars that the idea of autochthony is essential a feature for constitution making in the contemporary context and accordingly to addresses the research question as to whether autochthony would serve modern constitution making processes. Advancing this question, it is

argued with reasoning that that time has changed what autochthony means and that the neo-sense of autochthony is imperative as a test of legitimacy in constitution making. Even though autochthony provides an ideal procedure for constitution making for democratic states, it must be stressed that constitution making should not focus on the procedural aspect. On this premise, it is expected to present a comparative analysis with special reference to the constitutional history Sri Lanka on the effect of the process and substance on an autochthonous constitution based on the antithesis between them, this study would reason that both of them in the contemporary context are equally effective.

The Origin and Background of the Idea of Autochthony

“Autonomy is one fundamental principle in the constitutional structure of the Commonwealth. But for some Members of the Commonwealth it is not enough to be able to say that they enjoy a system of government which is in no way subordinate to the government of the United Kingdom. They wish to be able to say that their constitution has force of law, and if necessary, of supreme

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law within their territory through its own native authority and not because it was enacted or authorized by the parliament of the United Kingdom; that it is, so to speak, ‘homegrown’, sprung from their own soil, and not imported from the United Kingdom.” Thus wrote KC Wheare (Wheare 1960, p.89) defining the principle of constitutional autochthony which bore more strength than the idea of autonomy. Clearly and effectively embedded in the Constitution for the Irish Free State of 1922, the principle constitutes four main components *i.e.* authority derived from local people, the principle of autonomy, the principle of self-sufficiency and break from the legal traditions of the past and from the source of legal authority. The Constitution for the Irish Free State was followed by a series of Commonwealth countries such as India, Pakistan, Federation of Malaya and South Africa to claim independence through home-grown Constitutions that owe its validity to no outside source of authority.

Autochthony: a prerequisite? – a divided scholarly opinion

Scholars have argued differently as to whether the principle of autochthony should be applied in contemporary constitution making. Several scholars have admired the concept: Heidegger (Geschiere P 2011, p.321-22) suggesting the term ‘Bodenständigkeit’ used autochthony to replace the individualistic Anglo-Saxon and French versions of nationalism in Germany with one more communitarian. The Zambian constitution-making process was based on “investing the constitution with the character of autochthony and popular legitimacy”

(Anyangwe C 1997, p. 10-11). Dr. NM Perera called it a “great tradition” and Marshall explicated the autochthonous desire using an “off-spring mother” (Jayasuriya DC 1982, p. 25-40). Several jurisdictions (*Madzimbamuto v Lardner -Bruke* (1968) 2 SALR 284, 307; *The State v Dosso* (1958) 2 PSCR 180 at 184-85) have also recognized the ability of adopting a new grundnorm. However, it is interesting to note that almost all countries that embraced autochthony rejected granted constitutions, the reasons for which are worth examined.

Above all, granted constitutions were not contemplated to carry people’s wishes, for instance the Soulbury Constitution contained the wishes of the United Kingdom. In Addition, they were foreign work: Sir Ivor Jennings (Jennings WI 1953, p. 1-16; Kumarasingham K 2015; Jennings WI & Goonatileke HAI 2005) drafted the 1947 Constitution of Ceylon. Further, most granted constitutions restricted the government: especially its legislative power (*The Queen v Liyanage & Others* (1965) 67 NLR 193; *Liyanage & Others v The Queen* (1967) 1 AC 259; *Bribery Commissioner v Ranasinghe* (1964) 66 NLR 73,78). Yet, experience predicate that autochthonous constitutions neither achieved the ideal autonomy, self-sufficiency, inclusiveness etc.; they have failed to demonstrate the wishes of the people: both post-independent autochthonous constitutions of Sri Lanka represented the wishes of the prevailing party in power (Tiruchelvam N 1977; Coomaraswami R 1996 p. 23; De Silva KM 1977, p.2; Coomaraswami R, 2012, pp. 127;

Wickramasinghe R 2014, pp.49,58), public participation was minus (Welikala A n.d, p.7), questioning their legitimacy. When being faced by the practical reality of constitutions being created by one or a group of privileged elites, there seems no difference between them being local or foreign. Benjamin Franklin (Franklin B 1787 cited in Padover SK 1967, p.20) in his concluding speech at the constituent assembly in USA remarked: “when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be exposed?”

Nevertheless, granted constitutions being named unearthly, many Sri Lankan constitutional law scholars admire the Soulbury Constitution as the most outstanding constitution of the country (Welikala A n.d; Edirisinghe R & Selvakumaran N 1990 pp. 97,80), despite the contents of article 9 of the Constitution of Japan which was granted after the Second World War, it created a mighty state within a short time.

Rejection for constitutional autochthony has never been less effective than its acceptance; to Jacques Derrida (Derrida J cited in Geschiere P 2011, p.321-22) autochthony was a “too limited form of democracy which countries urgently need to surpass for a more universalistic version”; conductive factors for such rejection attract consecutive attention.

Although scholars like KC Wheare (Wheare KC 1960, p.89) proffered reputed views, due

to the lack of an interpretation of universal consensus, the procedure of achieving autochthony is uncertain (Sir Roberts-Wray K 1966, p.291-2). Constitutions which are considered to be autochthonous to a higher degree have made use of different endemic procedures allowing any procedure to be called autochthonous. Especially if a political party profits secured sufficient support among the population in an election or a referendum, a government can replace an agreed constitution with one subsisting their own needs (Sir Roberts-Wray K 1966, p.291-2), this may even lead to an extreme of misusing the referendum: the best system yet found for legitimizing an autochthonous constitution. The political leaders who fought for independence were god worshipped in the post independent era of most commonwealth countries whose resolutions people accepted almost without any question letting the leaders do *ad-lib*; this resulted absolute despotism which is evident in many post-independent African Colonies.

Irrespective of the strength of the national sentiment and recognition of the court, the core elements of the principle are still vulnerable for effort less aggression (Sir Roberts-Wray K 1966, p.291-2); for instance, the necessity of the sudden radical legal breach is questioned criticizing the scholars who advocated it for their blind eye on the demand for gradual development for which the Common Law provides explicit precedent (Ssekandi FM 1983, p.3). YP Ghai (Ghai YP 1972) insists that the whole theory emerged because of the “rapid”, “extensive” desire of politicians who are poisoned with the idea that a republican constitution will only

establish independence obtained from the colonial rule (Cooray JAL 1972, p.11), to change the constitution. A Sri Lankan scholar admits that a complete severance and going for a third republican constitution is debris while people have also affirmed such stance (Rajapakse R 2008, p.161-62).

Moreover, when improperly implemented autochthony can lead a country to a series of social, economic and political crux for which the so-called autochthonous constitutions of Sri Lanka provide ever the best example. Both these constitutions due to lack of a genuinely autochthonous process failed to address the minority concerns, thus aggravating the situation of the country: both constitutions promoted Majoritarianism; Dr. Colvin R. De Silva brought the discriminatory official language provisions provided by the Official Language Act, No.33 of 1956 to the 1972 Constitution (Article 7), which was further carried on in 1978 constitution (Article 18), Prabhakaran took arms because the 1972 constitution took away even the few rights they were left with (Virekanthan CV 2017). The 1978 constitution too contributed to authoritarianism and political crisis; the country had to face two youth insurgencies, thirty years of civil war, terrorism and ethnic conflicts; it's doubtful whether we should emphasize on autochthony anymore.

Rather, attention of the constitution-making of the 21st century has diverted from the idea of having 'home-grown' roots and the fact whether it is granted or autochthonous (Oliver PC 2017). The modern trend is towards a feasible result owned by the people (Public Representations Committee on

Constitutional Reform 2016) and enshrined by openness, inclusivity and active involvement of people in all stages through participation. The conflict between universalism and localism has spread all over the comparative constitutional law field; though the constitution is a local instrument, international standards of democracy and human rights are expected to be reached. The modern anticipation is a reconciliation of these two aspects using internationally recognized scholars in designing the draft so that these standards will automatically be brought in a manner that suits the host country (Saunders C 2012). Pure autochthony *i.e.* the constitution should not take in any foreign concept is now outmoded and not an essential feature of modern day constitutions. Instead, the neo sense of autochthony has rendered undeniable in contemporary constitution-making.

Autochthony: procedure or substance?

Autochthonous constitution-making process is generally identified in two sectors: the prior consultation and post consultation; the former more significant with which most countries succeeded through autochthony. Designing a format of democracy for a country is arduous; neither can we guarantee that democracy even would correspond the specific context of such country. After winning independence, two constitutions in 1901 and 1940 were implemented based on democratic principles. For instance, in Cuba, the 1940 Constitution created by a Constituent Assembly during the presidency of Federico Lарdeo Brú got fully suspended after the Cuban revolution. In 1976, after 16

years of non-constitutional government, the revolutionary government of Cuba on Communist Principles. After the amendment in 2002 the Constitution acknowledged socialist system irrevocable.

Post consultation process ensures public participation in constitution-making, but people's deficiency in legal matters raise doubts on its results. For instance, when the founding fathers introduced to the Constitution of USA intellectual property provisions providing the Congress power under Article 1, Section 8, Clause 8 of the Constitution to promote the progress of science and useful Arts by securing for limited Times by Authors and Inventors the exclusive Right to their respective Writings and Discoveries and under Article 1, Section 8, Clause 3 of the Constitution to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes together with implied powers under Article 1, Section 8, Clause 18 to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof (not only the introduction of the intellectual property clause, the entire constitution itself is a unique experiment, thus making the constitution substantially autochthonous as well), if the public opinion on such provisions was concerned, the answer would be a definite negative; it is unlikely that the 18th century Americans had a broad understanding about intellectual property. Besides, if the prior consultation is explicit and correct, post consultation need not be

worry much of, getting the final draft approved would suffice. An autochthonous Constitution in its process has to create a constitution that does not trace its validity to foreign legislation, 'autochthony' in this superficial sense is "purely procedural and most inadequate" (Ghai YP 1972, p.414) wherefore it is hard to agree completely with the proposition that the constitution-making process would ensure the autochthonous nature of the constitution.

The question probed is whether autochthony portend only a severance from the legal past and colonial clutches (Ayua, Guobadia & Adekunle 2003, p.30); experiences disclose the need for a deeper meaning that cherishes the substance of the constitution attesting that the constitution making process alone won't reach higher aspirations like autonomy, self-sufficiency, demonstration of the people's wishes, protection from discrimination, preservation of home-grown principles and institutions etc. (Ssekandi FM 1983, p.2). Autochthonous the process may be, yet no constitution would be autochthonous without a substance processing above qualities. As the significance of the making process shifts to the substance once a constitution is implemented, the difficulty of deciding a most suitable substance is no excuse.

Even the Constitution of USA- an ideal precedent for autochthony (Swaminadan S 2013) - can be questioned on the basis of the failure of constitutional functions due to substantive flaws of structure, rights and conventions. The 2016 Presidential Election results proved the time-tested system of Electoral Collage a failure; Donald Trump

won the election because of the narrow victories in Pennsylvania, Michigan and Wisconsin despite Hillary Clinton got nearly 3 million votes more than Trump (Tushnet 2017): though the Constitution itself [The Preamble of the Constitution] and the judiciary (*McCulloch v Maryland*(1819) 17 US (4 Wheat.) 316) have asserted that the constitution demonstrates the people's wishes they were overturned in reality (Tushnet 2017). Political parties challenged constitutional theories: the Constitution had not initially provided for or even later added provisions for a situation where the political party of the President control over the Congress as the theory of the separation of powers has been challenged with timely rise of political parties (Tushnet 2017) and the President violated human rights. The executive order of President Trump on immigration to USA: the "temporary suspension of admission of people of seven nations" or in simpler terms the "Muslim Ban", have violated human rights through discrimination on the basis of religion or national origin, together with other basic constitutional values of the rule of law and equal protection of law. However, the Constitution had not provided immunity provisions for the Presidency, even judicial interpretations have held that the President can be amenable to judicial proceedings only after an impeachment and that his immunity from civil damages covers only official acts (Tushnet 2017; *United Nations v Nixon*418 US 683; *Nixon V Fitzgerald*(1982)475 US 731). Article 37 of the Constitution of India supplies another example where the judiciary has refused the existence of Directive Principles; adopting Seeravi's argument

(State of Madras v SmtChampakamDorairajan(1951) AIR 226) that the Directive Principles are only "political exhortations".

Still, the process cannot be underestimated; both scholarly ideas and case studies exemplify that a truly autochthonous substance is possible under a truly autochthonous process; a poorly planned process is a foundation of future problems; the constitution-making process in Nepal 2009 provides profound example (Acharya ML 2014, p.46; *Public Participation* 2015). A truly autochthonous process is expected to meet high aspirations of representation, inclusiveness and equal opportunity to tender public opinion; the very process which Sri Lanka lacked and is lacking in her endeavor to achieve autochthony.

Autochthony: a failed experiment in Sri Lanka

In Sri Lanka, Aldous Huxley's prediction (Aldous Huxley cited in Fernando B 2016, p.12) that due to changes in technology and communication systems, new forms of dictatorships may emerge, which would use novel methods of propaganda for adjusting people's minds to authoritarian rule came to be a reality and autochthony, for the past 40 years meant nothing but a "highly localized comedy" (Fernando B 2016, p.12). The divided mentality, selfishness and narrow party interests were the greatest barriers in the road to autochthony. Neither the 1972 Constitution nor the 1978 (Virekanthan CV 2017) were substantially autochthonous as they lacked autochthonous processes. The First Republican Constitution provided for

many institutions, conventions and customs of the Westminster System; parliamentary democracy was never questioned, parliamentary sovereignty was used to establish an almighty legislature. Additionally, substantive conflicts between the provisions of the Constitution were remarkable. Under section 72 of the Constitution the National State Assembly consisted only of elected members whilst section 42 of the Constitution continues with the Soulbury Parliament together with its nominated members, *inter alia* Resolution 6 of the Draft Basic Resolutions mentioned that “the principles of delimitation of electoral districts shall be in accordance with the existing law (Virekanthan CV 2017; Coomaraswami R 2012, p.127; Nadesan S 1971, p. 11). Furthermore, the 1972 constitution was drafted by an illegal Constituent Assembly. Legality of the Constituent Assembly was challenged in **Suntharalingam's Case**: an application brought for an injunction restraining the Minister of Constitutional Affairs from replacing the existing Constitution with a new one. The application was dismissed by HNJ Fernando CJ, (Wijayathilake J, agreeing) on the basis “that a Court cannot consider the validity or otherwise of a new Constitution, unless and until a new Constitution is established or purported to be established”. However, after the implementation of the new Constitution the validity of the Constitution nor its making process could be questioned before courts as provided by the section 48 (2) of the Constitution (**Suntharalingam v The AttorneyGeneral** (1972) 75 NLR 126,137). The Constitution-making process was

initiated based on an assumed mandate: the manifesto of the United Front in 1970 General Election sought a mandate to permit the members of the Parliament that would be elected to function simultaneously as a Constituent Assembly to draft, adopt and operate a new Constitution which will declare Ceylon to be a free, sovereign and independent Republic pledged to realize the objectives of a socialist democracy securing fundamental rights and freedoms to all citizens. Though the United Front won the election, the so-called “unchallengeable mandate” they based their new Constitution on was no more than an assumption based on the defectives of the first-past-the-post system introduced by the very Constitution that they were so anxious to get rid of, neither as the election through which the Constituent Assembly was appointed was directed for the purpose (Nadesan S 1971, p. 7-11). Public opinion was ignored (Welikala A n.d), rejecting opposition ideas (Nadesan S 1971, p.8-9; Cooray JAL 1973 250-51; Coomaraswami R 1996, p.25), making the process an absolute party affair. The 1978 Constitution was drafted by a Select Committee headed by JR Jayawardane; after assuming power as the President the new Prime Minister, R. Premadasa was appointed as the chairman of the Committee. However, the President was invited to attend the meetings of the select committee, thereby he actively participated in the deliberations] (Jayasuriya DC 1982, p. 63). The similar procedural errors were repeated: the select Committee wasn't directed at the replacement of the 1972 Constitution (Bandaranaike SRD & Senanayake M 1977); it represented the authoritarian realpolitik

dreams (Amaratunga C 1989, p.345; Wickramasinghe R 2014, p.49,58) of JR, UNP's colossal rejected the opposition (Welikala A n.d, p.7) and the deliberations were secretive (Welikala A n.d, p.7). The Executive Presidency was introduced by the 2nd amendment to the Constitution of 1972 by way of an urgent Bill. It is doubtful whether the executive presidency demonstrated people's wish as they have been voting to abolish it since 1994 and a high demand still subsists for an adequate system that would correct the mistakes of a doomed past. Moreover, both constitutions represented the "majority community" not the "indigenous whole" (Udagama D 2012), people were not allowed to approve the Constitutions referendums which would have provided the legitimacy (Cooray MJA 1982, p.130) they lacked.

A consequential alienation due to public discount with the existing constitutional scheme is visible with the current preoccupation of Constitutional reforms (Udagama D 2012) too in which the participatory approach has not reached the common man. The Business Times and the ColomboBased Research and Consultancy Bureau ('Most people in Sri Lanka say Provincial Council are a failure', The Sunday Times, 09 December 2012, viewed 28 March 2018, <www.sundaytimes.lk>; Public Representations Committee on Constitutional Reform 2016) conducted a survey through street interviews and emails (a more progressive mode of gathering opinion compared to public meetings organized by the Public Representations Committee on Constitutional Reform; it's

most unlikely that common people have time to be in these meetings as they are more interestedly engaged in their life struggle) in seven provinces including the Northern Province based on the question whether the Provincial Councils were a success or otherwise. More than 70% of the people pf the country said that Provincial Councils are a failure; whether such a system should be continued or abolished merits questioning. Albeit considering this point, the Public Representations Committee on Constitutional Reform recommends continuing the Provincial Councils with more powers. It would have been more productive if the committee recommended that the provincial councils be abolished and instead strengthen the existing local government authorities. Neither the roots of which are genuinely ours (Jayasumana C 2017).

It is obvious that lack of participatory decision-making and overly centered government raised quenchless flames of ethnicity, wherefore Sri Lanka is in need of a theoretical framework for Constitution making process (Thiruvarangan M 2018) towards reconciliation and transitional justice using "positive ethnicity". The public representations for reconciliation in the frozen constitutional reform processes have demanded for better access to services, adequate representation and inclusive development for which the Public Representations Committee has made recommendation in directive principles, fundamental rights, judicial and electoral reforms, public services and independent commissions. Additionally, the government's Peace building Priority Plan of

2016 (PPP) (Sri Lanka Peace building Action Plan (August 2016) supports the Government of Sri Lanka to implement its reconciliation and transitional justice commitments to the people as part of its peace building agenda. The United Nations has played a key role in developing and coordinating the implementation of the plan which also is a tool for coordinating development partner's support to peace building. Operation of the Plan is guided by the Government's four Pillars of support of: Transitional Justice; Reconciliation; Good Governance; and Resettlement and Durable Solutions. (Public Representations Committee on Constitutional Reform 2016; Juma L 2001, p.500).

Procedural autochthony, Conflict resolution and participatory Constitution-making

Substance was more important when constitution-making was confined to the hands of few powerful politicians. Instead, the contemporary constitution-making welcomes greater emphasis on due process due to increasing need of building trust and the importance of public participation (Saunders C 2012, p.3). Constitution-making after 1980s centers on conflict resolution in which participatory constitution-making is much useful; constitution-making serves conflict resolution both procedurally and substantively; a platform is provided for negotiation concerning the outcomes through the resolution of differences (Sangroula Y 2014, p.130). Procedurally and substantively autochthonous constitutions of South Africa (Saunders C 2012, p.6-8; Khanal K 2014),

Kenya (Tobi N 1998), Nepal (Karkl B, Edirisinghe R 2014), Brazil and Uganda prove it being no more a unique experiment (Karkl B, Edirisinghe R 2014, p.47). Most importantly participatory constitution-making, recognized as a right by international law. Several international norms have provided for the right for participation that have been used for a right to participate in constitution-making process: the right to take part in public affairs by Article 25 of the International Covenant on Civil and Political Rights, the right minorities to self-rule by the United Nations Declarations on Indigenous Peoples, and the right of self-determination by the United Nations Charter, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (United Nations General Assembly, 1966; United Nations General Assembly; 2007; United Nations General Assembly, 1945; United Nations General Assembly 1966; International Labour Organization, 1989). These norms pay attention on both the substance and the process (Karkl B, Edirisinghe R 2014). Though constitution-making processes are loaded with extreme expectation practically most constitutions fail (Ginsburg T, Elkins Z & Blount J 2009, p.5), public participation is not immune from defects (*Public Participation* 2015) and what constitutions can provide too is limited (Rajapakse R 2008, p.161). Thus, a profound mixture of both procedural and substantive autochthony shall make a constitution indeed autochthonous and legitimate (Saunders C 2012, p.2).

Conclusion

In this essay, I have argued that the meaning and the scope of autochthony has widened from merely throwing away the colonial roots to ensuring the constitution to represent the true wishes of the people through the participatory in this modern sense is essential and that the constitution making process and the substance matters equally in ensuring that such constitutions are indeed ‘autochthonous’.

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PROTECTING THE FREEDOM OF EXPRESSION AND MEDIA FREEDOM UNDER COVID-19

Anushka Pathiraja Weerakkodi*

Introduction

As the novel coronavirus has reached nearly every country on earth, there has also been mass circulation of falsehoods that have spread as fast as the virus itself. These lies have helped pave the path for the infection, and they have sewn mayhem in how societies are responding to the pandemic. Recognizing the danger, United Nations Secretary-General António Guterres has warned that “our enemy is also the growing surge of misinformation” (Journalism, press freedom and COVID-19, 2020).

Independent media has never been so important. The work of journalists and media outlets around the world during this crisis of COVID-19 enables the general public to stay informed about statistics, the evolution of the pandemic, and the measures being taken by governments and other international bodies. This information is vital for people’s ability to protect themselves and each other. It is evident, however, that under the guise of fighting COVID-19, some governments are working to stifle the freedom of expression and crack down on legitimate dissent (Media Legal Defense Initiative, 2020).

What is meant by “Protection”?

The Cambridge Dictionary defines the term “protection” as the act of keeping someone or something safe from injury, damage, or loss, or the state of being protected.

The Freedom of Expression

The freedom of expression is a cornerstone in any functional democracy. In Sri Lanka, the freedom of expression is guaranteed under the 1978 Constitution of the *Democratic Socialistic Republic of Sri Lanka*. It states that every person is entitled to freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his choice under Article 10 and Article 14(1) (a) stipulates that every citizen is entitled to the freedom of speech and expression including publication.

Everyone has the right to communicate his or her opinions and ideas and share information in whatever form. In human rights, this is called the including freedom of expression. It prohibits the state and other people in society from engaging in censorship and it can be restricted only for very serious reasons (The freedom of expression & media, 2018).

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The including freedom of expression covers the scope of all the ways which you can express yourself regardless of the content of the message or the tone of the message. It enfolds all:

- places (public and private)
- purposes (political, artistic and commercial)
- forms (words, pictures and sounds)
- media (films, cartoons, radio, television and social media).

The freedom of expression is a matter of law, but also a question of ethics and morality. Ultimately, it concerns the intrinsic equality of human beings, as set out in the UN Universal Declaration of Human Rights. The freedom of expression, like universal suffrage, is based on the fundamental value and rights of individuals. Utterances, however, can inflict injury on individuals, groups of people and societies, which can give rise to demands for interventions to limit the freedom of expression (Carlsson and Weibull, 2018).

Not only in Sri Lanka, bu also in most other jurisdictions too, the freedom of expression is granted through principal legislative enactments.

The United States safeguards this right through the First Amendment to the *U.S. Constitution*, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress

of grievances" (The freedom of expression in the United States, 2013).

The *Europe Union Charter of Fundamental Rights* states under Article 11 regarding the freedom of expression and information. It stipulates that "everyone has the right to freedom. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority regardless of frontiers and the freedom and pluralism of the media shall be respected.

Chinese authorities which have historically considered the freedom of expression as a privilege rather than a right and that limited freedom of expression enables the government to better monitor potentially problematic social issues (referred to as "舆论监督"), have in recent years begun to tolerate criticism, but only from certain categories of people, a kind of "free-speech elite," and only in government-controlled forums (The freedom of expression in China: A Privilege, Not a Right | Congressional-Executive Commission on China, 2020).

Media Freedom

The freedom of expression gives special rights and duties to the media. The media informs society on matters of public interest and creates an important platform for public debates, scrutiny and reflection. Therefore, independent media and quality journalism are considered to be the "watchdog" of a democratic society (The freedom of expression & media, 2018).

Freedom of various kinds of media and sources of communication to operate in political and civil society. The term *media freedom* extends the traditional idea of
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freedom of press to electronic media, such as radio, television, and the Internet. The term acknowledges that the media in modern societies consist of more than print sources. Media freedom is generally held to be necessary for democratic societies. Individuals generally cannot get sufficient information on their own to make informed decisions on public matters, so they rely on media to provide information (Media freedom, 2020).

Media freedom implies media responsibility and accountability. If free media are going to fulfill their vital functions, then the public needs assurance that the media are seeking the truth and acting to guard the public interest. Government regulations on media seek to ensure that media act within the parameters of public interest. However, many argue that all or many government regulations interfere with media freedom and violate the public's right to choose and own media sources. On the other hand, government regulations may be necessary to control corporate media outlets that dominate the public's access to information (Media freedom, 2020). For the purpose of this study, the focus will be on the online media platforms such as Facebook, Twitter and news that appeared during this period of pandemic.

What is COVID -19?

Coronavirus Disease 2019 (COVID-19) is an infectious disease caused by Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2). It was first identified in December 2019 in Wuhan, China, and has since spread globally, resulting in an ongoing pandemic. As of 9th May 2020, more than 3.93 million cases have been reported across 187 countries and

territories, resulting in more than 274,000 deaths.

Common symptoms can include fever, cough, fatigue, shortness of breath, and loss of smell and taste. While the majority of cases result in mild symptoms, some progress to Acute Respiratory Distress Syndrome (ARDS), multi-organ failure, septic shock, and blood clots. The time from exposure to onset of symptoms is typically around five days but may range from two to fourteen days.

The virus is primarily spread between people during close contact, often via small droplets produced by coughing, sneezing, and talking. The droplets usually fall to the ground or onto surfaces rather than remaining in the air over long distances. People may also become infected by touching a contaminated surface and then touching their face. On surfaces, the amount of virus declines over time until it is insufficient to remain infectious, but it may be detected for hours or days. It is most contagious during the first three days after the onset of symptoms, although spread may be possible before symptoms appear and in later stages of the disease. The standard method of diagnosis is by real-time reverse transcription polymerase chain reaction (rRT-PCR) from a nasopharyngeal swab. Chest CT imaging may also be helpful for diagnosis in individuals where there is a high suspicion of infection based on symptoms and risk factors; however, guidelines do not recommend using it for routine screening (Coronavirus disease 2019, 2020).

What does Journalism or Media do?

Professional journalism helps us monitor what we think we know and what we do not know for sure. It also helps us track the evolving science about the virus, and about prevention and treatment, and the policy responses being adopted.

For example, in countering the conspiracy theory that 5G cellular networks have helped spread the coronavirus, news reporting has demolished this myth and delved into who is driving it.

Independent media enables the public to hold public authorities to account, as well as ensuring evidence-based policy and transparent practical steps about the crisis. In contrast, transmitting government messages in state-owned media is not effective if there is a lack of trust in these outlets (Journalism, press freedom and COVID-19, 2020).

What are the specific limitations of the Freedom of Expression and Media Freedom?

Even under normal circumstances, the freedom of expression and media freedom are not absolute rights. There are very strict requirements on how the freedom of expression and of media freedom can be restricted (legality, necessity and proportionality, legitimacy). In emergency situations, states can derogate from their obligation in relation to the freedom of expression and of media following the general rules. States must justify this by meeting two essential conditions: the situation must amount to a public

emergency that threatens the life of the nation, and the state must have officially proclaimed a state of emergency and notified other countries through the Secretary General of the United Nations (Pírková, 2020).

How the Prove Freedom of Expression and Media Freedom is affected by the COVID-19?

“A free press is especially vital during times of emergency. There should be no state censorship or other undue restrictions on the free flow of information”

-Freedom House, a U.S.-based democracy watchdog wrote in a statement-

On January 26 of 2020, Malaysian journalist Wan Noor Hayati Wan Alias wrote three posts on Facebook. In one of them, Hayati warned about the potential threat posed by 1,000 Chinese nationals that were allegedly arriving in Malaysia on a cruise ship. Little did she know that those posts could land her in jail.

A few days later Hayati was charged on three counts, for causing “public mischief.” If convicted, she may face up to two years in prison. Hayati is not the only journalist arrested because of the COVID-19 outbreak. Li Zehua, a journalist based in China, left CCTV, the country’s state-owned broadcaster to be able to report freely about the real situation in Wuhan, the Chinese province where the first new coronavirus outbreak had been identified. Li, who published his videos on various social media channels, was arrested on February 26, 2020.

In China, news websites have been shut down, social media protests criticizing authorities have been blocked and citizen journalists have been targeted directly.

Nevertheless, as the virus spread worldwide, there was hardly a day in the second half of March without news about restrictions of media freedom in an increasing number of countries, according to reports from the International Press Institute (IPI), a Vienna-based NGO. These restrictions include intimidation and/or other forms of harassment like arrests, attacks and legal threats that make the work of journalists more difficult if not impossible. (Nemeth, 2020).

However, in this time where communicating with the public, sharing data and information is more important than before, journalists in many places are finding their voice. In Pakistan, journalists who long dealt with a hostile government, have found a new, more critical voice. Even pro-government outlets have begun to ask tougher questions about the official response to the crisis. In South Africa, Spain and the UK journalists have been designated key workers and have been able to travel down to report, even as much of the rest of the population remains in lockdown.

But as the case studies below show, COVID-19 poses a new threat to press freedom at precisely the moment it should be defended (Selva, 2020).

In Sri Lanka, the Inspector General of Police has ordered the police to arrest those who “criticize” officials involved in the coronavirus response, or share “fake” or

“malicious” messages about the pandemic. According to the order, issued on April 1, officials “are doing their utmost with much dedication to stop the spread of COVID 19,” but “those officials’ duties are being criticized, minor issues are being pointed out,” and messages are being posted that “scold” officials, thus “severely hindering” their duties (Ganguly, 2020).

Protecting the Freedom of Expression and Media Freedom under COVID -19

Protecting the freedom of expression and media freedom in times of a pandemic is of vital importance. In almost all the countries around the world, people have been living in confinement for almost two months, a situation which has a profound impact on the communities, economies, families and daily lives. People have, more than usually, been relying on the media for news and information to better understand the COVID-19 crisis, ways to protect themselves and their families, and wider implications of the outbreak, as well as to evaluate the responses of the governments and the global community.

The crisis intensified the need for people to be able to access reliable news that they can trust, a quest made challenging enough by the digital information overload, indiscriminate use of various communication tools and news sources and the accompanying phenomenon of information disorder. Journalists have responded with resolve to fulfil their enhanced responsibility of informing the public and mitigating health and other risks stemming from the virus (Protecting the

freedom of expression and media freedom in times of pandemics, 2020).

The freedom of expression, which includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, through any media, applies to everyone, everywhere, and may only be subject to narrow restrictions. In this connection, the following can be directed:

Firstly, it is essential that governments provide truthful information about the nature of the threat posed by the coronavirus. Governments everywhere are obligated under human rights law to provide reliable information in accessible formats to all, with particular focus on ensuring access to information by those with limited internet access or where disability makes access challenging.

Secondly, internet access is critical at a time of crisis. It is essential that governments refrain from blocking internet access; in situations where internet has been blocked, governments should, as a matter of priority, ensure immediate access to the fastest and broadest possible internet service. Especially at a time of emergency, when access to information is of critical importance, broad restrictions on access to the internet cannot be justified on public order or national security grounds.

Thirdly, the right of access to information means that governments must be making exceptional efforts to protect the work of journalists. Journalism serves a crucial function at a moment of public health emergency, particularly when it aims to inform the public of critical information and monitor government actions. We urge all governments to robustly implement their

freedom of information laws to ensure that all individuals, especially journalists, have access to information.

Fourthly, we share the concern that false information about the pandemic could lead to health concerns, panic and disorder. In this connection, it is essential that governments and internet companies address disinformation in the first instance by themselves providing reliable information. That may come in the form of robust public messaging, support for public service announcements, and emergency support for public broadcasting and local journalism (for instance, through government health advertisements).

Resorting to other measures, such as content take-downs and censorship, may result in limiting access to important information for public health and should only be undertaken where they meet the standards of necessity and proportionality. Any attempts to criminalize information relating to the pandemic may create distrust in institutional information, delay access to reliable information and have a chilling effect on the freedom of expression.

Fifthly, we are aware of growing use of tools of surveillance technology to track the spread of the coronavirus. While we understand and support the need for active efforts to confront the pandemic, it is also crucial that such tools be limited in use, both in terms of purpose and time, and that individuals' rights to privacy, non-discrimination, the protection of journalistic sources and other freedoms be rigorously protected. States must also protect the personal information of patients. We strongly urge that any use of such technology abide by the strictest

protections and only be available according to domestic law that is consistent with international human rights standards (Protecting the freedom of expression and media freedom in times of pandemics, 2020).

Conclusion

Journalists are still doing extraordinary work, putting themselves at risk to report on a pandemic that is turning global systems upside down on an unprecedented scale. This pandemic must be documented, analyzed and recorded. People's stories must be told and politicians must be held to account if societies are to rebuild themselves. It is vital that journalism continues (Selva, 2020).

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STREET HARASSMENT

K.H.H.N Silva

‘Street harassment’ is a form of harassment. Primarily, sexual harassment, is use of unwanted comments, gestures, honking, catcalling, touching by strangers in public areas such as; streets, shopping malls, public transportation and rape.

This study attempted to understand street harassment in Sri Lanka. Interviews were conducted using women between the ages of 18 and 50 years to understand the nature of harassment they faced.

Street harassment can be recognized as a form of discrimination against women. It is questionable whether there are adequate laws in Sri Lanka to overcome the issue of street harassment in order to safeguard women’s rights.

The researcher seeks to assess both quantitative and qualitative data. References have been taken from the Penal Code of Sri Lanka and United Nations Convention on Elimination all forms of discrimination against women (CEDAW).

There is a law for major offences such as Rape and Sexual assault. There is a difference between sexual harassment and street harassment. Sri Lanka has Section- 345 on sexual harassment but there is no specific section on Street harassment.

Street harassment limits the freedom of movement of women and causes gender inequality which is fundamental rights guaranteed under Article-14(h) and Article-12(2) respectively under the 1978 constitution of Sri Lanka.

This Article is based on the Feminist approach. Therefore, only women were considered for the sample.

The questionnaire has ended with multiple questions to find the responses of women who have experienced street harassment. Apart from the questionnaire the Penal Code(Amendment) Act No: 22 of 1995 of Sri Lanka, Vagrants Ordinance of Sri Lanka, and Articles-12(2), 14(1)h of the Constitution of the Democratic Socialist Republic of Sri Lanka and International Standards such as the United Nations Convention on elimination all forms of discrimination against women (CEDAW) are analyzed through this.

Some women refused to give the true picture on street harassment which they have experienced.

Section-345 of the Penal Code (Amendment) Act No: 22 of 1995 introduced the offence of sexual harassment. This amendment is a great step forward because it has identified sexual harassment as a criminal offence.

Whoever, by assault or use of criminal force, sexually harasses another person, or

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by the use of words or action causes sexual annoyance or harassment to touch other person commits the offence of sexual harassment and shall be convicted and be punished with imprisonment of either description for a term which may extend to five years with fine or with both. They may also be ordered to pay compensation of an amount determined by court to the person in respect of for whom the offence was committed for the injuries caused by such person.

Explanation (1) unwelcome sexual advances by words or action used by a person in authority, in a working place or any other place shall constitute the offence of sexual harassment.

Explanation (2) for the purposes of this section, an assault may include any action that does not amount to rape under section-363.

This is a criminal offence. The burden of proof is high, and the harassers' action should be proved beyond reasonable doubt.

Moreover, attention should be drawn to the term 'Authority' which gives the idea on Police, Armed Service Personnel, School Officials, and Medical Officials. But in this Article; street harassment is identified as verbal and physical harassment done by strangers' in public street and not by any particular authority.

Such interpretation cannot be established through this provision and the stranger's actions are hard to prove beyond reasonable doubt. The term 'any other place' is ambiguous. 'Eiusdem generis' can be applied.

In the case of Powell V Kempton Racecourse (1899) The Vagrants

Ordinance can also be applied regarding street harassment.

According to Section-3(1)(e) of the Ordinance; Every person who upon any wharf, jetty, street, road, walk, passage, verandah or other place situated within any proclaimed area and used by or accessible to the public, persistently and without lawful excuse follows, accosts or addresses by words or signs any person against his will and to his annoyance shall be deemed an idle and disorderly person within the true intent and meaning of this ordinance, and shall be liable upon the first conviction to be imprisoned, with or without hard labor, for any term not exceeding fourteen days, or to a fine not exceeding ten rupees.

In this section it is clear that 'streets' are explicitly addressed. Also, the maximum fine is only 10 rupees, which would not suit the modern situation. Therefore, Vagrants ordinance is outdated and inadequate to remedy the issue of street harassment.

Article-12(2) of the Constitution of Sri Lanka entails 'No citizen shall be discriminated against race, religion, language, caste, sex, political opinion place of birth....'

Apart from that; in comply with Article-14(1) the freedom of movement and of choosing his residence within Sri Lanka is a guaranteed fundamental right. Right to equality and freedom of movement has been violated through street harassment. The convention on the elimination of all forms of discrimination against women is the primary international mechanism in respect of protection of women's rights. Since Sri Lanka is a signatory party to the convention, there is an obligation to ensure

that rights of women are protected and promoted within the country.

Article-2 of the convention on the elimination of all forms of discrimination against women (CEDAW) requires states to ‘pursue by all means and without delay a policy of eliminating discrimination against women’ which expect the duty to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation and take all appropriate measures including legislation , to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

CEDAW created an impact on the National Policy of Sri Lanka. The Women’s Charter was adopted and accepted as the government’s policy document on women.

It guarantees; political and civil rights, rights within the family, right to education and training, right to economic activity, right to healthcare and nutrition, right to protection from social discrimination and right to protection from gender-based violence.

The recent case on Wariyapola incident made an environment to address this issue. A girl was cat called by a young man in a public street and she slapped him. The video on girl’s reaction became famous in social media and it created a fear among men and in return was a motivation for women to stand against their rights.

Professor “Savithri Goonesekare”, had made an important point on this issue.

There is a serious breakdown of the hierarchy of institutions. When talking about this incident; the police made a rather illogical response.

They should have first taken the complaint and listened to both parties and then taken some action. The girl was not given an opportunity to respond. I’m not trying to justify her actions but then again,it is illogical. Also, this video was found on social media and you never know whether there are any technological manipulations. It’s in the hands of the police to make a detailed inquiry, but they failed to do their job. In the United Kingdom; there are number of specific laws which make street harassment illegal.

Section-5 of the Public Order Act 1986 states; A person is guilty of an offence if he;

- a) Uses threatening, abusive or insulting words or behavior or disorderly behavior.
- b) Displays any writing, sign or other visible representation which is threatening, abusive or insulting.

The maximum penalty is a fine. In Egypt, five years in prison and a fine of EGP 50,000.Following findings were revealed through the questionnaire.

The answers to the statement ‘What type of street harassment have you experienced frequently?’ 52%, 12%, 2%, 12% 8%, 14% have experienced catcalling, whistling, leering, stalking, groping, and public exposure respectively.

The answer to the statement is ‘What were your reactions?’ 77%, 10%, 12%, 1% have ignored, verbally responded, sought help from by standers or physically responded. The answers to the statement is ‘Did you receive assistance from the others (by-

standers)? 65% responded ‘Yes’ and 35% responded ‘No’.

88% of women from age 18 – 50, 12% from 36 – 55 experience street harassment. 45% stated that police were inattentive, 12% stated that they advised the harassers when they are brought to the police, 10% stated that they humiliated them for complaining such incidents, 33% agree that police rendered assistance to overcome their bad experience. The answers to the statement what were your inner reactions? 73%, 10%, 0.1%, 16.9% have felt annoyed, angry, happy, and disgust respectively.

Response to the statement ‘Does your way of dressing induce harassers?’ 96% agreed that the dress has no impact on the harassers while 4% stated that the dress induces harassers.

Responses to the statement ‘what are the personal barriers you have imposed on yourself to avoid street harassment? 8% try not to go alone, 32% wearing my favorite types of clothes, 48% try to avoid going in Public Street in certain times and 12% change their route. 90% of women experience harassment on daily basis and also it was revealed that majority of males of age 16-35 engage in street harassment. Through the questionnaire it was revealed that most men of age 16-35 engaged in street harassment and most common type of street harassment and the most common type of street harassment is catcalling (52%) and whistling (12%). Most women of age 18-50 had become the victims of such harassments. Moreover; it was revealed that most of their responses were ignored by such men. Even if they ignore such harassment, women commented that they feel angry and disgust towards such

harassers. 90% women experience harassment on daily basis and the interesting fact is that they mentioned harassment is treated as a ‘normal’ experience by them. Furthermore, it was stated that they try their best to act ‘neutral’ on such occasions because there is no remedy to avoid such harassment. The important fact to be noted is that majority of women agreed that they are being insulted by men for the fact that they are women. Moreover, they insisted that they feel unsafe, uncomfortable and insecure when they experience street harassment.

Also, few men of 0.1% have felt happy on the comments passed to them by men. According to this analysis most harassments fall into the category of verbal and certain action-based harassments. Also 98% women see street harassment as a social menace. Several women have gone through psychological trauma and as a result they tend to change their routes and routines frequently. In fact, they feel fear about men in public streets. Furthermore, women said that men engage in such harassment because they don’t feel any fear to harass women mainly because of their mentality on ‘Masculinity’ and they do not feel fear because of the fact that no legal actions are being taken to remedy the issue. This was revealed from the statements given by women and most of the women agreed that police were totally inattentive when they complained about their situation and that some police officers humiliated them for complaining on such experience of harassment. Apart from that they also argued that some police officers have mentioned that there is no law to address street harassment.

Therefore, it is evident through the given responses that street harassment is a serious issue that should immediately be addressed. Men treat women as ‘objects’ to release their inner frustrations and more importantly since there is no remedy men do not feel fear or rather there is no deterrent effect that has been created within the society. When the laws are lenient men try to gain unnecessary advantages from such lenient laws therefore, proposed civil remedy will be helpful in addressing this social menace of street harassment.

The following are some of the comments given by women of age 18-50.

‘I have been told worst things that can ever imagine and that no one should ever be heard’ (Respondent Age 26).

‘A guy last week catcalled at me, and I verbally responded him loudly when I walked by, I yelled at the top of my lungs and nearly 10 people turned around as he slinked away embarrassed. It made me react in this way because once complained about a harasser to the police they didn’t even care about me I felt sorry for being a girl’ (Respondent Age - 20).

From the above responses it is clear that women undergo serious violations of their right to movement and right to equality. What is more surprising is that the law enforcement authorities themselves show their attitudes of ‘Masculinity’ towards women and it undermines the dignity of women. She reacted in such an aggressive manner because her previous situation was not remedied. It is quite obvious that the comments itself has anger and annoyance and they believe that males do not respect females in the society. ‘When I walk alone,

people have whistled; this has happened to me every day and at many times. However, I do not react on such occasions, I rather avoid such people. Whistling and catcalling would not stop. The best remedy is just to ignore them, nobody cares about the embarrassment we go through she said’ (Respondent Age- 18).

‘I go to Pettah to buy essential household items. Obstructing my way and whistling are common. The best thing is to avoid such harassers and avoid eye contact. What we wear has nothing to provoke men to whistle at women. Even if you are fully covered catcalls would not stop. We have to deal with these things in day-to-day life. Actually, we are helpless in this respect she said. (Respondent-34). The worst thing I have experienced is, that a stranger followed me for several days. Even after I shouted at him, he fearlessly stalked me. He stopped that on the day I sought help from others (Respondent- 25).

‘Once I was indecently touched by a man and I immediately went to the police officer who was there close by and he thoroughly advised the harasser, but this unaccepted behavior has become a habit of men (Respondent- 30).

The prevailing law is not adequate to address this issue and there is no legal redress for them. Women act in aggression to release their inner pain and this might have adverse results. With the wide usage of social media certain campaigns are carried out to remedy the issue of street harassment. Some upload photos of harassers and those are being shared through social media. This creates more complicated issues and such acts violate certain ethics and it amounts in violations of rights of the harasser in return. It was

revealed that such acts are done by young women because law does not provide any remedy for street harassment and that women are being discriminated everywhere.

The above quoted responses give a strong message to the society and to the law making and law enforcement authorities to address and remedy the inadequacies in the prevailing legal system on the issue of street harassment and the proposed civil law remedy will pave the way to control the unaccepted behavior among harassers in public streets.

The prevailing law on such harassment is fragmented and scattered. Therefore; the author seeks to propose a civil remedy for street harassment to overcome the issue with the aim of creating deterrent effect. In order to establish a civil law, remedy the harassments that occur in streets such as; catcalling, leering, shouting, whistling, blocking the path, groping, stalking, public exposure assault, rape should be categorized into sectors. For that the basic rights such as freedom of movement, equality should be combined to come up with a wide interpretation to address street harassment.

Verbal harassment such as catcalling and whistling is hard to prove, and it is hard to convict the perpetrators. But the harassments have done by men directly results in discriminating women and embarrassing women in public streets and it determine the dignity of women. The offences are hard to prove yet the gravity of the negative impact on women are high, but due to the difficulty in gathering proof author seeks to categorize the mentioned offences as minor offences. Moreover; the

harassments such as; stalking, groping, indecent touching, public exposure that occur in public streets can be proved when compared with minor verbal harassments. In fact, the mentioned acts or physical conduct can be categorized as medium scale offences and evidence of eyewitnesses and by standers can be gathered to punish the harassers when such actions are done. However, the offences such as Rape and Assault are identified as criminal offences under the Penal Code of Sri Lanka.

Therefore; the author intends to propose the civil remedy to the category of minor and medium scale harassment. The words of such laws should be drafted in a manner in which it includes both verbal, physical as well as minor and major harassment. Since the verbal harassment is hard to prove the focus should mainly be on medium scale harassment. The demarcations as minor and major scale harassments are distinguished only for the purposes of gathering evidence and there should be no distinction on the imposed punishments in instances where verbal harassments can be proved.

Moreover; spot fines, fines and compensation and a maximum imprisonment of six months can be imposed. It is evident that criminal charges are hard to impose in these instances even though the gravity of the harassment is high due to the difficulties in gathering evidence regarding strangers.

Since this is an area where there is less attention but need more attention the responsible authorities should consider about establishing a new law which would address street harassment. Once a law is

introduced, responsible authorities should be given law enforcement training.

In conclusion; therefore, it is clear that women's rights and their fundamental rights are deprived and discriminated based on their gender, because of the patriarchal society and men's attitudes.

Civil redress has to be implemented. Law enforcement training should be given to police authorities and the police code of conduct should be practically enforced and they should be trained to respect the dignity of women. Also, the stereotypical attitudes of the patriarchal society should be changed. 'Blue for boys' and 'Pink for girls' concept should be changed. However; law is the major fact that should be considered to protect women from street harassment.

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MANURAWA 2020

සියද්ධි නසා ගැනීම පිළිබඳ තෙතිකමය සහ සමාජවිද්‍යාත්මක ඇසින්

අවල තාරක*

ඡේවිතය යනු කුමක්දැයි මා එක නිමෝහයක ඔබෙන් ප්‍රශ්නයක් අසම්. එවිට ඔබද, මමද ඡේවිතය යනු කුමක්දැයි තිරවවනය කරන ආකාරය එකිනෙක වෙනස් වන්නට පුළුවන. නූතන විද්‍යාත්මකව, ආගම මත පදනම්ව, සමාජවිද්‍යාව මූලාශ්‍ර කොට ගෙන ඡේවිතය යනු කුමක්දැයි ඔබ පසිදාන්තට පුළුවන. ලොව ඇති අපුරුවතම ත්‍යාගය නැතහොත් දෙවියන් විසින් හෝ දෙමාපියන් විසින් දුන් අපුරුවතම තිළිණය ඡේවිතය යයි මා මෙහි ලියමි. ඒ මට දැනෙන, මට හැගෙන බොලද වූද සිත කියන්නා වූද ඡේවිතය යන්නට මට දිය හැකි හොඳම පිළිතුරයි. උපදින විට තිළිණවන, පළමු වැරදීමතුල, පළමු පියවර තැබීම මත, පළමු ආදරය අතුරින්, පළමු හාඳුව අධියසින්, ජයගන්නා හැම විවකම්ද, පැරදී තැගී සිටින හැම විවක්දීම, සිතට මෙන්ම ආත්මයටම දැනුන යම් දෙයක් වේ නම් එය ඡේවිතය බව යුටුශුබ විඩියෝවක් මෙය ලියන තප්පරයේ මට පවසම්න් සිටියි. සැබුවින්ම ඡේවිතය යනු අර්ථකථනය කළ නොහැකි අපුරුවතම දායාදයකි.

තප්පරයෙන් තප්පරය විදිනා, විද්‍යාතා ඡේවිතය එක නිමෝහයකදී අවසන් කොට, ඡේවිතය තුළින් නික්ම යාමට යමුකට සිතෙන්නේ නම් එය සැබුවින්ම පුදුම සහගතය. ලොව වෙසෙනා සැම සත්වයෙකුම පාහේ වඩා ආදරය වන්නේ තම ඡේවිතයට බව බොහෝ ආගමික නායකයින් දේශනා කොට ඇති බව සැබැය. නමුත් සිය දිවිය අත් හරින්නට සිතනා මිනිසුන් වෙසෙන සමාජයන් අප අතරම තිබෙන බව කෙනෙකු පිළි නොගන්නට හැකිය. බොහෝ සිය දිවි නසා ගැනීම වාර්තා වන රටක් තුළ අප වාසය කරමු. එය ලොකය පළමු ස්ථානය බව ලොක සෞඛ්‍ය සංවිධානය නිවේදනය කළේ 2017 වර්ෂය ආරම්භයේදීය. රටවල් එකසිය හැත්තැ දෙකක් අතුරින් යේෂිගත කළ සියදිවි නසා ගැනීමේ දත්තයන් අනුව ශ්‍රී ලංකාව තුළ පිරිමි පාර්ශවයට වඩා කාන්තාවන් සිය දිවි නසා ගැනීමට පෙළඹෙන බව වාර්තා වී තිබේ. එය එකට නවයක අනුපාතයකි. ලොව

සිය දිවි නසා ගැනීම වැඩිම රටක් ලෙස පෙර වසරවල් තුළදී වාර්තා වූ ශ්‍රී ලංකාව තුළ මිනිසුන් එසේ තම දිවිය අවසන් කිරීමට පෙළඹෙන හේතුව විමසා බැලීම ඔබේද මගේ ප්‍රබල යුතුකම වන්නේය. සියදිවි නසා ගැනීමට ශ්‍රී ලංකාව වැනි රටක් තුළින් වාර්තා වන්නාවූ හේතු සාධක ලෙස ඡේවිතය පිළිබඳ බලාපොරාත්තු සුන් වීම, මානසික ආත්‍යිය, පිනෙන්මාදය, ආර්ථික දුම්කරතා මෙන්ම තුදෙකලාවීම දැක්විය හැකිය.

සිය දිවි නසා ගැනීම පිළිබඳව අදහස් ඉස්මතුව ඇත්තේ පුළුල් තේමාවන් වන ආගම දරුණය ගොරවය සහ ඡේවිතයේ අර්ථය මතය. ගින්නෙන් දැවී අඟ්‍රේ යාම මත සිය ආත්මය පවත්තු වන බව විස්වාස කළ උතුරේ ත්‍යාත්මක වූ දෙමළ ර්ලාම විමුක්ති කොටී සංවිධානයේ කාන්තාවන් මරාගෙන මැරෙන කොටී සාමාජිකාවන් බවට පත් වූහ. සිය සැමියා කෙරෙහි උපන් අසීමිත සෙනෙහස නිසා හෝ සමාජ සම්මතයන් නිසා හෝ ඉන්දියානු පතිනියන් සිය සැමියාගේ විතකයේ හිද ඔහුගේ ප්‍රාණය නිරුද්ධ සිරුර සමග සිය දිවියද ගිනි දෙවියන්ට පිළුහ. එක්දහස් තවසිය හැත්තැ අවේදී ගානාවේ ජේන්ස් වුවන් නගරයේ පිපල්ස් දේවස්ථානය තුළ ජ්මි ජේන්ස් නම් පුරුෂවරයා විසින් දරුවන් සහ කාන්තාවන් ඇතුළු ත්‍යාගය දහඳට දෙනෙකු සිය දිවි නසා ගැනීමට පෙළඹුව අතර ඉන් තුනෙන් එකක් පමණ සයනයිනි විෂ මිෂ මරණයක් වූහ. ජපානයේ ඔකිගහරා වනාන්තරය ලොව පුරා ප්‍රසිද්ධියට පත්ව ඇත්තේ ගුරුණාමා කන්ද පාමුල හරිත සාගරය නම් වනාන්තරය නිසා නොව පුරාණයේ සිට සිය දිවි නසා ගන්නන් හා දිවිය අත් හැර යන්නන් සිය අවසන් ගමන උදෙසා ඔකිගහරාව තොරා ගත් නිසාය. රැස්ස ගසක ගෙල වැළැලාගෙන, විස හාවිතයෙන් හෝ මාජය අධිමාතාවන් හාවිතයෙන් හෝ කන්දෙන් බිමට පැනීම මගින් ජපනුන් සිය දිවිය ඔකිගහරාවේදී නසා ගත්හ. වර්තමානයේ පවා ඔකිගහරාව තුළත් සමස්ත ජපානය තුළත් සිය දිවි නසා නසා ගැනීමේ අනුපාතය ඉතාම ඉහළය. විනයේ ගොක්ස් කොන් ආයතනය සිය ආයතන පරිගුය සමන්විත

* දෙවන වසර, ශ්‍රී ලංකා නීති විද්‍යාලය

ගොඩනැගිල්ල වටා දැල් සවි කිරීමට තීරණය කමල් දෙදහස් දහනත වසරේදිය. දෙදහස් දහස් සිට මේ දක්වා ඉහළ මහල් වල සිට බිමට පැන සිය දිවි නසා ගත් සේවකයින් ගණන වසරකට අවසියයකි. පැය ගණනක් විවේකයින් තොරව සේවය කිරීමට සිදු වීම, පැයකය යෙන් සත තිස්පහක වූ අසාධාරණ ගෙවීම, දරදුෂී පාලනයන්, සිමා කිරීම මෙන්ම මානව හිමිකම් දැවැන්ත ලෙස සිමා කර තිබීම මෙම මරණ වලට හේතුව ලෙස ඇපල් සමාගම කළ පරෝශණයින් අනාවරණය විය. එම ආයතනය තුළ සේවය කරන්නන් ටැබූ පරිගණක එකලස් කලද කිසිදිනක වැඩි යන්තුයක් ක්‍රියාත්මක වීම දැක නොතිබේ. ඇමරිකාවේ ජ්වත්ව බොඩී නම් තරුණයකු වටා ගෙතුණු “ඒරෝයර ගොරු බොඩී” විතුපටය එම දකින්නේ දෙදහස් අට වසරේදිය. තම සමරිසිහාවය මව විසින් පිළි ගැනීම ප්‍රතික්ෂේප කොට දිගින් දිගටම ආගමානුකුල වත් පිළිවෙත් හරහා සිය පුතු සුව කිරීමට යාමේ ප්‍රතිපලයක් ලෙස මාශධ අධිමත්රාවක් ගෙන බොඩී විසින් සිය දිවි තොර කර ගැන්හ. මුවන්ගේ තිස්ල සිරුරු සොයා ගත්තේ දින දෙකකට පසුවය. සරගමුව විශ්වවිද්‍යාලයේ තිවක වූදය දරා ගත නොහැකිව අමාලි වතුරිකා නම් ශිෂ්‍යාවක් ගෙල වැළැලා ගෙන මිය ගියේ රේ වික කාලෙකට පෙරය.

සියදිවි නසා ගැනීම කුමක්ද යන්න විමර්ශනය කිරීමේදී සිංහල සහ ඉංග්‍රීසි ගබඩකේෂයන් මගින් දක්වා ඇත්තේ මෙම ක්‍රියාව මගින් තමන් වෙත මරණය සිදු විය හැක බව දන්නා වූ අවබෝධය සහිත වූ යම් උපක්‍රමයක් මගින් ජ්විතය අවසන් කර ගැනීමේ ක්‍රියාවලයයි. සරලව දක්වන කළේහි සිය දිවි නසා ගැනීම මානවයා ආරම්භයේ පටන් පැවති සමාජ සංසිද්ධියක් බව දක්වා තිබේ. මිනිසා වානර යුගයේ සිට වර්තමානය දක්වා මෙහි පැතිරීම පිළිබඳව විමර්ශනය කිරීමේදී අනුකරණය සහ සමාජ සම්මතය හෝ සිරිත් ලෙස වර්ධනය වන්න ඇතැයි සිතිය හැකිය. මානව ශිෂ්‍යවාරයේ ගෝත්‍රික අවදියේ සිට වර්තමානය දක්වා හැගේලය විවිධත්වයක් සහ විෂමතාවය අනුව සියදිවි නසා ගැනීම පවතී බව එකිවෙශ්‍ය වෙස්ට්මාක් නම් මානව විද්‍යාඥයා විසින් දක්වා තිබේ. ක්‍රිස්තු වර්ෂ හතරවන සහ පස්වන සියවස්තුල ග්‍රීක සහ රෝම ජාතිකයින් තුළ පොර්ෂය, වේදනාව දරාත නොහැකි බව හෝ දේශානුරාගය මස්සේ සියදිවි නසා ගැනීමට පෙළඹුවේක් පැවති බව ඉතිහාසය ගෙන හැර දක්වයි. රෝමයේ මේ සඳහා අවකාශය ලැබුනද පසුකාලීනව 14 වන ලුවේ රුප වැනි පාලකයින් විසින් මෙවැනි පුද්ගලයින්ට එරෙහිව දුඩුවම් වැඩි කළ අතර 19 වන සියවස්දී එක්සත් රාජධානීය විසින් සියදිවි නසා ගැනීමට වෙර දැරීම සහ මනුෂ්‍ය සාකන්ධයට තැන් කිරීම එක හා සමාන වරදවල් බව ප්‍රකාශයට පත් කර

ශ්‍රීලංකාව සිය දිවි නසා ගැනීම පිළිබඳව පුළුල් කතිකාවතකට තැවතන් සමාජය යොමු වූයේ පසු හිය කාල වකවානුව තුළ වාර්තා වූ පේරාදෙණිය විශ්වවිද්‍යාලයේ විද්‍යා පිට ශිෂ්‍යාවකගේ මරණයත් සමාගය. කිසිවකු නොදත් ඇයගේ පොදුගලික කාරණයක් මගින් රත්තු යකඩ යකාට බිජිවීමට ඇයට බල කර තිබුණි. බදුල්ල වෙත ඇය ඇවැන්නේ

තිබුණි. යුයිටි නම් එස්කීමෝ වරැන් අතර සියදිවි නසා ගැනීම සමාජමය සම්මතයක් ලෙස පැවති බව සඳහන් වේ. තවද හායි ජනපදවාසීන් විසින් සිය රුෂ මිය ගිය විට ඔහුගේ තිලධාරින් සියදිවි නසා ගත බව ජනප්‍රවාද තුළ සඳහන් කර තිබේ. මිට ඉහත මා විසින් සඳහන් කළ සති පුරාව නම් දිවි නසා ගැනීමේ ක්‍රියාවලිය තුළදී 1818 වර්ෂය තුළ කාන්තාවන් 839 ක් සැමියාගේ විතකයට බිජි වී ඇති අතර 1821 වර්ෂය වන විට කාන්තාවන් 2336 ක් සැමියා කෙරෙහි උපන් ප්‍රේමය පෙන්වීම සඳහා ඔහුගේම විතකයේ අවසන් සුපුම් හෙලා තිබේ. දෙවන ලෝක යුද්ධ සමයේ හරාකිරි සහ සේප්පුකි යන නාමයන්ගෙන් ක්‍රියාත්මක වූ ජපාන සියදිවි නසා ගැනීම් ජපාන හමුදා තුළ ක්‍රියාත්මක වූ අතර දෙවන ලෝක යුද්ධයේදී ජපාන අධිරාජයා විසින් තමා යටත් වන බව ප්‍රකාශ කළ තිවේදනය තිකුත් කළ මොජාතේදී බොහෝ පිරිස් දරාගත නොහැකි ජාතිකානුරාගය හේතුවෙන් ජපාන රජ මාලිගය ඉදිරිපිට දිවි නසාගත් බවට වන වාර්තා පවතී.

ආගමික මතවාද සහ සිය දිවි නසා ගැනීම.

ප්‍රංග සමාජ විද්‍යාඟ්‍යයු වන එම්ල් බුරුකයීම් විසින් සරල සමාජය, යාන්ත්‍රික එකාබද්ධ හාවයකින් යුතුක්ත සමාජයක් ලෙස හඳුන්වයි. ස්වභාවික ලෝකය හා සම්පූර්ණ සඛැධනා ඇති එකාබද්ධතාවක් ලෙස බුරුකයීම් විසින් යාන්ත්‍රික එකාබද්ධතාවය හඳුන්වා දී ඇත. යාන්ත්‍රික එකාබද්ධතා සහිත සමාජයි පුද්ගල සඛැධනා ගොඩනැගී ඇත්තේ ආයාසයෙන් නොව නිරායාසයෙනි. ප්‍රාථමික සමාජ වල යාන්ත්‍රික එකාබද්ධතා ලක්ෂණ දැකිය හැකි අතර පුද්ගල විෂමතා අවම වී තිබුණි. ප්‍රධාන වශයෙන් ඒ වන විට පවතින ජනගහනය අවම විම බලපාන්නට ඇත. පැවති ප්‍රාථමික සමාජයන් තුළතන සමාජයන් වෙත පරිනාමය එම්ල් දුරකයීම් විසින් හඳුන්වාදී ඇත්තේ යාන්ත්‍රික එකාබද්ධතාවයේ සිට කෙන්ද්‍රිය එකාබද්ධතාවය කරා යොමුවීමක් ලෙසයි. ප්‍රාථමික සමාජය තුළ මිනිස් අවශ්‍යතා සරල වූ අතර තුළතන සමාජය මිනිස් අවශ්‍යතා පුළුල් හා සංකීර්ණ තත්ත්වයක පවතී. මුළික අවශ්‍යතා සපයා ගැනීමෙන් අනතුරුව ඔවුන්ට

වෙනත් ව්‍යවමනා තාප්ත කර ගැනීමේ අවශ්‍යතාවක් ඇත.

ආගමික පසුවීම පිළිබඳව කතිකා කිරීමේදී බුදු දහම සියදිවි නසා ගැනීම පාපයක් ලෙසත් මත් හාවය දුගතිගාමී විමට එය හේතුවක් වන බවත් දක්වන අතර කතොලික ආගමද සියදිවි නසා ගැනීම පාපයක් ලෙස දක්වයි. එමෙන්ම යුදේවි ආගම විසින් එය දෙවියන්ගේ පාරිඹුද්ධත්වය පිළි තොගන්තා පුද්ගලයින් විසින් සිදු කරනු ලබන ක්‍රියාවක් බව සඳහන් කර ඇති අතර ඉස්ලාම් ආගම විසින් සියදිවි නසා ගැනීම තහනම් කර ඇති බව සඳහන්. තවද හින්දු ආගම ගෙනහැර දක්වන ලබන ආකාරයට උපවාස කිරීම මගින් තම ජීවිතය අවසන් කර ගැනීම සඳහා යමෙකට හැකියාවක් පවතින බව දක්වනු ලබනවා. ඉහත දැක්වූ පරිදි හින්දු ආගම විසින් සති පුරාව අනුමත කර තිබේ. හගවත් ගිතාව නම් ගුන්පයේ අවවැනි පරිභේදයේ 22 සහ 23 යන වගන්ති තුළ වසරේ තොරා ගත් දිනකදී තොරාගත් තුම්බේදයක් යටතේ තොරාගත් වෙලාවක මෙලාවන් සමුගැනීම යහපත් බව දක්වා තිබේ. එමෙන්ම ඉස්ලාම් ආගම තුළින් බිභිඩු ඇතැම් අන්තවාදී ආගමික කල්ලි ආග්‍රායෙන් පැහැනැගුණ වහාබිවාදය වැනි අංශ තුළ වෙනත් පුද්ගලයින් සාකනය තුළ ස්වර්ගයේ ද්වාර විවර වන බවට වූ ප්‍රචාරයන් මත එවන් තුස්තවාදී කණ්ඩායම් මරාගෙන මැරෙන බෝම්බකරුවන් ලෙස ක්‍රියා කරන අතර මැතැක ශ්‍රීලංකාව මුහුණුන් පාස්ක ප්‍රභාරය වැනි ප්‍රභාර එහි ප්‍රතිපලයකි. ගින්න මත සිය ආත්ම පවත්තාවය ලබා ගත හැකි බව විශ්වාස කරනු ලබන හින්දු පතිනියන් අපට හමු වන අතර සුපුකට පද්මාවත් විනුපටයේ දක්වන ආකාරයට මෙන්ම අතිතයේ ඉන්දියානු රාජ්පුත් කාන්තාවන් සිය සැමියාගේ මරණය අවසානයේ හෝ යුද පරාජයක් අවසානයේ ඉද්ද වූ ගින්න වෙත සිය සිරුර ලබාදුන් අතර ලංකාව තුළ ක්‍රියාත්මක වූ දෙමළ ර්ලාම් තොටී සන්ධිඛානයේ කාන්තාවන් මරාගෙන මැරෙන බෝම්බ කාරියන් බවට පත්වීමේ එක් හේතුවක් වුයේ ඔවුන් තුළ ගින්නෙන් වන ආත්ම පවත්තාවය පිළිබඳව වූ විශ්වාසය යැයි සැලකේ. එම්ල් බුරුකයීම් තම ප්‍රංග මානව විසින් දක්වා ඇති පරිදි පුද්ගල සියදිවි නසා ගැනීම ආකාර තිත්වයක් යටතේ දක්වා ඇත. එහි පළමුවැන්න ආත්මිය සියදිවි නසා

ගැනීමයි. එමෙන්ම පරහිතකාමී දිවි නසා ගැනීමක් තවත් ආකාරයක් ලෙසද ඔහුගේ විග්‍රහය තුළ දක්වන අතර බොද්ධ සාහිත්‍ය තුළද පරහිතකාමී දිවි නසා ගැනීම බොහෝමයක් දක්නට ලැබේ. පන්සිය පනස් ජාතක කතාවන් තුළද බොද්ධ ඉතිහාසය හා බැඳී බොහෝ ජනප්‍රවාද තුළද මෙලෙස සිය දිවිය තොර කර ගැනීම පිළිබඳව දක්වා තිබේ. තවද දුරකියිම විසින් දක්වන පරිදි සමාජමය තරගකාරීත්වය තුළ ඇැතිවන අනෙක විද පිඩාවන් හමුවේ මෙසේ සියදිවිය තොර කර ගැනීමට මිනිසුන් පෙළබෙන බවයි. බුදු දහම උගන්වන පරිදි මිනිසත්බවක් ලැබීම දුරලබය එය පරම දුරලබ සාධකයකි.

(කිවිජේ මනුස්ස පටිලාභෝ) ලෙස දක්වා ඇත. මිනිසත්බව නසා ගැනීම මෙන්ම ඒ සයදහා අනුබල දීමද බුදු දහමේ අනුමත නොකෙරේ. ඉස්ලාමය පිළිබඳව පූජාල්ව කතා කිරීමේදී ඉස්ලාම් දහම පවසනා ආකාරයට සියදිවි නසා ගැනීම විශාලම පවති. මෙම හේතුවෙන් ඉස්ලාමය අදහන බැතිමතුන් ඉතාම අවම ප්‍රමාණයෙන් දිවි තොර කර ගැනීම සයදහා පෙළබෙන බව දක්වා තිබේ. මුස්ලිම වරැන් තමාගේ මරණයෙන් පසු ඇති මතු ජීවිතය ගැන අදහන අතර ඔවුන් දිවි තොර කර ගැනීමට පෙළහේන්නේ නම් ඔවුන්ට දිවියන් වහන්සේ ගැන විශ්වාසයක් තිබිය නොහැකිය. එමෙන්ම දහම ගැන අවබෝධයක්ද නොමැති බව දක්වා තිබේ. සෞදී අරාබිය වැනි රටවල දිවි නසා ගැනීමේ ලයිස්තුවේ ඉතා පහළ අගයන් වාර්තා කරනු ලබන අතර දිවි නසා ගැනීමේ දුරකියේ 2012 වසරේදී සෞදී අරාබිය 171 වන ස්ථානයේ සිටීම දක්නට ලැබීණි. ඉදෑද වූ අල් කුරානය තුළ දක්වා ඇති පරිදි

“දුෂ්පත්කමට ඩිය වී නුම්ලාගේ දරුවන් සාතනය නොකරන්න. අපීම නුම්ලාටද ඔවුන්ටද ආභාරය ලබා දෙමු. තවද තින්දාසහගත ත්‍රියාවන්හි ප්‍රසිද්ධ දේවද රහස්‍යගත දේවද සම්ප නොවන්න. අල්ලාහ් වැලක්වූ කුමන ජ්‍යවයක් වුවද අයිතියක් නොමැතිව සාතනය නොකරන්න.”

මෙලෙස දක්වා ඇති අල්කුරානයේ වගන්ති හේතුවෙන් බොහෝවිට මුස්ලිම ජාතිකයින් සිය දිවි නසා ගැනීම සයදහා යොමු වන්නේ තැක. තොවා විද්‍යා පදනම දක්වන පරිදි ඔවුන් අතර සියදිවි නසා ගැනීම අවම වීමට

මුළික හේතුව කුරානයේ බලපැමි සහ මුස්ලිම්වරුන් අතර ඇති නරකාදිය පිළිබඳව වන දැඩි විශ්වාසයයි.

කිතුණුදහම ආගුයෙන් විග්‍රහ කිරීමේදී මුල්කාලීනව සිය දිවි නසා ගැනීම පවත් ලෙස සලකනු ලැබූ අතර එය දෙවියන්ට එරෙහිවූ ත්‍රියාවක් බව දේව අපහාසයක් ලෙස දක්වන ලදී. නමුත් වත්මන් සමාජය තුළ කිතුණු සමාජය සහ පල්ලිය නව අදහස් මේ පිළිබඳව දක්වා තිබේ. පහලාස් වන සියවස තුළ ගාන්ත ඔගස්තින් විසින් ලියනු ලැබූ දෙවියන්ගේ නගරය නම් ගුන්රිය තුළ කිතු දහම සියදිවි නසා ගැනීම සයදහා වන ප්‍රතිච්‍රිතෝධය දක්වා තිබුණි. හයවන සියවස පමණ වන විට සියදිවි නසා ගැනීම අපරාධයක් මෙන්ම පවත් ලෙස සැලකුණි. 1533 වැනි කාලවකවානුන් තුළ ක්‍රිස්තියානි සමාජය විසි සිය අගමානුකූල අවමංගල වාරිතු පවා ඉටු කිරීමෙන් වලකින ලෙස සමාජ සම්මතයන් සියදිවි නසා ගැනීමට එරෙහිව දැඩි කොට තිබුණි. 13 වන සියවසේදී තොමස් ඇක්වයිනාස් විසින් සියදිවි නසා ගැනීම දෙවියන් වහන්සේට එරෙහි ත්‍රියාවක් ලෙසත් පසුතැවිලි වීමට නොහැකි පාපයක් ලෙසත් දක්වන ලද අතර සියදිවි නසා ගැනීම වැලක්වීම සයදහා සිවිල් හා අපරාධ නීති පනවන ලදී. සාමාන්‍ය හුමදානයකට ඉඩිම වැලක්වීමට පල්ලිය විසින් කටයුතු කළ අතර සියදිවි නසා ගත් පූද්ගලියින්ගේ සහ පවුල් වල දේපල රාජ්‍යන්තක කිරීමට කටයුතු කරන ලදී. කතෝලික පල්ලිය විසින් වත්මනෙහිද දේවදර්මය ප්‍රකාරව සිය දිවි නසා ගැනීමෙන් වන මරණය බරපතල කාරණයක් ලෙස සලකනු ලබන අතර දෙවියන් වහන්සේගේ ත්‍රියාගයක් වන ජීවිතය විනාශ කිරීම යනු ගැලවීම පිළිබඳව වන්නා වූ බලපොරාත්තු සුන් වීමක් ලෙස දක්වා තිබේ. නමුත් වත්මන් අදහස් ප්‍රකාරව ක්‍රිස්තුස් වහන්සේ මියගිය අයව සාධාරණය විනිශ්චය කරනු ලබන බවත් යුක්ති සහගතව විනිශ්චය කරනු ලබන බවත් සයදහන් වේ. බසිබලයේ සයදහන් පරිදි සියදිවි නසා ගැනීම පාපයකි.

සියදිවි නසා ගැනීම සම්බන්ධ නෙතික තත්ත්වයන් පිළිබඳව කතිකා කිරීමේදී ආසියාතික, ඇමරිකානු සහ යුරෝපියානු

රාජ්‍යයන් මෙන්ම සිසුවලේලියා මහාද්වීපය තුළ ක්‍රියාත්මක වන නෙතික තත්ත්වයන් විමසා බැලීම අවශ්‍ය වේ. බොහෝ රාජ්‍යයන් තම නෙතික පදනම් ආගමික පසුබිමක් මත සැකසීමකට ලක් කර ඇති අවස්ථා මෙන්ම ඉන් පරිභාෂිත අවස්ථා අපට මෙහිදී හඳුනා ගත හැකිය. ඉන්දියාව පිළිබඳව අවධානය යොමු කිරීමේදී ඉන්දියානු දැන්වීති සංග්‍රහයේ 309 වන වගන්තිය වැදගත් වේ. සියදිවි නසා ගැනීමට උත්සහ කිරීම හා ඒ ආශ්‍රිතව සිදු කරනු ලබන ක්‍රියාකාරකම් සිරදුවුවම් ලැබීම , දඩ මුදලකක් නියම කිරීම මෙන්ම ඉහත දැක්වූ දැන්වන දෙකෙන්ම දැඩුවම් කරනු ලැබිය හැකිය. නමුත් මෙම 309 දරන වගන්තිය සිමාකිරීමක් දක්නට ලැබෙන අතර 2017 ඉන්දියාව තුළ පනවන ලද මානසික සෞඛ්‍ය ආරක්ෂණ පනත ප්‍රකාරව මෙම පනතේ අදාළත්වය සිමා කර ඇත. දැන්වීති සංග්‍රහයේ 309 වන වගන්තිය නොතකා සියදිවි තොර කර ගන්නා හෝ ඒ සඳහා තැන් කරනා ඕනෑම පුද්ගලයෙක් වෙනත් අකාරයකට ඔවුන් නොකළහාත් දැඩි ආතතියකින් පෙළෙන බවට අනුමාන කළ යුතු අතර එම සංග්‍රහය යටතේ නඩු විභාග කර දැඩුවම් නියම කරනු නොලැබිය යුතුය, සියදිවි නසා ගැනීමට තැන් කිරීම අපරාධමය වරදක් වන බැවින් එය එසේ නොවන බවට තරේක ගොඩනැගුවද ඉන්දියානු ආණ්ඩුකුම ව්‍යවස්ථාව ප්‍රකාරව නිතියෙන් නියම කර ඇති කාර්යයපටිපාරියෙන් පරිභාෂිතව කිසීම පුද්ගලයෙක් ඔහුගේ ජ්‍යවිතයෙන් හෝ පෙළ්ගලික නිදහස අහිමි කිරීම නොකළ යුතුය. ආණ්ඩුකුම ව්‍යවස්ථාව මගින් ජ්‍යවිත්වම් අයිතිය හෝ නිදහස ආවරණය වන අතර ඒ සඳහා මැරීමේ අයිතිය ඇතුළත් නොවේ. මැමත් චුනේච් වෙබ් අඩවිය ලේක් සෞඛ්‍ය සංවිධානය රස්කළ දත්ත අනුසාරව දක්වන පරිදි 2018 වසර වන විට ඉන්දියාව තුළ සියදිවි නසා ගැනීමේ අනුපාතය මිනිසුන් ලක්ෂයකට 16.3 ක අනුපාතයකි. තවද සියදිවි නසා ගැනීමේ දරුකයේ 21 වන ස්ථානය වන විට දිනාගෙන ඇත්තේ ඉන්දියාවයි. පාකිස්ථානය තුළ පවතින සියදිවි නසා ගැනීම මුලික වශයෙන් මුලික සෞඛ්‍ය සෞඛ්‍ය ගැටළුවක් ලෙස හඳුනා ගත හැකිය. වාර්තාවන් දක්වන ආකාරයට පාකිස්ථානය තුළ සියදිවි හානි කර ගැනීම සම්බන්ධයෙන් වන වාර්තාවන්

සැකසීම සහ දත්තයන් රස් කිරීම සමාජීය 2020 වශයෙන් පවතින යම් පසුගාමී අදහස් හේතුවෙන් ඉතා අසිරු කාර්යයකි. පාකිස්ථානය වැනි ඉස්ලාමිය රාජ්‍යයක් තුළ ආගම විගාල කාර්යය හාරයක් ඉටු කරනු ලබයි. එබැවින් ඉස්ලාමිය ඉගන්වීම ප්‍රකාරව රට තුළ සියදිවි නසා ගැනීම තහනම් ක්‍රියාවකි. නමුත් නිහා තවමත් පිළිතුරු සැපයීමට නොහැකි වූ ගැටළුවක් ලෙස පාකිස්ථානය තුළ තවමත් සියදිවි නසා ගැනීමේ ගැටුවුව ඉතිරිව පවතී. ලොව හයවන විගාලම ජනගහනයක් හිමි රාජ්‍ය වනුයේ පාකිස්ථානය වන අතර එහි සමස්ත මුස්ලිම් ජනගහනයේ ප්‍රමාණය රටේ සම්පූර්ණ ජනගහනයෙන් 97 % ක ප්‍රමාණයකි. පාකිස්ථානය තුළ සියදිවි නසා ගැනීමට තැක් කිරීම සහ ඒ සඳහා අනුබල ලබාදීම අපරාධමය වරදක් ලෙස සැලකේ. ගුද්ධ වූ අල් කුරාණයෙහි 4:29 හි දක්වන පරිදි "හදම යදමකා බඳු නසකක හදමරිකම ඉප්ලිමි වදා යි ඉෂා පැරුප්පමෙක එද හදම." එබැවින් ඉහත සඳහන් වූ පරිදි ඉස්ලාමිය රාජ්‍යයක් වීම නිසාවෙන්ම පාකිස්ථානු නිතිය තුළ සිය දිවි නසා ගැනීයමෙකු සියදිවි නසා ගැනීමට උත්සහ කිරීමට ඇත්තේ අපරාධමය ස්වභාවයකි. පාකිස්ථානු දැන්වීති සංග්‍රහයේ 309 වගන්තිය ප්‍රකාරව සියදිවි නසා ගැනීමට උත්සහ ගැනීමේ වරදක් වන අතර ඒ සඳහා සිරදුවුවම් , දඩ මුදලක් හා ඉහත දඩ මුදලක් සහ සිරදුවුවම් යන ද්වීත්වයෙන්ම දැඩුවම් කළ හැකි වරදකි. තවද එවැනි සිදුවීම් පොලිසිය වෙත වාර්තා කළ යුතු අතර බොහෝවිට කළාතුරකින් මෙවැනි සිදුවීම් වාර්තා වන පසුබිමක් තුළ පාකිස්ථානය විසින් මෙවැනි මෙවැනි ප්‍රතිකාර සඳහා යොමු කිරීම සිදු වේ.

එංගලන්තය තුළ යෙමෙකු සියදිවි නසා ගැනීමට උත්සහ කිරීම අපරාධමය වරදක් ලෙස සැලකෙන්නේ නැත. 1961 වසරේ ඉදිරිපත් වූ සියදිවි හානිකර ගැනීමේ පනතේ 2 (1) වගන්තිය ප්‍රකාරව තවත් අයකුට සියදිවි නසා ගැනීමට උපකාර කිරීම අනුබල දීම උපදෙස් ලබා දීම හෝ එවන් අයකුට සිය දිවි නසා ගැනීමට උත්සහ කිරීමට උපකාර කිරීම වසර දහාතරක් නොඹක්මවන කාලයක් සඳහා සිරදුවුවම් නියම කිරීම යන වරදට වරදකු කිරීම සඳහා හේතු වේ. තවද ඉතා දරුණු රේගයකට ගොඩුව සිටිමින් අදාළ

රෝගය උත්සන්න ව්‍යවහොත් සිය දිවි තොරකර ගැනීමට අදහස් කරගෙන සිරි පර්චි නම් කාන්තාවක් විසින් විදේශයකදී තමාගේ දිවිය තොර කර ගැනීමට උපකාර කරනු ලබන තම සැමියා සම්බන්ධව තම රටේ නිතිය අඩිකරණ සමාලෝචනයට ලක් කිරීම සඳහා තඩුකරයක් පනවන ලද අතර ඇයට තම සැමියාගේ කැමැත්ත තොමැතිව සහ සහාය තොමැතිව තම දිවි තොර කර ගැනීම කළ තොහකි බව දක්වන ලදී එම වැරුෂ බිංව තඩු තීරණයෙන් එය ප්‍රශ්න කළ අතර අවසන තීරණය වුයේ සියදිවි තසා ගැනීම සඳහා උපකාර මෙන්ම අනුබල ලබා දීම යන ක්‍රියාවන් අපරාධමය වරදක් වන බවයි. සහායක සියදිවි තසා ගැනීම සඳහා වන කතිකාවත ඉත් පසුව වඩා පූජාල් වූ අතර එහි ප්‍රතිපළයක් ලෙස වර්තමානයේ දිවි තසා ගැනීම සඳහා වන සාපරාදී දැන්වන සහ සම්බාධක ඉවත් කර තිබේ. නමුත් රාජ්‍යයන් විසින් මූහුණ දෙන මූලික ගැටලුව වනුයේ සියදිවි තසා ගැනීම සඳහා උපකාර කිරීම සානුකම්පිතව කළ යම් ආකාරයක වන ක්‍රියාවක්ද තැන්හොත් කෙළුවය පදනම් කරගනිමින් කළ සාහසික ක්‍රියාවක්ද යන්න පැහැදිලිව බෙදා වෙන් කර හුතා ගැනීමේ ගැටලුවයි.

ශ්‍රීලංකාව තුළ ඉතා ඉහළ මට්ටමේ සියදිවි තසා ගැනීමේ අනුපාතයක් වාර්තා වන අතර 2020 වසර වන විට එක්සන් ජාතීන්ගේ ලෝක සෞඛ්‍ය සංවිධානය විසින් 2018 වසරේ නිකුත් කළ දත්ත පදනම් කරගනිමින් ලබාගත් වාර්තාවන් ප්‍රකාරව ආර්ථික සිය දිවි තසා ගැනීමේ දරුණකයේ 29 වන ස්ථානයේ රදී සිරින අතර එහි අනුපාතය පුද්ගලයින් ලක්ෂයක් සඳහා 14.6 ක් වශයෙනි. ආර්ථික සියදිවි තසා ගැනීම සඳහා බලපෑම් කිරීම දක්නට ලැබේ. එනම් මත්දුව්‍ය හාවතා කිරීම, අධ්‍යාපනය සම්බන්ධ ගැටළ, සමාජීය තරගය සහ මානසික පීඩනය මේ සඳහා හේතු වන බව දක්වා තිබේ. දැන්වනින් සංග්‍රහයේ 299 වන වගන්තිය ප්‍රකාරව යම් තැනැත්තෙකු සිය පන හානි කරගන්හොත් එකිනී සිය පන හානි කරගැනීමට අනුබල දෙනු ලබන තැනැත්තෙකුට මරණ දැඩුවුම් දැඩුවම් කළ යුතුය. එනම් සියදිවි තසා ගැනීමට අනුබල ලබා පීම ලාංකිය තීතිය තැනැත්තෙකුට සිය පන හානි කරගැනීමට තැන් කළහොත් හා ඒ

සඳහා යම් ක්‍රියාවක් කරතාත් ඔහුට අවුරුද්දක් දක්වා කාලයක දෙඟාකාරයෙන් එක් ආකාරයක බන්ධනාගාර ගත කිරීමක් හෝ දැඩුවනින් හෝ එකිනී දැඩුවම් දැඩුවම් කළ යුතුය. නමුත් 1998 අංක 29 දරණ දැන්වනින් සංග්‍රහ සංගේධන පනත ප්‍රකාරව 302 වන වගන්තිය ඉවත් කරනු ලැබේ. එබැවින් ශ්‍රීලංකාව තුළ වර්තමානයේ සියදිවි තසා ගැනීමට තැන් කිරීම සඳහා දැඩුවම් කිරීමක් සිදු තොවන අතර බොහෝවිට පොලිසිය හරහා මනොවෙදායා ප්‍රතිකාර හා මනො උපදේශන සේවාවන් වෙත යොමු කිරීම දක්නට ලැබේ.

ඡේවිතය යනු දෙවියන් විසින් යුත් අපුරුවතම තානාගය හෝ මව පියා විසින් යුත් දිව්‍යමය වරම ලෙස ඔබටද මටද පැසිදාලන්නට පූජාවන. එය අවසන් කර නික්ම්මීමට උත්සහ ගැනීම නිශ්පල දෙයක් මෙන්ම ඡේවිතය යනු විදිය යුතුදෙයක් විනා විදිවිය යුතු දෙයක් තොවන බව පසක් කිරීමද එවන් පුද්ගලයින් වෙනුවෙන් නීතියේ සහය ගෙන යාමද ලබාදීමද ඔබගේම මගේද යුතුකම වන්නේය. එබැවින් ඡේවිතයට ආදරය කිරීමට අප ලෝකය වෙත ඉගැන්විය යුතුය. දරුවාගේ සිට මහල්ලා දක්වා එම ඡේවිතයේ හරය නම් බීජය වැළිරිය යුතුය. තුනත විද්‍යාත්මක, ආගමික සමාජයිය හෝ ආර්ථික හා සංස්කෘතිකමය හේතුන් විමර්ශනය කිරීමද එවන් ගැටළ අවම වන පරිදි දේශපාලන සහ පරිපාලනමය ප්‍රතිපත්ති හා තීරණ සකස් කිරීමද රටක් වශයෙන් කළ හැකි ඉතා වට්තාම කාර්යයයි.

ආග්‍රීත ලේඛන

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IMPLEMENTATION OF THE LAW ON SOLID WASTE MANAGEMENT IN SRI LANKA

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Introduction

Sri Lanka is a beautiful island in the Indian Ocean. Though it is true, there are some deleterious factors which caused to destroy that beauty. Among them disposal of solid waste is a major environmental issue. At present in Sri Lanka, it has become a national concern. Therefore management of solid waste is essential to overcome the problems related to solid waste.

What is the solid waste?

Solid Waste can be described as materials which are generated from the result of human daily activities in the places like households, public places and city streets, shops, offices and hospitals. Solid waste generators can be categorized in to eight such as residential, industrial, commercial, institutional, construction and demolition, municipal and agricultural solid waste. Municipal solid waste is a term usually applied to a heterogeneous collection of wastes produced in urban areas and the nature of the municipal solid waste varies from region to region. Further, urban wastes can be categorized into two major components namely organic and inorganic. The organic components of urban solid waste can be identified under three broad categories such as putrescible,

fermentable, and non-fermentable. Putrescible wastes tend to decompose rapidly and unless carefully controlled and decompose with the production of objectionable odors and visual unpleasantness. Fermentable wastes also tend to decompose rapidly, but without the unpleasant accompaniments of putrefaction. Non-fermentable wastes tend to resist decomposition and break down very slowly.

At present, higher percentage of people lives in the cities and also the rate of urbanization is increasing rapidly. Therefore it caused to increase the challenges to waste disposal. In Sri Lanka there are 341 local authorities. Among them 24 are Municipal Councils, 41 are Urban Councils and 276 are Pradeshiya sabha. Waste collection and waste disposal is happening in all the municipal council and urban council. It is estimated that over 6400 tons per day of solid waste are generated in Sri Lanka (Visvanathan, 2006).

Solid waste, especially Municipal Solid Waste is a growing problem in urban areas of Sri Lanka and this problem is aggravated due to absence of proper solid waste management systems in the country. At present in many instances solid waste are collected in mixed state and being dumped in environmentally very sensitive places like road sides, marshy

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lands, low lying areas, public places, forest and wild life areas. It causes to numerous negative environmental impacts such as ground and surface water pollution, air pollution and etc.

How to Manage Solid Waste?

Integrated solid waste management refers to the strategic approach to sustainable management of solid wastes covering all sources and all aspects, covering generation, segregation, transfer, sorting, treatment, recovery and disposal in an integrated manner, with an emphasis on maximizing resource use efficiency. The major Integrated Solid Waste Management activities are waste prevention, recycling, composting and combustion and disposal in properly designed, constructed, and managed landfills (USEPA, 2002). Recycling is a process that involves collecting, reprocessing, and recovering certain waste materials to make new materials or products. Composting is considered as the conversion of waste materials into soil additives. Recycling and composting generate many environmental and economic benefits. Disposal is done to manage waste that cannot be prevented or recycled. One way to dispose of waste is land filling. In here place the waste in properly designed, constructed, and managed landfills, where it is safely contained. Another way to handle this waste is through combustion. Combustion is the controlled burning of waste, which helps to reduce its volume.

An effective integrated solid waste management system considers how to prevent, recycle, and manage solid waste in ways that most effectively protect human health and the environment. Integrated solid

waste management has been strongly promoted by the Ministry of Environment, Central Environmental Authority and various governmental and non-governmental organizations in the country. Not only that, Integrated Waste Management is an approach that is most compatible with an environmentally sustainable development. It refers to the complementary use of a variety of practices to safely and effectively handle municipal solid waste.

Important Laws and Regulations related to Solid Waste Management in Sri Lanka

As in many other developing countries solid waste has been identified as one of the main environmental issues in Sri Lanka. As are mediation for the growing of solid waste, some laws are implemented.

In 1862, when the British administrated the country, the first piece of legislation pertaining to waste management was introduced in Sri Lanka. The first law was implemented through the Nuisances Ordinance (No.15 of 1862) which was subsequently amended (No.61 of 1939; No.3 of 1946; No.57 of 1946). The rest of the legislations were introduced in 1939 through Urban Council Act (No.61) and in 1947 through the Municipal Council Act (No.16). Pradeshiya Sabha Act No.15 of 1987 is also important regulation in solid waste management. These Acts and Ordinances state that the local authorities are responsible for proper removal of non-industrial solid waste and for providing suitable dumpsites. Furthermore in Sri Lanka, the basic legal framework required for municipal solid waste management is provided under the

central government, provincial council and local authority regulations and legislations. The necessary provisions are given under the sections 129(duty of council as to conservancy and scavenging), 130 (all refuse collection to be the property of council)and 131 (places for disposal of refuse and for keeping equipment)of the Municipal Councils Ordinance (1980), Sections 118 (duty of council as to conservancy and scavenging), 119(all refuse collection to be the property of council.) and 120 (places for disposal of refuse and for keeping equipment)of the Urban Councils Ordinance, No. 61 of 1989, Sections 41(power to throw rubbish upon adjacent lands) and 93(duty of Pradeshiya Sabha as to conservancy and scavenging) to 94 (all refuse collected to be property of Pradeshiya Sabha) of the Pradeshiya Sabha Act, No. 15 of 1987 and the 13thAmendment to the constitution (1987) and the Provincial Councils Act No. 42 of 1987.

According to the Municipal Council Ordinance, the Urban Council Ordinance and the Pradeshiya Saba Act, all municipal solid waste generated within the boundary of local authorities is their property, and they are mandated to remove and dispose of such waste materials without causing any nuisance to the public. This implies that of all the municipal waste management functions in Sri Lanka, the most daunting remains waste collection such as the process of gathering waste from places of generation and storage, and transporting them to where they are stored, treated or disposed (Batuwitage, 2004).

In the case of M.M. Khalid and 3 others vs. Chairman of Sri Jayawardenapura-Kotte Urban Council (1996) Vol.3, part III SAELR p. 62, action was brought under section 98 of Code of Criminal Procedure Act No 15, 1979 by residents of Senanayake Avenue against the chairman of the Jayawardenapura-Kotte Urban Council. They claimed that the Urban Council was dumping garbage in the vicinity of Senanayke Avenue which is a residential area causing public nuisance. The court stated that under section 120 of the Ordinance the garbage must be disposed in a manner which does not cause nuisance. Further section 220 which requires one month's notice to be given to the Urban Council regarding any action, has no application to an action under section 98 of the Code of Criminal Procedure Act. The court stated that a nuisance cannot be excused under section 261 of the Penal Code and rejected the Urban Council's claim and made the conditional order absolute.

In addition to those, one of the important laws and regulations with regard to solid waste is the National Environmental Act No 47 of 1980, which restricts the emission of waste materials into the environment. The Central Environmental Authority was established under provisions of the National Environmental Act, No. 47 of 1980and it states the responsibilities and powers of the Central Environmental Authority. Further, National Environmental (Amendment) Act, No. 56 of 1988 and National Environmental (Amendment) Act, No. 53 of 2000 have amended the sections in main act giving more concern towards the waste. And also, the Gazette No. 1466/5 ordered regulation for the

materials coming under polythene or polythene products.

Furthermore, special regulation, No 1627/19 (2009) made by the Minister of Environment and Natural Resources under Paragraph (h) of Sub-section (2) of Section 32 (2) (h) of the National Environmental Act, No. 47 of 1980 which is clearly mention about the Municipal Solid Waste Special regulation. According to the National Environmental (Municipal Solid Waste) Regulations, No. 01 of 2009, no person shall dump municipal solid waste along sides of any national highway; No person shall dump solid waste at any place other than places designated for such purpose by the relevant local authority or any person or body of persons authorized by them in that behalf and any person contravening the provisions of this regulation shall be guilty of an offence punishable under Section 31 of the Act. 3.In addition to that it includes that, no person shall collect or cause to be collected any municipal solid waste from any designated place along the national highway, other than during the hours of 6.00 p.m. to 6.00 a.m. and also it provides that the collection of domestic waste may be carried out by any person or body of persons authorized in that behalf, from the respective households, during the hours of 6.00 a.m. to 6.00 p.m.

Not only that, Ministry of Environment prepared the national strategy for solid waste management in 2000, which recognized the need for solid waste management from generation to final disposal through a range of strategies, based on the 3-R principle: reduce, reuse and recycle. This was superseded by a national policy for solid

waste management prepared in 2007 to ensure integrated, economically feasible and environmentally sound solid waste management practices for the country at national, provincial and local authority level.

Centre for Environmental Justice Vs Central Environmental Authority & three others.

This case was filed in the Supreme Court against violation of fundamental rights by the unnecessary garbage dumping management of the government of Sri Lanka. Petitioners have complained to the court about dumping of garbage all over the country and called for the formulation of a national policy on garbage dumping. Specially, in this case Meethotamulla incident is cited as adverse impact of unnecessary garbage plan. Petitioners further states to the court that unnecessary garbage dumping influences right to life, right to healthy environment.

Further, a major activity that bounded from the national policy is the setting up of the Pilisaru Programme in 2008 to solve the solid waste problem at the national level, the central environmental authority, with the concept of reusing the resources available in the collected garbage to the maximum before final disposal. It is empowered to take legal action against those local authorities that are not managing their solid waste properly. Pilisaru is a successful integrated urban planning approach to solid waste management in Sri Lanka. Ministry of Environment & Natural Resources of Sri Lanka has launched a national level solid waste management programme with the participation of other government organizations, specially urban development

authority, private institutions, NGOs & experts in this field (Dasanayaka, 2009). There are five main objectives in the Pilisaru Program such as development of a national policy on solid waste management development of a national strategy on solid waste management, effective education & awareness for all stakeholders on solid waste management including training & capacity building and legal reforms to strengthen effective law enforcement.

Discussion

One of the main issues in Sri Lanka is national level strategy on solid waste management, provincial level policies and strategies are not adequately harmonized with the needs and capabilities of the local governments. And also, current conventional approach of solid waste management system is more concern on collection and disposal, disregards on reuse and reduction. This approach does not encourage the residents for an obligatory social partnership with the solid waste management.

In the other hand, the general public considers that solid waste management is a sole responsibility of municipality. They think that the whole waste which is disposed should be collected by government anyhow. That means the general attitude of the public is “we dump then they collect”.

Further, one of the main issues of Sri Lankan context is mixed state solid wastes dumping which lead the problem of separating, reusing and recycling the wastes. The final disposal of the all waste in open dumps in the country is more than 95 %. Open dumps are generally low lying degraded land which are state

owned and are used only for flood retention. In some parts of the country even privately owned lands are used for open dumping. These dumps are used to dispose every kind of waste such as industrial waste, municipal solid waste, hospital and clinical waste, slaughterhouse waste altogether without any segregation.

Meethotamulla garbage dump was a mountain of garbage over 16 acres that collapsed on 14th April 2017 killing 19 people. Massive protests followed this event asking the government to find a different solution to solid waste problem. After the Meethotamulla incident, the Colombo Municipal Council started disposing waste at sites in Muthurajawela sanctuary and Kotikawatta dumping grounds. The decision to deposit garbage at Muthurajawela is contrary to the ‘Ramsar Convention on Wetlands of International Importance’ concluded at Ramsar, Iran in 1971 and also it was declared as a sanctuary by the government in 1996 in recognition of its vast bio-diversity. Nevertheless this declaration will serve no purpose if garbage were allowed to be deposited as it will destroy the ecosystem. The issue was challenged in court by people and a non-government organizations and as a result discussions to formulate a national policy on waste management by the Ministry of Mahaweli Development and Environment were started in January 2018. However the policy makers have turned their attention to waste to energy solutions and other probable answers to this problem. Because the protection of the environment is essential for the sustainable development of a country.

Additionally, more focused on solid waste management in Sri Lanka is given for the land filling. But it should be the last option of solid waste management. However, this has become the conventional approach in Sri Lanka, because the easiness of the option. In addition to this, lacks of financial and human resources in councils, solid waste issues are increased and lead towards the ineffective management. Because priority is not given for the solid waste management still in Sri Lanka, national to local level. Further, officers engaged in solid waste management have no enough training and knowledge in solid waste management. Accordingly, most of the local authorities have no inbuilt capacity to formulate, establish and run proper waste management plants due to lack of infrastructure facilities such as machinery, equipment, professional staff and skilled labor. Moreover, sufficient funds are not available for operations relating to separation, composting, recycling and disposal as well.

Therefore it can be understood very clearly that though there are good policy frames as discussed in the above section, still issues remain, because the implementation and monitoring of those waste management actions are not efficiently and effectively functioning. Still Sri Lankans, top to grass root level are not aware about why we actually need to manage waste. Therefore, Sri Lankans need an attitudinal change. Further, though there are awareness programs, it is essential to think to what extent they are inculcated in people's minds and hearts. Pilisaru Project is one of the best examples in Sri Lanka. But, still it is not widely spread

and implemented effectively and efficiently around Sri Lanka as expected.

Thought there are number of polices, statues, strategies to minimize the disposal of solid waste, it increases day by day. It indicate that the failure of current mechanism in Sri Lanka. The thing is that, the mind of the people should be made. There should be a change in people's attitudes towards the nature friendly situation. Sri Lankans have inherited a long history and a rich culture with noble values for the protection of the environment. In a landmark judgment of the International Court of Justice in the Danube River Basin Case, Judge C. G. Weeramantry adopted the principle enunciated by Arahat Mahinda to king Devanampiyathissa "*great king, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it*". It conveys the message that since the King is not the owner of the land, but only its trustee, his duty is to protect and preserve it for the benefit of all living being. If the attitude of general public and their thoughts can be built like this, rules and regulations, laws and statues are not wanted to implement moreover.

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ONE IS NOT BORN, BUT RATHER BECOMES A WOMAN

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According* to Simone de Beauvoir, on her book the “Second sex”, “woman” is a concept created rather than biologically, psychologically determined. It is a construct depending on existing cultural viewpoints, stereo types, social stigma of communities which will limit and bound the female to a certain scope expecting herself to block her freedom, ironically freedom for her is a locked cage. Constructs and gender roles redefine her identity and is constantly looked down either as the daughter, or the shadow of the husband or the caretaker of the children or the one who keeps the pot boiling. The life of a woman will never lay on a rose bed. A life for a woman is hard as the pelting stone on a river, constantly being pushed and thrown by the waves of the current.

When a woman is expected to only cook, speak when allowed, practically living a socially excluded life, at another sphere of living women have the liberty to enjoy an occupation she desires, to perform in public places and to roam in to nightclubs. These massively diverse roles women play depend on culture. Certain instances, traditional roles impose threats, making her run to save her own life from the existing cultural expectations that society wish to see. The African tribes which require women to add rings to the necks, or add enlarged plates to the lips, or to undergo sexual cultural stigma which involve in harming her interior body parts as pointed out in the book “Desert Flower” by Waris Dirie. The tradition of female genital

mutilation practiced, un hygienically, leaves many young to bleed and die and others to come back and spend the normal life which will never be normal.

With time and changing economy gender roles are constantly pushed in to a flux that change along with the social and economic conditions. Today we live in a different *society*, a different paradigm which allows us to speak and say what we want and desire and have reached in to a pedestal where we are able to demand for our rites. But not all women are ready to accept this opportunity.

Sri Lanka is a country where gender-based violence is not completely eradicated and with the society structured on the male dominance, chauvinism and patriarchy, some men abuse their power as they believe that women are an object of possession. The situation is similar in countries such as Middle East where the gender equality and the gender gap is so vast and extreme, the living world a living hell for women while in countries in the Europe continent gendered violence is mild as the law and the functioning is strong. However according to the Central Bank report 2.1% of women in Sri Lanka, experience violence daily and 17% experience violence of any sort including 75% of them are belittled or seriously offended, 15% are forced for sex and 3% are burned or hit with objects^[1].

Women are subjected to many foams of violence; violence inflicted within the family (domestic violence), cultural/traditional violence and violence

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inflicted by the community such as rape, sexual harassment, prostitution, murder, abortion etc. For examples, the sexual bribes asked from mothers who are willing to get the child in to the school, or the situation where the child was not admitted to the school on a rumor that the mother of the child has HIV which turned out that she was not a carrier of HIV. Another type is the violence inflicted by the state which includes custodial violence, violence against displaced or refugee women, exploitation of labor, and violence against migrants. The use of females in sex slavery by the Japanese military at the Second World War period under the label of “comfort women” resulted in controversial issues as there were about 200,000 women suffering in the hands of men, leaving nothing but incurable physical and psychological wounds.^[2]

The International Criminal Court (ICC) defines rape “invasion the body of a person by conducts resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”^[3] However according to the penal code of the country, rape was defined to be an interaction forcefully condoned on a woman by a man where penetration is essential. However, this limits the definition of rape in to a man and a woman where it was made gender neutral and inclusive by the amendment No. 22 of 1995, including “using his genitals, or any other part of the body, or any instrument, on any other part of another human being”. Act no. 29 of 1998 and the Act no.16 of 2006 advances the existing laws on rape, incest, trafficking, sexual harm and sexual exploitation with the

introduction of gang rape and other graver offences.

These unfortunate situations result in unwanted pregnancies, injuries and diseases such as HIV, AIDS and other sexually transmitted diseases and resulting suicides and homicides due to shame, psychological trauma, and heavy stigmatization on sex and related acts are still a taboo in certain societies. Violence is a vicious circle. Children who are subject to see their mother beaten up or assaulted in various foams have traumatized mentality and providing a reason for justifying their anger and revenge. Children absorb what he hears, the brutal words, the cries of the pain, the fear they witness all create an imaginary story which they try to fit themselves in to while equally being absorbed in to the violence, which is a behavior learnt through experience.

“I’ve met many women who were forced to have abortions, and one that stands out is a woman who had gone abroad to work and was raped by the husband in the family for which she worked... she had to come back to Sri Lanka and get an unsafe, backstreet abortion.”

– Sonali Gunaseka, Director of Advocacy at the Family Planning Association of Sri Lanka^[4]

The section 303-307 of the penal code points out the laws on abortion, where 306 permits an abortion if the life of the mother is in danger. However, the law needs amendments as unwanted pregnancies due to rape, and abnormalities in the fetus is given no space where as it should be permitted to abort with the consent of the mother. The vacuum on law makes such unfortunate to get abortions done illegally on unsafe practices, unhygienically leaving bigger scars on her

life. The choice should be hers. It should not be forced on her. Further in countries like India, China, Pakistan and many other South Asian countries, the slight knowledge of a birth of a female child is subjected to an abortion. Parents favor a boy as their first child.

Countries like Malaysia, Cost Rica, Hong Kong and Thailand have given space for abortion to be conducted on rape victims as she has a right to live freely and being raped was not her choice. World today is moving forward to liberalization of abortion laws. France, Vietnam Netherlands, Cuba and Canadian states have fully liberalized the concept allowing free and safe abortion leading to reduction in maternal mortality. However, 39% of the world's population lives in countries with highly restrictive laws governing abortion including Sri Lanka. [5]

On topics such as abortion, the religious perspectives, brings out opinions which are debatable and subjective such as asking whether killing a being is fair, or the topic of the fetus claimed to be a being or life is not. However, is it fair to being pushed in to having a fetus cultivated on a woman without her consent? The force she had to endure, the mental pain and agony, traumatization, can it all be covered up by the word Karma or any religious principle. Law and religion are separate topics where the amalgamation leads to a mess. In deciding laws related to rape, abortion the woman should have a say in it.

Most women are now mindful and is being aware of their rights and given a chance to make and amend the existing life better than the current state of living. It is unfortunate that some women choose to keep silent at times of battles in their lives while some are prevented from accessing the law and authority, or simply having access to another person to turn into

is so farfetched. However, as Malala Yousafsa once said, "do not wait for someone to come and speak for you. It is you who can change the world". [6]

The dying question is why women choose to stay silent? Cultural and traditional societies guided with heavy family structures and roles. Countries like Pakistan, certain parts of India, and other South Asian countries women see themselves as the caretaker of the house, being confined to the four walls of the house, eating the leftovers or given tea when her brothers and father is having milk, getting the bones of the chicken while the male members get the thighs and the juicy parts of the meal. Life beyond the walls is unimaginable.

At certain times some women simply stay silent as they are so engrossed in to and is blinded by the social stigma, that their deep connection towards the husband, or due to the deep acceptance towards the system that they believe in, they are doing the right action or the accepted mode of living by staying silent. The pressure and the fear instilled in females keeps the women silent as asking for their stand or their right is an unimaginable leap as the certain society refuses to accept women's rights which gives the fear of being ridiculed as a gullible woman, or as an insane woman. Further the concept of the privacy is crucial as all domestic activities are considered as private family problems that outsiders are excluded to. Hence the violence women face is kept bottled up and silenced. Most women are ashamed to openly talk as these memories are haunting and shameful to be said to another.

Women also reject justice due to limited knowledge about their rights and due to the unfamiliarity of the justice system. At a circumstance, they prefer forgetting the

unwanted memory, the courts and the legal activist wants them to relive the dream making them uncomfortable. In a situation they keep their grievances blocked and bottled, the courts expect them to voice it out for many people to hear and judge. Women also faces the inconvenience of talking to male lawyers, the language barrier of certain minorities too may add blocks and barracks to justice.

Referring to the “Concluding Remarks” of the observations given by the United Nations Convention of Elimination of Discrimination Against Women (UNCEDAW) on a periodic report of Sri Lanka, draws attention and highlights few aspects of the Muslim Law of the country.^[7] The law governing Sri Lankan Muslims is the Muslim Marriage and Divorce Act of 1951 (MMDA), where many laws are traditional and long standing leading to oppression of females and children. Muslim society is dominated by the heavy masculinity, placing men in the roles of law authority such as the Board of Quasits, Quazi's courts, jurors, marriage registrars. Many Quazis are not lawyers who act on their discretion resulting the law to bend on partiality toward their own sex. The Article 16(1) of the 1978 Constitution gives effect to the MMDA, even though there are inconsistencies with the fundamental rights provisions. Hence the report recommends the women to be eligible and play active roles of such authority, remove the inconveniences in discussing certain matters and for fair justice. But it is hardly possible with the traditional mentality and male chauvinism.

Further, the report points out that the Muslim women should have freedom of choice to get married under the General law of the land or the Muslim law. In marriage

rather than the two-peoples deciding their favorable law, they are expected to marry according to the customs and traditions which are long held principles of the community. The discussion on increasing the minimum age of marriage for a Muslim had brought out many positive remarks but however the implementation is taking a snail journey. Child marriage is immoral and barbarous. A married Muslim child, not below the age of twelve to be engaged in sexual acts is exempted from the liability of statutory rape.

Women's Right in the international platform took its baby steps in the year 1848, with the introduction of the Seneca Falls convention, the first women's right convention along with the suffragettes movement making the voice on rights, equality and equity. The movement was born since women were denied some of the basic rights enjoyed by male citizens.^[8] Married women could not own property and had no legal standing over any money but confined to topics of the house hold and motherhood. Such movements gave rise to a wave of feminism which redefined the role of women. Theodore Roosevelt a key activist in the support of the movement on equal rights while the climax of this movement was the passing of the 19th amendment which granted the right to vote for women.^[9]

The decade of 1976 – 1985 was known as the “Decade of Women” while the First World Conference on Women took stand in Mexico City (1975) resulting the Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace.^[10] This was held with the conjunction of the International Women's Year, 1975. CEDAW was an important milestone where the conference

focused on equal access to education, employment opportunities, and adequate health care services. Further, broad concepts of women's rights such as sex-based discrimination (Article 1), the adoption of the domestic legislation (Article 2), laws which ensure gender equality (Article 3), trafficking and sexual exploitation (Article 6). Article five talks on the role of the state in eliminating prejudices and customs based on inferiority and superiority of sex or the stereotypical roles of the two sexes. This was signed, opened to ratification of the general assembly and came into force as a United Nations mechanism in 1979 but enforced in 1981.

The Second Conference on Women, Copenhagen, 1980 focusing on equal access to education, employment opportunities, and adequate health care. The Third World Conference on Women took place in Nairobi, 1985 was mirroring the progress women's equality and encourage women's participation in various fields while the Fourth Conference on Women was at Beijing, 1995. [10] In 1993, the Vienna Declaration and Program of Action, gives light on the protection of human rights and fundamental freedom, claiming it to be a birthright of any person where its protection is the state's first responsibility of the government. [11]

The Declaration of Elimination of Violence Against Women (DEVAS) 1993 is an important concept as for the first time the convention specifically refers to women in all sorts of environments "such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children,

women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence". [12] Further defining violence, it includes, gender-based violence, physical, sexual or psychological harm/suffering to women, threats, coercion, deprivation of liberty either in public or in private life.

Sri Lanka took the initiative to ratify women's right according to the CEDAW back in 1981 by ratification and Sri Lanka is also a member of the Declaration of Elimination of Violence Against Women. However, it is interesting to note that, a decade before initiating this rights Sri Lanka and the world was gifted with the first female prime minister, where she was abused and engulfed in a wave of vulgar sexist attack. Ranasinghe Premadasa said the parliamentary seat of Mrs. B was to be purified ones a month, implying the menstrual cycle. [13] She was a woman who broke the glass ceiling.

According to the statutory provisions of the law, the constitution of Sri Lanka, the Article 12 states that everyone is entitled to the equal protection of the law without being subjected to any discrimination based on petty margins of demarcation such as sex, religion, cast and so on. The Chapter 16 of the penal code, talks on the offences effecting life, yet psychological abuse and economic abuse not is emphasized and is unable to create a substantive offence without physical abuse.

Mirroring on the recent events of the country, the ban on women to purchase liquor really lit the discussions on gender neutrality and equity as many was not aware of such a law. However, adoption of the new notification to amend Excise Notification No.666 of 31st December 1979, removes the ban on

the sale of liquor to women “within the premises of a tavern” but keeping a loophole for the sale of liquor to women in other places except a tavern.[14] The late president bought back the ban on the sale of liquor to women within a week or two. The controversial issue was that the Article 2 of the Constitution state that no person can be discriminated based on sex, but however women still are banned from gaining her own drink at a bar, which violate the fundamental rights of women and therefore is unconstitutional.

The ministry spokesman Ali Hassan claimed that “The idea was to bring gender neutrality”. While some human right activists such as Thaygi Ruwanpathirana stated that “the world is going one way, Sri Lanka is running a race to the bottom”. She further stated that women living in Saudi Arabia, a heavy ultra conservative society had loosened the tight grip on women giving them the right to drive cars.[15]

To have effective mechanisms on women’s rights, it is important to have awareness and acceptability in a society. The relevant authorities such as law advocates must always reach for the needy as a woman not knowing her rights, the law and the power she has is like a sheep that blindly spend their life. Hence as the Latin maxim says, “ignorance of the law is no excuse”. Every person is to understand the law and adhere to it. Every woman should exercise their power. Stereotypical stigmatized views are to be eradicated. However, it is difficult to change existing traditions and practices, long held beliefs and thinking patterns, but with time and access to education, the economic burdens and cultural influence starts to deteriorate. Further these notions on how a girl is to behave, what women are allowed and what not is heavily influenced

by religion as it defines and guides morals. Law and religion cannot be stirred by the same spoon.

In certain societies women themselves look down upon other women. Stigmatized cultured societies will have a rigid, inflexible notion and attitude towards women who have been subjected to rape, abortion or any other offences and injustices. They are rejected, excluded, shouted at and treated as criminals where the offence might not be her fault at all. Such attitudes pull out her remaining broken self-esteem and trample on it as it is like poking a finger on an eye which is almost ready to burst out in tears. Receiving help, medical assistance, law advice is itself a burden as we live in a society of harmful notions, destructive attitudes, where everyone and everything is judged, made comments on, while the facts are irrelevant. Due to the vast amount of cases the courts are lodged with, reaching the verdict on a rape case or an abortion had lost its real value as within the interval of time from the rape to the verdict she will be verbally abused, looked down and squashed by mean compliments. In unfortunate situations she is not even responsible for the crime. An innocent girl framed, slaughtered by the community where she will always be the raped girl or an indecent girl. The attitudinal change is a dire. A woman should be a steady hand to another, ready to help those who are stepped on and need help not further push them down.

Women should be active participants on any and every field they prefer. There are no limits as limits are constructs. Many societies recommend teaching as the best occupation for a female, since a teacher is close as a mother to children, again shining

on the gendered identity, sticking like superglue.

Girls are condemned and prevented following their hearts while expected to fit in to the selected roles like pieces of jigsaw puzzle. However, women have been successful in breaking glass ceiling and making their own mark. Ada Augusta Lovelace, (first female programmer), stephanie Kwolek[16] (inventing Kevlar, a material five times stronger than steel and used in creating bullet proof materials) and Katherine Johnson, a brilliant mathematician condemned for being black and for being a woman, made her statement by stating, "There's no protocol for a man circling Earth either, sir"[17] when she was dismissed entering a meeting regarding space travels, "There's no protocol for women attending." Girls are to be encouraged choosing mechanics over bakery, working with drills and grills, because its passion that leads to creators and inventors who will drag the countries name forward. School teachers and parents should not cut down the shoots that reach for the sky.

Have you ever wondered what is the point that changes a girl from laughing loud to a hearts content to simply covering her mouth and giggling like a lady? What is the change that made a girl to alter their simple behavior such as running, talking, eating from a boy? Have you noticed that there is no change in behavior of a child, either boy or a girl at their young ages but gradually the girls change, and boys remain the same? These massive changes in their lives are due to three words an adult use. The “-LIKE A GIRL” phrase, which will immediately stop a girl and insert elegance, softness while redefining the system. The phrase used it to a boy would give them a sense of

inferiority, which they immediately try to alter. Hence “run like a girl”, “talk like a girl” and “be a girl” are just words that simply ask her to hide the strong character and be the fictitious character community wants her to be.

As the topic of this article says, “ONE IS NOT BORN, BUT RATHER BECOMES A WOMAN” is true. The society creates the woman; the society limits her, and controls her. Hence, I conclude with the statement made by Maya Angelou, an American poet and a civil activist “EVERY TIME A WOMAN STANDS UP FOR HERSELF. SHE STANDS UP FOR ALL THE WOMEN”.

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HUMANS VS RIGHTS AND ARE HUMANS RIGHT?

Theekshana Ranaweera*

As history with scientific evidence says we humans are six million years old and the modern form of humans only evolved about 200,000 years ago. If you as a one human being on this planet earth, took a long deep dive into the history of millions and millions of years of earth there's no way of denying we humans are not that old. As we know civilization is only about 6,000 years old, and industrialization started in the earnest only in the 1800's. Days after days mankind walked into many eras of development. Started exploring the world and new territories. Invaded new lands, Build Empires, came as a new species and started to rule the planet earth by their own measurements, their own design, with their own definitions.

We as humans created our own worlds; we saw our surroundings as resources and materials. We named them, separated them into groups, saw those as things as rare and valuable and the rest as reusable and not so hard to find. Through civilization and growing populations, science and technology came into the main role play that gave an enormous driving force and speed to the development of the mankind. However, through every road and path to success and development we as a mankind came to a one rough confounded road which we still keep carrying our modern world lives. After industrialization employments grew fast and people ha

d to work. Every country, every empire wanted to compete with each other's to make their own brands to gain victory for

their own glories. Simply one man to another became a tool for a road to success. Suddenly the word "Labour" came top of the world. You as a human I know you kept reading to this point of this article and started thinking "Yeah I know this stuff, this is history as we know". Now that we started to look into the history, we know what comes next. Rough roads, conflicts, hunger for power then. We end up in wars. The big red word "war" is an all-time big topic of the world since humans started populating the earth. However as mentioned in the topic "Rights for Humans" had to born somewhere. At some point world had to stop and think about protecting and respecting one another despite all the conflicts world had.

How human rights were born? That is the history of human rights. The belief that everyone, by virtue of her or his humanity, is entitled to certain human rights is fairly new. Its roots, however, lie in earlier tradition and documents of many cultures; it took the catalyst of World War II to propel human rights onto the global stage and into the global conscience.

Throughout much of history, people acquired rights and responsibilities through their membership in a group – a family, indigenous nation, religion, class, community, or state. Most societies have had traditions similar to the "golden rule" of "Do unto others as you would have them do unto you." The Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Quran (Koran), and the Analects of

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Confucius are five of the oldest written sources which address questions of people's duties, rights, and responsibilities. In addition, the Inca and Aztec codes of conduct and justice and an Iroquois Constitution were Native American sources that existed well before the 18th century.

In fact, all societies, whether in oral or written tradition, have had systems of propriety and justice as well as ways of tending to the health and welfare of their members.

Modern Human Rights which were created after world war -ii is what the world knows today. But it's important to take a look in the history of human rights in different parts of the world before the modern days.

Humans Rights in Ancient and Pre- Modern Eras

Some notions of righteousness present in ancient law and religion are sometimes retrospectively included under the term "human rights". While Enlightenment philosophers suggest a secular social contract between the rulers and the ruled, ancient traditions derived similar conclusions from notions of divine law, and, in Hellenistic philosophy, natural law. Samuel Moyn suggests that the concept of human rights is intertwined with the modern sense of citizenship, which did not emerge until the past few hundred years. Nonetheless, relevant examples exist in the Ancient and pre-modern eras, although Ancient peoples did not have the same modern-day conception of universal human rights.

Ancient West Asia

The reforms of Urukagina of Lagash, the earliest known legal code (2350 BC), is

often thought to be an early example of reform. Professor Norman Yoffee wrote that after Igor M. Diakonoff "most interpreters consider that Urukagina, himself not of the ruling dynasty at Lagash, was no reformer at all. Indeed, by attempting to curb the encroachment of a secular authority at the expense of temple prerogatives, he was, if a modern term must be applied, a reactionary." Author Marilyn French wrote that the discovery of penalties for adultery for women but not for men represents "the first written evidence of the degradation of women". The oldest legal codex extant today is the Neo-Sumerian Code of Ur-Nammu (2050 BC). Several other sets of laws were also issued in Mesopotamia, including the Code of Hammurabi (ca. 1780 BC), one of the most famous examples of this type of document. It shows rules, and punishments if those rules are broken, on a variety of matters, including women's rights, men's rights, children's rights and slave rights.

Africa

The Northeast African civilization of Ancient Egypt supported basic human rights. For example, Pharaoh Bocchoris (725-720 BC) promoted individual rights, suppressed imprisonment for debt, and reformed laws relating to the transferral of property.

Antiquity

Some historians suggest that the Achaemenid Persian Empire of ancient Iran established unprecedented principles of human rights in the 6th century BC under Cyrus the Great. After his conquest of the Neo-Babylonian Empire in 539 BC, the king issued the Cyrus cylinder, discovered in 1879 and seen by some today as the first human rights document. The cylinder has

been linked by some commentators to the decrees of Cyrus recorded in the Books of Chronicles, Nehemiah, and Ezra, which state that Cyrus allowed (at least some of) the Jews to return to their homeland from their Babylonian Captivity. Additionally, it stated the freedom to practice one's faith without persecution and forced conversions.

In opposition to the above viewpoint, the interpretation of the Cylinder as a "charter of human rights" has been dismissed by other historians and characterized by some others as political propaganda devised by the Pahlavi regime. The German historian Josef Wiesehöfer argues that the image of "Cyrus as a champion of the UN human rights policy is just as much a phantom as the humane and enlightened Shah of Persia", while historian Elton L. Daniel has described such an interpretation as "rather anachronistic" and tendentious. The cylinder now lies in the British Museum, and a replica is kept at the United Nations Headquarters.

Many thinkers point to the concept of citizenship beginning in the early poleis of ancient Greece, where all free citizens had the right to speak and vote in the political assembly.

The Twelve Tables Law established the principle "Privilegia ne irroganto", which literally means "privileges shall not be imposed".

The Mauryan Emperor Ashoka, who ruled from 268 to 232 BCE, established the largest empire in South Asia. Following the reportedly destructive Kalinga War, Ashoka adopted Buddhism and abandoned an expansionist policy in favor of humanitarian reforms. The Edicts of Ashoka were erected throughout his

empire, containing the 'Law of Piety'. These laws prohibited religious discrimination, and cruelty against both humans and animals. The Edicts emphasize the importance of tolerance in public policy by the government. The slaughter or capture of prisoners of war was also condemned by Ashoka. Some sources claim that slavery was also non-existent in ancient India. Others state, however, that slavery existed in ancient India, where it is recorded in the Sanskrit Laws of Manu of the 1st century BC.

In ancient Rome a ius or jus was a right which a citizen was due simply by dint of his citizenship. The concept of a Roman ius is a precursor to a right as conceived in the Western European tradition. The word "justice" is derived from ius.

The coining of the word 'Human rights' can be attributed to Tertullian in his letter To Scapula where he wrote about the religious freedom in Roman Empire. He equated 'fundamental human rights' as a 'privilege of nature' in this letter.

Middle Ages

Magna Carta was written in 1215.

Magna Carta is an English charter originally issued in 1215 which influenced the development of the common law and many later constitutional documents, such as the 1689 English Bill of Rights, the 1789 United States Constitution, and the 1791 United States Bill of Rights.

Magna Carta was originally written because of disagreements between Pope Innocent III, King John and the English barons about the rights of the King. Magna Carta required the King to renounce certain rights, respect certain legal procedures and

accept that his will could be bound by the law. It explicitly protected certain rights of the King's subjects, whether free or fettered—most notably the writ of habeas corpus, allowing appeal against unlawful imprisonment.

For modern times, the most enduring legacy of Magna Carta is considered the right of habeas corpus. This right arises from what are now known as clauses 36, 38, 39, and 40 of the 1215 Magna Carta. Magna Carta also included the right to due process:

No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man; we will not deny or defer to any man either Justice or Right.

As history goes on either way backward or forward it's hard not to notice human rights as we see today is not a very modern. As a matter of fact it was always with us deep down with our moral compasses helping with directions for a better society and for a safer world. Human Rights became an immense subject after the Second World War and after the birth of the United Nations.

In the modern everyone talks about Human Rights, Most of the countries are respecting the theories to help to protect the right of a single human being and they are even getting into pacts and making new conventions, new campaigns, documentaries, putting on new laws in every section in government and non-governmental bodies. So, looking into modern human rights topic is like asking someone have you seen the moon!?

Because everyone has seen it. Everyone has heard about it. It's obvious we humans as an advanced creature with advanced technology getting to know about something is not a big deal anymore thanks to the information technology we have. But the elephant in the room that we don't see is it's the same thing like mentioned before we all have seen the moon and of course we've heard about it but do we care about it anymore!? Human Rights are just all over the very air we breathe just as some element we know it's a thing but the modern world as we know we are just sitting in the middle of nowhere and we just keep looking and only hearing about those RIGHTS. Even the most powerful countries in the world they only show they care but from inside there are many missions and programs only about chasing the power and collecting resources for themselves. There are many wars and silent torturing everywhere all over the world in the very moment as we speak now too.

Going forward in this topic it's essential to see what kind of system runs the modern human rights and how those things function.

Inventing New Human Rights

As advanced technologies transform our daily lives, increasingly severe limitations impose themselves upon all humankind. This inevitable and extremely dynamic process results in the diversification of the mechanisms of legislation and law enforcement. The evolution of law during the past century reveals a change in the legal force of many different forms of legal documents. For instance, all legal systems generally confirm that both written and unwritten law has always existed in parallel. Even sixty years ago, legislation

itself was not so intensive. Daily life was mostly regulated by unwritten rules, observation of customs, social standards and traditions. For example, signed forms of contracts were not as common as nowadays, when individuals underwrite the vast majority of their legal actions. The same situation can also be found in the field of lawmaking.

There is now an expressed need to regulate as many spheres of human life as possible. Including communication, internet access, education, marriage, and travel. Discussion is now widespread about reinventing human rights. If we agree on the assumption that all human rights derive equally from the status of autonomy in compliance with dynamic social prerogatives, new regulation does not mean new human rights. Nevertheless, the reinterpretation of human rights by each new generation is always positive and necessary.

The (re)invention of human rights is grounded in new assumptions about individual autonomy. Before they can possess human rights, first people first have to be perceived as separate individuals capable of exercising independent moral judgment. To be autonomous, a person must be recognized as legitimately separate and secure in his/her separation, but have human rights. Personhood must be appreciated in some more expressive model. Human rights depend on both self-possession and on the recognition that all others are equally self-possessing. An ambiguous notion of the status of others illustrates the incomplete and uncertain matrix of relations, often open to a discriminative display of mutual respect and equality. On the other hand, there are

situations when it is essential to intervene in the person's private life to avoid harm and protect the rights of other people. In 2005, The European Court of Human Rights investigated the case of K.A. and A.D. v. Belgium²⁵, which raised the issue of the extent to which acts of sadomasochism ought to be protected by the right to respect for private life. The issue that had to be determined was whether interference with the applicants' right to respect for their private life was 'necessary in a democratic society'. The right to engage in sexual relations is derived from the right of autonomy over one's own body, an integral part of the notion of personal autonomy, which could be construed in the sense of the right to make choices about one's own body. It followed that the criminal law could not in principle be applied in the case of consensual sexual practices, which were a matter of individual free will. Accordingly, there had to be 'particularly serious reasons' for interference by public authorities in matters of sexuality to be justified for the purposes of Article 8 (right to respect for private life) of the Convention. However, in the case mentioned sexual practices were not carried out with the person's free will. For this reason, the European Court of Human Rights decided that the government institutions of Belgium that took action to stop these activities and punish the person responsible for harming other people did not violate the right to private life because these institutions were acting in accordance with the public interest.

Who is entitled to fill the gap between the control spheres of two equally autonomous individuals? An extensive catalog of rights and freedoms is not the solution. A plethora of newly bestowed rights would burden

people with volume and complexity of information without necessarily precluding new ad hoc situations. The individual is challenged to evolve additional capacities, skills, experience, enhance knowledge and specialization. Enactment of new rights is not effective. The trends of modern life cannot be predicted for 60 years onwards. Invention of new human rights per se is not a solution.

On the other hand, overall social development is inseparable from human rights. The latter are complement to self-tendencies. Because of intense global integration, development and human rights are becoming different, logically distinct, but operationally and conceptually linked issues. Prior to this, human rights had possessed autonomy and ‘power’ in certain fields (marginal groups of people, self determination, etc.). The processes of the social change are simultaneously rights-based and economically grounded, and should be conceived in such terms, including human rights as a constituent part. According to the Nobel Prize winner Amartya Sen, social development is the expansion of capabilities or substantive human freedoms, ‘the capacity to lead the kind of life [a person] has reason to value. Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers perhaps even the majority of people.

Creating an environment for human rights advancement provides potential to change the way people perceive themselves in vis-à-vis the government and other entities (me-me, me-you relationships). From the point of view of the individual and human rights, some non conformity, such as malnutrition should not be tolerated and are called violations. If it is agreed that human rights are natural and inalienable, violations

originate from clearly deliberate decisions and volition to commit them. An understanding of the spirit, and not only the letter, of universal rights enables policy public, commercial or individual to enrich the implementation and effective control of purposes and functions of human rights. Strongly autonomous people can invoke universal human rights assistance as the primary weakness of a state. If a person is not able to embrace his/her life activity and pursue satisfying results because of vagueness and lack of legal instruments, such an individual is free to act in compliance with minimum public expectations and extensive personal preferences. Promoting and protecting the right to autonomy (or autonomy as freedom per se) entails change and modernization in democracy, strengthening of the state and society with self-sustaining purposeful members. Human rights, as conceived in the Universal Declaration of Human Rights on the idealistic point of view, belong exclusively to the individual. In considering personal autonomy, it is very important aspect to understand how the individual is modeled in the Universal Declaration of Human Rights, what is the idealistic vision of an autonomous person. “The individual is modeled on a Kantian autonomous subject, theoretically free of gender or class. The focus of the Declaration upon this subject reflects ‘the hopes and idealism of a world released from the grip of World War II’, promoting the rights of the individual in the wake of a horrifying genocide and the spread of ideology. Of course, we should not look at the official law as the primary source of human rights. Human rights and justice derive from the conscience of every individual, from their perception of the limits of freedom. It is this understanding that is subsequently enacted

by authorities and recognized as official law. Society gives the authorities only the function of caretaker and protector of these rights and freedoms.

The same can be said of the Universal Declaration of Human Rights. Everyone would agree that this document is a powerful tool for the protection of individual rights. But in the course of protecting these rights, one should not forget the concept and the importance of personal autonomy. The Declaration cannot interfere in personal autonomy but draws a definitive normative line between what constitutes the fundamental conditions for right and wrong in the primarily public sphere. ‘In other words, the Universal Declaration of Human Rights regulates human rights in the sphere where the rights of individuals collide. This sphere can be called public life. However, in his/her private life, in the autonomous sphere, a person is absolutely free to act in any way he/she wishes.

Basically, human rights protect the ability of individuals to meet their basic needs and live autonomous lives. To live a minimally good life one must be able to hope and dream, to pursue one’s goals and carry out projects, to live life on one’s own terms. It is important to understand that the Universal Declaration of Human Rights cannot regulate everything and guarantee all the rights that all individuals need. In addition to fundamental human rights, such as the right to life, the right to freedom, and the right to private life, individuals need a variety of different rights never to be enacted in any legal document and guaranteed globally. Humans are too different and it is impossible to foresee what rights will be needed after a further 60

years. That is why human rights need the concept of personal autonomy a sphere of life where a person would be able to plan his/her actions and realize those particular rights. ‘Some people do not need the things that would let them occupy social roles and others need things that they do not need to occupy these roles (especially if they hope to occupy other roles).’ N. Hassoun provides us with an example of a monk who may not need to have children or be a worker, but meanwhile would need religious freedom. On the other hand, if this monk were to leave his monastery, he should have the opportunity to have a job and children. Modern human rights based claims to individual autonomy arise primarily not out of opposition to community but from the desires of modern persons to use intellectual and technological innovations to supplement their continued traditional ties with genetically and geographically based communities.

In conclusion Human Rights as we always talk but something we never dive deep into, this needs to be looked at in new ways and it has to be re invented again due to the fast changing world mechanisms adapting to new situations and for new approaches as well. Before everything no matter how modern or advanced we get as humans the most important thing is keeping humanity and being kind to one another with caring and love no matter the race, social status or someone’s background. Those pure golden beams of qualities come from the depths of our human hearts. Like the beginning of this article, before we establish the rights for humans, humans should be right to gain access to those kinds of rights. It will be the ultimate and purposeful path to gain human rights in the correct way to the billions of

humans in our world. A virtuous path to be exact. Being one of the elder generation you can teach the younger generation, for the little minds with growing and glowing hearts, To always keep the good qualities and moral grounds in their hearts, you can teach them earth is a precious place hidden amidst thousands of other empty barren worlds, same like, there could be billions of empty and worthless things and in them there can be a one little beautiful lively thing to convince there's still humanity can prevail and it has hope. Finally all those things come to a one conclusion, that humans should be right to avail the rights for humans!!!

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නීතියෙහි අනාගතය?

ලභිරු මාධ්‍ය විරසිංහ*

නීතිය යනු පොදු හැදය සාක්ෂාත්‍යයි -

තෝමස් හේබිස්

වර්තමානය වන විට දිනෙන් දින හෝරාවෙන් හෝරාව අකටයුතුකම්, අපරාධ සිදුවන සිසුතාව ඉහළ යම්න් පවතින ආකාරය ඇස්ස්පනාපිටම අපට පැහැදිලිය. සාහසික මානසිකත්වය උත්තේෂනය වන සමාජ ක්‍රමය තුළ අපරාධකරුවන් නීතියේ මාදැලෙහි රිංගා යාමට හැකි පැල්මවල් විඳින් රිංගා යාමට නොනවතින උත්සහයක යෙදී සිටී. විටින් විට එසේ සොයාගත් පැල්මවල් හරහා ඔවුන් රිංගා බෙරි යනුද පෙනෙන්. එවන් සිදුවීම් මගින් අනතුරට භාජනය වන්නේ මුළු මහත් මිනිස් සමාජයමය. අනෙක් අතට සමහර අවස්ථාවල අපරාධ මානසිකත්වයක් නොමැති පුද්ගලයන් ද දූෂියම් නොලැබිය යුතු වරදට දූෂිවම් ලබනු දැකිය හැක. එය අභාගයයට කරුණෙකි. සිවිල් සමාජය තුළද යම් යම් පිරිස් නීතියේ ඇති සමහර ප්‍රතිපාදන හේතුවෙන් අගතියට පත් වී සිටින අවස්ථා දැකිගත හැකිය. මේ හේතුවෙන් අපේ රටේ පවතින නීතිය තුළ යම් යම් යාවත්කාලීන වීම සිදුවිය යුතු බවට පැහැදිලි වේ. එසේ සිදුවිය යුතු යැයි අනුමාන කළ හැකි යාවත්කාලීන වීම කිහිපයක් මෙසේ දැක්විය හැක.

අපරාධයක් හෝ භානියක් වැළැක්වීමට තිබියදී ක්‍රියාත්මක නොවීම.

මහා විනාශයක් වැළැක්වීමට අවස්ථාව තිබියදී ක්‍රියාත්මක නොවීම තිසා අනිසි භානි සිදුවීම කොතොතුන් සමාජයේ දක්නට ලැබේ. එවන් අවස්ථාවක තිවැරදිව ක්‍රියාත්මක වීමෙන් සිදුවන භානිය අවම කිරීම සමාජයේ වගකීමකි.

මහ මග සිදුවන අනතුරුවලදී තුවාලකරුවන් රෝහල්වලට ඉක්මණීන් ප්‍රවාහන නොකිරීම රට තුළ කොතොතුන් දැකිය හැකි සිදුවීමකි. එවන් අවස්ථාවක තුවාලකරුවන් ප්‍රවාහනය

කරන රථයේ රියදුරුද උසාව් පොලිස් වල රස්තියාද වීමට සිදුවේ යැයි කියමින් එවන් අවස්ථා මගහරින පුද්ගලයින් නිතර දෙමෙලේ දැකිගත හැකිය.

පසු ගිය දිනක බ්‍රිමත් පුද්ගලයින් දෙදෙනෙකු මහමග අවසිහියෙන් සටන්වදී එකකු එල්ලකරන පොලු පහරකින් අනෙක් පුද්ගලයා මියරිය වීඩියෝ පටයක් ප්‍රවාත්ති වැඩ සහභන්වල විකාශනය විය. එය වැළැක්වීමට ඕනෑතුරම් පිරිසක් එම ස්ථානයේ සිටියන් කිසිවෙකුත් එය වැළැක්වීමේ කිසිදු උත්සාහයක් දරනු නොපෙනුනි.

මෙවන් අවස්ථාවල සමාජය අනතුර වැළැක්වීමට වඩා තම ජ්‍යෙම දුරකථන විඳින් ඒවා වීඩියෝ ගත කර සමාජමාධ්‍ය වල පත්‍රවාහැරීමට උත්සුක වීම මිනිසුන් ලෙස අප ලැඤ්ඡාවට පත්වීය යුතු අවස්ථාවකි. අනතුරක්, විනාශයක් වැළැක්වීමට අවකාශය තිබෙනාම් එය වැළැක්වීම සමාජ වගකීමකි. අව් ආයුධ අතින්ගත් පුද්ගලයින් මෙල්ල කළ යුතු බවක් මෙහිදී අදහස් නොවේ. නමුත් එයෙන්දා අප දකින අවස්ථාවන්ගෙන් බොහෝමයක් ඉතා සුළු පරිග්‍රාමයක් යොදා වැළැක්වීමට හැකි අවස්ථා බව දැකිගත හැකිය. එවන් අවස්ථාවල තම සමාජ වගකීම ඉටුනොකරන පුද්ගලයින් සඳහා ක්‍රියාත්මක කිරීමට යම් නීති රාමුවක් සැකසීම කාලීන අවශ්‍යතාවයකි.

අනෙක් අතට මෙවන් අවස්ථාවලදී පුද්ගලයින් ලබාදෙන තොරතුරු අනුව ක්‍රියාත්මක විය යුතු රජයේ අදාළ අංශ හැකි උපරිම කාර්යක්ෂමතාවයකින් ක්‍රියා කිරීමට වගබාගත යුතුව ඇත. බොහෝ අවස්ථාවලදී පොලිස් හඳුසි ප්‍රතිචාර අංශ, තිනි නීතිමේ අංශ ආදිය ක්‍රියාත්මක වන විට සිදුවීමට ඇති සියල්ල සිදුවී හමාරය. සමාජය තම වගකීම තිසිලෙස ඉටුකරන අතරතුර රජයේ වගකීව යුතු අංශ සමාජය සමග අනෙක්නා වගයෙන් ක්‍රියාකිරීමෙන් අපරාධ හා සිදුවන විනාශයන්ගෙන් අඩකට වඩා වැළැක්වීමේ හැකියාව පවතී. නීති පිටින් කඩා දැමීය හැකි දේ පොරොවෙන් කැපීමට ©All rights reserved ISSN 1800-055X Vol. Iv

* නීති ගිෂ්‍ය, පළමු ව්‍යවර, ශ්‍රී ලංකා නීති විද්‍යාලය

සිදුවනතෙක් නොහිද ක්‍රියාකීරීම සැමගේ වගකීම බව අවබෝධ කරගත යුතුය.

ගබසාව නීතිගත කිරීම

වගකීම් විරහිත වර්ථමාන සමාජය තුළ සාමාන්‍ය ගබසාව සඳහා නීත්‍යානුකූල ආරක්ෂිත ප්‍රතිපාදන සලසා නොමැති බැවින් අදාළ පුද්ගලයින් පමණක් නොව මුළු මහත් සමාජයට අගතියට පත්වන අවස්ථා කොතෙකුත් පවතී.

ගබසාවක් අවශ්‍ය වූ පුද්ගලයින් නීත්‍යානුකූල වුවත් තැනත් ඒ සඳහා යොමුවන බව ස්ථීර කරුණකි. නීත්‍යානුකූල කුමවේද නොමැති ශ්‍රී ලංකාව වැනි රටක ඒ සඳහා මුවුන්ට තෝරාගත හැකි මාරුග නම් වංචික වෙදාදුවරු සහ අනතුරු දායක ගබසා මාෂධ අලෙවි කරන ජාවාර්මිකරුවන් වීම අන්තරාය තීවුකරයි. හොර රහස්‍ය මෙවන් ගබසා කිරීම සිදුකරන වෙදාදුවරු ඒ සඳහා නිසි පුහුණුවක් නොලැබුවන් වීම අදාළ සේවාව ලබාගන්නා කාන්තාවන්ගේ ජීවිත සමහර අවස්ථාවලදී මරණය දක්වා වූ අන්තරායකට හෙළනු ලබයි. මෙවන් ජීවිත අවධානමක් ගැනීමෙන් සහ සිදුවන වැරදිම හේතුවෙන් සඳාකාලික අඛාධවලට ලක්වීමෙන් අගතියට පත්වන්නේ අදාළ ගරහනී කාන්තාව පමණක් නොව ඔවුන්ගේ ප්‍රවූල්ව පිරිස් ඇතුළු මුළු මහත් සමාජයට මේ හේතුවෙන් අගතියට පත් වේ.

නීත්‍යානුකූල ගබසාවක් කරගත නොහැකි කාන්තාව කොටුවන්නේ ගිණුලිහිණී රෙලකටය. කළ දුටු කළ වල ඉහගන්නට මොවුන් මදකුදු පසුබෑට නොවේ. ගබසා සැද්කමකට ලක්ෂ ගණනක මුදලක්ත්, ගබසා මාෂධ සඳහා තිස් හතැලිස් දහසින් මුදලුත් ලබාගන්නේ අදාළ කාන්තාවන්ගේ පිළිසරණක් නොමැති අසරණ බව ප්‍රයෝගනයට ගනිමිනි. එම අවස්ථාවල එම වංචිකයින් විසින් එම කාන්තාවන්ගේ ජීවිතය රුදී පවතින්නේ තමාගේ දැනීම බව දැන දැනම ඇයෙගේ ජීවිතයත් අනතුරේ හෙළමින් යම් අනතුරක් සිදුවුවහොත් තමාට තීතිය ඉදිරියේ මුහුණ දැමට සිදුවන දුවුවම්ද නොසලකා හරිමින් කටයුතු කරන්නේ මිනිස් ජීවිත වලට වඩා මුදල් අගනා බව ලොවට විද්‍යා දක්වමිනි.

අනෙක් අතට ගබසා කිරීමට අවශ්‍ය වුවත් එසේ නොකිරීමෙන් උපදින් දරුවන්ගේ

අනාගත ඉරණම කුමක් ද? එම දරුවා දෙමාපියන්ගෙන් ප්‍රතිසේෂ්ප වන්නේ මෙලොවට බිජිවීමටත් පෙරාතුවය. එම දරුවා කුස පිළිසිදාගත් කාලයේම දෙමාපියන්ට අනවශ්‍ය වස්තුවක් බවට පත්වී හමාරය. මහු හෝ ඇය මෙලොව එලිය දැකීමෙන් පසු කිසිදු සුගතියක් අත්වේයැයි කිවහැක්කේ කාභවද? බොහෝ අවස්ථාවල එම දරුවාට තම පවුල තුළ නොයෙක් දුක් කමිකටොල් මධ්‍යයේ දුක්ඩිත ජීවිතයක් ගතකරමින් සමාජයෙන් කොන් වී ජ්‍රවත් වීමට සිදුවේ. නැතහොත් කානුවක හෝ හ්‍රී රෝද රථයක් තුළ අනහැර දැමෙන දරුවාට තම දෙමාපියන් කවුද යන්නවත් නොදැන තම සුන්දර ලමා විය ආදරය සෙනෙහස අහිමි ලමා නිවාසයක ගෙවා කිසිදු යූතියෙක් නොමැතිව සමාජය වෙත පියනැගීමට සිදුවනු ඇත. සුළඟ නොවුවත් යුහෙද නොවන සමහර අවස්ථාව ඉපයුතු ලදුරුවන් මරා දැමුණු අවස්ථාද දැකිය හැක. ඉපදීමට පෙර මරාදැමීමට නොහැකි වූවානම් ඉපදුන පසු හෝ මරා දැමීමට කටයුතු කරන මිනිසුන් දරුවකුගේ මිනිස් ජීවිතයේ අයය නොදැන්නා බව නිසැකය. ගබසාව යනු සර්ව සම්පූර්ණ පිළිතුරක් නොවුවත් දෙමාපියන්ගේ වගකීම විරහිත භාවයෙන් උපදින දරුවකු ඉහත අවස්ථාවලට මුහුණීමට සැලැස්වීමට වඩා ගබසාව පායෝගික පිළිතුරක් බව පැවසිය හැක.

ස්ත්‍රී දුෂ්චරණය වීමක් හේතුවෙන් කාන්තාවක් ගැබී ගැනීම අති විශේෂ අවධානය යොමු කළයුතු අවස්ථාවකි. මෙහිදී අගතියට පත් කාන්තාව වෙනුවෙන් වන්දී ගෙවීමට සහ සිදුකළ අපරාධය වෙනුවෙන් දුවුවම් වීදීමට ස්ත්‍රී දුෂ්චරණය සිදුකළ පුද්ගලයාට සිදුවේ. නමුත් මුහුගේ ක්‍රියාව හේතුවෙන් අදාළ කාන්තාව මවක් වීම වැළැක්වීමට ක්‍රියාපටිපාරියක් නැතිවීමට හේතුව කුමක් ද? මෙවන් අවස්ථාවකදීවත් ගබසා කිරීමත් නීත්‍යානුකූල නොවන්නේ කුමන හේතුවක්මත ද? ස්ත්‍රීයකගේ ජීවිතය බෙරාගැනීමට ගබසාවක් සිදුකිරීමේ ප්‍රතිපාදන දැන්ඩ නීති සංග්‍රහයේ 303 වගන්තිය යටතේ සැලස්වා ඇත. වෙදාදු විද්‍යාත්මක හේතුවක්මත් පමණක් කාන්තාවකගේ ගබසා කිරීම නීතිගත කොට සමාජ විද්‍යාත්මක කරුණකදී ගබසාව නීත්‍යානුකූල නොකිරීම හාස්‍යජනක නොවේ ද? තමාව දුෂ්චරණය කරන ලද පුද්ගලයාට අයත්

දරුවෙකු මෙලොවට බිභිකීම් ඇයගේ මුළුඉදිරි ජ්විතයටම විනාශයක් නොවන්නේ ද?

දරුවෙකු මෙලොවට බිභි කිරීමේ සම්පූර්ණ වගකීම් අදාළ කාන්තාව සතුවේ. එම ක්‍රියාවලිය තුළ ඇය විසින් දරාගන්නා දුක්, කැපවීම ආදියෙන් කොටසක් ගබඩාව වැළැක්වීම වෙනුවෙන් නීති සම්පාදනය කරන ලද හෝ එම නීති ක්‍රියාත්මක කරන පුද්ගලයින් විසින් බාරගනු ඇතැයි අපේක්ෂා කළ නොහැක. අවසාන වගයෙන් ඇසීමට ඇති ප්‍රශ්නය නම් කාන්තාවගේ කුමැත්ත නොමැතිනම් මාස ගණනක් වැය කරමින් තම ගරීරය, ඇට, මස්, නහර වැය කරමින් මෙලොවට දරුවෙකු බිභිකරන ලෙස බල කිරීමට වෙනත් කිසිදු පුද්ගලයෙකුට ඇති අයිතිය කුමක් ද යන්නයි.

මාධ්‍ය මගින් පුද්ගල අනන්‍යතාවයට සිදුකරන භානි

අද වන විට නිවසක රුපවාහිනී යන්තුය ක්‍රියාත්මක කරත්, ජ්‍යෙෂ්ඨක් වෙත අඩවියකට පිවිසුනත් වෙනත් මොනයම් හෝ සමාජ මාධ්‍යක් වෙත පිවිසුනත් එක් පොදු ලක්ෂණයක් දැකගැනීමට හැකිය. එය නම් විවිධ මාධ්‍ය කණ්ඩායම් සමාජ අවධානය දිනාගැනීමේ අරමුණින් ප්‍රවත් මැවීමේ නොතින් තරගයක යෙදී සිරීමයි. සිත් ඇදගන්නා සුළු, නමුත් නොමග යවත් ප්‍රවත් දිරි යොදා ගනිමින් උදේ හවස පුද්ගලයන් වෙත පැමිණෙන ප්‍රවත් බොහෝය.

ප්‍රශ්නය මතුවන්නේ රසවත් ප්‍රවත් මැවීම සඳහා මෙවන් පිරිස් පුද්ගලඅනන්‍යතාවයට භානි වන සුළු තොරතුරු යොදා ගැනීමයි. රටෙහි වගකිවයුතු කිරීමින් යැයි ක්‍රියාගන්නා මාධ්‍ය ආයතන පවා මෙසේ නිර්ලප්තිත, වගකීම් විරහිත අයුරින් පුද්ගල අනන්‍යතාව රටක් ඉදිරියේ වෙන්දේසි කරන්නේ තම ආයතනයට ඇති ප්‍රේක්ෂක ආකර්ෂණය වැඩිකර ගැනීමේ එකම අරමුණ පෙරදැරී කරගෙනය.

මාධ්‍ය හැඳුනුම්පත ද්‍රව්‍යමා කරගනීමින් තමාට අදාළ නොවන අන් මිනිසුන්ගේ පුද්ගලිකත්වයට අත පොවන මාධ්‍යවේදින්ට විරුද්ධව විශේෂ පියවර ගැනීම තවත් අත්‍යවශ්‍ය කරුණකි. මෙවන් අවස්ථාවලදී ඇති හැකි අය නීතියෙන් පියවර අරගන්නා

නමුත් සාමාන්‍ය මිනිසුන් බොහෝවිට මේ අකටයුතුකම් ඉදිරියේ නිහඹව සිටී. ඒ හේතුවෙන් සමස්ථයක් වගයෙන් ගත්කළ පොදු මහජනතාවගේ පුද්ගලිකත්වය සුරක්ෂා සඳහා විශේෂ සිමාකිරීම් මාධ්‍ය ආයතන වලට පැනවිය යුතු අතර සමාජ මාධ්‍ය භාවිතයෙන් සිදුවන ප්‍රතිරුප භානිකිරීම් වැළැක්වීමටද වගකිවයුත්තන් විසින් නීසි පියවර ගත යුතුය. අවම වගයෙන් සහනාධාර ලබාගන්නා පුද්ගලයකගේවත් මුහුණ ජන මාධ්‍ය තුළ විකාශනය නොවන ආකාරයෙන් පුද්ගලිකත්වය සුරක්ෂා යුතුය.

සමාජ මාධ්‍ය සහ අන්තර්ජාල පැණිවුඩ සේවා හරහා සිදුවන ලිංගික හිංසනයද අද වන විට ඉතා උපරිම මට්ටමකට පැමිණ ඇත. යම් පුද්ගලයකට අයත් පුද්ගලික නිරුවත් ජායාරුප, විඛියෝපට ආදිය සමාජ මාධ්‍යකට මුදාහැරුන අවස්ථාවකදී කිසිසේත් පාලනය කරගත නොහැකි ලෙස මුළු මහත් සමාජය තුළම පැතිරි යයි. මිනිසුන්ට අයත් පුද්ගලිකත්වය ඉන්පසු පොදු දේපලක් ලෙස අවහාවිතාවට ලක්වේ. අවසානයේ අදාළ පුද්ගලයින්ට සහ ඔවුන්ගේ සම්පතමයන්හට සමාජයට මුහුණදීමට නොහැකිවන ලෙසට සමාජය විසින්ම පිඩිනයට ලක් කරයි. මෙසේ එල්ලවන මානසික පිඩිනය දරාගත නොහැකිව සිදුවන සියදිවි භානිකර ගැනීම් කොතොකුත් දැකගත හැකිය.

තවදුරටත් ව්‍යාජ ලෙස ජායාරුප විකාති කිරීමෙන් සහ අන් සතු ජායාරුප භාවිතා කර සමාජ මාධ්‍ය ගිණුම් පවත්වාගෙන යැමෙන් පුද්ගලයකගේ වරිතය හිතාමතා සාතනය කිරීම අද වන විට සාමාන්‍ය තත්ත්වයක් බවට පත් වන තරමට බහුලව සිදුවේ.

මෙවා වැළැක්වීම සඳහා පවතින නීති යාවත්කාලීන විම පමණක් ප්‍රමාණවත් නොවන අතර අදාළ නීති ක්‍රියාත්මක කරන අංශ කාර්යක්ෂමතා ක්‍රියාකළ යුතුය. සියලු දෙනා තේරුම්ගත යුතු එක් දෙයක් ඇත්තැන්ම ඒ නීති මගින් තමා සීමා කිරීමට වඩා තමාම ස්වයං පාලනයකින් යුතුව ක්‍රියාත්මක වීමෙන් තමාට සමාජයටන් සිදුවන භානිය අවම වන බවයි. යමක් සිදු කිරීමට පෙර තමා උපමාකර සිතා බලා ක්‍රියාකළානම් සමාජය සැමට සෞදුරු ස්ථානයක් වනු නියතය.

බරපතල තුවාල සිදුකිරීම සහ මිනිමැරීම අතර පරතරය

මිනිමැරීමේ වරදට මරණීය දඩුවමින් දඩුවම් ලැබෙන නමුත් බරපතල තුවාල සිදුකිරීමට ලැබෙන දඩුවම වසර කිහිපයක සිර දඩුවම් පමණි. නමුත් මේ අවස්ථා දෙක අතර එතරම් වෙනසක් නැති බව පැහැදිලිව අධ්‍යයනය කළ විට පෙනේ.

දිනාහරණ වශයෙන් බරපතල තුවාල සිදුවන පිහි ඇශ්‍රුමක් සලකමු. මෙම පිහිපහර මරණීය නොවන්නේ මිලිමිටර කිහිපයක පරතරයකින් විය හැකිය. ප්‍රශ්නය ඇතිවන්නේ මෙම පිහිපහර එල්ල කරන ලද පුද්ගලයා කුමන ආකල්පයකින් පිහිපහර එල්ල කරන ලද්දේද යන්නයි. නමුත් අපට ප්‍රත්‍යක්ෂ වන එක් කරුණක් නම් මරණය සිදුවන ප්‍රමාණයට මදක් මෙපිටින් පිහිය නැවතුයේ අපරාධකරු සවේතතිකව නොවන බවයි. පැහැදිලිවම ඔහු පිහි පහර එල්ල කිරීමේද එයින් තුවාලකරු මිය යා හැකි බව නොදැන සිරියේයැයි පැවසිය නොහැක. තවදුරටත් පැහැදිලි කළහොත් බරපතල තුවාල සිදුවන සේ හිසට එල්ල කරන ලද පොලු පහරක් තවත් අගලක් එහා මෙහා වී මරණය සිදුනොවෙනැයි කාටනම් කිව හැකි ද?

මෙහිදි සැලකිය යුතු කරුණ වන්නේ මරණයක් සිදුවීමට ඉතා ආසන්න බරපතල තුවාලයක් සිදුකරනු ලැබූවෙකු හට මරණය සිදුනොවීමේ වාසිය ලබා නොදිය යුතුය යන්නයි. ඔහු එම ක්‍රියාව සිදුකිරීමේද මරණය වුවත් අත්වය හැකිය යන වෙනතාවන් යුතුව එය සිදුකරන ලදී. ඔහුත් මිනිමරුවෙකුත් අතර ඇත්තේ ඉතා සුළු පරතරයක් බැවින් මිනිමැරීමට අදාළ දඩුවමෙන් බොහෝ දුරස්ථ දඩුවමක් ලබා ගැලවී යාමට ඉඩ හැරිය යුතු නොවේ.

මානුෂීය හේතුමත සෞරකම

තෝරු, මෝරු හසුනොවන නිතියේ දැලට හාල්මැස්සන් පමණක් හසුවන බව නිතර දෙවේලේ සමාජයේ රැවිදෙන කාරණාවක් බවට පත් වී ඇත. සත්‍ය වශයෙන්ම මෙම කියමත අභ්‍යන්තර නොවන බව පෙනේ. බ්ලියන ගණනින් ජනතා මුදල් කොල්ලකන බල පුළුවන් කාරයින් නිතියට ද දේශපාලන

බලපැමි එල්ල කරමින් දඩුවම් විලින් බේරිමට විදේශගත වෙමින් කට්ටි පනිතු දැකගත හැක. අනෙක් පසින් තම දරුවන්ගේ කුසගිනි නිවීමට සුළු සෞරකමක් කළ පුද්ගලයෙකු දඩු මුදල් ගෙවාගත නොහැකිව මාස ගනනක් සිරගතවීමසිදුවන අවස්ථාද දැකිය හැක.

මෙවන් අවස්ථාවලදී අන්ත දුරි භාවය හේතුවෙන් සෞරකම් කරන පුද්ගලයෙකුට දඩුමුදල් ගෙවාගැනීමේ හැකියාවක් ඇති බව අපේක්ෂා කළ නොහැක. අඩු ආදායම් ලාභින්ට දඩු මුදල් ගෙවාගැනීම පහසු කිරීම සඳහාද යම් ප්‍රතිපාදනයක් සැලකිය යුතුව ඇත.

මක්නිසාද යත් එවන් අවස්ථාවක අදාළ පුද්ගලයා සිරගත කිරීමෙන් ඔහු පමණක් නොව බොහෝ විට ඔහුට අයත් මුළු දරු පැවුමේ තවත් අභාගාතට වැටෙන නිසාවෙනි. සුළු සෞරකමක් වැනි දෙයක් සිදුකල පුද්ගලයෙක් නිතිය ඉදිරියට පැමිණ වීමෙන් පසු ඔහු එම සෞරකම සිදුකලේ සත්‍ය වශයෙන්ම නැති බැරි කම හේතුවෙන්දැයි සෞරා බැලිය යුතුය. මක් නිසාද යත් අද සමාජයේ මත් ද්‍රව්‍ය වලට ඇතිබැහි වුවන් මත්ද්‍රව්‍ය මිලදී ගැනීමට මුදල් සෞරාගැනීම සඳහා නිරතුරුව සෞරකම් වල නියැලෙන බැවිනි.

එසේ සෞරකම සිදුකලේ නැති බැරි අසරණ බාවය සඳහා පමණක් යැයි ඔප්පු වූ අවස්ථාවක එම පුද්ගලයාට රජය විසින් සමාජී ආධාර වැනි යම් සහනයක් ලැබේ නැතිදැයි සෞරා බැලිය යුතුය. අද වන විට එසේ ආධාර ලබා දීමිද දේශපාලනීකරණය වී ඇති අතර ආධාර අත්‍යාවශ්‍ය නොවන පුද්ගලයින් ආධාර ලබාගතන්නා අතර සත්‍ය වශයෙන්ම ආධාර අවශ්‍ය පුද්ගලයින්ට තිසින් නොලැබෙන අවස්ථාද බහුලව දක්නට ලැබේ.

එහිදි අදාළ පුද්ගලයාට එසේ ආධාර කිසිවක් නොලැබෙන්නේ නම් අවවාද ලබාදී, අවශ්‍ය ආධාර එම පුද්ගලයාට ලැබෙන තැනට කටයුතු සලසා දීමෙන් එම පුද්ගලයාට තවදුරටත් සෞරකම් කිරීමේ අවශ්‍යතාවක් නොමැති පුද්ගලයෙකු බවට පත් කිරීමලදායී මාර්ගයකි.

ନିଲ ଅର୍ଦ୍ଧମେ ମୁଖୀରେଣ୍ଟ ଜିଦ୍ଧକରନ ଅପରାଦ

යම රටක රජය විසින් යම් රජයේ
 නිලධාරීයක් පත් කරන්නේ ජනතාව
 වෙනුවෙන් යම් කාර්යයක් ඉටුකර පොදු ජන
 යහපත ස්ථීර කිරීමටයි. නමුත් තුන්වන
 ලෝකයේ රටවල නිලධාරීන් විසින් නොයෙක්
 අවස්ථාවල තම නිලයේ බලය පුද්ගලික ලාභ
 ප්‍රයෝගන සඳහා භාවිතා කිරීම සහ
 අත්තනෝමතිකව නිල බලය භාවිතා කිරීම
 කොතෙකත් සිදුවේ.

විශේෂයෙන්ම පොලිස් අත්අඩංගුවේ සිටින පුද්ගලයන් මරා දැමීම නින්දිත කරුණකි. ‘ආයුධ පෙන්වීමට රගෙන යන පුද්ගලයින් පොලිස් නිලධාරීන් වෙත අදාළ ආයුධ වලින් පහර දීමට උත්සහ කිරීමේදී පොලිස් වෙඩි පහරින් මියයාම’ මාධ්‍ය හරහා කොතෙකත් අසන්නට ලැබෙන කරුණකි. දැඩි පොලිස් රකවල් මත රගෙන යන මෙම සැකකරුවන් මාංව යොදා දෙපසින් පොලිස් නිලධාරීන් විසින් අල්ලාගෙන සිටින අතරතුර එසේ ආයුධ ප්‍රහාර එල්ල කිරීම විශ්මයජනක කරුණකි. මෙවන් අවස්ථාවලදී අපරාධ කාරයෙකු බැවින් එසේ කිරීමට සුදුසු බව සමාජය විසින්ද අනුමත කිරීම හාස්‍යජනක අනුවනකමකි. අපරාධකරුවෙකුට දඩුවම් තියම කිරීමට අයිතිය ඇත්තේ අධිකරණයට පමණි. පොලිසියට එවන් බලයක් තොමැති. ඉහත සඳහන් ආකාරයේ අවස්ථාවකදී පොලිසිය සිදුකරන ලද ක්‍රියාව සමාජය විසින් සාධාරණීකරනය කිරීමෙන් සිදුවන්නේ ඉන්පසු අවස්ථාවලදී අපරාධකාරයින් තොවන පුද්ගලයින්ට පවා හානි කිරීමට එම නිලධාරීන් පසුබට තොවීමයි.

සමාජ යහපත වෙනුවෙන් පත්කරන ලද නිලධාරීන් විසින් එම නිල ඇදුමේ බලතල යොදාගෙන සිදුකරන අපරාධ සාමාන්‍ය පුද්ගලයෙකු විසින් එම අපරාධයට සිදුකරන අවස්ථාවට වඩා අතිශයින් බරපතලය. එහෙයින් මෙවන් නිලධාරී අපරාධ වැළැක්වීම සඳහා විශේෂ නීති පදනම්තියක් සහ ඒවා සෞයා බලා ක්‍රියාත්මක කිරීමට විශේෂ ආයතනන් පිහිටුවීම අත්‍යාවශ්‍ය කරුණකි.

ଦ୍ୱିତୀୟ କଣ୍ଠାଳୀ ପରିମାଣ ପ୍ରତିପାଦନ

දි ලංකාවේ පවත්නා සාමානු නීතිය යටතේ
යම් විවාහක යුවලකට දික්කසාද වීම සඳහා
විශේෂ අවශ්‍යතා කිහිපයක් සම්පූර්ණ කළයුතු
වෙයි. එනම් එක් පාර්ශවයක් අනාචාරයේ
හැසිරීම, ද්වේශ සහගත හැරයාම සහ
විවාහවන අවස්ථාවේ පවත්නා සුවකල
නොහැකි ලිංගික බෙලනීනතාවයයි. මෙම
කරුණු සම්පූර්ණ නොවන අවස්ථාවලදී
දික්කසාද වීම පහසු කරුණක් නොවේ.

నම్రత లర్పతమాన సంకీరణ సమాచారమయ తుల
ప్రద్వగలడినీంట సాదారణ విడయెను దైకుషాధ
వీంట కులు చిన్నారుమి లేచు ద్వారికియ హైకియ.
దైకుషాధవీంటి అవశ్యకావయ ఆక్రమి పిరిచే
నీతిమయ బాదిక లేచువెను కుల్చరువు విలాహయ
తుల రథు తావైమి ప్రయోగ యిసకట మ్రుళేవునీనకి.
కల్యామెండి మొ వెనీచీమె ర్వమణ్ణావ
గాహసీప ప్రవణేచితువయ దుకులు ఉఱల యైమె
అవద్యానమిక పలవి. చతు విడయెనుం నీతి
ప్రావతియ యైతునే ప్రద్వగలడినీం పణస్పుల
స్వల్పామె విను వెనువున ప్రద్వగలడినీ బలెను
బెడు తావైమంట నోవీయ యైతుయ.

දෙදෙනෙකු විවාහ වන්නේ තම කැමැත්ත සහ
අනිමතය පරිදිය. එලෙසින්ම විවාහවේම
භූප්‍රදිසු යැයි ඔවුන්ට හැගේනම්
දික්කසාදවේමේ අයිතියද ඔවුන්ට තිබිය යුතුය.
විවාහක යුවලකට තවදුරටත් විවාහය
පවත්වාගැනීමේ අවශ්‍යතාවයක් නැතිනැති
විවාහ සහතිකය යනු ඇරඟ ඉන්න කඩ්දාසි
කැබේල්ලක් පමණි. එවන් අවස්ථාවක
දික්කසාද වීමට නීතිමය බාධා ඇතිවේමෙන්
අදාළ පුද්ගලයින් මානසික පිචිනයට පත්වීම,
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යොමුවේම වැනි දේ සිදුවීමේ ප්‍රවනතාවය
වැඩිවේ.

ଶହେଣିନ୍ ଵିଳାହୟ ଅବଶ୍ୟ ଅପ୍ରସରାତ୍ମେ ନୀଦିଲୁଙ୍କେ
ଵିଳାହ୍ୱିତେ ଉଚିଷ୍ଟାଲୁଙ୍କେମ ମେନ୍ତମ ଦୈକ୍ଷକଷ୍ୟାଦ
ତିତେ ଅବଶ୍ୟ ମୋହୋତେ ଅନବଶ୍ୟ ବାଦ୍ୟ
କିରିମ ଲିଲିନ୍ ତୋରବ ଚେତ୍କାମୌତେତନ୍
ବେନ୍ତିତେ ହୈକିବନାଙ୍କେ ଏ ନୀତି ଲିହିଲେ କିରିମ
ଜ୍ଞାନୀୟ.

ପ୍ରକାଶ

- දැයේව නීති සංග්‍රහය
 - Marriage Registration Ordinance

CONTEMPORARY ANALYSIS ON DEVELOPMENT OF INTELLECTUAL PROPERTY LAW IN SRI LANKA

Viduravi Liyanage*

Intellectual property can be defined as creations new ideas of the mind: inventions; literary and artistic works in such examples as record labels, musical piece; and symbols etc. Intellectual property can be furthermore divided into four major categories: Namely Copyrights, Trademarks, Patents and Trade Secrets. Intellectual Property law governs the infringement of above said areas in order to allow original creators to get benefited from their work and keeping them motivated for further endeavors. Digging into bit deeper copyright work covers the literature work naming few as textbooks, novels, reading materials in all kind of, plays etc. It moreover evolves to the extent of films, music, drawings, painting, architecture, photography and goes on. In the area of trademarks, IP plays a major role in order to protect trade brands. IP law governs and regulates Trade Secrets, making companies and individuals be safe from copying their work. As an example the world famous coca-cola recipe is a trade secret and an IP of the coca-cola company. A patent protects breach of pirating highly valuable work. World famous mobile phone manufacturer, Apple Inc patented their Iphone swipe function in the guise of a patent.

Common law did not recognize intellectual property rights. Justice Brandeis communicated this belief in his dissent to International

News Service v. Associated Press:¹ "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, as free as the air to common use."

When discussing more about Intellectual property, a question arise what is a right in Intellectual Property and how they allow protecting and governing an individual person to an extent of a country? Simply Intellectual Property rights are like any other property right. They allow creators, or owners to be benefitted from their own work or investment in a creation. Intellectual Property rights are highlighted and outlined throughout the Universal Declaration of Human Rights, thus making a significant importance to the whole mankind. Article 27 of the above mentioned declaration provides benefit from protecting against infringement of IP. The significant importance of intellectual property was first recognized in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are governed by the World Intellectual Property Organization (WIPO).

World Intellectual Property Organization (WIPO)² is an international organization

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¹ *International News Service v. Associated Press*, 248 U.S. 215 (1918)

² (WIPO - World Intellectual Property Organization, 2020), <https://www.wipo.int/portal/en/>

that governs and regulates rights of creators and owners of intellectual property. WIPO was established in 1970. WIPO works closely with its member states to ensure correct guidance of Intellectual Property rules and laws, and helps to implement such in respective legal systems. Furthermore WIPO helps to maintain a subtle international trade.

Intellectual Property rights must be governed and regulated by a administrated authority in a certain geographical area (a region, country) due to several critical reasons. The rapid development of mankind lies within its capacity to invent new ideas, mechanisms etc. Furthermore by implementing IP to a legal system it ensures to protect infringement o such rights which helps the original creator or the owner to be benefited from their work and to get motivate for creating new invention throughout. IP has a vast potential in elevating the lifestyle of a man and a country. It enhances the job market by creating new inventions and as the end result IP directly hits the economy of a country. It also helps the social development and benefits to the whole mankind.

A patent is an exclusive right granted for an invention – a product or process that provides a new way of doing something, or that offers a new technical solution to a problem. A patent provides patent owners with protection for their inventions. Protection is granted for a limited period, generally 20 years³. The International Patent system is governed and regulated by

World Intellectual Property Organization (WIPO), *The Patent Cooperation Treaty (PCT)*⁴ is a sub body that assists applicants in seeking patent protection internationally for their inventions. Patent protection means an invention cannot be commercially made, used, distributed or sold without the patent owner's consent. Patent rights are usually enforced in courts that, in most systems, hold the authority to stop patent infringement. A patent owner has the right to decide who may – or may not – use the patented invention for the period during which it is protected. Patent owners may give permission to, or license, other parties to use their inventions on mutually agreed terms. Owners may also sell their invention rights to someone else, who then becomes the new owner of the patent. Once a patent expires, protection ends and the invention enter the public domain. This is also known as becoming off patent, meaning the owner no longer holds exclusive rights to the invention, and it becomes available for commercial exploitation by others.

The first step in securing a patent is to file a patent application. The application generally contains the title of the invention, as well as an indication of its technical field. It must include the background and a description of the invention, in clear language and enough detail that an individual with an average understanding of the field could use or reproduce the invention. Such descriptions are usually accompanied by visual materials – drawings, plans or diagrams – that describe the invention in greater detail. The

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https://www.nipo.gov.lk/web/index.php?option=com_content&view=article&id=14&Itemid=145&lang=en

⁴

<https://www.wipo.int/treaties/en/registration/pct/>

application also contains various “claims”, that is, information to help determine the extent of protection to be granted by the patent.

An invention must, in general, fulfill the following conditions to be protected by a patent. It must be of practical use; it must show an element of “novelty”, meaning some new characteristic that is not part of the body of existing knowledge in its particular technical field. That body of existing knowledge is called “prior art”. The invention must show an “inventive step” that could not be deduced by a person with average knowledge of the technical field. Its subject matter must be accepted as “patentable” under law. In many countries, scientific theories, mathematical methods, plant or animal varieties, discoveries of natural substances, commercial methods or methods of medical treatment (as opposed to medical products) are not generally patentable.

Patents are granted by national patent offices or by regional offices that carry out examination work for a group of countries – for example, the *European Patent Office (EPO)* and the *African Intellectual Property Organization (OAPI)*. Under such regional systems, an applicant requests protection for an invention in one or more countries, and each country decides whether to offer patent protection within its borders. The WIPO-administered *Patent Cooperation Treaty (PCT)* provides for the filing of a single international patent application that has the same effect as national applications filed in the designated countries. An applicant seeking protection may file one application and request

protection in as many signatory states as needed.

Below are some celebrated international case laws in patent infringement.

Samsung electronics co., ltd. v. apple inc. (*s.ct. 2016*)⁵. The U.S. Supreme Court addresses the issue of damages in design patents under 35 U.S.C. 289. In this decision, the Supreme Court ruled that the relevant “article of manufacture” for arriving at a sec 289 damages award need not be the end product sold to the consumer but may be only a component of that product. This decision overrules the Federal Circuit's 2015 Apple v. Samsung decision, at least as it applies to damage calculations under Section 289.

Apple inc. v. samsung electronics co., ltd. (*fed. cir. 2015*)⁶. This is the primary appeal from the nearly \$1 billion dollar trial verdict in the Apple v. Samsung litigation. In this decision Federal Circuit overturned the verdict with respect to Apple's trade dress rights, finding that the evidence showed that the trade dress was functional and unprotected. However, the Federal Circuit held that the functional aspects in Apple's design patents did not prevent a finding of infringement of those elements. The Federal Circuit found that it was not necessary to ignore functional elements in a design patent when considering infringement. The Federal Circuit also found that Apple should be awarded Samsung's profits on the entirety of the infringing cell phones, a decision that was overturned by the Supreme Court.

⁵ 137 S. Ct. 429, 196 L. Ed. 2d 363, 580 US ___ - Supreme Court, 2016

⁶ 786 F. 3d 983 - Court of Appeals, **Federal Circuit, 2015**

Ethicon endo-surgery, inc. v. covidien, inc. (fed. cir. 2015)⁷. The Federal Circuit considered how to consider alternative designs when analyzing whether a design patent is invalid for being directed to a functional design. The Federal Circuit clarified that there is no mandatory test for determining whether a claimed design is dictated by its function. Nonetheless, an inquiry into whether a design is functional should begin with "an inquiry into the existence of alternative designs." As for infringement, the Ethicon decision clarified that the Egyptian Goddess case requires a consideration of the prior art only if the patented design and the accused device are not plainly dissimilar. Because the accused device was not similar to the patented design, there is no reason to consider the prior art.

In the area of trademark protection it plays a great role. Trademark is an important sign that identifies certain goods or services produced or provided by a certain person or a company. The system helps consumers to identify and purchase a product or service based on its quality.

Trademark protection ensures that the owners of marks have the exclusive right to use them to identify goods or services, or to authorize others to use them in return for payment. The period of protection varies, but a trademark can be renewed indefinitely upon payment of the corresponding fees. Trademark protection is legally enforced by courts that, in most systems, have the authority to stop trademark infringement. In a larger sense, trademarks promote initiative and enterprise worldwide by rewarding their owners with recognition

and financial profit. Trademark protection also hinders the efforts of unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior or different products or services. The system enables people with skill and enterprise to produce and market goods and services in the fairest possible conditions, thereby facilitating international trade.

Trademarks may be one or a combination of words, letters and numerals. They may consist of drawings, symbols or three-dimensional signs, such as the shape and packaging of goods. In some countries, non-traditional marks may be registered for distinguishing features such as holograms, motion, color and non-visible signs (sound, smell or taste). In addition to identifying the commercial source of goods or services, several other trademark categories also exist. Collective marks are owned by an association whose members use them to indicate products with a certain level of quality and who agree to adhere to specific requirements set by the association. Such associations might represent, for example, accountants, engineers or architects. Certification marks are given for compliance with defined standards but are not confined to any membership

They may be granted to anyone who can certify that their products meet certain established standards. Some examples of recognized certification are the internationally accepted "ISO 9000" quality standards and Eco labels for products with reduced environmental impact.

⁷ 796 F. 3d 1312 - Court of Appeals, **Federal Circuit, 2015**

Below mentioned is a major landmark case in breaching trademark laws.

yahoo!, inc. v akash arora & anr [1999 (19) ptc 201 (del)]⁸. The first decision on the protection of IP rights on the Internet. In what is known till date as a Landmark judgment in cyber squatting, the Delhi High Court held that a domain name served the same function as a trademark and was therefore entitled to equal protection. As the domain names of the plaintiff ‘Yahoo!’ and defendant ‘Yahoo India!’, were nearly identical and phonetically similar, there was every possibility that internet users would be confused and deceived into believing that the domain names had a common source or a connection. The court further observed that the disclaimer used by the defendants was not sufficient because the nature of the Internet is such that use of a similar domain name cannot be rectified by a disclaimer, and that it did not matter that ‘yahoo’ is a dictionary word. The name had acquired uniqueness and distinctiveness and was associated with the plaintiff. The Bombay High Court, in **Rediff Communication v. Cyber booth & Anr** 2000 PTC 209 also observed that the value and importance of a domain name is like a corporate asset of a company.

Copyright laws grant authors, artists and other creator’s protection for their literary and artistic creations, generally referred to as “works”. A closely associated field is “related rights” or rights related to copyright that encompass rights similar or identical to those of copyright, although sometimes more limited and of shorter duration. The beneficiaries of related rights are: performers (such as actors and musicians) in their performances;

producers of phonograms (for example, compact discs) in their sound recordings; and broadcasting organizations in their radio and television programs. Works covered by copyright include, but are not limited to: novels, poems, plays, reference works, newspapers, advertisements, computer programs, databases, films, musical compositions, choreography, paintings, drawings, photographs, sculpture, architecture, maps and technical drawings.

The creators of works protected by copyright, and their heirs and successors (generally referred to as “right holders”), have certain basic rights under copyright law. They hold the exclusive right to use or authorize others to use the work on agreed terms. The right holder(s) of a work can authorize or prohibit: its reproduction in all forms, including print form and sound recording; its public performance and communication to the public; its broadcasting; its translation into other languages; and its adaptation, such as from a novel to a screenplay for a film. Similar rights of, among others, fixation (recording) and reproduction are granted under related rights. Many types of works protected under the laws of copyright and related rights require mass distribution, communication and financial investment for their successful dissemination (for example, publications, sound recordings and films). Hence, creators often transfer these rights to companies better able to develop and market the works, in return for compensation in the form of payments and/or royalties (compensation based on a percentage of revenues generated by the work). The economic rights relating to

⁸ I.A. No. 10115/1998 and Suit No. 2469/1998

copyright are of limited duration – as provided for in the relevant WIPO treaties – beginning with the creation and fixation of the work, and lasting for not less than 50 years after the creator's death. National laws may establish longer terms of protection. This term of protection enables both creators and their heirs and successors to benefit financially for a reasonable period of time. Related rights enjoy shorter terms, normally 50 years after the performance; recording or broadcast has taken place. Copyright and the protection of performers also include moral rights, meaning the right to claim authorship of a work, and the right to oppose changes to the work that could harm the creator's reputation.

Rights provided for under copyright and related rights laws can be enforced by right holders through a variety of methods including civil action suits, administrative remedies and criminal prosecution. Injunctions, orders requiring destruction of infringing items, inspection orders, among others, are used to enforce these rights.

Copyright and related rights protection is obtained automatically without the need for registration or other formalities. However, many countries provide for a national system of optional registration and deposit of works. These systems facilitate, for example, questions involving disputes over ownership or creation, financial transactions, sales, assignments and transfer of rights. Many authors and performers do not have the ability or means to pursue the legal and administrative enforcement of their copyright and related rights, especially given the increasingly global use of literary, music and performance rights. As a result, the establishment and enhancement of collective management organizations (CMOs), or

“societies”, is a growing and necessary trend in many countries. These societies can provide their members with efficient administrative support and legal expertise in, for example, collecting, managing and disbursing royalties gained from the national and international use of a work or performance. Certain rights of producers of sound recordings and broadcasting organizations are sometimes managed collectively as well.

There are different legal systems in worldwide making significant changes in law which they apply. In Sri Lankan Law context it almost protects all rights that declared by WIPO and several other treaties. Intellectual Property Act No.36 of 2003 is the frame work within Sri Lanka which helps to protect, govern and regulate the Intellectual Property Rights and is a member of WIPO. Sri Lanka too ratifies international treaties and agreements such as (PCT) Patent Co-operation Treaty, TRIPS Agreement and Berne convention⁹.

The main body that governs Intellectual Property of Sri Lanka is “The Nation Intellectual Property Office”¹⁰. It was first established on January 1, 1982 with the same mandate under the provisions of Code of intellectual property *Act no 52 of 1979*. Per Intellectual Property act no 36 of 2003 cites in sec 4, the only government body established for administrating Intellectual Property matters including registration and moderation of industrial designs, patents is “*National Intellectual Property Office*” and it is established under ministry of higher education, technology and innovations.

In Sri Lanka trademarks are registered for 10 year periods, which calculate from the

⁹ <https://www.wipo.int/treaties/en/ip/berne/>

¹⁰ <https://www.nipo.gov.lk/>

date of application. Unlike the other intellectual property, Trademarks Registration can be renewed for any number of times (10 Year periods) if the prescribed fee is paid in time, and thereby could remain in force for an indefinite period of time.

Lever brothers- vs- r. m. renganathan pillai¹¹

Case discusses infringement of trade marks. Held that the marks of wrapper on the soap imported by the defendant were calculated to deceive and amounted to an infringement of plaintiff's trade mark.

M.S hebtulabhoj & co – vs- stassen exports ltd¹²

Violation of trade mark under Intellectual Property law. It said that mislead the public by trying to imitate the product. Held that it committed infringement of appellants rights as a registered owner of the trade mark.

Lipton ltd – vs- stassen exports ltd¹³

India the neighboring country of Sri Lanka too implements a common law system influenced by the British colonial rules. They too being a member of WIPO and have a kind of strict policy in governing IP rights emphasize below significant case laws.

The indian performing society v. vodafone idea ltd

The Calcutta HC directed Vodafone to deposit a whopping amount of Rs. 2.5 crore in a copyright infringement suit filed by IPRS. The decision raised two main issues,

amongst others: (1) The nature of the "right to receive royalty" available to authors of musical and literary works and (2) Against whom this particular right can be exercised and the enforcement mechanism for ensuring the same. The right to receive royalty is not an exclusive right under Section 14 of the Copyright Act and that it is, in effect, a contractual term used between the assignor and assignee of the copyright in underlying works, as mandated by the statute.

Navigators logistics v. kashif qureshi

In this case an employer alleged that a former employee was using their customer list to compete with them. With respect to copyright, the court held that the employer had failed to establish that the list was 'original' under the 'skill and judgment' standard espoused in Eastern Book Company v D.B. Modak. On grounds of confidentiality, the court held against the employer. It concluded that it is not possible to claim confidentiality in every customer list, since most details are available in the public domain. Therefore, the plaintiff must specifically establish the economic or commercial value of their customer list in order to protect it.

sanjay kumar gupta & anr v. sony pictures networks india p ltd.

Delhi High Court rejected the plea of copyright infringement against Sony Entertainment in relation to 'Kaun Banega Crorepati'. The appellants, in this case, had a concept termed "Jeeto Unlimited", where home viewers of a quiz show could participate live in a quiz show and were rewarded for answering correctly. It was

¹¹ 39 NLR 332

¹² (1989)1 Sri L.R. 189-58

¹³ 1989. 1 SLLR, 191

alleged that, on presenting this concept to Sony, they were compelled to sign a consent letter which allowed Sony to use the concept without incurring any liability. The Court applied the 'scenes a faire doctrine' stating that since the idea was to enable home viewers to simultaneously play along with contestants, some similarities were bound to arise, but upon scrutiny, crucial differences were found in concepts of the appellant and respondent. The Court held that there was no breach of confidentiality as the appellants had signed a consent letter authorizing Sony to use the concept.

In comparing to rest of the world Sri Lankan legal system plays a huge role to protect, govern and regulate Intellectual Property rights. Compared to past few decades Sri Lanka too gains a lot more regulations and laws implemented to its legal system. Due to the rapid growth of the world the economy, social aspects have risen to their climax. Due to the rapid growth of new trends invented every day, meaning that laws, regulations must too get updated accordingly. Sri Lankan legal system must update rules that govern Artificial Intelligence. Moreover certain existing rules too weaken its governing possibilities and are outdated. As an example the fine system must update and charges must be more strict to punish who violates the law. Human race gets motivated through their inventions all the time. It helps in development of economical system which sustains a country. The literature aspects (films, music, art) of Intellectual property must govern much tighter in order to secure the original creator or the owner of such work to be motivated in doing their future work.

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රාජුල් ජේරුකන්ද*

"යම දිනෙක තාක්ෂණය අපගේ මානව අන්තර්ත්‍යා ඉක්මවා යනු ඇතැයි මම බිය වෙමි. කිමද එවිට ලෝකයට ඉතිරි වන්නේ මෝඩයන්ගේ පරම්පරාවක් පමණි." ඇල්බේ අයින්සේයින්-තාක්ෂණික මානවයා

අද මිනිසා වෙන කවරදාටත් වඩා අන්තර්ජාලය හාවිත කරයි. මුවහු අධිවේශී අන්තර්ජාලය සහ අධිතාක්ෂණික ස්මාර්ට් ජ්‍යෙග දුරකථන අපගේ සමාජයේ ධනාත්මක අංශ ලෙස සලකති. අන්තර්ජාලය සහ ජ්‍යෙග දුරකථන පද්ධති යනු අපගේ දෙනික ක්‍රියාකාරකම් සහ අනනුතා සංවර්ධනය සඳහා තීරණාත්මක කාර්යභාරයක් ඉවු කරන සූචිතාල සන්නිවේදන පද්ධතින් ය.

ගැටුපු ව වන්නේ මෙම තාක්ෂණයන් ද බොහෝ විට සංණාත්මක ලෙස හාවිතයට ගැනීම ය. බොහෝ පුද්ගලයින් අන්තර්ජාලය හෝ ජ්‍යෙග දුරකථන මගින් හිරිහැරයට හාජනය වන අතර එහි ප්‍රතිඵලයක් ලෙස ඔවුන් ව්‍යාකුලත්වයට හා මානසික පිඩිනයට පත් වේ. බොහෝ විට එම පුද්ගලයින්ට සිදුවන්නේ ඔවුන් සයිලර් හිංසනයේ ගොඳුරක්ව ඇති බව තෙරුම් ගැනීමට නො හැකි විමසි. එහි ප්‍රතිඵලයක් ලෙස අන්තර්ජාලය හාවිත කරන්නන්ගේ ආරක්ෂාව අනතුරට පත්ව තිබේ අන්තර්ජාල පරිභිලකයින්ගේ දැඩි කනස්සල්ලට හේතු වී තිබේ.

අන්තර්ජාලය හා සමාජ මාධ්‍ය යනු සමාජ හා දේශපාලන වෙනසක් බලමුපු ගැනීම් සඳහා ප්‍රබල මෙවලමක් විය හැකිය. බොහෝ යොවනයන් තාක්ෂණය වගකීමෙන් යුතුව හාවිත කළ ද, පසුගිය දශකය තුළ 'සයිලර් හිරිහැර කිරීම' නමින් අන්තර්ජාල සමාජ කරනවායේ තව ආකාරයක් ද අනාවරණය වී තිබේ. කැනඩාව, එක්සත් ජනපදය, ජපානය, වීනය, ඉන්දියාව, බෙන්මාර්කය, ඕස්ට්‍රොලියා නවසිලන්ත වැනි රටවල මූලික

පර්යේෂණ මගින් සහාය කරනුයේ සයිලර් හිරිහැර කිරීමේ සංසිද්ධිය ගේලීයව සිදුවන බවයි.

හයානක විය හැකි වෙළරස් හා කුමලේඛන දේශ වැනි බොහෝ අන්තරායන් අන්තර්ජාලය සතුව ඇත. සයිලර් හිරිහැර කිරීම අන්තර්ජාල හා සමාජ ජාල පරිභිලකයින්ගෙන් විශාල කොටසකට බලපෑම් කිරීමට හේතු වන ගැටුපු ව කෙරෙහි අවධානය යොමු කිරීමට අවධානය යොමු කළහොත්, ප්‍රමුණ්, යොවනයන් පමණක් නොව, වැඩිහිටියන් ද වැඩියෙන් මේ ආකාරයේ හිරිහැර කිරීම්වලට ගොඳුරු වන බව දිස් වේ. 2010 වසරේ සිට මෙම සයිලර් හිරිහැර කිරීම දිසු ලෙස ඉහළ යන බව පෙනේ. තොරතුරු ගෞයාම සහ සන්නිවේදනය පහසු කරන පද්ධතියක් හයානක "ස්ථානයක්" බවට පත්වීම කණ්ගාටුවට කරුණක් බැවින් මෙය විශ්ලේෂණය කළ යුතු වේ

මැත වසරවලදී බොහෝ රාජ්‍යයන් සයිලර් හිරිහැර කිරීම සම්බන්ධයෙන් විශේෂයෙන් නීති පැනවීමට පටන් ගෙන තිබේ. සාම්ප්‍රදායික හිරිහැර කිරීම සඳහා පනවා ඇති නීති මගින් සයිලර් හිරිහැර කිරීම ද ආවරණය වන බව තවත් සමහර රාජ්‍යයන් පවසයි. අන්තර්ජාලය නිර්නාමිකභාවය සහ සැයුවුණු අනනුතාවයක් සහිත පැතිකඩික් නිර්මාණය කිරීමට අවස්ථාව ලබා දෙයි; ඉතින් සයිලර් හිරිහැර කිරීම නැවැත්විය හැකිකේ කෙසේද? සත්‍යය නම් මෙම ප්‍රශ්නය එතරම් සරල දෙයක් නොවන බැවින් පහසුවෙන් පිළිතුරු දිය නොහැකි බවයි. දැනටමත් ඒ ගැන සැලකිලිමත් වීම සහ වැඩි වශයෙන් සයිලර් හිංසකයින් මින් ගැලීම් යන බැවින් මෙහි අභ්‍යන්තරය පදා ගත යුතු වන්නේ ය.

"අන්තර්ජාලය, සමාජ ජාල හා ජ්‍යෙග දුරකථන පද්ධති හරහා සයිලර් හිංසනට පත්වීම හා හිරිහැර කිරීම නතර කළ හැකිද යන ප්‍රශ්නය නැගිය යුතු වන්නේ ය.

* ප්‍රථම වසර, ශ්‍රී ලංකා නීති විද්‍යාලය

සයිලර් හිංසනය යනු ?

සයිලර් හිරහැර කිරීමකට අරථ දැක්වීම් එකකට වඩා තිබේ, සයිලර් හිරහැර කිරීම අරථ දැක්විය හැක්කේ වෙනත් පුද්ගලයෙකුට රිදුවීමට හෝ අපහසුතාවයට පත් කිරීමට අදහස් කරන පෙළ හෝ පින්තුර යැවීමට හෝ පළ කිරීමට අන්තර්ජාලය, සමාජ ජාල හෝ ජ්‍යෙගම දුරකථන හෝ වෙනත් උපාංග හාවිතා කරන විට හෝ කෙටි පණිවිඩ යැවීම, විදුත් තැපෑල හෝ වෙනත් ඔනැම ඩිජිටල් තාක් ජණයක් හාවිතා කරමින් වෙනත් පුද්ගලයෙකු හෝ පුද්ගලයින් විසින් වෙනත් පුද්ගලයෙකු හෝ පුද්ගල කණ්ඩායමක් නැවත නැවතත් වධනීංසා පැමිණවීම, තර්ජනය කිරීම, හිරහැර කිරීම, ලැංඡ්ජාවට පත්කිරීම හෝ වෙනත් ආකාරයකින් ඉලක්ක කිරීම' වේ. සයිලර් හිරහැර කිරීමේ තත්ත්වයක් ඔබ සමග තවදුරටත් සම්බන්ධ වීමට අවශ්‍ය නැති කෙනෙකුට විදුත් පණිවූඩ්‍යක් යැවීම තරම් සරල විය හැකි නමුත් එයට තර්ජන හෝ ලිංගික හිරහැර කිරීම ඇතුළත් වන විට හෝ සංසදයක් නිරමාණය කර එම පුද්ගලයා සම්විව්‍යට ලක්වන විට එය ඉතා බරපතල විය හැකිය.

සයිලර් හිරහැර කරන්නන් ඔවුන්ගේ ගොදුරු වූවන්ගේ පුද්ගලික දත්ත වෙබ් අඩවි හෝ සංසදවල පළ කිරීම හෝ වෙනත් අයෙකු ලෙස පෙනී සිටිමින් වින්දිතයාගේ නමට වෙනස් තොරතුරු ප්‍රකාශයට පත් කිරීම, තොරතුරු එක් රස් කිරීම සිදු කරයි. හිරහැර කරන්නන්ගේ බහුතරය ඔවුන්ගේ වින්දිතයාට සමාජ ජාල ඕස්සේ තර්ජනාත්මක පණිවිඩ යැවීම, ලැංඡ්ජාවට පත්කිරීම හෝ වින්දිතයාගේ අතිය පොද්ගලික තොරතුරු, ජායාරුප, වීඩියෝ ද්රැගන, මීමිස් වැනි දැ ප්‍රසිද්ධියේ මූදාහැරීම සිදු කරයි.

- ර්මේල්, කෙටි පණිවිඩ සහ සමාජ මාධ්‍ය හරහා අනිෂ්ට හෝ තර්ජනාත්මක පණිවිඩ යැවීම.
- යමෙකුට හිරහැර කිරීම සඳහා ව්‍යාප ගිණුම්, පිටු, සමුහ නිරමාණය කිරීම, අවමානයට හා කළබලයට සමාජ මාධ්‍ය හාවිතා කිරීම.
- සමාජ මාධ්‍යයන්හි අන් අය අපහසුතාවට පත් කිරීම සඳහා කොමොන්ට්‍රු දැමීම, අපහාසාත්මක මෙනැම අනෙකා අපසුවට පත්වන පෝස්ට්‍ර වැශ කිරීම.

- අන් අය ගැන අහිතකර පින්තුර, මීමිස් හෝ පණිවිඩ පළ කිරීම.
- අන්තර්ජාලය හරහා ප්‍රසිද්ධියේ පුද්ගලයෙකුගේ ගිණුමට අනවසරයෙන් ඇතුළවීම, ඔවුන් මෙන් පෙනී සිටීම හෝ ඔවුන්ගේ පැතිකඩ අනවග ක්‍රියාකාරකම් සඳහා හාවිතා කිරීම හෝ විය හැකිය.

සයිලර් හිරහැර කරන්නෙක් යනු කවරෙක් ද?

සයිලර් හිරහැර කරන්නන් සාමාන්‍යයෙන් ඔවුන්ගේම සයිලර් පරිසරයේ නිෂ්පාදනයන් වන අතර ඔවුන් ද සයිලර් හිරහැරයට ලක වී තිබිය හැකි ය. කෙසේ වෙතත්, ඔවුන් වැඩ කිරීමට කම්මැලි හෝ තො හැකි හෝ සම්පූර්ණයෙන්ම ව්‍යාකුල මානසිකත්වයක් ඇති අනෙක් අයගේ ජීවිතය අවුල් සහගත කිරීමට කැමැත්තක් දක්වන පුද්ගලයින් වේ. බොහෝ විට සයිලර් හිරහැර කරන්නන් කණ්ඩායම් වශයෙන් වැඩ කරන්නෙයා වෙති. ඒ ඔවුන්ට කණ්ඩායම් ආකාරයෙන් යම් ගක්තිමත් හා ආරක්ෂාකාරී බවක් දැනෙන තිස්‍යය. නමුත් ඔවුන් සමහර විට ඔවුන්ගේ අතිසි ක්‍රියාවන් හි ප්‍රතිඵල ඒ ආකාරයෙන්ම භුක්ති විදින්නේ නැත. පරයේෂකයන් විසින් හදුනාගෙන ඇති පරිදි, මෙම වධකයන් සමහර විට ඔවුන්ගේ ගොදුරු වූවන්ට වඩා මානසික අව්‍යුත්‍ය විසින් ගොදුරු වී සිටී.

අප කනස්සල්ලට පත්විය යුතු කාරණය නම්, සයිලර් හිරහැර කරන්නන් ඔවුන්ගේ වින්දිතයින්ට තර්ජනාත්මක, අසහා හෝ විහිලසහගත ඊමේල් පණිවූඩ මෙමිස් යවන විට ඔවුන් තාප්තිමත් බවක් ලබා ගැනීමයි, එනම් මානසික රෝගී තත්ත්වයක පසු වීමයි. සයිලර් හිරහැර කරන්නන්ගේ සම්පූර්ණයික හිරහැර කරන්නන්ගේ අංක එකේ අරමුණ වන්නේ බලය තබා ගැනීමයි. සැම තත්ත්වයක්ම පාලනය කිරීමට ඔවුන්ට අවශ්‍යය. ඔවුන්ට අවශ්‍ය වන්නේ අධිපතින් වීමට හා වින්දිතයින් සියලු දෙනා ඔවුන්ට යටත් කර ගැනීමට ය. මෙවන් මානසික රෝගීන් අපට ස්වභාවික පරිසරයේ මූණ ගැසෙන්නේ නැත. එනම් වින්දිතයින් හා මූහුණට මූහුණ හොඳින් කතා කරන මෙම පුද්ගලයින් ඇතැමැවිට එක් වින්දිතයින් අස්වසාලති. එනම් ද්විත්ව රුප රගදැක්මක් පෙන්වීමට මෙම මානසික ව්‍යාකුල හිංසකයින් අති දක්ෂය.

අන්තර්ජාලය හා සමාජ ජාල මස්සේ මෙකි වින්දිතයින්ට හිරිහැර කරන්නේ එකී වින්දිතයින් සමග ඇතැම්විට තිබෙන ප්‍රශ්නයක්, හෝ ආරවුලක් නිරවුල් කරගැනීමට ඔවුන් හා මූහුණට මූහුණ සාකච්ඡා කිරීමට තරම් ගක්තිමත් පොරුෂයක් නොමැති නිසා සහ ඔවුන්ට වින්දිතයින් කෙරේ ඇති තදබල ර්‍රේෂ්‍යාව හෝ තරහවක් හෝ එම දෙකම නිසා ය.

සයිලර හිංසනයේ මූහුණුවර

සයිලර හිරිහැර කිරීම අන්තර්ජාලයේ හා සමාජ මාධ්‍යයන්හි කැත “මූහුණ” පෙන්වයි. සයිලර හිරිහැරයට ගොදුරු වුවන් මානසික අවපිච්චයට පත්විය හැකි අතර ඇතැම් අවස්ථාවන්හිදී සියදිවි නිසා ගනී. එබැවින් අන්තර්ජාලයෙහි, සමාජ ජාලයන්හි හා නව තාක්ෂණික උපාංග පිළිබඳ බොහෝ මිනිසුන්ට හරිහැරී අවබෝධයක් නොමැති බවත්, සමස්තයක් ලෙස අන්තර්ජාලය ගැන ඔවුන් නොදැන සිටියහොත් ඔවුන්ට “රිද්වීමට” හෝ සයිලර හිංසනයට ලක්වීමට හැකියාව ඇති බවත් අපට තේරුම ගත හැකිය. සයිලර හිරිහැර කිරීම පුද්ගලයින්ට හෝ පුද්ගල කණ්ඩායම්වලට අහිතකර බලපෑම් කිහිපයක් ඇති කරයි. සාමාන්‍යයෙන්, එය ආරම්භ වන්නේ වින්දිතයාගේ පැන්තෙන් ව්‍යාකුල හැඟීමින්, එනම් රිද්වීමක් දැනෙන නිසා පුද්ගලයෙකු හෝ පිරිසක් ඔවුන් ඉලක්ක කර අපහාස කර ඇත්තේ භූදෙක් සයිලර හිංසකයින්ට ඇති මානසික රෝගී තත්ත්වයක් නිසා හැර වෙනත් හේතුවක් නිසා නොවේ යැයි බොහෝ වින්දිතයින් අවබෝධ කර නොගනී. ඔවුන් ඉලක්කය වන්නේ මන්දියි බොහෝ වින්දිතයින් අසනු ඇති, තමුන් සමහර විට සයිලර හිරිහැර කරන්නන් පවා එයට හේතුව නොදැන සිටිති. හිංසනයට ගොදුරුවුවන් ක්‍රමයෙන් බිඟ හෝ තනිකම, තම නිවස හැර යාමට සිත්වීම, පුද්ගල බිඟ හෝ සමාජ බිඟ හෝ පාසැල් යාමට ඇති බිඟ වැනි හැඟීම් ඇති වේ. වින්දිතයාට දිගින් දිගටම හිරිහැර කරන්නේ නම්, ඔහුගේ අධ්‍යාපනය පහත වැටීම, රැකියා කිරීමේ අපහසුතා, පුද්ගල සම්බන්ධතා පහත වැටීම හා මානසික ආතතියේ රෝග ලක්ෂණ පෙන්වීමට ඉඩ ඇති අතර එමගින් ඔහුට අනෙක් පුද්ගලයන් සමග සන්නිවේදනය කිරීම හෝ නව සම්බන්ධතා ඇති කර ගැනීම අපහසු වනු ඇත.

මානසික අවපිච්චය ද ඇතැම් විට සයිලර හිරිහැර කිරීමේ එක් රෝග ලක්ෂණයක් විය හැකි අතර, එවා රෝග ලක්ෂණ ලෙස හඳුන්වන්නේ සයිලර හිරිහැර කිරීම දැන් අපේ සමාජයට “රෝගයක්” ලෙස පෙනෙන බැවිනි. උපකාරය සඳහා යොමුවිය යුත්තේ කොතැනට දැයි වින්දිතයා මෙන්ම හිංසා කරන්නන් පවා නොදැන්නා හෙයින් ඔවුන්ට අසරණාවයේ හැඟීමක් ඇති වේ. තිරන්තර හිරිහැර කිරීම වල හා තිරන්තර හිරිහැරයන්ට ලක්වීමේ බරපතල අවස්ථාවන්හිදී ඇතැම්විට වින්දිතයා හා හිංසකයා යන දෙපක්ෂයේම පිරස් සියදිවි නසා ගැනීමට පවා කටයුතු කරයි.

සයිලර හිරිහැර සම්බන්ධ සමාජ දැනුම්වත්හාවය

සයිලර හිරිහැර කිරීමේ තරුණය කෙතරම් සැබැදු? එය එතරම් විශාල ප්‍රශ්නයක්ද? මතයන් වෙනස් වන බව පෙනේ. එයට හේතුවන්නේ අතිබහුතරයක් සිතුනුයේ සයිලර හිරිහැර කිරීම යනු තවත් එක සාමාන්‍යය හිරිහැර කිරීමක් යැයි ඒ හා සමග සංසන්ධනය කිරීම නිසාය. අප එවත් වන සමාජයේ, කාංසාව සහ මානසික අවපිච්ච ගැටුපාඨියකට නොයෙක් ආකාරයේ හිංසනයන් වගකිව යුතුය. අනෙක් අතට, බොහෝ පුද්ගලයන් මෙම පුකාශයට එකත නොවෙනි, සයිලර හිරිහැර කිරීම එතරම් ගැටුවෙන් නොවන බවට ඔවුන් අදහස් කරන්නේ අන්තර්ජාලයේ කිසිවක් “සැබැඳු” නොවන නිසා සහ කියන හෝ කරන ලද දේවල් එතරම් සැලකිල්ලට නොගත යුතු යැයි කියමින් ය.

අප යොවනයන්, වැඩිහිටියන්ට වඩා තාක් මණයේ විකාශනය වඩා හොඳින් වටහාගෙන සිටිති. ඒ නිසා මාධ්‍ය විසින් අපව රට්ටීමට ලක් කලද ඔවුන්ගේ එම සැම කාර්යභාරයකම හා සැම තත්ත්වයක්ම වඩාත් තාරකික ලෙස වටහා ගැනීමට අපට හැකිමුත් තවමත් යොවනයින් අතර වැඩිවන සියදිවි නසාගැනීම් සංඛ්‍යාව පැහැදිලි කිරීමට අපට නොහැක. හිරිහැරයට ලක්වන බව පවසන ඕනෑම කෙනෙකුට සරල පරිගණක ගැටුපාඨි ඇති වුවත් බිංචිල් ලෝකයේ තමන්ව ආරක්ෂා කර ගන්නේ කෙසේද යන්න ගැන ඇතැම්විට ඔවුන් කිසිවක් නොදැනී. අන්තර්ජාලය එහි සැබැඳු “මූහුණ” නොපෙන්වන බව සත්‍යයක් වන අතර සයිලර හිරිහැර කිරීම අපව කනස්සල්ලට පත් කළ යුතු එකම අන්තර්ජාල ගැටුවෙන් නොවේ.

අන්තර්ජාලය අදුරු වලවල් වලින් පිරි ඇති අතර ඔහුම අයෙකු ව්‍යාකුලත්වයට පත් කළ හැකි මුසාවන්ගෙන් පිරි ඇත. එනම් සයිබර් හිරිහැර කිරීම අපගේ සමාජය දිනෙන් දින කම්පනයට පත් කරන ඉතා විශාල ප්‍රශ්නයක් වන තමුත් සයිබර් හිරිහැර කිරීම අප ගැටලු වක් ලෙස සලකා බැලිය යුතු අවසාන දෙය නොවේ. එම නිසා අන්තර්ජාල අන්තර්යන්ගෙන් ආරක්ෂා විය හැකි ආකාරය සහ අන්තර්ජාලය හරහා සමව්වල් කිරීම හෝ වංචා නොකිරීම පිළිබඳව සැම අයෙකුවම දැනුම් වත් කළ යුතුය. වරදෙහි යෙදෙන්නන්ට දැඩුවම් කිරීමට මෙන්ම ඔවුන් වරදයෙහි යොමු නොවීමට අවශ්‍ය තෙතිනික රාමු ද දැඩිව ගොඩනැගිය යුතුය.

සයිබර් හිංසනයේ ගොඩරු

2008 දී දරුණු සයිබර් හිරිහැර කිරීමකට උදාහරණයක් ලෙස, මිසුරි හි 13 හැවිරිදි මෙගන් මේයර සිය කාමරයේ සියදිවි නසාගත් විට සයිබර් හිරිහැර කිරීම යනු කමක්දයි වටහා ගැනීම එක්සත් ජනපදයේ සමත් වුවත් එය බොහෝ දෙනා දැඩි කම්පනයට පත් කළ යෙයක් විය. නිරදය හා කුරිරු සයිබර් හිරිහැර කිරීම හේතුවෙන් නිරන්තරයෙන් ඇතිවන ආතතියේ ප්‍රතිඵලයක් ලෙස මෙගන්ගේ මරණය සිදුවි ඇති බව විමර්ශකයින් සෞයා ගත්හ. මෙගන් ජ්වත් වූ ප්‍රදේශයේ අසල්වැසියන් වූ මෙගන් සමග රැක්වූ වූ මෙගන්ගේ මිතුරියක් සහ ඇගේ පියා වූ ලොරී ඩිජිටල් ප්‍රාග්ධනයෙහි සහ ඇගේ සේවය කළ 18 හැවිරිදි තිලධාරියෙක් සමඟ එක්ව, මෙගන් ජ්වත් වූ ප්‍රදේශයට අදු තින් පැමිණි පිරිම් ලමයෙක් ලෙස වෙස්වලාගෙන් මයිස්පේෂ් (සමාජ ජාල වෙබ් අඩවිය) හරහා ඇය සමග සම්බන්ධතාවයක් ගොඩනගා ගත්තේය. මෙගන් කමා පිරිම් ලමයෙක් සමග සම්බන්ධතාවයක් ඇති බව විශ්වාස කිරීම සඳහා මෙම ප්‍රාධ්‍යවක් තිරමාණය කර තිබේ. ප්‍රාධ්‍යව හෙළිදරව් වූ විට, සමව්වලයට ලක්වීමේ නින්දාවට මුහුණ දීමට මෙගන්ට ප්‍රමාණවත් මානාකික ගක්තියක් නොතිබූ අතර ඇය සිය දිවි නසා ගැනීමට තීරණය කළාය. තමුත් එවකට මිසුරි හි සයිබර් හිරිහැරයට එරෙහිව කිසිදු තීතියක් නොතිබූ බැවින් එම කණ්ඩායමේ කිසිදු සාමාජිකයෙකුට එරෙහිව තැංකි පැවරීමට ඔවුන්ට නොහැකි විය. එහෙත් මෙම සිද්ධිය සැලකිල්ලට ගත් මිසුරි තීති සම්පාදකයින් දැන් සයිබර් හිංසනයට එරෙහිව නිති පනවා ඇත.

තවත් සියදිවි නසාගැනීමක් මැසවුසේටිස් හිදී සිදුවිය. ගෝබ් පින්ස් 15 හැවිරිදි අයර්ලන්ත සංකුමණිකයෙකි. ඇය පාසලේදී, වෙබ් අඩවි වලදී සහ ඇගේ ජ්‍යෙග ප්‍රාග්ධනයෙන් හිරිහැරයට ලක්වීය. ඇගේ මිතුරන් කිහිප දෙනෙකු අනිම් වේ යැයි බියෙන් ඇය සිය ගෙස්බුක් සැකසුම් හෝ ජ්‍යෙග ප්‍රාග්ධන අංකය වෙනස් කිරීම ප්‍රතික්ෂේප කළාය. අවාසනාවකට මෙන්, ඇය "පරාර්ථයෙක්" යන අදහස ඇයට මරා දැමීමට හේතු විය.

සංඛ්‍යා ලේඛන හා දත්ත

2008 දී කළ සයිබර් හිරිහැර කිරීමේ පර්යේෂණ සම්ක්ෂණයක දී එක්සත් ජනපද හා යුරෝපා රටවල පාසල් සිසුන් 2000 ක් පෙන්වුම් කරන්නේ ඔවුන්ගෙන් 43% ක් පමණ සයිබර් හිරිහැර කිරීම ලෙස අර්ථ දැක්විය හැකි තත්ත්වයන්ට ගොඩරු වී ඇති බවයි. ක්ෂණික පණ්ඩිචියක් ලැබීම ඔවුන්ගෙන් 15.8% කළබලයට පත් කළේය. "මයි ස්පේෂ්" සමාජ ජාලය හි යමක් පල කිරීම නිසා ඔවුන්ගෙන් 14.1%ක් කළබලයට පත් විය. රාත්ත් වඩා හයානක දෙය නම්, 2009 සැප්තැම්බර් මාසයේ දී තරුණයන් 1,247 දෙනෙකුගේ සම්ක්ෂණයකින් වයස අවුරුදු 14-24 අතර, වයස කාණ්ඩයේ තරුණ තරුණයන්ගෙන් 50% ක් බිජ්වල් අපයෝජන හැසිරීම් වලට මුහුණ දී ඇති අතර, වයස අවුරුදු 18-24 අතර වැඩිහිටි යොවනයන්ගෙන් 52%ක් - 47%ක් දක්වා කාන්තාවන් සයිබර් හිංසනයට ඉලක්ක කර ගැනීමට වැඩි ඉඩක් ඇත. තව දුරටත් යොවනයන්ගෙන් 45% ක් වාර්තා කරන්නේ සමාජ ජාල වෙබ් අඩවි වල මිනිසුන් එකිනෙකාට පහත් ලෙස සලකන බවත් ය.

සාම්ප්‍රදායික හිරිහැර සමග ඇති සම්බන්ධතාව

"මුගුරු සහ ගල් මගින් ඔබේ ඇටකටු කැඩී යා හැකි තමුන් ඔබේ නමට කිසි විටෙකන් හානියක් නොකරනු ඇත" යනුවෙන් වාක්‍ය බණ්ඩියක් ඇත. සාම්ප්‍රදායික හිරිහැර කිරීමවලට වඩා සයිබර් හිරිහැර කිරීම අඩු හොතික වුවද, එය ප්‍රදේශයන්ට ඉතා විනාශකාරී හා දිගු කාලීන බලපෑම් ඇති කරයි. පරිගණකයෙකට ප්‍රවේශ වීම සහ යමෙකුගේ මානාකික තත්ත්වය විනාශ කිරීම ඉතා

පහසුය. මිනිසුන් නොසලකා හරින දෙයක් නම්, අන්තර්ජාලය හාවිත කරන සැම කෙනෙකුම හිරහැර කරන්නෙකු විය හැකි අතර, සාම්පූද්‍යීක හිරහැරවලට ගොදුරු වූ කුඩා, ගාරිරිකව දුරුවෙකු ද හිරහැර කරන්නෙකු විය හැකිය.

කෙසේ වෙතත් වෙනස වන්නේ යමෙකට දැන් විශාල තිරිසනෙකුට වඩා විශාල හානියක් සිදුකළ හැකි තත්ත්වයක සයිබර් හිංසනය පැවතීම ය. ම්‍රිතානුයේ හිරහැරයට ගොදුරු වූ ” එම්ලි මුජ් ” පැවසුවේ, “අන්තර්ජාලය තුපුරු නිහඹ සතුරෙකි: ගැටපු ව විසඳීමට කොතැනින් පටන් ගත යුතු දැයි ඔබ නොදති. මුහුණක් නොමැති පරිගණකයක් ගාරිරික හිරහැර කරන්නෙකුට වඩා තර්ජනක් වේ. එසේ නොවුවහොත් මෙම බිජිසුණු පණිවිඛ කියවන ප්‍රේක්ෂකයින් අති විශාල විය හැකිය”

පාසුලේදී හිරහැරයට ලක්වුවහොත් ගෙදර ගොස් එය අවසන් කළ හැකිය, නැතහොත් පාසලේදීම අදාළ බලධාරයින් මාර්ගයෙන් විසඳාගත හැකිය. නමුත් ඇතැම් රටවල සයිබර් හිරහැරයට ලක්වුවහොත් පිළිසරණක් සොයා යාමට තැනක් නැති බව ද සත්‍යයකි.

සයිබර් හිංසනයට එරෙහි නීති

සැගවුණු අනන්තතා සහිත ව්‍යාජ පැතිකඩ හෝ පැතිකඩ පැවතීමත් සමග වරදකාරී පාර්ශවය සොයා ගැනීම දුෂ්කර බව දැන් කටුරුන් දන්නා කරුණකි. සයිබර් හිරහැර කිරීම සම්බන්ධයෙන් නීති සම්පාදකයින් නව නීති සම්මත කිරීමට උත්සාහ කරන්නේ දැනුට එය සමග සාපුවම කටයුතු කළ හැකි නිශ්චිත නීති නොමැති බව පෙනේ. ඔවුන්ට අවශ්‍ය වන්නේ බිංදු ගැනීවීම, හිරහැර කිරීම හෝ දැඩි මානසික පිඩාවන්ට හේතු වන වෙනත් ඕනෑම ක්‍රියාවක් නීති විරෝධ යැයි හඳුන්වන නීති සමග සයිබර් හිරහැර කිරීම ආමන්තුණය කිරීමට ය. එසේ වුවද, සැගවුණු අනන්තතාවයට හෝ ව්‍යාජ පැතිකඩ වලට එරෙහි නීති පිළිබඳ බොහෝ තොරතුරු සැගව පවතින බව පෙනේ. නමුත් වෙක්සාස් සහ පෝර්ජ්යාව වැනි ප්‍රාන්තවලින් පමණක් අන්තර්ජාලයේ වෙනත් අයෙකු ලෙස පෙනී සිටීමට එරෙහිව සාපුවම කටයුතු කරන නීති සම්මත කර ඇත. වැදගත්ම දෙය නම් සමාජ ජාල වෙබ් අඩවි වල ව්‍යාජ පැතිකඩ පළ කරන පුද්ගලයින්ට ඔවුන්ගේ සමාජ

විරෝධ හැසිරීම සම්බන්ධයෙන් වෝදනා ලැබිය හැකි වෙමයි.

නිවියෝර්ක්, මිසුරි, රෝඩ් අයිලන්ඩ් සහ මෙරිලන්ඩ් ඇතුළු එක්සත් ජනපදයේ ප්‍රාන්ත ගණනාවක, සයිබර් හිරහැර කිරීම සහ බිංගල් හිරහැර කිරීමට ද දැඩිවම් කිරීමේ නීති හඳුන්වා දී ඇත. 2007 දී අවම වශයෙන් ප්‍රාන්ත හතක්වත් අන්තර්ජාලය හරහා හිරහැර කිරීමට එරෙහිව නීති සම්මත කළේය. නිදුසුනක් වශයෙන්, මිසුරි හිස්ප්‍රිංගිල්ච් හි බාර්ඩන් ප්‍රේරි, මාර්ගගත හිරහැර කිරීම (online harassment) වැරදි ක්‍රියාවක් ලෙස නම් කරමින් නගර නීතියක් සම්මත කළේය. මිසුරි හිතවත් නගරයක් වන ගාන්ත වාල්ස් නගරය ද එවැනිම නීතියක් සම්මත කර තිබේ. තවද, මිසුරි හිපෝරසන් නගරයේ 2008 දී සයිබර් හිරහැර කිරීම නීති විරෝධ කරන පනත් කෙටුම්පතකට රාජ්‍ය නීති සම්පාදකයින් විසින් අවසාන අනුමැතිය ලබා දෙන ලදී.

2008 අගෝස්තු මාසයේදී කැලිලෝනියා ප්‍රාන්ත ව්‍යවස්ථාදායකය සයිබර් හිරහැර කිරීම සම්බන්ධයෙන් සාපුවම කටයුතු කළ පළමු නීතිය සම්මත කළේය. මෙම පනත “එකලස් කිරීමේ පනත් කෙටුම්පත 86 / 2008” ලෙස නම් කරන ලද අතර එහි අදහස වූයේ එය විද්‍යුත් සන්නිවේදන උපකරණයක් හෝ පද්ධතියක් හරහා සිදුකරන හිරහැර කිරීමට අදාළ ප්‍රතිපාදන එකතු කරන අතර පාසුල් / නීති බලාත්මක කිරීමේ හවුල්කාරින්ට වැඩිසටහනට විද්‍යුත් සන්නිවේදනය පිළිබඳ අර්ථ දැක්වීමක් එකතු කිරීමක් යන්නයි. අවසානයේදී, මෙම නීතිය 2009 ජනවාරි 1 වන දින සිට ක්‍රියාත්මක විය. බොහෝ පාසල්වලට දැන් සයිබර් හිරහැරවලට මුහුණ දීමට හැකි වී ඇත්තේ පහත සඳහන් වෙනස්වීම නීතා වූවද, සයිබර් හිරහැර එරෙහි නීතිවල පහත සඳහන් තොරතුරු ඉදිරිපත් කළ යුතුය. එනම් 2007 දී ආකැන්සාස් හි දී, පුද්ගලයෙකුගේ සයිබර් හිරහැර කිරීමක් පාසලේදී හෝ පාසුල් දේපල යොදාගෙන සිදු නොකළත් එම සයිබර් හිරහැර කිරීම වලට එරෙහිව කටයුතු කිරීමට පාසල් නිලධාරීන්ට අවසර දෙන නීතියක් ඔවුන් විසින් සම්මත කරන ලදී. නීතිය පැනවීමෙන් පසු එහි ප්‍රතිඵලය වූයේ බාහිර හිරහැර කරන්නන්ට ද දැඩිවම් කිරීමට පාසල් පරිපාලකයින් වැඩි අවකාශයක් ලබා ගැනීමයි.

අයෝවා ප්‍රාන්තයෙහි, පාසුල් දී හෝ පාසල් දේපල යොදාගතිමින් හෝ සාමාන්‍යයෙන් පාසුල්

උත්සවයකදී හෝ පාසල විසින් අනුග්‍රහය දක්වන ක්‍රියාකාරකම් වලදී සිදුවන හිරිහැර කිරීම ආවරණය වන පරිදි සයිබර විරෝධී හිරිහැර කිරීමේ ප්‍රතිපත්ති අනුගමනය කිරීමට පාසල්වලට බල කරන නීති කිහිපයක් සම්මත වී තිබේ. නිවිෂරසි හි සැමවිටම සයිබර හිරිහැරයට එරෙහිව දැඩි නීති සම්පාදනය කර ඇත, නමුත් 2007 වන තෙක් සයිබර හිරිහැර කිරීම ඇතුළු කිසිදු නීතියක් බලාත්මක නොවේය. සෙසු සිසුන්ට එරෙහිව හිරිහැර කිරීම සම්බන්ධ පුද්ගලයින්ට ද දැඩිවම් කිරීමට නීතිය මගින් පාසල් කාර්ය මණ්ඩලයට බලය ලබා දෙයි. 2006 දී ඉඩාහෝ හිදී එහි නීති සම්පාදකයින් විසින් පාසල් කාර්ය මණ්ඩලයට, විශේෂයෙන් නිලධාරීන්ට, සිසුන්ට හිරිහැර කිරීම සඳ හා පරිගණකයක් හෝ වෙනත් ඉලෙක්ට්‍රොනික උපකරණයක් හාවතා කරන සිසුන්ගේ පාසල් කහනම් කිරීමට නීතියක් සම්මත කරන ලදී. ඔවුන් ප්‍රාන්තයේ දී, ඔවුන් සයිබර හිරිහැර කිරීම පිළිබඳව විස්තරාත්මකව බැලීමට තිරණය කළ අතර එහි අර්ථ දැක්වීම පුළුල් කළහ. මැතකදී, රෝඩි අයිලන්ඩ් හි ආණ්ඩුකාරවරයා විසින් මධ්‍යම රුපයේ නීතිවලට පවත්තිව, නීතිවිරෝධී බවට වෝද්‍යා කරමින් සයිබර හිරිහැර කරන්නන් උසාවියට ගෙන යා හැකි පනතක් සම්මත කිරීමට උත්සාහ කළේය. වර්මොන්ට හි දැනටමත් හිරිහැර කිරීම සහ සයිබර හිරිහැර කිරීම වලට එරෙහිව ඉතා දැඩි නීති ක්‍රියාත්මකව නීති සම්පාදකයින් මැතකදී අන්තර්ජාලයේ වෙනත් පුද්ගලයින්ට හිංසා කරන පුද්ගලයින්ට බොලර් 500 ක දඩ මුදලක් නියම කළහ. වර්මොන්ට මෙම ආකාරයේ හිරිහැර කිරීම්වලට එරෙහිව දැඩි නීති සම්පාදනය කරන ලද එක්සත් ජනපද ප්‍රාන්තයන්ගෙන් එකක් ලෙස සැලකේ.

සයිබර හිංසනයට එරෙහිව ශ්‍රී ලංකාවේ නීති ප්‍රතිපාදනය

දැන්ඩ නීති සංග්‍රහය ශ්‍රී ලංකාව තුළ හෝ ඉන් පිටත සිදුකරන සාපරායි වැරදිවලට දැඩිවම් කරන අතර, ප්‍රමා අපයෝග්‍යන වැළැක්වීම සහ එවැනි අපයෝග්‍යන්ට ගොදුරු වන දරුවන්ගේ ආරක්ෂාව සහ ප්‍රතිකාර කිරීම පිළිබඳ ජාතික ප්‍රතිපත්තියක් ප්‍රමා ආරක්ෂණ අධිකාරය විසින් සකස් කරනු ලැබේ; සියලු ආකාරයේ ප්‍රමා අපයෝග්‍යනවලට එරෙහිව කටයුතු සම්බන්ධිකරණය හා අධික්ෂණය සඳහා; ඒ හා සම්බන්ධ හෝ ඒ හා සම්බන්ධ සිදුවීම් සඳහා. එපමණක් නොව, 2005 අංක 34 දරණ ගෘහස්ථ හිංසනය පිළිබඳ පනත,

ගෘහස්ථ හිංසනය වැළැක්වීම සඳහා සහ ඒ හා සම්බන්ධ සිදුවීම් සඳහා තෙනතික ප්‍රතිපාදන සපයයයි. ඒ හැරුණු විට, 1998 අංක 20 දරණ අධ්‍යාපන ආයතනවල නවක වදය සහ වෙනත් ආකාරයේ හිංසනය කහනම් කිරීමේ පනත මගින් නවක වදය සහ වෙනත් ආකාරයේ ප්‍රව්‍යෙන් ක්‍රියා සහ අධ්‍යාපන ආයතනවලින් කුරිරු, අමානුෂීක හා පහත් ලෙස සැලකීම ඉවත් කරනු ලැබේ. ඉහත සියලු තෙනතික ප්‍රතිපාදනයන් ශ්‍රී ලංකාවේ පුරවැසියන් එකී ගාරීරික හිරිහැරවලින් ආරක්ෂා කරයි.

ශ්‍රී ලංකාවේ දැන්ඩ නීති සංග්‍රහයේ 345 වන වගන්තිය ලිංගික හිරිහැර හා 372 වන වගන්තිය කප්පම් ගැනීම සහ 483 වගන්තිය අපරාධ බිඟ ගැන්වීම වැනි වැරදි වලට එරෙහිව කටයුතු කරයි. ශ්‍රී ලංකාවේ දැන්ඩ නීති සංග්‍රහය එම අපරාධ කහනම් කළද, සයිබර අවකාශය හරහා “හිරිහැර කිරීම” පිළිබඳව සවිස්තරාත්මකව ආමන්තුණය කරන ප්‍රමාණවත් තෙනතික ප්‍රතිපාදනයන් තවම නොමැතේ.

එපමණක් නොව, අසහා ප්‍රකාශනවලට එරෙහිව 1927 අංක 4 දරණ අසහා ප්‍රකාශන ආයා පනත පැවතිය ද එය සයිබර අවකාශයේ අසහා ප්‍රකාශනයන් එරෙහිව ක්‍රියාත්මකවන බවක් නොපෙනේ. එට අමතරව, සංස්කරණය කරන ලද දැනුම දුන් පින්තුර අනුමැතියකින් තොරව බෙදා ගැනීම එකී ආයා පනතේ 2 වන වගන්තිය යටතේ ද දැඩිවම් ලැබිය හැකි වරදකි එහෙත් එය සයිබර අවකාශයේ බෙදා හැරීමක් ද දැඩිවම් ලැබිය හැකි වරදක් ලෙස පැහැදිලිව සඳහන් නොවේ. පරිගණක අපරාධ හඳුනා ගැනීම සඳහා 2007 අංක 24 දරණ පරිගණක අපරාධ පනත මගින් පරිගණක අපරාධකරුවන්ට එරෙහිව දැඩිවම් නියම කරනවාද? එය සයිබර හිරිහැරවලින් වින්දිතයින් ප්‍රමාණවත් ලෙස ආරක්ෂා කරයිද? එහි 6 (1) වන කොටස විශ්ලේෂණය කළ විට පරිගණක අපරාධ පනතතේ සඳහන් වන්නේ ” යම් පුද්ගලයෙක් කිසියම් කාර්යයක් කිරීමට පරිගණකයක් හිතාමතාම හාවතා කර, දැනුවත්ව හෝ විශ්වාස කිරීමට හේතුවක් තිබියදී, එම ක්‍රියාව නිසා මහජන සාමයට අනතුරක් හෝ ආසන්න අනතුරක් සිදුවනු ඇතැයි විශ්වාස කිරීම” වරදක් ලෙස දක්වයි. ශ්‍රී ලංකා ආණ්ඩුකාම ව්‍යවස්ථාවේ පවා “මහජන සාමය” සඳහා නිසි අර්ථ දැක්වීම්. “මහජන සාමය” යන යෙදුමට නීසි අර්ථ දැක්වීමක් තිබේ නම්, පරිගණක අපරාධ

පනත මගින් සයිලර් හිංසනයට එරෙහිව ද වින්දිතයින් ආරක්ෂා කළ හැකිය.

ඒ හැරුණු විට, පරිගණක අපරාධ පනතේ 7 වන වගන්තිය යමෙකු පරිගණකයකින් හෝ ගබඩා මාධ්‍යයකින් අනවසර දත්ත ලබා ගැනීම සහ "දත්ත විනාශ කිරීම හෝ විකාති කිරීම" වරදක් කරයි. නමුත් සයිලර් හිංසනයට එරෙහිව පියවර ගැනීම සඳහා මෙම කොටස නීති විගරදයින් සහ අධිකරණය විසින් නිසි ලෙස විශ්ලේෂණය නොකෙරේ.

එනම්, දෑන්ති නීති සංග්‍රහය, ගෘහස්ථ හිංසනය පිළිබඳ පනත, ලමා ආරක්ෂණ අධිකාරියේ පනත යනාදිය නෙතික ප්‍රතිපාදනයන් මගින් ශ්‍රී ලංකාවේ පුරවැසියන් හිරිහැරවලින් ආරක්ෂා කරයි. සමාජයට අන්තර්ජාලය හඳුන්වාදීමට පෙර සයිලර් හිංසනය ශ්‍රී ලංකාවේ නීතිය මගින් පරිගණක අපරාධ පනත ද ඇතුළුව නිසියාකාරයෙන් හඳුන්වාදී නොමැත.

සයිලර් හිරිහැර කිරීම සම්බන්ධයෙන් කටයුතු කිරීමට විධීමත් නීති ශ්‍රී ලංකාව තුළ නොමැති වුවත්, 2006 ගෙවීම් උපාංග පනත සහ පරිගණක අපරාධ පනත 2007 යටතේ සිදුවන ඕනෑම ප්‍රභාරයකට මුහුණ දීම සඳහා අපරාධ විමර්ශන දෙපාර්තමේන්තුව (CID) තුළ පොලිසියට සයිලර් අපරාධ ඒකකයක් ඇත. (සයිලර් අපරාධ ඒකකය - 0112326979)

එමෙන්ම ශ්‍රී ලංකා පරිගණක හඳුසි අවස්ථා සූදුනම කළේචායමක් (කුසාම්) ඇත. (කුසාම්) සයිලර් ප්‍රභාරවලට ප්‍රතිචාර දැක්වීමට සහ යථා තත්ත්වයට පත් කිරීමට ද මුවුණ සහාය වෙති. මුවුණට ඔබගේ පරිගණකයට හෝ පද්ධතියට යම් සයිලර් ප්‍රභාරයක්, තර්ජනයක් එල්ල වී ඇත්තම හෝ ඔබට උපකාර කළ හැකිය.

Report@cert.gov.lk විද්‍යුත් තැපෑලන් එවීමෙන් හෝ කුසාම් - 0112691692 ඇමතිමෙන් මුවුණ අවශ්‍ය උපකාරයන් කරනු ඇත. තවද අවශ්‍ය නොරතුරු වෙබ් අඩවියෙන් www.cert.gov.lk තුළට පිවිසීමෙන් ලබා ගත හැකිය. තවද වසය 18 අඩු පුද්ගලයෙක් නම් ජාතික ලමා ආරක්ෂණ අධිකාරියට - 1929 ඇමතිමෙන් අවශ්‍ය සයිලර් හිංසනයන් පිළිබඳ පැමිණිලි ඉදිරිපත් කළ හැකි ය.

සයිලර් හිරිහැර කිරීමකට මුහුණ දෙන්නේ කෙසේද?

මබ හිරිහැර කරන පුද්ගලයාට හෝ පුද්ගලයන්ට කිසි විටෙකත් ප්‍රතිචාර නොදක්වන්න. ඔබ පිළිබඳ දෙන විට, එය දිගටම කරගෙන යාමට මුවුණ දිරිමත් කරයි. සමාජ මාධ්‍ය, රැමීල්, පෙළ සහ / හෝ දුරකථන ඇමතුම් සඳහා බිලොක් විශේෂාංග භාවිතා කරන්න. පණිවිඛ සහ රැමීල් සිට සමාජ මාධ්‍ය අන්තර්ජාලය දක්වා දුරකථන වාර්තා දක්වා ඒ සියල්ල සුරකිත්ත්න. සැම දෙයකම තිරපිටපත් හෝ රැගෙන සියලු සන්නිවේදනයන් පිළිබඳ වාර්තාවක් තබා ගන්න. දේවල් ප්‍රධාන තැනක් ගනී නම්, මේ සියල්ල ඔබේ පැමිණිල්ලට හා නැඩුවට සහාය වන සාක්ෂි වෙනු ඇත. වැඩිහිටි කුවුරුන් හෝ මේ සම්බන්ධව දැනුම්වත් කරන්න. ඔහුම ආකාරයක හිරිහැර කිරීම බරපතල ගැටළුවක් වන අතර එය බැහැර නොකළ යුතුය. එබැවින්, ඔබ අන්තර්ජාලය හරහා හිරිහැර කරන බව ඔබ සිතන්නේ නම්, දෙම්වියියන්ට, පැවුල් සාමාජිකයෙකුට, රජයේ සහය වන සේවා ආයතනවලට කියන්න, නීතිඥවරයෙකුගේ උපදෙස් ලබාගන්න. බොහෝ විට, තිවුරදී සහාය ඇතිව, අදාළ අධිකාරියට පැමිණිල්ල ගෙන යන්නේ ද නැතහෙත් එය ගොස්බුක්, ඉන්ස්ට්‍රුඩ්ම හෝ විවිටර හෝ අදාළ වෙබ් අඩවි වලට වෙත වාර්තා කළ විට ඔබට යම් සහනයක් උපකාරයක් ලැබෙන්නේ නම් පමණක් හෝ එසේ නැත්තම් පැමිණිල්ල කවදුරටත් ඉදිරියට ගෙන යාමට ඔබ කටයුතු කළ යුතුය.

හිංසනය නොහැඳිනීම

නීති සහ ප්‍රතිපත්ති වෙනස් කිරීමට සහ ඒවා ක්‍රියාත්මක කිරීමට උත්සාහ කළද, කනස්සල්ලට කරුණ නම්, අන්තර්ජාලය හෝ ජ්‍යෙෂ්ඨ දුරකථන හරහා සන්නිවේදනය නිර්නාමික බවක් ලබා දෙන අතර කිසිදු නීතියකට සයිලර් හිරිහැර කිරීම නතර කළ නොහැකි විමයි. බොහෝ ව්‍යාප පැතිකඩියන් නිර්මාණය කර ඇත්තේ විහිම කිරීම සඳහා හෝ "ගොස්බුක්" සහ "මයි ස්පේෂ්" වැනි සමාජ වෙබ් අඩවිවල සිටින පුද්ගලයින්ට හිරිහැර කිරීම සඳහාය. ඇත්ත වශයෙන්ම, මෙම අවශ්‍ය අපට වෝදනා කිරීමට හෝ දොස් පැවරිය හැකි කිසිවෙකු සිටිදී? සයිලර් හිංසනයක් කළේයා හඳුනා ගැනීමට ක්‍රමයක් තිබේද? අපේ සමාජය ප්‍රව්‍යාච්නාවය ප්‍රවර්ධනය කරන අතර එය මෙම ගැටළුව මගහරවා ගැනීමට උපකාරී නොවේ. වීචියෝ ක්‍රිචා, රුපවාහිනිය සහ සියලු ම ජනමාධ්‍ය බොහෝ දුරට ප්‍රව්‍යාච්නාරී සිදුවීම පෙන්නුම් කරයි. මේ නිසා ප්‍රමාදයින් සහ යොවනයන් ප්‍රව්‍යාච්නාවට පුරු එම

ඇති අතර ඔවුන් එය සාමාන්‍ය දෙයක් ලෙස සිතති. සමස්තයක් වශයෙන් ඇතැම් දෙම්විපියන්ට සයිබර් හිරහැර කිරීමේ අදහස නුරු නැති අතර ඔවුන්ගේ දරුවන් සයිබර් හිරහැරවලින් ආරක්ෂා කර ගැනීමට ඔවුන්ට තොහැකි ය. තාක්ෂණය ඉතා වෙශයෙන් සංවර්ධනය වෙමින් පවතින බැවින් එය ඔවුන්ගේ වරදක් තොවේ. යොවනයන් සාමාන්‍යයෙන් ඔවුන්ගේ ගැටුපු ගැන දෙමාපියන් සමග කතා තොකරන අතර එමගින් දෙම්විපියන්ට තම දරුවන්ට උපකාර කිරීම ඉතා අපහසු වේ. බොහෝ පාසල්වල වැරදී වන්නේ ඒ පිළිබඳව සිඹුන්ට ප්‍රමාණවත් ලෙස දැනුම්වත් තොකිරීම හෝ තමන්ව ආරක්ෂා කර ගන්නේ කෙසේ 'ද යන්න තො පෙන්වීමයි. අවාසනාවන්ත සිදුවීමකට පෙර සයිබර් හිරහැර කිරීම හා එයින් මේම පිළිබඳ දරුවන්ට යම් දැනුමක් තිබිය යුතු ය. මෙම ගැටුපු වට දොස් පැවරිය හැකි එකම දෙය සමස්තයක් ලෙස සමාජයම වේ.

කළ යුත්තේ කුමක් ද?

අවසාන වශයෙන්, අන්තර්ජාලය සහ ජ්‍යෙගම දුරකථන සන්නිවේදන පද්ධති අපගේ ජීවිත පහසු කරවන අතර අපගේ ක්‍රියාකාරකම් වල ඉතා වැදගත් කාර්යභාරයක් ඉටු කරයි. එහෙත් එම උපකරණයන් යොදාගනීමින් අනුන් අපයෝජනයට ලක් කිරීම, හිරහැර කිරීම අවාසනාවන්ත තත්ත්වයකි. අන්තර්ජාලයේ සහ ජ්‍යෙගම දුරකථනවල දහාත්මක පැහැතිකඩයන් ප්‍රශ්න කිරීමට හෝ ගණනය කිරීමට තොහැකිය. කෙසේ වෙතත් බොහෝ දුරට විශ්වාස වන්නේ සාමාන්‍යමක කරුණු සංඛ්‍යාත්මකව හා බැඳුම් ලෙස විශාල බවයි. කෙවින් බෙනාන් පැවසු පරිදි: "සයිබර් හිරහැර කිරීම නව තාක් ප්‍රණයේ පිළිගත තොහැකි මූහුණුවරක් වන අතර එය විසඳීම සඳහා සමාජය පුරා සාමූහික ක්‍රියාමාර්ග අවශ්‍ය වේ. පාසල් ප්‍රධාන කාර්යභාරයක් ඉටු කළ යුතු අතර, මෙම නව මග පෙන්වීම මගින් සයිබර් හිරහැර කිරීමේ අවස්ථා වඩාත් එවායි ලෙස හඳුනා ගැනීමට සහ ඒවාට විසඳුම් ලබා දීමයි. නැතිනම් එය වළක්වා ඔවුන්ගේ ජීවිත සමග ඉදිරියට යාමට දරුවන්ට ඉගැන්විය යුතුය. හිරහැර කරන්නන්ගේ ගොදුරු බවට පත් කිරීම වළක්වා ගන්නේ කෙසේද යන්න ඔවුන්ට ඉගැන්විය යුතුය. ගක්තිමත් පොරුළපයක් ගොඩනැගීමට දෙමාපියන්, ගුරුවරුන් දරුවන්ට උදව් කළ යුතු ය."

සයිබර් හිරහැර කිරීම ඉහළ යමින් පවතින අතර එය පරිගණකයක් හෝ ජ්‍යෙගම දුරකථනයක් ඇති සහ හාවිතා කරන ඕනෑම කෙනෙකුට පාහේ බලපාන නමුත් සයිබර් හිරහැර කිරීම නැවැත්මීම

හෝ බාධා කිරීම පිළිබඳ අදහස බොහෝ දුරට ඔවුන් තුළ පවතී. පාසල්වල, පාසල් වලින් පිටත සහ සැම තැනකම සයිබර් හිරහැර කිරීම පවතින අතර දෙම්විපියන් තම දරුවාගේ ක්‍රියාවන් පාසල තුළ සහ ඉන් පිටත මූල්‍යත්වාන්ම පාලනය තොකරන හෙයින්, හිරහැර කරන්නන්ගේ සැලසුම් අනුගමනය කිරීම ඉතා අපහසු ය. සමස්තයක් ලෙස පාසල් හිංසනය අඩු වෙමින් පවතින අතර, හිරහැර කිරීම හැසිරීම 5% කින් ඉහළ ගොස් ඇත .එසේම, 2010 අවසාන මාසයන් තුළ දී සයිබර් හිරහැර කිරීම හේතුවෙන් සියලුවි නසාගැනීම කිහිපයක් සිදුවිය. පුද්ගලයෙකුට තවත් කෙනෙකුට හිරහැර කිරීමට හේතු රාජියක් ඇති අතර හිරහැරයට ලක්ඛු පුද්ගලයා නිශ්චලිදව සිටීම්, වර්ධනය වන ගැටුපු වට මේ ආකාරයෙන් දායක වීමක් එලස හේතු විය හැකිය. එවැනි තත්ත්වයක් මගහරවා ගැනීම සඳහා සැමුවීම අවශ්‍ය වන්නේ අන්තර්ජාලයේ අදුරු වලවල් වලට ගොදුරු වූ මළයින් සහ තරුණයින් සඳහා වැඩිහිටියන්ගේ සහ රජයේ බලධාරයින්ගේ සහයෝගයයි. දෙමාපියන් හා ගුරුවරුන් විශේෂයෙන් එය අමතක තොකළ යුතුයි.

අන්තර්ජාලය හා ජ්‍යෙගම දුරකථන හරහා හිරහැර කිරීම සැබුවීම් නතර කළ තොහැකි බැවින් එය සමග ගනුදෙනු කිරීමට ඇති හොඳම ක්‍රමය නම් ලමයින්ට, හා තරුණ පිරිසට එහි ගැට්ල හා හිංසනයන්ට මුහුණ දීමට අවශ්‍ය ප්‍රතිඵලිකරනය ලබාදීමයි. නැතිනම් එය වළක්වා ඔවුන්ගේ ජීවිත සමග ඉදිරියට යාමට දරුවන්ට ඉගැන්විය යුතුය. හිරහැර කරන්නන්ගේ ගොදුරු බවට පත් කිරීම වළක්වා ගන්නේ කෙසේද යන්න ඔවුන්ට ඉගැන්විය යුතුය. ගක්තිමත් පොරුළපයක් ගොඩනැගීමට දෙමාපියන්, ගුරුවරුන් දරුවන්ට උදව් කළ යුතු ය.

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WHY IT IS ESSENTIAL TO HAVE AN AMENDMENT TO THE ABORTION LAW IN SRILANKA

S. Asvinijaa*

Introduction

“I don’t think government has the proper role in forcing a woman to have a child or forcing a woman not to have a child. And we have seen that around the world. This is something that should be privately decided with the family, woman, all the private factors of it, but we should work toward preventing the necessity of abortion”

-Ralph Nader

An American political activist, author, lecturer and attorney

“By abortion, the mother doesn’t learn to love, but kills even her own child to solve problems”

-Mother Teresa

The above stated quotes give two various ideas about abortion. Whenever we take the debate on abortion, it deals with rights and wrongs of ending a pregnancy deliberately. Pregnancy is considered as a gift for women, simultaneously becomes a risk which influences life. Complications of pregnancy may affect a woman in a great deal. Abortion is a very painful topic for both men and women who face a situation in which a difficult choice has to be made between alternatives, especially ones that are equally undesirable and whether to terminate or to continue a pregnancy. Abortion always holds contrasting opinions.

Most people concur with the abortion or disagree, and few people are dubious. One side those who call themselves ‘pro-life’. They say that intentionally causes abortion is always wrong, although it may on very rare occasion. on the other side those who call themselves ‘pro-choice’ or ‘supporters of abortion rights’, and who regard intentional abortion as acceptable in some circumstances.

Abortion is being and always been a hot topic and very controversial issue all around the world. The debate on abortion, whether it is justifiable morally? Or it can be justifiable under legislations. Even in Sri Lanka amendment bills on abortion were submitted to the parliament few times but in all circumstances the bills have been opposed and withdrawn for several reasons. This article aims to analyze the legal consequences and the medical consequences on abortion and also discuss the important facts on why Sri Lanka needs an amendment on abortion law with some certain restrictions.

The history of abortion

Abortion has a history over many centuries in different cultures. There is a rich history of abortion was accepted in both ancient Roman and Greece. Until the late 1800 U.S provided abortions without legal prohibitions. In pre-modern era the Vedic and Smrti laws of India reflected a concern with preserving the male seed of the three upper castes and the religious courts

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imposed various penances for the women or excommunication for a priest who provided abortion. In the epic Ramayana, there is description that the practice of abortion was being done by the surgeon or barbers those days. An ancient medical text known as the Eberspapyrus, written about 1550 BCE, suggests that an abortion can be induced with the use of a plant-fiber tampon coated with a compound that included honey and crushed dates. Later herbal abortifacients used in the process.

In the old testament of Bible several legal passages that refer to abortion, but they deal with the terms of loss of property and not sanctity of life. But the new testaments of Bible don't explicitly deal with abortion.

Abortion became a crime because of some reasons. A trend of humanitarian reform in the mid-19th century broader liberal support to criminalization, because at that time abortion was a dangerous procedure done with crude methods, few antiseptics and high mortality rates.

In the mid-to-late 1800s U.S began passing laws that made abortion illegal. The motivations for anti-abortion laws varied from state to state. One of the reasons included fears that the population would be dominated by the children of newly arriving immigrants, whose birth rates were higher than those of "native" Anglo-Saxon women.

Abortion policies around the world

Legal status of the abortion has different opinions around the world. Almost every country permits abortion under a least circumstance, except six countries. El Salvador, Malta, The Vatican, Chile, The Dominican Republic and Nicaragua are the six countries which ban abortion entirely.

Most industrialized countries allow abortion without any restrictions. About 125 countries have some restrictions, permitting abortion only in limited situations. Some countries are on process to legalize the abortion and some are trying to ban the abortion without any exceptional situations.

By geographical region, abortion policies were most restrictive in Oceania, followed by Africa and Latin America and the Caribbean. Only 6% of governments in Oceania and Africa and only 12% in Latin America and Caribbean allowed abortion upon request. 18 countries in Africa, 12 in Asia, 8 in Latin America and the Caribbean and Oceania allowed abortion only to save a woman's life. Europe and northern America in contrast, had the most liberal abortion policies in 2013. Both governments in Northern America and 73% of governments in Europe allowed abortion on request.

China liberalized its abortion law in the 1950s and promoted the practice under its one-child policy, which was enacted in 1979 in an effort to curb population growth by restricting families to one child. The policy includes fines, compulsory sterilization and abortion. Now China has raised its two child policy.

Kenya has the root of United Kingdom's penal code, where the abortion is an offence, except when mother's life is on risk. From 2019 Kenya has extended this exception and included the cases of rape. As other former European colonies reevaluate their abortion statutes; many are expanding the grounds for abortion. For instance, Benin, Burkina Faso, Chad, Guinea, Mali, and Niger, nations whose restrictive abortion laws were holdovers

from the 1810 Napoleonic Code imposed by France have made abortion legal in cases of rape, incest, and fetal abnormality.

Zambia is one of the few countries where abortion is permitted for socio economic reasons. But despite having a liberal law, structural and cultural barriers make it difficult to obtain abortions for Zambia women because they have very poor health service in their country.

Recently (March 2020) New Zealand parliament passed a bill decriminalizing abortion and allowing women to choose a termination up to 20 weeks into a pregnancy. New Zealand will be rightly treating the abortion as a health issue.

Alabama law (May 2020) bans abortion except if there is a serious health risk to the mother or fetus, with no exceptions for rape and incest.

Argentina president has submitted a legal abortion bill recently (March 2020), the president of Argentina said, that the state must protect its citizens in general and women in particular, society in the 21st century needs to respect the individual choice of its members to freely decide about their bodies.

Abortion policies of Sri Lanka

Abortion is generally illegal in Sri Lanka. Sri Lanka has one of the strictest abortion law in the world. Which stipulates that abortion is illegal unless the life of the mother is at risk; in this situation also you need 3 doctors' signatures to agree to the abortion, if not, the abortion will not be permitted. Abortion is an offence under the penal code of Sri Lanka enacted in 1883? Aborting a pregnancy except to save the life of the mother is a crime under Sri Lankan

penal code. Section 303 of the penal code defines the offence of causing miscarriage. In medical terms abortion and miscarriage have got different definitions. The Sri Lankan courts have accepted that the term "miscarriage", in the context, must be given its normal dictionary meaning-namely, "premature expulsion of the contents of the womb before the term of gestation is complete" (*Regina v Waidyasekara* 57 NLR)^[6]

According to section 303 of the penal code define the offence of causing miscarriage. This offence is said to be committed when a person voluntarily causes a woman with child to miscarry unless the miscarriage is caused in good faith for the purpose of saving the life of the woman. Section 303 carries out an explanation, that a woman who causes herself to miscarry is within the meaning of this section. So here the miscarriage is done with the consent of the woman and there is an intention to cause the miscarriage. The section 303 prescribes two alternative penalties for the punishment defined in the same section.

- Imprisonment of either description for a term which may extend to three years, or fine, or both in all cases voluntarily causing miscarriage
- Imprisonment of either description which may extend to 7 years in cases where the woman is quick with child.

The lighter sentence may be imposed when some elements are established.

Section 304 of the penal code defines the miscarriages caused without the consent of the woman.

Section 305 of the penal code constitutes the offence of causing death by an act done with intent to cause miscarriage.

Section 306 of the penal code recognizes the offence of doing an act with intent to prevent a child from being born alive or cause it to die after birth.

Section 307 of the penal code defines the offence of causing the death of a quick unborn child by an act amounting to culpable homicide.

Section 308 of the penal code imposes liability for the offence of exposure and abandonment of a child.

Section 309 incorporates the offence of concealment birth of a child by secret disposal of the dead body.

The offence of miscarriage or abortion and the punishments given for them constituted in the penal code of Sri Lanka enacted in 1883.

The Universal Declaration of Human Rights

The universal Declaration of human rights (UDHR) is a milestone of human rights drafted by representatives with different legal and cultural background from all regions of the world. The declaration was proclaimed by the Nations General Assembly in Paris on 10th of December 1948. the first time in the history the fundamental human rights to be universally protected and it has been translated in 500 languages.

Sri Lanka Ratified the UDHR 1955 and fully incorporated the declaration into the first republic constitution in 1972 and some selected rights in the UDHR into the 1978 constitution.

Article 01 of the Universal Declaration Human Rights opens with the fundamental statement of inalienability,” All human beings are born free and equal in dignity and rights”. Significantly the word “born” was used intentionally to exclude the fetus or any antenatal application of human rights. An amendment was proposed and rejected that would have deleted the word “born”, it was argued that to protect the right to life from the moment of conception. The representatives from France explained that the statement on article one of the Universal Declaration of human rights meant that the right to freedom and equality was inherent from the moment of birth. They couldn’t amend the article with fewer votes. Thus, the fetus has no right under the universal declaration of human rights. The deliberately gender-neutral term “everyone”, utilized thereafter in the declaration to define the holders of human rights, refers to born persons only. According to UDHR if a fetus has no rights, then abortion is not a crime.

Criticism of Amnesty International (AI)

Amnesty international is an organization founded to defend those imprisoned for political crimes and to fight for human rights abuses. According to amnesty international an abortion is a basic health care need for millions of women, girls and others who can become pregnant, it’s not only gender women and girls (women who were assigned female at birth) who may need access to abortion service, but also intersex people, transgender men and boys, and people with other gender identities who have the reproductive capacity to become pregnant. AI explains that worldwide 01 in 04 pregnancies end in abortion every year.

Amnesty international gives some valid reason for why they want abortion to be legalized. According AI criminalizing the abortion is not reducing the abortion; it makes the abortion less safe. Strict laws are not controlling the abortion; people have abortion whenever they need. Amnesty International requests the countries to legalize the abortion and prevent the deaths and injuries from unsafe abortion.

Steps Taken for the Amendment of Abortion Policies in Sri Lanka

The abortion debate was taken to the parliament around three times.^[8]

- In 1995 the Ministry of Justice presented penal code amendment bills for rape fetal impairments in parliament which was withdrawn by the minister following a vigorous debate.
- In 2011 the national action plan for human rights 2011-2016 included the goal to decriminalize abortion for rape and major congenital abnormalities.
- In 2013 the law commission proposals called for legalization in the case of rape and fetal impairment.

The abortion conversation sparkled again in 2017. public debate began over proposals to amend the law on abortion but it was opposed by the Roman Catholic Church and other religious centers. For this current debate revolves around the recommendations made following findings of the Justice Aluvihare special committee which are:

- To decriminalize the abortion and allow for medical termination of pregnancies in the specific

circumstances like rape, incest, the pregnancy occurring in a girl below 16 years (statutory rape) and serious fetal impairment.

- To provide for a procedure for medical termination or pregnancies on one of the above grounds that will be rigorously regulated to prevent the abuse of the process.
- To enact/ amend legislation as appropriate to facilitate the inclusion of the above provisions.

This large conversation was largely driven into the public attention by Medias. The report from the media clearly said that Roman Catholic Church opposed all proposed reforms on abortion law. Bishop Winston Fernando said that the Roman Catholic Church opposes any form of abortion of whatsoever. Not only from the Roman Catholic but also all the religious leaders of the country opposed this reform.

The attempt to reform the law in 2017 was met with initial success, then the Minister of Justice Dr. Wijeyadasa Rajapakshe said that he doesn't think there will be much challenges. However, the drafting of the Bill was put on hold because President Maithripala Sirisena wanted to consult with religious leaders, who showed strong opposition to the reform. It was later reported that the proposals had not been put forward to the Health Ministry or the Government and it was only a discussion that took place. When the proposal was received, it would be debated by the Cabinet. However, Minister of Christian Affairs, John Amaratunga, was reported to have said that the Prime Minister Ranil Wickremesinghe, assured him that abortion would not be legalized.

Proposals have also been made to legalize Mifepristone and Misoprostol, two drugs that are commonly used for illegal abortions in Sri Lanka.^[9] Although they are currently banned, stocks are smuggled into the country in the bags of people returning from India, where they are readily available. Misoprostol is sold covertly in most pharmacies at a cost of 150 rupees per pill. Medical abortions do have benefits relative to surgical abortions because they are less intrusive procedures, there is no risk from general anesthesia, and there is less risk of secondary infertility due to scarring and intrauterine adhesions (scar tissue that forms between the inner walls of the uterus.) However, due to the inability to regulate the sale of these drugs, patients don't have complete information on correct doses; some women potentially face health risks from taking incorrect dosages. An attempt to legalize Misoprostol in 2010 failed when the responsible body was unable to reach a decision on registration.

Religious leaders have always been one of the main sources of opposition to proposed reform of Sri Lanka's abortion laws. Despite the Pope's pronouncement that absolution can be given by a priest, as shown by Prof. Wilfred Perera, Catholic leaders in Sri Lanka have maintained a strong view against legalising abortion. President of the Bishops's Conference, Bishop Winston Fernando, said "no one has a right to take a life. Natural birth to natural death, life is sacred. And we believe life begins at the moment of conception". Cardinal Malcom Ranjith reportedly said that children born as a result of rape or incest would be institutionalized by the church in their orphanages and care homes. "I invite you all to spread the message to all you meet that abortion is murder", he said.

Other religious leaders, from Christian, Buddhist and Muslim communities have also voiced opposition to reform.^[9]

Law and religion are two dissimilar concepts. Sri Lankan citizen can follow any religion which they like or refrain themselves from following any religion. But law is applicable equally to all native of Sri Lanka. We have to understand that when drafting a law in a country or reconstructing law religious leaders should not interfere. Legislations directly affect the people of the state. So alternation of a country should go through a referendum. Referendum will give a transparent conclusion on the reform. But our law doesn't permit a referendum to amend a penal section.

Why we Need a reform for Abortion?

People have abortion constantly, regardless of what the law says. Preventing women and girls from accessing abortion does not mean they stop needing it. Attempt to ban or restrict abortion do nothing to reduce the number of abortion, it only forces people to seek out unsafe abortions. Unsafe abortions are defined as "a procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that doesn't conform to minimal medical standard or both" by the world health organization. Unsafe abortions can have fetal consequences.

Even though abortion is considered as a crime in Sri Lanka, the Sri Lanka journal of medicine has estimated that nearly 700 abortions take place in country daily and the ministry of health stated in 2016 that 658 abortions are performed daily and also unsafe abortion remains a major cause of

maternal death. Contrary to common belief, most women seeking abortion in Sri Lanka are married. In a 1997 study the reason given by married women for needing an abortion, were that their pregnancy was too soon after the last delivery, poverty and foreign employment.

Sri Lankan domestic workers in the foreign countries are disregarded by their agents and by Sri Lankan authorities as well. There have been numerous cases of runaway maids who have been repeatedly raped by the employers. Later they have been accused of theft. Migrants are at high risk of being victims of spurious charges. Victims of rape are being accused of adultery and fornication in Middle East countries, and also they can't abort the baby which is a result of that rape. Some domestic workers return to Sri Lanka and seek for unsafe abortion.

Another tragic but a common form of asexual abuse in Sri Lankan families is incest. According to a study by voice of women, a radical woman's publication and advocacy group, the commonest incidence of incest are by fathers and step fathers and in the families where mother have migrated for a job and left the kid with the father or family members.

When law doesn't allow to abortion in these kind of situation people go for illegal and unsafe abortion. Developing countries have strictest laws on ending the pregnancy and also have the highest unsafe abortion rates. The impact of rape, statutory rape and incest will remain for lifelong if the victim is not allowed for an abortion.

Fetal disease refers to disorders originating in utero. Examples include hydrops fetalis and chorioamnionitis. When a mother gives birth to a baby who has fetal disease that

birth defect can negatively impact the physical and mental health of parents and care takers. Many parents experience significant depression, fear and anxiety which may have a divesting effect on the whole family. Ultra sound can detect some types of physical birth defects. When a fetus is detected with defects government can allow them to go for abortion.

Dr. Halappanavar, a dentist, and her husband, an engineer, were living in Galway in 2012 and preparing for the birth of their first child. That all changed when, 17 weeks pregnant, Dr. Halappanavar went to the hospital with back pain. Doctors said that she was having a miscarriage and her fetus would not survive but that she could not be given an abortion. Ireland, "a Catholic country," and it would be illegal to terminate the pregnancy while the fetus still had a heartbeat. After being repeatedly refused an abortion; she waited days until the heartbeat stopped. The contents of her womb were removed. By then she had an infection, and she died of septicemia the following day. The woman on the mural was Savita Halappanavar, and her story came to be synonymous with calls for repeal of Ireland's Eighth Amendment, which effectively banned abortion in Ireland. Her story galvanized the campaigners calling for an end to the ban and was cited again and again when the country overwhelmingly voted to repeal the amendment.

If an upper-middle class Sri Lankan is in need of abortion, that person can go to certain private hospital and pay for the service. But when the person is poor, unable to access the service due to lack of officially regulated information, it is often in the cases we have heard about places or procedures by word -of- mouth. These

places are unhygienic and the service providers are unskilled, the woman may not be given pain relief. The woman may have a horrible experience. Sri Lanka's maternal mortality rate is low, unsafe abortions and their consequences account for a high proportion of the deaths that do occur, and the morality rate for abortion stands at about 15%.

Some restrictions must be included in the Abortion law amendment

Sri Lanka needs a reform in the abortion law, but with some certain restriction. Sri Lanka is a multi-cultural country enriched with cultural essence. Religious leaders' opinion is not fully acceptable, but according to some cultural aspects abortions cannot be acceptable in all the situations. About 1% or less seeks abortions for incest, rape and fetal deformities. Then what about others? They seek abortion for several reasons and most of them are married people, who already have kids or sudden pregnancy soon after the delivery. Another reason is socio-economic reason. Other than these cases, abortions take place due to the illegal relationships (adultery or bigamy) and sexual relationships before marriage or living together.

The laws must not allow abortion for the people who seek abortion for their bad behaviors. These kinds of abortions must be banned forever. Otherwise this will lead to a cultural degradation. If the law admits these kinds of people to access abortion service, the future generation will get spoilt. Married woman can go for family planning soon after the delivery of the baby. Contraceptive use is the key to reduce the abortion.

If the Sri Lankan law legalizes the abortion with above mentioned restrictions, people can access a safe abortion for a valuable reason in the hospitals. The law must give permission only to the government hospitals to undertake the abortions. When a woman reaches the government hospital to access the service on abortion in such situations like rape, incest and fetal disease, she must submit proper evidence to the hospital; otherwise the hospital must not allow her to abortion. As well as she must bring her parent, guardian or spouse along with her. That person also must have proper legal document to prove themselves as parent/guardian or spouse. In the cases of rape or incest doctors will sign it off when there is an absolute proof. Yet it can take many years to prove the rape/incest in a court. Before the court gives the final verdict the baby in the womb want wait. So these cases should be heard in a proper way and verdicts should be given as soon as possible.

Conclusion

Religious beliefs should not be a platform while making laws in a country. Religious influences in law making can have some negative impacts. All religion leaders and institutes should maintain a neutral attitude towards the abortion law as well as other laws. They must let the law makers to do their jobs. If each and every religious leader tries to justify their reasons no any modifications can be made for our ancient laws.

Rape and incest are similar in the sense that both are criminal acts. In our system of justice, we punish the criminal. We do not punish the victim, nor do we punish the criminal's children. We are told, however, that if pregnancy occurs as a result of rape

or incest, offering the victim an abortion is the compassionate thing to do. No woman should be “forced to carry that monster’s child

When rape/ incest victims give birth to that rapist’s baby their whole life is ruined. Some charities may offer shelter for those young mothers but they don’t get a chance to continue their education or career. The worst situation is incest, where the baby born with many mental and physical disabilities and they need a life time care.. In case of incest and statutory rape the victim are minors. She is not physically eligible to give birth to another baby and also she is not mentally matured to be a mother. Teenage mothers can’t support their babies because they are not ready for the motherhood mentally, physically and financially. The people from our country rarely adopt babies, so adoption cannot be a solution for this. Mentally that mother cannot accept that baby. That baby will always remind her about that horrible pain of rape Sri Lankan law makers must consider the amendment on abortion on rape, incest, statutory rape and fetal disease with some restriction. Other than these situations abortion should not be legalized. Married woman have so many options on family planning. So, their careless is not a reason for the abortion. Woman must follow a proper family planning to avoid unplanned pregnancy. Family planning methods are very much accessible in Sri Lanka without any cost.

Criminalizing the abortion doesn’t stop the abortion completely; it just makes the abortion less safe. Deaths due to unsafe abortions can be preventable by law. Many countries are starting to change their abortion policies, Sri Lanka also can go for an adaption with needful restrictions. In Sri

Lanka this topic has been kept in the hands of parliament and religious leaders, there is no way to change this law. This matter should be kept in the hands of public. Each and every legislation is going to rule the public. Legislations have a direct influence on people of the country.

“LAW MUST PROTECT THE PEOPLE, NOT BELIEFS”

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FRESHERS' WELCOME

The Law students' Human Rights Movement 2020 began their yearly ventures with the Introduction Programme for the preliminary year students on the 20th of January. At the occasion, the newcomers were briefed on the activities and events that awaited their enthusiastic participation. The official HRM file and several other valuable publications were also presented to the newcomers.

LEGAL AID PROGRAMME

We, as emerging members of the legal fraternity have an immense responsibility upon our shoulders to cast aside the ignorance of our fellow citizens, and make them better aware of legal rights. **The Law Students' Human Rights Movement** strongly believes that as students studying law, and as future legal professionals, we have a moral obligation to take it upon ourselves to provide these underprivileged people with the necessary legal assistance. Therefore, in accordance with our duty to make legal representation open to everyone, we organize "**Legal Aid Campaigns**" island wide, with the intention of answering the pressing needs of the people.

Our Legal Aid Programme held at Athkanda Rajamaha Viharaya, Kurunegala on the 15th February received a marked number of participants with diverse issues.

FIELD VISITS

The Law Students' Human Rights Movement has been organizing **Prison Visits** for the students of Sri Lanka Law College for more than a decade. The students gain awareness on the prisoners' lifestyles and how these unfortunate people can be reformed and rehabilitated to be productive members of our society.

In accordance with HRM annual calendar, **The Law Students' Human Rights Movement** has been organizing the **Parliament Visit** for the students of Sri Lanka Law College. The aim is to give opportunities to the students to observe the parliament complex including the Chambers, Hansard Rooms, Bills Section and the Parliament Library. The officers of the

Legislative Service of the Parliament will give the students a thorough understanding about the law making process of the Parliament.

We, The Law Students' Human Rights Movement regret to have not been able to conclude the Field Visits Programmes this year due to the prevailing pandemic situation in the country and security reasons.

WORKSHOPS AND SEMINARS

The Human Rights Movement has been conducting a workshop, in collaboration with **The Crime Record Division of Sri Lanka Police** to aware the law students about the application of **Forensic Science and Importance of Fingerprint Identification** in criminal investigation.

The participants gain the invaluable opportunity to augment their knowledge on criminal proceedings and the functions of the SOCO.

EDUCATIONAL ASSISTANCE PROGRAMMES

Broadening the standards of the Kuppis conducted in previous years, we conducted our '**Manudama' Kuppi Series**' for all the requested subjects which were conducted by high achievers of examinations held in previous years as an eager step to uplift the academic standards of Preliminary year fellow students. Main areas that are examinable were covered in each tutorial session. Thus, we are glad to notify that we have received encouraging feedback from the first year students regarding these Kuppi sessions.

LEGAL AWARENESS PROGRAMMES

We, The Law Students' Human Rights Movement are regret to have been not able to conclude some of our flagship events such as Legal Awareness Programme for school students and 2nd Legal Aid Programme due to prevailing pandemic situation in the country and security reasons.



Legal Aid Programme



AGM



The Manurawa Journal Launch



Workshops on Criminal Investigation



Parliament Visit



Manudama kuppi series



I am the Change



Prison visit

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