Paper ID: 323

The Effectiveness of the Piercing of Corporate Veil Under Sri Lankan Law: A Comparative Analysis of the Sri Lankan Law with UK Law.

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***Abstract*—** This research intends to discover and evaluate the adequacy of Sri Lankan statutory provisions and case laws regarding the corporate veil piercing doctrine compared to the UK jurisdiction. This also intends to find out the reforms and solutions to amend the Sri Lankan Companies Act[1]and also to develop the law relating to this field. This is especially focused on to find a solution to the current corporate issues in Sri Lanka.

This research has included the historical evolution of the concept of separate legal personality and the veil piercing theory and their current application in UK and Sri Lankan jurisdictions. This research critically analyses the development of the case laws and the statutory provisions regarding the veil piercing in the above mention jurisdictions, based on the qualitative and traditional black letter methodology.

After analysing all above aspects, finally this research came to a conclusion, the current statutory provisions in Sri Lanka regarding the veil piercing is adequate. However, there is still a lack of judicial interpretations regarding this doctrine and need to regulate some set of uniform rules to pierce the veil. This research comes into the end with the suggestions of some minor reforms to the Companies Act No 07 of 2007 Sri Lanka and other generally applicable Suggestions.

I. INTRODUCTION

A company is a body where the corporate and legal personality[2] is separate from its members composing it. Being a distinct legal entity, the shareholders of the company are not personally liable for the debts of a company. The doctrine of corporate veil came in to force in **Salomon** V **Salomon Co. Ltd** [3] case andlater this has become the landmark case and judicial precedent to many cases with respect to separate legal personality. This case has introduced a concept of a fictional veil, which is put between stakeholders and company. This artificial veil prohibits third parties from interfering in to the affairs of stake holders. The viewpoint of the judiciary toward the metaphorical veil has not always been opposed. However, under exceptional circumstances and in some compelling situations the court of law ignores the shelter of the veil and penetrating it. This called piercing or lifting of veil. Courts used to deny the corporate protection when it has been used as a sham[4] for deliberate wrongdoings of a company[5].Once the court has lifted upon this metaphorical veil shareholders or any member of a corporation becomes liable for the company's debts. As a common law country UK is following judge made law. Its judge's duty to interpret the law to ensure the corporate governance. Sri Lanka also follows the footsteps of UK. The Civil Law Ordinance No. 05 of 1852 Sri Lankainaugurates the

[1] Companies Act No 07 of 2007.

[2]Wikramanayake Arittha., Attorney-at-Law, *Company Law in Sri Lanka* (2007), p.40

[3] [1897] A.C 22

[4] DHN food Distributors Ltd. V Tower Hamlets [1976] 1 WLR 852

[5] Gilford Motors Co Ltd v Horne [1933] Ch 935.

applicability of the English law into Sri Lankan legal system. In **Amarasekara** v **Mitsui & Co Ltd**[6] case the Supreme Court of Sri Lanka accepted that English commercial law can be applied to the Sri Lankan Legal system. The comparative study is based on UK and USA jurisdictions because they are consider as most significant common law jurisdictions as well as most prominent bodies of corporation law in the world.[7]

Under the statutory provisions, UK's Limited Liability Act in 1855 provided guidelines regarding the protection of creditors and shareholders before enactment of the Companies Act, 2006 United Kingdom. Shareholders of a company are personally liable for the debts of a company. The Company's Act of UK did not lay down the legal procedures to pierce corporate veil but judiciary penetrate the veil under certain circumstances when necessities arise. The new companies act No. 07 of 2007 is the governing law for corporate bodies of Sri Lanka. Although it has some governing principles of corporate limited liability and shareholder's responsibilities, when compared with the UK jurisdiction, it is obvious that further reforms must be introduced to strengthen the Act. The proposed research will be an attempt to if find any reforms needed or if so, what they need to be.

II.RESEARCH OBJECTIVES

1.To critically analyse the adequacy of statutory provisions in the Companies Act No.07 of 2007 of Sri Lanka, grounds on veil piercing and new developments on veil piercing to regulate the doctrine of corporate veil in Sri Lanka.

2.To compare and analyse the statutory provisions and the development of case laws in the UK with the Sri Lankan law to evaluate their relevance and adaptability in Sri Lanka.

3.To recommend necessary reforms to the Companies Act No 07 of 2007of Sri Lanka in the light of the comparative analysis in order to protect the innocent parties from the fraudulent acts of company shareholders.

III.RESEARCH METHODOLOGY

To achieve the main purpose of this proposed research, it is important to deal with several research methodologies. This paper is regarding the doctrine of piercing of corporate veil and it has examined the evolution of the corporate veil doctrine, The grounds piercing the corporate veil in comparison with UK law as well as the statutory provisions and case laws regarding the piercing the veil of incorporation. This research is a doctrinal research[8] and researcher used traditional 'black-letter'[9] methodology to examine theoretical aspects of law relating to the corporate veil piercing.

This research encompasses the qualitative research methodology in a comparative approach[10]. This includes the data gathered through primary, secondary sources. Such as legislative enactments (So-called primary sources)[11], law reports, textbooks, journal articles, and etc. Apart from that the researcher used internet search engines such as Hein Online, Law Lanka, and Law net. In this research, quantitative research methodology

[6] [1993] 1 SLR 22.

[7] Cheng T.K., 'The Corporate Veil Doctrine Revisited: 'A Comparative Study of the English and the US Corporate Veil Doctrines' ' [2011] 34(2) Boston College International and Comparative Law Review 333

[8] McConville and Wing Hong Chui (2007)Research Methods for Law, Edinburgh University Press, pp.18-21.

[9] This research aims to systematize, rectify and clarify law on any particular topic by a distinctive mode of analysis to authoritative texts consists of primary and secondary data.

[10] Julie Mason and Michael Salte (2007) Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research, Person education Limited pp.182-190.

[11] Mike McConville and Wing Hong Chui (2007) Research Methods for Law, Edinburgh University Press, p.19.

did not use because this research did not base on any numerical data which have been collected through interviews of experts or did not distribute questionnaires. However systematic analysis of case laws was based on the positivist paradigm of the doctrinal research. The main reason not to choose the quantitative method or a mixed method of qualitative and quantitative is, that the previous researchers in this research area very rarely used the quantitative method or mixed method of qualitative and quantitative because this research is based on the "positivist paradigm".

This research has included research methods like desk research method, case law research method, comparative method and deductive reasoning method. The primary and secondary sources were mainly collected through a desk research method. This method uses to examine the various grounds on piercing the veil of incorporation and various theories and approaches adopted by UK jurisdiction. The case law method used to gather the information regarding the current law relating to veil piercing, various approaches used by the courts to pierce the corporate veil and also to find out the new developments of this theory introduced by the UK jurisdictions. The researcher used comparative method to compare and contrast the similarities and differences between Sri Lankan and UK Jurisdictions. Finally, researcher has used deductive reasoning method to utilise the findings of the research for arriving conclusion and making recommendations.

When considering the validity and the reliability of the data used in this research, it is evident that those data are relevant and directly associated with the research area. This is because the data gathered through the primary and secondary sources, which are undoubtedly reliable. Finally, the researcher is satisfied with the validity of her research being able to achieve her objectives of the research. However, this topic of research could have been more successful if there were enough resources such as case laws, journal articles regarding the corporate veil piercing in the Sri Lankan context.

IV.LITERATURE REVIEW

A company is a completely different legal personality. It is distinct from its members and the managers of the company and cannot be sued in respect of its liabilities. The foundation stone of separate legal personality of a company was established under English law in the case of **Salomon** V **Salomon Co. Ltd**[12]. The principal of distinct legal personality which is also called as doctrine of corporate veil has on the whole been applied by the courts since the above judgment has been given. Later on courts attempted to depart from this doctrine when there were some hardships and injustices caused. There is no closed list of circumstances to pierce the corporate veil[13] According to the **Gower** the judiciary would lift corporate veil when it has been used as a cloak to commit fraud or improper conduct[14]. **Pennington** explained four inroads that the corporate veil can be pierced. They are imposing taxation by government, when it is important to protect the public interest, or where the company has been formed to bypass certain law or contract and when company act as agent or a trustee[15]. According to **Aritha Wickramanayake**[16]courts have been pierced or lifted corporate veil in circumstances such as to prevent fraud[17], prevent deliberate avoidance of contractual obligations[18], in a cases of deciding the premises of a company to

[12] [1897] A.C 22
[13] Ottolenghi,s, 'From peeping behind the corporate veil to Ignoring it Completely'(1990) 53 MLR 338
[14] Gower, *Modem Company Law* 4th ed., (1979), p.137.
[15] Pennington, R., Pennington's Company Law, 8th ed.,(India,2006), pp.43-44
[16]Wikramanayake Arittha., Attorney-at-Law, Company Law in Sri Lanka(2007), p. 41
[17] Jones v Lipman [1962] 1 All ER 442.
[18] Gilford Motor Co Ltd v Horne [1933] Ch 935.

apply specific status such as tax laws[19], for the interests of national security[20] or comply with public policy[21].

Under various eras UK judiciary has had different approaches regarding corporate veil. The first period called the early experimentation period, from 1897 to the Second World War when the **Salomon**v. **Salomon**[22] was decided. In this period English courts used to have different approaches to the doctrine. The second period called heyday of the doctrine, which is after the War and continued until 1978, the year **Woolfson v. Strathclyde Regional Council**[23]was decided. In this period of time much of the vitality of the doctrine has been used. **Lord Denning** has done an enormous contribution regarding the interpretation on doctrine of corporate veil in this era. He has introduced the single economic unit theory. Under this theory court consider the mother corporation and its subsidiaries as a single economic unit. The third period, which is continuous up till today and doctrine uses disfavour fully[24]. In recent history cases of **Beckett Investment Management Group v Hall**[25]and **Stone &Rolls *v.* Moore Stephens**[26] and **Prest V petrodel Resources Ltd**[27]courts did not hesitate to pierce the veil.

In Sri Lankan scenario there are not much cases decided in courts regarding the corporate veil doctrine. It is also observed the courts have narrow down their approaches when it comes to interpretation of separate legal personality. In the case of **Trade Exchange (Ceylon) Ltd v Asian Hotels Corporation**[28]Supreme Court held that the company and its shareholders were distinct legal entities and even though almost all the shares were held by a Government. In the case of **Visualingam** V **Liyanage**[29] Court held that corporate veil will be lifted when companies' conduct is illegal. This was emphasized also in the case of **Hatton national Bank** V **Sumathipala Jayawardhana and two others**[30]. The section 03 of the Companies Act No 07 0f 2007 Sri Lanka described the concept of Limited Liability comes under the [31] and sec 87 limits the liability of the shareholders any act, default or an obligation of the company. The former shareholders' liability limited under Section 269 of companies act Sri Lanka and they are not liable for the defaults of the company. The section 49 of Companies Act of Sri Lanka protect the shareholder's rights over the share. On the other hand, Sec 219(1) creates liability for wrongful trading of directors and sec 375(1) provides guidelines to lifting of corporate veil under fraudulent trading. The scope of companies' act of Sri Lanka regarding the corporate veil is more generalised and it is clear that legislature has still not properly addressed the gray areas of separate legal entity. There is no any measure regarding the piercing of corporate veil. It is essential to reform law with appropriate legal provisions meet the needs of society to protect innocent parties from fraudulent acts of companies as well as to provide guidelines for judiciary to be act in much broader sense to ensure justice.

V.ANALYSIS

The statutory provisions reveal the prevailing policy of the state and diminish the judicial discretion. The statutory requirements abide the judges even the outcome of those restrictions are contemplated. These statutory

[19] Adams V Cape Industries Plc [1991] 1All ER 751.
[20] Daimler Co Ltd v Continental Tyre & Rubber Co Ltd [1916] 2 AC 307.
[21] ex p Factortame Ltd [1991] 3 All ER 769.
[22] [1897] A.C 22.
[23] [1978] SLT 159.
[24] Cheng T.K ., 'The Corporate Veil Doctrine Revisited: 'A Comparative Study of the English and the US Corporate Veil Doctrines' ' [2011] 34(2) Boston College International and Comparative Law Review pp.334-336
[25] [2007] EWCA Civ 613.
[26] [2009] 1 AC 1391.
[27] [2013] 3 WLR 1.
[28] [1981] 1 SLR 67.
[29] [1983] 2 SLR 31.
[30] [2007]1 S L R 181.
[31] Companies Act No 07 of 2007.

exception removing the "shield of limited liability" which used by the company shareholders and directors. It is also imposed sanction for wrongdoings committed by those people.

When comparing the Sri Lankan Company Act with the English Company Act there are some similarities, such as sec- 993 of UK Act and sec-375 of Sri Lankan act which both acts accept the criminal and civil liabilities. Apart from that the sec 375(2) is equivalent to the sec 213-217 of insolvency Act of 1985 UK. Sri Lanka act has gone much further than UK act because not only liquidator but any creditor can make application to the court. When considering the provisions of the Company Employment Rights Act 1996 UK, it seems Sri Lanka is lacking behind those provisions. When looking at the provisions of Companies Act of Sri Lanka, it is observed "When justice required" is the basis Sri Lanka use to pierce the veil of incorporation. This is contradictory with the current position in the UK[32].

When considering the vagueness created by the judicial inroads, it is obvious that statutory exceptions are on the rise and judicial pronouncements on the decrease regarding the piercing of corporate veil. However, the most noted thing is Sri Lanka has influenced by the UK.

VI.RECCOMANDATIONS

Corporations represent the huge part of everyday life and multinational companies have been driving the economic globalization throughout the world[33]. The separate juristic personality and limited liability of those companies are mostly discussed controversial topics in this modern business world. These are considered as the backbone of commercial law and most important bases for economic developments. However, in the form of business these corporate monsters perform illegal acts such as shielding assets from creditors and other claimants, money laundering, corruption, hiding and try to take the undue advantage from the corporate separate entity. Therefore, it is necessary to impose control over such misconducts and judiciary should play an important role sticking the balance between saving the investments and ensuring justice to the society. One such control is piercing the veil of incorporation to identify the actors' hind behind it and impose liability.

This research was focused on the adequacy of statutory provisions in the Companies Act Sri Lanka[34] regarding the piercing of corporate veil, the development of statutory provisions and case laws in Sri Lanka in comparison to UK law and if needed, to recommend necessary reforms to the Companies Act[35] Sri Lanka.

When considering the development of case law regarding the piercing of corporate veil in Sri Lanka, it is obvious that generally Sri Lankan law is following the footsteps of UK and which is still hesitate to pierce the veil of incorporation by the judiciary. It is also evident even there are some applicable laws to pierce the corporate law, courts are still unable to take the full advantage of those laws. Sri Lanka has very limited case laws[36] which have dealt with veil piercing and its obvious courts always have more favour towards the separate legal entity of a company[37]. In *Ukwattha V DFCC Bank*[38] court has separated bank from his directors and accepted the

[32]Prest V Prestendol [2013] 3 WLR 1.
[33]Alexandra Horvathova et al. (2016) Piercing the Corporate Veil US lessons from Romania andSlovakia, Chicago and Kent Journal of International and Comparative Law, 17(1),Article 7.

[34]Companies Act No 07 of 2007.
[35] Ibid.
[36]This is mentioned in the recent book of K.Kanag-Isvaran et al, (2014).Company Law.
[37]Trade Exchange (Ceylon) Ltd v Asian Hotels Corporation [1981] 1 SLR 67, Supreme Court held that the company and its shareholders were distinct legal entities and even though almost all the shares were held by a Government
[38] [2004] 1 SLR 164.

doctrine of separate legal personality in an extreme level. Recently in Sri Lanka, there are massive frauds taken place and it is questionable whether the court able to interpret the law properly. The recent case of *Perpetual Treasuries Pvt Ltd and Others V Central Bank of Sri Lanka and Others*[39], The petitioner company has changed its name before the day file the proxy and proxy was having the old name of the company. The rubber stamp of the proxy included a new company name and registration no. The Court dismissed the case considering the separate legal entity between two companies and held the petitioner company is no longer exists.

However, in the case of *Visualingam V Liyanage*[40] and *Hatton national Bank V Sumathipala Jayawardhana and two others*[41] Courts have changed their direction and pierce the veil when the instances of separate legal entity used as a device to defend creditors or used for the illegal improper purpose. The limitation made to above cases by a recent judgement of *DFCC Bank V Muditha Perera and Others*[42] court accepted the separate legal personality principle and upheld the decision of 'Solomon'. In the Golden Key Case[43], one of the biggest frauds committed in Sri Lanka, Court order to pierce the corporate veil and order directors to pay the depositors by selling their personal assets.

However, when comparing the Sri Lankan scenario with UK jurisdiction it is evident that Sri Lankan case law need more developments when piercing the veil of incorporation. Especially not only to deal with the fraud cases. Judiciary must follow the new developments/ improvements in UK jurisdiction have invented and Sri Lankan judges need more education regarding this doctrine in a context of lots of frauds occurring within the country. Judiciary also need to setup unique guidelines, rules or grounds to pierce the corporate veil (This is also lacking in UK jurisdiction).

When considering the statutory veil piercing in Sri Lankan context, it is evident that Sri Lankan Companies Act has satisfactory provisions to safeguard the creditors of the company. However, it needs to include more provisions and mechanisms to protect minority shareholders. It is also recommend to require from parent companies to publish the details of their subsidiaries annually, which is lacking behind the current act.

Finally, the most important thing is the public convenience in this matter. People need to be aware regarding the remedies to take actions on the corporate fraud cases and other similar matters and to switch the red light to the wrongdoers.

[39] CA Writ 37/17, Decided on 01/06/2017.
[40] [1983] 2 SLR 31.
[41] [2007]1 S L R 181.
[42] SC Appeal 150/2010 (25/03/2014).
[43] SC. FR. No. 191/09 with Nos. FR. 192/09, 197/09-206/09, 208/09-216/09, 225/09, 226/09, 244/09, 246/09-255/09, 315/09, 335/09, 372/09(10/03/14).

Paper ID: 198

Legal Implications of COVID-19: *Force Majeure* and Contractual Obligations in International Sale of Goods

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Abstract - The year 2020 has been challenging for businesses worldwide with COVID-19 leading to the disruption of the global economy. The unprecedented circumstances led by this pandemic, inter alia, raise concerns pertinent to the liability for failure to fulfil contractual obligations in international commercial contracts due to COVID-19. United Nations Convention on Contracts for the International Sale of Goods (CISG or Vienna Convention) performs a significant role in the spectrum of international sales. Article 79 of the CISG reflects the legal concept of force majeure, which provides a defence for non-performance of contractual obligations in certain enumerated circumstances beyond the parties' control. In this respect, the current research, through the doctrinal research methodology, reviews the application of force majeure to grant relief for non-performance of contractual obligations due to COVID-19 where a contract is governed by the CISG. The study concludes that COVID-19 is likely to be considered an impediment beyond the control of the parties under Article 79 of the CISG even though the likelihood of successful invocation of the article will vary depending on the circumstances of each case.

***Keywords*— COVID-19, International Trade, , Sale of Goods, Contractual Obligations, *Force Majeure*.**

I. INTRODUCTION

The novel Coronavirus disease 2019, commonly known as COVID-19, was initially identified in December 2019 in Wuhan, China. Thenceforth, this outbreak significantly grew across international borders, leading the World Health Organisation to characterise COVID-19 as a pandemic on 11 March 2020. Hence, to contain the virus, countries have resorted to various measures to restrict movement, nationally and internationally through national lockdowns, nationwide curfews, closure of the international borders and suspension of international travel. The unfavourable impact of COVID-19 on the wide-spectrum of daily activities, particularly on national and cross-border trade is tremendous. It has constrained the supply chains. While only certain goods, such as grocery items, are in high demand, the demand for other types such as white goods has decreased (PricewaterhouseCoopers, 2020).

These unprecedented circumstances, *inter alia*, raise questions about the liability of parties to international commercial contracts for failure to meet their contractual obligations due to COVID-19. As the dilemma unfolds, the *force majeure* clauses in contracts and the relevant laws could be useful to protect the parties. If a *force majeure* clause is absent in a certain contract, the parties will have to have recourse to the relevant laws. If the contract relates to international trade of goods, the CISG may apply. In view of this, the current paper intends to examine the application of *force majeure* to grant relief for non-performance of contractual obligations due to COVID-19, in instances where the CISG governs a contract.

II. METHODOLOGY

This doctrinal research involved a close analysis of primary sources such as international Conventions and secondary sources such as books, journal articles along with online sources to offer a reasoned and coherent account of the relevant law. The researchers conducted an in-depth analysis of

the provisions of the CISG to address the research question regarding how *force majeure* operates to grant relief for non-performance of contractual obligations due to COVID-19, where the CISG governs a contract. The sole aim of this doctrinal research is to describe the relevant body of law and how it applies (Dobinson and Johns, 2007). In that sense, this research is purely theoretical.

Since the area under scrutiny; contractual obligations in light of the crisis created by COVID-19 is a novel issue, the absence of judicial decisions on the particular matter to date, has been a limitation to the research. The research scope is restricted to the contractual obligations of the contracts that are governed under the CISG.

III. DISCUSSION AND ANALYSIS

A. Force Majeure Clauses

It is an internationally recognised principle that contracts must be entirely performed by both parties (*pacta sunt servanda*). However, if parties to a contract are unable to duly fulfil the contractual obligations due to the occurrence of an event beyond their reasonable control, would the obligor be liable for the non-performance or can that party claim exoneration? In such events, the law provides relief through the operation of *force majeure*. The term *force majeure* refers to a superior force event such as acts of God or acts of war. In the law of contract, a *force majeure* clause is a type of clause which warrants a party to a contract to suspend or terminate the contract upon the development of a situation that prevents, impedes or delays the performance of the contract (McKendrick, 2018). The objective of a *force majeure* clause is two-fold; allocating risk and putting the parties on notice of events that may suspend or excuse service (Dalmia, 2020). Typically, *force majeure* events may include fire, flood, civil unrest, or terrorist attack.

The concept of *force majeure* which originates from Roman law and is found in civil law countries (in French, German, Italian and even Chinese law), is not typically recognised in common law countries (Balestra, 2020). A *force majeure* is a civil law concept that has no settled meaning in the common law. It must be expressly referred to and defined in a contract (Dalmia, 2020). When a contract has no *force majeure* clause, there still may be protection for the parties under doctrines of frustration, impracticality and impossibility, but the exceptions may be narrower than those offered by more specific *force majeure* clauses (Sircar, 2020). Generally, most international commercial contracts include a *force majeure* clause (Balestra, 2020).

The wording of a *force majeure* clause is crucial. The exact scope of the clause will depend upon the wording used to construct the clause. *Force Majeure* clauses come in many shapes and sizes., ranging from the simple clause providing for cancellation of the contract if the performance is interrupted by circumstances embraced within the term force majeure, to clauses of immense complexity, including, *inter alia*, a list of excusing events, provisions for notices to be issued to the promisee and detailing the consequences of the *force majeure* event (McKendrick, 1995).

Generally, an elaborated *force majeure* clause may have three fundamental components (McKendrick, 2018). The first component is the description of the events that invoke the clause. The description of the *force majeure* events is commonly divided into two parts. The first part consists of a list of certain events whereas the second part includes a general provision that seeks to embrace events that are absent in the specific list. The second component of a clause includes obligations of the parties concerning the reporting of the occurrence of the *force majeure* event. This will cover the matters such as the person to whom the report is to be made, the time at which the report is to be made, the form of the report and the consequences of failing to report in a specified manner. Yet, it is to note that all *force majeure* clauses do not

have this component. The third component consists of the remedial consequences of the occurrence of a *force majeure* event. A clause can grant an extension of time, suspension or variation or the termination of the contract.

In the absence of a definition of *force majeure* in statute or common law, the parties to a contract are free to agree what will amount to a *force majeure* for the purpose of their contract, reporting obligations and what the consequences will be if such an event happens (Longworth and Jones, 2020). The burden of proof lies with the party that seeks to invoke the *force majeure* clause.

B. The Effect of Force Majeure in Contracts under the CISG during COVID-19 Crisis.

With the closure of international borders and the implementation of different social distancing methods, the pandemic has led to a financial slowdown across countries in many sectors and has created obstructions of business. Given the situation, an inevitable concern arises concerning the inability to perform the contractual obligations in cross-border trade. Obligations such as provisions of goods or services are largely affected in the current circumstances. In view of this, this section of the research paper critically analyses the function of *force majeure* during COVID-19 crisis to relieve those who are parties to contracts that come within the purview of the CISG.

1) The Sphere of Application of the CISG: The CISG seeks to overcome the disparities between the different legal systems around the world, particularly between the civil law (French and German sub-traditions) and the common law (English and American sub-traditions), through building a uniform law for the international sale of goods (Henseler, 2007). Prior to analysing *force majeure* under CISG, it is necessary to examine briefly, the sphere of application of the Convention. Articles 1-6 of the CISG details the scope of the application. The CISG applies to contracts in two ways.

It applies to the sale of goods when both parties to the contract of sale have their places of business in different States that are both Contracting States unless the parties have excluded its application under Article 6 of the CISG. However, even if one or both parties do not have their place of business in a contracting State, the CISG may apply, "when the rules of private international law lead to the application of the law of a Contracting State", subject to the limitation in Article 95 in the Convention. For instance, if two parties in France and Sri Lanka have chosen French law as the law of the contract, the CISG would normally apply since France is a contracting State although Sri Lanka is not. Further, when deciding the application of the CISG, the nationality of the parties or the civil or commercial character of the parties or of the contract (for instance, the place where the buyer takes delivery and whether the goods are to move from one country to another country) remains irrelevant.

However, if the fact that the parties have their places of business in different States does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract, that fact is to be disregarded. There are further limitations to the application of the CISG. The Convention does not apply to certain types of sales, *viz*. sales of goods bought for personal, family or household use, sales by auction, sales on execution or otherwise by authority of law, sales of stocks, shares, investment securities, negotiable instruments or money, sales of ships, vessels, hovercraft or aircraft and sales of electricity. Unless a contract expressly excludes the application of the CISG or the parties otherwise so indicate, the CISG can automatically apply to transactions of a party with foreign buyers or suppliers of raw materials, commodities and manufactured goods (McMahon, 2017).

2) Force Majeure under the CISG: The term *force majeure* is not explicitly used in the CISG. However, it is widely acknowledged that

archetypal instances of *force majeure* qualify as a common cause for exemption from liability under Article 79 of the CISG. Article 79(1) specifies as follows:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

Accordingly, an impediment beyond a party's control is considered the basis for *force majeure* (Alper, 2020). Scrutiny of Article 79(1) depicts that there are four requirements to satisfy for successful invocation of the defence.

a) Presence of an impediment that is beyond the party's control.

Whether circumstances amount to an impediment in terms of Article 79 of the CISG is determined based on the contractual allocation of risk, trade usages and the typical sphere of control of the party in breach (Linklaters, 2020).

b) The impediment is unforeseeable.

This means that the impediment was not foreseen at the time the contract was concluded. Whether the requirement of unforeseeability is satisfied will be decided by applying the objective standard of a reasonable person in the position of the party in breach at the time, the relevant contract was concluded (Linklaters, 2020).

c) The impediment and its consequences could not have been reasonably overcome or avoided.

For instance, it would be considered whether the parties sought an alternative source of goods or attempted to arrange an alternative means of transport. This will also be ascertained with reference to the contractual allocation of risk.

d) The non-performing party must show that the non- performance is due to the impediment.

Also, pursuant to Article 79(4) of the CISG, if the party in breach does not comply with the requirement of giving a notice to the innocent party regarding the impediment and its effect on the inability to perform within a reasonable time after the non-performing party knew or ought to have known of the impediment, that party will be liable to pay damages resulting from the non-receipt of such notice.

The effect of Article 79 of the CISG is providing a defence to the non-performing party of a contract a defence against an action for damages and not to terminate the contract (Nicholas, 1989). Hence, if a party is excused from the non-performing, the party is not liable for damages. However, the other party holds the right to avoid the contract in case of a fundamental breach pursuant to other provisions under the title of remedies under the CISG (Bund, 1998).

It is also noteworthy that the CISG imposes liability on the party relying of the breach of contract as well. Article 77 of the CISG dictates that the parties shall take reasonable measures to mitigate damages caused by the other party. In the event of noncompliance, the party in breach will be entitled to claim a reduction in damages. Further, it is notable that under Article 79(3) of the CISG, temporary impediments will only temporarily excuse the obligor for the period for which the impediment exists. The excuse is not permanent.

3) COVID-19 pandemic and Article 79 of the CISG: The kind of unforeseen disruption to lives and businesses that the current world is experiencing due to COVID-19 is what one expects a *force majeure* clause is constructed to respond to (Longworth and Jones, 2020). Alper (2020) and Kuhne (2020) comment that in view of the early case law and Article 79(1) of the CISG, COVID-19 pandemic is likely to be

considered a *force majeure* event. Clearly, the impediment caused by COVID-19 is beyond the reasonable control of parties. It should also be relatively easy in most cases to prove the causal link between non-performance and COVID-19; that non- performance is due to an impediment as a result of COVID-19. Whether the parties could have avoided or overcome the consequences of COVID-19 would have to be decided by ascertaining the circumstances of each case (Alper, 2020).

As for precedent case law concerning a pandemic, there is precedent CISG case decided by the China International Economic and Trade Arbitration Commission [CIETAC] (PRC) in 2005 concerning the Severe Acute Respiratory Syndrome (SARS) outbreak (Arbitration Award 2005, L-Lysine case, [2005]). In this arbitral award, the tribunal decided that the seller could not claim SARS as a *force majeure* event and get excused from performance under Article 79 of the CISG since SARS had happened a few months before the contract was signed. The requirement of foreseeability was not satisfied.

Further, it is worth noting that, generally, under Article 79 of the CISG, economic hardship alone is not perceived as *force majeure* unless the performance becomes unequivocally burdensome for one of the parties. For instance, a case decided in 2009 by the Belgian Supreme Court, *Scafom International BV v. Lorraine Tubes S.A.S.*, where the supplier of steel tubes claimed that steel prices had abruptly risen; the Supreme Court, in connection with Article 79 of the CISG, ruled that:

Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the treaty.

It is also to be observed that the crisis created by COVID-19, similar to that of SARS and Middle East Respiratory Syndrome (MERS) will seemingly remain impermanent. Hence, the relief granted through Article 79 of the CISG for non-performance in international contracts will be in effect only until the crisis subsists. It means if the other party has not avoided the contract; the party in breach will be liable to perform the contractual obligations when the impediment passes (Bund, 1998).

In the event the parties to contracts that are subject to CISG wish to derogate from Article 79 of the Convention, they can choose to include a *force majeure* or hardship clauses in the contract and agree upon more flexible and broader terms and consequence in view of a *force majeure* event. Notably, contractual guarantees also may constrain the degree to which parties can rely on this Article (Linklaters, 2020).

IV. CONCLUSION

In light of the analysis of Article 79 of the CISG and the judicial precedent, *force majeure* can, seemingly, operate to excuse non-performance as a result of COVID-19 provided that the elements of the Article are duly fulfilled. Given the precedent, Article 79, however, is unlikely to provide relief to non-performing parties of contracts that were entered after COVID-19 was officially declared a global pandemic by the WHO. In fact, parties to contracts that were executed after the pandemic went viral will presumably face difficulties in establishing that the impediment was not foreseeable. The element of foreseeability will not be an issue for contracts that were executed before COVID-19 appeared in the globe since the contracting parties could not have possibly foreseen any massive economic interruption that a tiny virus could cause in this ear of technology and science.

One of the main grounds for non-performance in this time of COVID-19 crisis would be due to the economic hardships. Yet, economic hardships are not commonly considered a basis for *force majeure*, to invoke Article 79 of the CISG. Yet, if a party that has highly been affected to the detriment by a hardship that has been

triggered by COVID-19, this should be a ground for *force majeure* to ensure justice and grant due relief that sufferer.

Keeping the above discussion into consideration, the implications of the COVID-19 in international contracts under CISG would have to be decided on the case-by-case basis. To receive relief under the CISG for the impediment created by COVID-19, parties are advised to adhere to the crucial requirements, e.g., tendering reasonable notice of non-performance, take requisite measures to mitigate the resulting losses of the pandemic, e.g., making negotiating to preserve the contract and other steps to that would be necessary to allow establishing the losses, e.g., maintaining proper records and gathering evidence of the losses or delays.

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Copyright Protection of Application Programme Interfaces: An Analysis of the Sri Lankan Position

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Abstract - Application program interfaces (APIs) are ubiquitous in our digital experience as they are responsible for ensuring interoperability between software. However, the applicability of copyright law to APIs has become a point of significant contention. Last year the Supreme Court of the United States granted a writ of certiorari to review the U.S. Court of Appeals' rulings on whether such software interfaces attract copyright protection and whether the use of an existing software interface in creating a new program constitutes fair use. The questions raised in these legal proceedings have far ranging implications for the practices and business models of the software industry and any other businesses that rely on APIs for network effects. This paper provides an overview of the debate surrounding copyright protection of APIs and then analyses the Sri Lankan Intellectual Property Act, No. No. 36 of 2003 and case law relating to copyright law within the country to consider the position of APIs under the existing Sri Lankan intellectual property regime. The analysis reveals that there are several ambiguities and open questions under the Sri Lankan copyright regime which create uncertainty as to whether APIs attract copyright protection. Further, it is unclear as to the applicability of the defence of fair use to allow copying of APIs in limited circumstances in the event of copyright protection. This gives rise to the same questions of law raised in the Google v Oracle proceedings. As such, it is recommended that the Legislature intervene and provide guidance to address the uncertainty created for the country's software industry and other businesses reliant on APIs.

Keywords - API, Copyright, Software, Interfaces, Fair Use

INTRODUCTION

Application Program Interfaces, more commonly referred to as APIs, have often been described as the glue that connects the digital world. A more apt description is unlikely to be found as APIs are what ensure interoperability between different systems by allowing for the seamless exchange of data between the said systems. Technological advancements that are rapidly gaining traction such as the Internet of Things are heavily reliant on APIs to achieve the level of interconnectivity required. Moreover, as of June 2020, there are over 23,100 web APIs recorded (ProgrammableWeb, 2020), a significant leap from the 2000 web APIs in January 2010 (Santos, 2017).

Considering how crucial APIs are to the digital experience, the question of copyright in APIs is swiftly becoming the centre of global debate, particularly because a longstanding legal battle over APIs between Google and Oracle has been granted certiorari by the United States Supreme Court to review questions on copyright protection of APIs and fair use in Google LLC v Oracle America, Inc. (United States Supreme Court 2020). The issues raised in this litigation are of significant relevance to other jurisdictions regarding the treatment of APIs. This paper proposes to analyse Sri Lanka's copyright regime to see whether it would raise similar questions of law as those raised in the Google v. Oracle proceedings.

II. RESEARCH METHODOLOGY

This paper provides a brief overview of the history of the API copyright debate and common arguments raised in relation thereof. Thereafter, the provisions of the Sri Lankan Intellectual Property Act, No. 36 of 2003 and case law relating to intellectual property are examined to consider whether the Sri Lankan intellectual property regime when applied to the context of APIs gives rise to the same underlying ambiguities that gave rise to the Google v. Oracle case.

AN INTRODUCTION TO APIs AND ISSUES UNDER COPYRIGHT LAW

A Brief Overview of APIs

APIs are sets of rules that allow one software to communicate with another software. APIs function in a number of contexts, including enabling internal interoperability with other software of the same ecosystem and external interoperability with software developed by third parties. In the absence of APIs, developers would have to write new code every time they wanted their software to interact with another software. To circumvent this painstaking procedure, APIs are a set of instructions for a particular software that, on a basic level, allows developers to make interoperable software. In essence, APIs ensure interoperability without software developers needing to understand how the other party's software works and obviates the need for the developer to develop new code each time she wants to interact with a software system.

In theory, APIs are purely functional as they permit communication and facilitate data exchanges between software rather than generating data of their own accord. For example, the Uber app utilises a Google Maps API to obtain location data from Google Maps. The location data is generated by Google Maps' proprietary algorithm and the API acts as a conduit for such information to be transferred to the Uber app. Thus, APIs do not generate data by themselves but function as information pathways.

The use of APIs was initially limited to achieving functional interoperability by software industries but now there has been a growing interest by businesses in leveraging APIs to monetise data, create strategic partnerships and gain access to more data to create new products (Iyengar, Khanna, Ramdath and Stephens 2017). For example, close upon 800 of the web APIs recorded (ProgrammableWeb, 2020) are related to banks which signify a growing interest by banks to open up customer and payment data to third party providers as part of the open banking movement.

Storms Ahead: The Oracle v Google Saga

The European approach to copyright in functional aspects was established in the case of SAS Institute Inc v World Programming Limited (2012), wherein the Court of Justice of the European Union case held that Article 1(2) of the Council Directive 91/250/EEC of 14 May 1991 must be interpreted to mean that the functionality of a computer program did not constitute a form of expression and was therefore not protectable by copyright.

Meanwhile, across the pond, copyright jurisprudence in the United States had largely stabilised on the idea that features that were commonly deemed functional or network aspects of software were not subject to copyright protection after initial copyright battles addressing the same in the United States in the early 1990s (Menell, 2018). However, the question was once again raised when Oracle America, Inc filed a case against Google, Inc (now Google LLC) in 2010 over 37 packages of code. Oracle America alleged that Google used Oracle's JAVA APIs without authorisation in its Android operating system and claimed approximately $9 billion in damages for lost revenue.

The trial court initially ruled that APIs did not attract copyright protection. In 2014, the

Court of Appeals for the Federal Circuit overruled the trial court's ruling on the basis that the JAVA API declarations attracted copyright protection due to the creativity involved in their creation.

Once again at the trial level, Google's defence of fair use prevailed and the judgment was once again appealed to the Court of Appeals. The Court of Appeals for the Federal Circuit held that the said use by Google did not constitute fair use and remanded the case to the trial circuit for trial on damages.

Google subsequently appealed the case to the Supreme Court to review the copyright and fair use rulings of the Court of Appeal and certiorari was granted last year. The outcome of this case is touted to have lasting ramifications on the software industry and future technological innovation.

Common Arguments Regarding the Copyright Protection of APIs

The position of APIs under copyright law has been a point of contention. One school of thought argues that APIs cannot attract copyright protection due to their functional nature. In the United States, copyright protection of certain aspects of software has historically revolved around the question of functionality. In the United States case of Lotus Development Corporation v Borland International Inc (1995), the Court held that the menu command hierarchy of a software cannot attract copyright as it merely allowed users to control and use software without requiring access to the underlying code. In reaching this decision, the Court considered that if the menu command hierarchy received copyright protection, the same operation would have to be expressed in a different manner in every program. Therefore, by extension of this principle, APIs cannot attract copyright as they serve a functional purpose.

A collateral argument is that APIs can only be expressed in a standard manner and such expression constitutes necessary expression; therefore, such APIs cannot be subject to copyright protection (Balganesh, S., Nimmer, D. and Menell, P., 2020).

Further, it has been argued that a ruling that APIs attract copyright protection would have a stifling effect as it would confer on copyright holders "a patent like veto power…the ability of a copyright holder to control the operations of others' products merely because they use its programming interface as a method for communicating or interoperating with the copyright holder's product" (Red Hat, Inc. Brief in Google v. Oracle, 2019). Moreover, a lack of copyright protection would enable a more efficient development process as programmers can copy and reimplement existing APIs without fear of claims of copyright infringement (Electronic Frontier Foundation Brief in Google v. Oracle, 2014). However, it must be noted that the force of the interoperability argument greatly diminishes when APIs are copied for the purpose of creating software that is deliberately not incompatible as specifically argued in Google v. Oracle (Brief for SAS Institute Inc, 2020).

From a theoretical perspective, it has also been posited that API developers cannot be included in the same category of creators of creative works as APIs are developed due to necessity rather than due to seeking a specific reward for creative endeavour; therefore, copyright protection is not necessary to incentivise innovation (Sagdeo, 2018, p.255).

An alternative school of thought believes that APIs should be afforded the same level of copyright protection as other software products. This is because it has been argued that there many different ways of expressing an API and the significant creative choices taken by developers that amount to protectable expression under copyright law (Brief for the United States in Google v. Oracle, 2019).

Further, failing to confer copyright protection on APIs has been argued as undermining the efforts and investments of proprietary software companies. (Brief for SAS Institute Inc, 2020). It has been contended that if APIs are protected by copyright, such a position expands the opportunities for software companies to recoup their investments through a variety of licensing options and they should be free to make such choices (Brief for SAS Institute Inc, 2020).

IV. THE POSITION OF APIs UNDER SRI LANKAN COPYRIGHT LAW

The outcome of Google v. Oracle would have far reaching implications globally and should make academics and practitioners to look at their own legislation to see whether APIs attract copyright protection under their law. At this juncture, it necessitates the review of the Sri Lankan position on APIs and to consider if the existing intellectual property regime gives rise to similar legal issues as those encountered in Google v. Oracle.

Exploring the Question of Copyright Protection of APIs under Sri Lankan Law

Under the Sri Lankan Intellectual Property Act, No. 36 of 2003 (hereinafter 'the Intellectual Property Act'), original computer programs are specifically protected as works in terms of Section 6(1)(a).

The definition of originality has differing standards globally and it has yet to gain extensive judicial consideration in the Sri Lankan courts on that specific question. Under the Feist Publications Inc v Rural Telephone Service Co (1991) standard of the United States, a minimal level of creativity is needed for a work to constitute copyrightable material. However, under the approach of the courts of the United Kingdom, even matters that do not involve creative expression and simply involve the compilation of data may constitute copyrightable material (Cornish, T. William, L. Aplin, D., 2013), often referred to as the sweat of the brow doctrine. The question was addressed by the Sri Lankan Supreme Court in Director, Department of Fisheries v. C. Aloy Fernando (2018) wherein the Court had to make a finding of originality to see if a disputed work attracted copyright prior to the proof of infringement. In coming to its finding, the Court held that the preparation of the work involved skill, choice of language and style, composition and intellectual effort. This definition does not necessarily preclude works made involving the sweat of the brow doctrine and leaves the position open ended. As the lower threshold of the sweat of the brow doctrine is still open under Sri Lankan law, the likelihood of APIs attracting copyright under Sri Lankan law is significantly higher.

The definition of a computer program is set out under Section 5 of the Intellectual Property Act as a "set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result". The term computer is also defined under Section 5 of the Intellectual Property Act to mean "an electronic or similar device having information processing capabilities". It is also interesting to note that these definitions reflect the same wording used in the Code of Intellectual Property (Amendment) Act, No. 40 of 2000 which initially introduced copyright protection for software under Sri Lankan law. While the first API was developed in 2000, APIs only began to gain traction several years later.

As APIs are a set of instructions on how to communicate with software, they can, for the purposes of the Intellectual Property Act, be deemed to cause a computer to "achieve a particular task or result" by transferring information. Returning to the Uber example, when the app requires location data, it is one of Google Maps' APIs which achieves this by facilitating the transfer of data from Google

Maps. Thus, prima facie, APIs are protected under Sri Lankan copyright law as they fall within the definition of a computer program under the Intellectual Property Act.

However, it should be noted that on a strict construction of the definition of a computer program, certain types of APIs may potentially be excluded from copyright protection as the API does not always make a "computer" perform or achieve a particular result. The definition of a computer under the Intellectual Property Act seems to impose an implied restriction of the applicability of the Intellectual Property Act to scenarios involving physical devices with information processing capabilities.

Further, in terms of Section 8(a) of the Intellectual Property Act, copyright protection will not be extended to "any idea, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work". This express removal of copyright protection for such matters is a new inclusion to Sri Lankan intellectual property law as a comparative provision was not included in the Code of Intellectual Property Act, No. 52 of 1979 as amended ('Code of Intellectual Property'). The Code of Intellectual Property was based on the World Intellectual Property Organisation's model law for developing countries (Cabral, 2004) and the said model law also did not include such a provision.

While the wording of Section 8(a) of the Intellectual Property Act has yet to receive judicial consideration in Sri Lanka, APIs have the potential to fall within the wording 'method of operation' in the aforementioned section due to their utilitarian nature. As per the United States case of Lotus Development Corporation v Borland International Inc (1995), 'a method of operation' refers to a means by which a person operates something and therefore, the menu command hierarchy of software is uncopyrightable because, without it, users would be unable to access or control the software's functional capabilities. Therefore, in theory, APIs can be deemed to fall within the category of a method of operation as they set out a method to allow interoperability between software systems.

Further, Section 8(a) of the Intellectual Property Act may also be interpreted to allow for a single work to be separated into copyright protected and non-copyright protected elements as Section 8(a) specifically notes that the exempted categories do not obtain copyright protection "even if expressed, described, explained, illustrated or embodied in a work". In light of this, APIs may potentially be split into segments attracting copyright and purely utilitarian segments which do not attract copyright.

While it is an established principle of copyright law that an idea is not protected by copyright but the expression thereof can attract copyright, it should also be noted that Section 8(a) allows for instances where the expression of an idea may, in certain instances, not be subject to copyright. The wording of Section 8(a) may open the door for the entry of an equivalent of the merger doctrine, a judicial construct of U.S. copyright law. Expounded in the United States Court of Appeals case of Morrisey v Procter & Gamble Co (1967), the merger doctrine prevents courts from deeming a work as attracting copyright protection if there is only one or limited means of expressing the said works. This recognises that the idea and expression have merged to the extent that they are indivisible and, by virtue of such merger, copyright protection cannot be afforded to the work. However, whether Sri Lankan courts would accept such an interpretation or reject the doctrine like their counterparts in the U.K. as in Ibcos Computers v Barclays Mercantile (1994) is to be seen.

Thus, it is difficult to ascertain how the question of copyright protection of APIs

would be treated judicially in the event of a legal dispute under Sri Lankan law.

B. The Potential Defence of Fair Use under Sri Lankan Law

In the event of a finding of copyright protection, standard industry practices such as copying common elements would now be a violation of the economic rights of the copyright holder of the API. It is now necessary to consider if the statutory formulation of the defence of fair use under Section 11 of the Intellectual Property Act can be used to allow the industry to continue such practices.

Section 11(1) of the Intellectual Property Act gives examples of purposes that constitute fair use which include criticism, comment, news reporting, teaching, scholarship and research. It should be noted that Section 11 is a non-exhaustive provision and can be interpreted to include similar purposes.

Further, Section 11(2) sets out four factors to be considered; namely, the purpose and character of the use, the nature of the copyrighted work, amount and substantiality of the portion used and the effect of the use upon the potential market for or value of the copyrighted work. It is interesting to note that these factors reflect the same four factors that are used in § 107 of the U.S. Copyright Act and the outcome of the Google v Oracle saga could potentially be influential in future interpretations of this section.

On a first reading, of Section 11(2), it can be argued that since APIs are used solely to achieve interoperability, there is no inherent commercial value in copying the API itself. However, if under judicial consideration, the assessment of commercial use includes the ancillary benefits that arise from the use of the API i.e. the ability to interoperate software due to the API and thereby improving the commercial viability of the new software, it is likely to fail to satisfy Section 11(2)(a).

The utilitarian nature of APIs may support a finding of fair use in terms of Section 11(2)(b) as APIs involve more than a series of creative choices.

Further, as per Section 11(2)(c), the degree of copying is relevant. If the API is copied verbatim, it is unlikely to amount to fair use. However, if only features are copied and improved upon, there is a likelihood of coming to a finding of fair use.

Finally, assessing the market value and the effect of use for the potential market or value of the copyrighted API in terms of Section 11(2)(d) is heavily contextual. For example, if a monetised API is copied, there would be a market available for it.

Thus, a finding of fair use in terms of Section 11 is heavily contextual and there is no clear indication under the Intellectual Property Act that the copying of APIs would, in general, attract the defence of fair use under Sri Lankan law.

Implications of the Issues Pertaining to the Copyright Protection of APIs under Sri Lankan Law

The wording of the Intellectual Property Act and existing case law on intellectual property do not give rise to a clear stance on copyright on APIs. As noted in the Red Hat, Inc Brief in Oracle v Google (2019), technological innovation is likely to be disrupted if the software industry is not certain as to where it stands. In the event APIs constitute copyrightable works, players in the software industry may find that they are liable for inadvertent copying or they may find themselves reinventing the wheel by constantly having to create new APIs to avoid copyright infringement.

Further, the impact of such ambiguity may also be extended to businesses outside of the software industry that are relying on APIs as a cornerstone for strategic expansions as it opens the said businesses up to hitherto

unconsidered claims of copyright infringement.

V. CONCLUSION

APIs are often unconsidered and unseen essentials in our digital lives. A determination on the question of copyright protection of APIs would have far reaching ramifications not only for the practices in the software industry but also other businesses that rely on APIs to facilitate growth via network effects.

Under the Sri Lankan Intellectual Property Act, it is difficult to predict how APIs could be treated. Whether APIs attract copyright, or only aspects thereof would attract copyright and whether the fair use can be raised as a successful defence against infringement of potential copyright in APIs are just some of the questions that arise under our copyright regime within the context of APIs.

The circumstances are such that it behoves the Legislature to consider and provide guidelines as to how APIs should be treated under the law. In the interim, one of the options available to the software industry to safeguard themselves at this juncture would be to focus on the development of APIs that involve less creative choices and thereby reducing the chances of attracting copyright protection. Failure by the Legislature to provide clarification would result in the Sri Lankan software industry and all other industries that are looking to APIs for strategic purposes to be left mired in uncertainty and, in a worst case scenario, potentially subject to long drawn out legal battles such as that of the proceedings between Google and Oracle.

ACKNOWLEDGMENTS

The Author would like to thank her fellow Warwick Business School alumnus, Mr. Vig Kannan at Mosaik Analytics, for his invaluable feedback on the technical aspects of this paper.

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Technical Session II: Session Summary
Session Theme: Emerging Trends in Public Law: Legal and Economic Perspectives

Session Chair: Mohan Peiris PC

Technical Session II on Law was held on the sub theme of 'Emerging Trends in Public Law: Legal and Economic Perspectives' and the session was chaired by Mohan Peiris PC. He He served as the Attorney General of Sri Lanka from 2008 to 2011 and as the Chief Justice in Sri Lanka from 2013 to 2015.

NS Liyana Muhandiram was the first presenter of the technical session II. Her research was on Right of the Host State to Regulate the Environment and Investment Protection. She explored the legal implications of each way by highlighting the most appropriate method to incorporate environmental concerns in the texture of Bilateral Investment Treaties (BIT) in her presentation.

SPCT Abeysiriwardena, VR Algewatta and ALU Gamage presented their research titled The Failure of Guardians: Mount Lavinia Artificial Beach and Public Trust Doctrine which was a timely research based on current environmental concerns in the country.

Third presenter of the session was SBYM Duneesha Siwrathne. Her research was titled 'How the Offence of Rape has been Overshadowed by Marriage and its Impact on National Growth of Sri Lanka: A Critical Analysis from Legal and Economic Perspectives'. It was a interdisciplinary research which reflects both criminal law aspect and the economic impact of the offence of Rape.

The research titled 'Establishing Rule of Law to Achieve Sustainable Development: The Pathway for National Growth in Sri Lanka' was presented by TD Walgama which was focused on the development of a comprehensive framework with an effective monitoring procedure and responsible institutions to achieve sustainable development, which would lead its way to comply with international standards and ultimately to national growth.

Final research presented at technical session IV was 'Application of the Concept of Reparation in Transitional Justice in Sri Lanka'. It was a co authored research paper by AN Hettiarachchi and WDS Rodrigo. They presented the paper suggesting adopt the victimcentric approach, thereby making it possible to address individual cases equally and effectively rather than addressing grievances of specific communities.

Mohan Peiris, PC concluded the session by reflecting the importance of learning the law through a universal approach.

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Paper ID: 494

Right of the Host State to Regulate the Environment and Investment Protection - A Changing Landscape

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Abstract - The increase in investment flows is one of the newest challenges in the pursuit of sustainable development. Generally, investors establish their operations in countries that have less stringent environmental regulations to reap maximum benefits from the investment. It has been estimated that a 1% increase in foreign direct investment contributes to a 0.04% increase in environmental pollution. In response to this challenge, countries have revisited and re-framed their Bilateral Investment Agreements (BITs) in a manner to balance the host state's regulatory power concerning its commitments to protect the environment with investment protection. Accordingly, environment-related language has been used by different states within the BITs to preserve the regulatory power of the host state. Such language can be identified mainly in seven ways; i) referring to the environment in preambles of BITs, ii) reserving policy space for the regulation of environment in general, iii) reserving policy space for environmental regulation for the specific subject matter, iv) exceptional clause to indirect expropriation, v) none-lowering environmental standards to attract investments, vi) environmental matters and investor-state disputes and vii) general promotion of progress in environmental protection and cooperation. The effect of each way is different and therefore, this research purposes to explore the legal implications of each way by highlighting the most appropriate method to incorporate environmental concerns in the texture of the BIT.

Keywords—Bilateral Investment Agreements, Regulatory power, Policy Space, Indirect Expropriation, Non-Lowering Standards, investor-state disputes

I. INTRODUCTION

International Investment Law (IIL) and International Environment Law (IEL) are two distinct regimes that resulted from the fragmentation of international law(Koskenniemi,2006). Until the principle of sustainable development emerged environmental concerns were not integrated into the International Investment Agreements (IIAs)(Vinules,2012; Footer, 2009). Significantly, Part I of the Brundtland Commission Report of 1987 and Principle 4 of the RIO Declaration recognize sustainable development as a way-out to reconcile the tension between development and environment and accordingly affirmed that environmental protection should be integrated into all development process to achieve the sustainable development. As a part of IIAs, BITs are vitally important as more than 180 countries of the globe are a party to at least one BIT(Footer,2009).

The UNCTAD and various scholars have identified many existing BITs as the first generational BITs since they reflect mostly the demands of the capital-exporting countries in the developed world. They are not detailed in nature. (World Investment Report,2015: Salacuse, 2015) One of the main criticisms against these first generational BITs is that they are drafted in a way of hampering the State's sovereign right to regulate the matters relating to the environment, national security, public health, employment, and economic development. (Harten and et al,2010: Spears, 2010). When environmental state measures which are taken to comply with the international environmental obligations of the host state negatively affect the protection of

investment, investors tend to make claims against the host state. If the policy space for environmental concerns of the host state is not expressly stipulated in the BIT, non-commercial concerns become less important in the eye of the investor-state dispute settlement mechanism(ISDS) and many state measures get halted at the arbitration. ((Beharry and Kurutzky,2015; Vinules,2012: Spears, 2010).

With the realization of the fact that BITs are not harmless political declarations and they 'bite' state measures, countries like Venezuela, Bolivia, and South Africa have rendered to terminate their BITs while other states like Canada, United States, China, France, Norway, and the United Kingdom tended to reframe the policy space in their BITs.

The Second generational BITs preserve more regulatory autonomy and flexibility for host countries to adopt non-discriminatory measures having a bonafide intention for the general welfare. Such BITs have adopted the principle of sustainable development *inter alia*, providing an explicit reference to the protection of the environment to restrain the discretionary power of the arbitral tribunals. This approach has not only been followed by OECD members. Countires such as Ghana, India, Brazil, Azerbaijan, and Serbia have also followed the same approach. These BITs purpose to balance the state's environmental concerns with its investment protection commitments and also assist the tribunals with precisely drafted BIT in interpretation.

Even according to Article 31.1 of the Vienna Convention of the Law of Treaties(VCLT), the ordinary meaning of the treaty is paramount important in treaty interpretation and potential conflicts between environmental concerns and investment protection can be considerably mitigated through the incorporation of explicit reference to the environmental concerns. By now, more than 50 countries have revisited their BITs and revised their model BITs.

In this backdrop, the purpose of this study is to explore the ways in which environmental concerns have been integrated into modern BITs. Each way of reference is different and the implication of them varies with the textual formation of the BIT. The subsequent sections of the paper are dealt with it. The study concludes by suggesting the most appropriate way of including environmental concerns within the texture of BIT.

Reseach Methodology

Due to the analytical nature of the study, this research is primarily based on the qualitative research approach. BITs signed by the countries were used as the primary sources and books, refereed journal articles, arbitral decisions, statements of the officials, conference papers, and documents of non-governmental organizations were used as secondary sources.

RESULTS AND DISCUSSION

According to a study done by the Organization for Economic Cooperation and Development (OECD) in 2011, although only 6.5 percent of the BITs concluded till 2010 contained the environment-related language in overall, an essential dimension of the newly concluded IIAs from the 1990s is that 89 percent of them include environmental concerns. However, there are variations in the inclusion of environmental language in IIAs from BIT to BIT. For instance, Egypt, Germany, and the United Kingdom have less than 1% of the propensity of inclusion of environmental concerns. Nonetheless, 83% of IIAs of Canada, 75% of IIAs of New Zealand, 61% of IIAs of Japan, and 34% of IIAs of United States contain environmental concerns in their BIT. Moreover, the modern state practice has rapidly increased this tendency and the author of this research found that all the BITs concluded in 2017,2018, and 2019 contain environment-related language.

As the OECD study has pointed out, the way of inclusion of environment-related language can be identified mainly in seven ways; i) general language in preambles of BITs, ii) reserving policy space for the regulation of environment in general, iii) reserving policy space for the

environment regulation for the specific subject matter, iv) exceptional clause to indirect expropriation, v) none-lowering environmental standards to attract investments, vi) environmental matters and investor-state disputes and vii) general promotion of progress in environmental protection and cooperation(Gordan and Phol,2011). This expression proves that environmental concerns have come forward in treaty negotiations in the contemporary world. A BIT may use one or multiple references to the environment in any of the ways mentioned above.

General language in preambles of BITs

The preamble mainly deals with the objective and purpose of the investment agreements. It recognizes that the promotion of investment can be achieved *inter alia* without relaxing environmental measures. Reference to environmental concerns or sustainable development in the preamble does not create any right or obligation between the parties; it only appears hortatory and inspirational nature (Beharry and Kurutzky,2015). However, according to Article 31 (1) and (2) of the VCLT, the preamble helps in interpreting the object and purpose of the treaty.

Reserving policy space for the regulation of the environment in general

The most used expression on the environment in second-generation BITs is reserving policy space for regulating the environment. This is famously identified as an exception clause. This clause is significant as it purposes to exempt certain transactions or people or situations from the applicability of the commitments in an investment agreement to protect the interests of the host state. In some agreements, this clause is referred to as the general exception, as environmental concerns, as beneficiaries of the protective norms as human, animal, plant life, or health and some to sustainable development and environmental protection or right to regulate.

A state measure within the meaning of this exception clause would be legal, irrespective of its non-compliance with other provisions of BIT(Salacuse,2015: Dolzer,2012; Ranjan,2012). The effectiveness of this provision has been further strengthened in some BITs specifying the nexus between the state measure and the policy objective. For instance, the phrase 'as *it considers appropriate to'* in Article 9 of Rwanda-Arab BIT is having self-judging nature and does not as strict as the phrase 'as it considers.' It gives policy space for the host state to decide the limitations and legitimize its state measures which purpose to regulate the environment. Extending this flexibility further, Article 12(6) of the US Model BIT has provided the procedure for any party to consult the other party regarding any matter relating to the exception clause. This provides an opportunity for the parties to negotiate their differences in a flexible manner.

Reserving policy space for environmental regulation for specific subject matter

Moreover, a limited number of treaties reserves policy rights for a particular purpose on the environment in the performance requirement clause or national treatment clause. Performance requirements allow states to take measures necessary to protect the environment and natural resources(Ex-US model BIT, Article8(3)(c): Canada- Moldova BIT, Article 9.2). Occasionally, some BITs might include provisions that give retrospective effect to the exceptions of national treatment, including the environmental measures(Ex- Article 3.3 of Russia-Sweden BIT). In Congo-US BIT of 1990, Congo has reserved its right to make limited exceptions in *inter alia* drinking water supply. These provisions further provide latitude for the host state to validate the state regulation.

Exceptional clause to indirect expropriation

Moreover, explicit recognition of environmental concerns that tighten the scope of expropriation is also a well-known way to reduce the tension between regulatory power and promotion of the investment(Gordon and Phol 2001:

Ranjan,2012). When the text of the BIT does not differentiate non-compensable regulation with compensable expropriation, the tribunal adopts three tests to determine the case; namely, the sole effect test, police power test, and proportionality test. However, famous arbitral awards such as *Metalclad v Mexico, Tecmed v Mexico* and *Santa Elena v Costa Rica* are evidence of the heavy burden placed on the government to ensure legal certainty. Furthermore, the police power test has been confused with the well-settled right of the State to expropriate foreign investment under customary international law lawfully(Ranjan,2012). Hence, to avoid these confusions the second generation BITs have exempted bona fide and non-discriminatory state measures that purpose to ensure environmental protection from the indirect expropriation(Ex-Article 6.8 of Argentina-Arab BIT, Annex B10 of Canada-Mongolia BIT and Article 5.5 of India's Model BIT). Further, BITs have provided precise limitations to the indirect expropriation stipulating the proper criteria viz. economic impact of the state measure, the intervention of the reasonable expectations of the investors, and character of the state action which requires a case by case, fact-based inquiry. This criterion has been followed in the US Model, Canada-Mongolia BIT, and Japan-Argentina BIT. Moreover, this approach lessens the discretionary power given to the arbitrary tribunals to decide upon the disputes.

None-lowering environmental standards

Non-lowering measures are purposed to avoid lowering environmental standards of the host state to attract investors. This provision came as a response to the 'pollution heaven hypothesis' whereby, the host state purposes to attract investors by lowering environmental or labour standards(Footer,2009) Most of the recent BITs include none lowering environmental standards with the phrase that *'it is inappropriate to encourage the investment by relaxing..'*. The scope of the clause may be varied with a treaty to treaty. For instance, Article 17 (2) of Brazil-Guyana BIT has provided a procedure for the parties to settle their issues relating to lowering standards by consultation. However, in order to reap the maximum benefit from this non-lowering environmental standard, a country has to incorporate this standard into it's all the BIT commitments including the most favored nation's (MFN)treatment. Otherwise, the MFN treatment would enable investors to attract more favorable substantial protection given under another BIT of the host state.

Environmental matters and investor-state disputes

ISDS mechanism is the most effective international remedy available for the investor, and also it facilitates attracting more foreign investors from the viewpoint of the host state. As Vinuales points out, approximately 40 claims with environmental components have been brought before arbitral tribunals from 2000-2010. Second generation BITs have attempted to avoid the criticisms made on the ISDS mechanism against its democratic deficit. For instance, Model BIT of Canada and Model BIT of USA have accepted *amicus curiae* briefs in their BITs. In *Biwater v Tanzania* the tribunal accepted the significance of the *amici's* contribution as it affirmed public interest in the investor-state dispute, convincing the tribunal about sustainable development, right to water and international corporate social responsibility. Moreover, Both in *Methanex Corporation v United States* and *United Parcel Service of America Inc. v. Government of Canada* the tribunal granted amicus standing to NGOs and public interested groups to submit written submissions.

In Addition to this, Brazil- Guyana BIT and the US Model BIT have excluded the application of environmental concerns from the dispute settlement mechanism. Further, Article 12.5 of the US Model BIT has introduced exhaustion of local remedies as a precondition to ISDS and it provides a forum for both the parties to have a compromise. Further, US-Rwanda BIT,

Argentina-Arab BIT, and India Model BIT have allowed consultation of experts on environment-related matters without prejudice to the arbitration procedure with the approval of other disputing parties. More importantly, India's Model BIT provides direction for the tribunal to consider the damage caused to the environment by the investor as a factor to mitigate the compensation when monetary damages are awarded.

General promotion of progress in environmental protection and cooperation

Furthermore, some BITs contain clauses that promote the furtherance and corporation of environmental objectives calling states to strengthen environmental standards. This expression is important when the treaty is interpreted according to the holistic approach by the tribunal.

In addition to these seven ways, the recent BITs have identified the voluntary responsibility of the parties to internalize the standards of corporate social responsibility and OECD Guidelines for Multinational Enterprises. It is evident in Article 17 of Argentina- Brazil BIT, Article 12 of India Model BIT, Article 17 of Japan-Argentina BIT, Article 10of Serbia Model BIT. The Brazil-Guyana BIT is progressive in this regard as matters relating to corporate social responsibility have been excluded from arbitration. More importantly, the Morocco-Nigeria BIT has provided standardization for the companies in areas of resource exploitation and high-risk industrial enterprises that they should maintain their certification to ISO 14001 or an equivalent environmental management standard. If the investors are not obliged to prescribe standards, the host state can take action against the investors. This further obliges parties to comply with the international environmental obligations that the host states or home states are parties. Furthermore, unlike other BITs, conducting environmental impact assessment prior to the establishment of the investment has also been recognized under this BIT. Consequently, the text of the BIT has legitimized the right to regulate the environment of the host state.

CONCLUSION

One of the vibrant features in the second generation BIT is the inclusion of environment-related language for the protection of the environment within the BIT. Accordingly, the conflicting nature of environmental regulation and investment promotion can be minimized by explicit reference to the environment. Since the investment treaty is the primary source in an investment dispute, if the treaty provisions are precisely drafted concerning the rights of both the host state and investors, the tribunal will be able to strike an appropriate balance between the two. However, whether both parties have a similar bargaining power to finalize a BIT depends upon the circumstances.

Linking environmental concerns explicitly with the expropriation clause and general exception clause would generate more latitude for host states to legitimize their state measures without violating the treaty provision. Reference to the environment in the preamble is significant when the purpose and object of the treaty are questioned. However, the preamble alone would not be able to regulate the environmental concerns of the host state. Similarly, the clause relating to the general promotion of progress in environmental protection and cooperation alone does not provide sufficient policy space for the host state to legitimize its state measures on environmental protection. Moreover, none-lowering environmental standards prevent degrading the environmental quality of the host state by its state measures and also by the investors. The effect of this provision is less influential than the exception clause. Multiple references can be made in a BIT to properly balance environmental protection with investment promotion. The US Model BIT and Morocco-Nigeria BIT of 2016 are more progressive in this regard as they contain environment impact assessment and environmental management standards in BITs

extending the common ways of including environment-related language. However, such expression would not unilaterally enable the state to legitimize their arbitral or political decision. The state bears the burden of proof of these clauses and hence, investors' rights will not be jeopardized.

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Paper ID: 463

The Failure of Guardians: Mount Lavinia Artificial Beach and Public Trust Doctrine

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Abstract - Sri Lanka has been identified as one of the most visited tourist destinations due to environmental and the archaeological background. The projects that have been carrying out by the government for the purpose of restoring the environment should entertain the process which is prescribed by the legal system of the country. The applicable legal authorities for the Mount Lavinia artificial beach project are the Coast Conservation Act No 57 of 1981, the National Environmental Act, and the constitution which has laid down the process applicable to the projects which may adversely affect the environment. Carrying out EIA(Environmental Impact Assessment) is the yardstick to estimate the environmental impact which will result from the project. The power of exercising the EIA is with the director-general of the coast conservation. The sovereignty of the people is exercised by the executive, judiciary, and the legislature. Fails to carry out a prescribed process by the authorities violate the sovereignty of people thus results in the violation of public trust. As per the possible remedies filling a fundamental rights violation, writ application, or can apply for an injunction. This research will examine the relationship between the environmental impact assessment and the public trust doctrine relating to the Mount Lavinia artificial beach project and how the project has violated the public trust by not conducting an EIA thus violating the sovereign power of people. The research is carried out to identify the existing legal framework of the study area, to understand the practical issues in developing the project, and to provide recommendations as remedies to curb such violations. The black letter approach has been used to identify and clarify the status of the project.

Keywords – Environmental Impact Assessment, Public Guardianship, Pubic Trust Doctrine

I. INTRODUCTION

As per the constitution, it is a fundamental duty of every citizen to protect nature and conserve its riches. Even though safeguarding natural resources is declared as a fundamental duty under the constitution of Sri Lanka, at the same time it can be considered as a responsibility of the consumers of natural resources and human beings as a part of nature. Sri Lanka As an island, it is important to pay considerable attention to the coastal conservation when launching projects which can adversely affect the coastal environment.

Recently Sri Lanka has been started several artificial beach development projects in west coastal areas such as Calido, Agulana, and Mount Lavinia in order to control the coastal erosion of respective areas. This research is mainly focused on the legal aspect which governs the artificial beach project in Mount Lavinia, the practical issues of the project, and possible remedies to curb the current and future violations in this area of study. The law requires carrying out an environmental impact assessment prior to the conduct of development projects in environmentally sensitive areas. The decision-making power of coastal related matters lies with the authorities of central environmental and coastal conservation. In the abuse of these designated powers results in violation of the public trust doctrine impliedly protected by the constitution of Sri Lanka.

II. RESEARCH PROBLEM

Do the responsible authorities have acted within their capacity to protect the environmental rights in developing Mount Lavinia artificial beach?

III. METHODOLOGY

The research is based on a qualitative study. This Research paper complies with the mixed research method. Primary and secondary sources are used as a black-letter approach to identify and clarify loopholes and issues of the study area and as empirical approach expert information has been gathered by a senior environmentalist was used in order to examine and understand the current status of the project. All the existing literature including legislations, judicial decisions, juristic writing, and other writing has been used as secondary data.

IV. DISCUSSION AND ANALYSIS

Environmental Impact Assessment

EIA is a process of assessing the socio-environmental effects of a proposed development project which likely to alter the physical nature of the environment. The main object of conducting an EIA is to examine, analyze, and assessment of positive and negative impact of the planned activity. Environmental impact assessment is used to make decisions more transparent and to mitigate the negative impact of the relevant development project and enhance the potential positive impact.

The act has interpreted the EIA as a written analysis of the prediction of environmental consequence of a proposed development activity under the Interpretation Section 42 of the Coast Conservation Act (CCA). This section states that a development activity including the avoidable and unavoidable adverse environmental effects, alternatives which can less harmful to the coastal zone along with the reasons to reject such alternatives and irreversible or irretrievable commitments of resources required by the proposed development activity.

Analysis

The project of the creation of an artificial beach in Mount Lavinia can be taken as an amalgamation of two components. The main component is the creation of the artificial beach in Mount Lavinia and the dependent component is the sand integration from the Ratmalana area with the purpose of creating the artificial beach.

Sand filling project

The main project is governed under the Department of Coast Conservation and Coastal Resources Management (DCC&CRM) since it is a development activity carried out on the coastal area which results in the project proponents to adhere to the Coast Conservation Act No 57 of 1981 and National Environmental Act No 47 of 1980. According to Section 42 of the Coast Conservation Act(CCA) the term “development activity” has been interpreted as any activity likely to alter the physical nature of the coastal zone in any way including the construction of buildings and works the, the deposit of wastes or other material from outfalls, vessels, or by other means, the removal of sand, coral, shells, natural vegetation, seagrass or other substances, dredging and filling, land reclamation and mining or drilling for minerals, but does not include fishing.

Further, the Act has laid down certain ground rules to protect the coastal area of the country and has prescribed a permit procedure to be attended before conducting a development activity within the coastal area. CCA Section 14(1) submits that any person cannot engage in a development activity other than the activities prescribed within the coastal area except under the authority of a permit issued on behalf of the director. Further in favor of the sustainable development Section 14(2) of the Act has authorized the minister to prescribe certain categories of development concerning the long term stability, productivity, and environmental

quality of the coastal zone which is allowed without a permit issued under subsection (1).

After such authorization Section 16(1) of the said Act acquiesces that upon the application for a permit to conduct a development activity within the coastal zone the director shall require the applicant to furnish an environmental impact assessment (EIA) concerning the said activity and the duty to comply for the requirement is within the applicant. The EIA process firstly mandated for the large scale development projects and environmental sensitive areas by the Gazette no. 772/22 of 1933. It also prescribes the type of projects which require to conduct an EIA. Further elaborates if there are less adverse environmental impacts initial environmental examination (IEE) can be prescribed instead of an EIA.

The creation of an artificial beach undoubtedly alters the physical nature of the coastal zone. Thus, according to the CCA, it mandates a permit in order to carry out this project. However, even though the objective of this project is to protect the environment or the project provides nourishment as a soft solution to the beach, it does not justify the fact that the project does not require an EIA. It exists within the discretion of the Director-General to demand an EIA for the development activities. The EIA report is the authentic document to determine whether the project will result beneficially or detrimental to the environment. The effect on the environment due to a proposed project cannot be predicted before the process of EIA. Thus, the lack of furnishing the requirement of the EIA report evidently results in abuse of discretionary power which is given to the Director-General of the DCC&CRM. Noncompliance with such given power amounts to abuse of power.

The Director-General has an absolute power to prescribe projects which shall not require an EIA report, whether the EIA or the IEE should be conducted and authorize a project to be conducted after furnishing the EIA or IEE. Thus, the Act seems to have given high discretionary power to the Director-General (Ranasinghe and Gunawardena, 2020)

In the process of the EIA main actors are the project proponent and the Project Approving Agency (PAA). The PAA is the administrative authority that guides the project proponent in the EIA process and to obtain the approval.

The fact that coast conservation being the both project proponent and the project approving agency violates the natural justice principle “nemo judex in causa sua” (no one is judge of his own case). The project proponent and the deciding authority cannot be the same person whether such project is environmental adverse or not. It violates the main rationale of implementing such a procedure which is

to determine the environmental impact. In the process of obtaining the permit from the Director-General of the DCC&CRM for a project conducting within the coastal zone the Director-General of the coast conservation should require the applicant to furnish an EIA relating to the said project. The purpose of conducting an EIA is to figure out the environmental impact which will result due to the process of the project.

In the process of implementing a soft solution such as creating an artificial beach, the engineers and the related authority should consider where all sand will be collecting due to the waves of the beach. However, it has predicted that the area was “Wallawatta” but it is doubtful. It proves the fact that the project was conducted without proper expert knowledge.

Further, it can be identified that the project has not been conducted in to a proper time scale and as a result of that sand has been caused to erosion due to the high tide in May to September. According to the DCC&CRM they have suggested a soft solution in order to prevent coastal erosion. But this had affected adversely resulting in the great portion of filled sand had gone away back to the ocean. Thus,

resulted in a complete change of the inborn environmental beauty of the beach. The long identified tourism destination has been changed and the fisheries industry has caused a detrimental effect due to this creation of artificial beach. The result after the nourishment project is not better what appeared prior to the nourishment identified as the No action alternative principle.

The sand mining project

The depending component of the Mount Lavinia Beach nourishment project is the subordinate activity which was conducted to procure the required sand for the project. According to the report of the sand nourishing projects made by the DCC&CRM, it necessitates 150,000 cubic meters of sand for the project and it has been extracted from the sea in Ratmalana. This area at the sea in Ratmalana was 2 KM ahead from the coastal area and is famous for a vast amount of biodiversity which was created by a coral reef lagoon with four reef sites (Lack of Environmental and Social Considerations in Mt. Lavinia Beach Development Project – Ejustice, 2020). Further, this area is most important for the fishermen to engage in their fishing activities as this place provides a sufficient fish catch for the fishermen. However, due to the sand dredging which was carried out between the areas of Palagala and Degalmada reefs into the depth of 15–20 feet, it can be predicted that the reef lagoon will be filled by the sand up to the 1st reef which runs parallel to the coastal area from Mount Lavinia to Colombo (Lack of Environmental and Social Considerations in Mt. Lavinia Beach Development Project – Ejustice, 2020). As a result of this, the reef will be destroyed and the biodiversity surrounding the reef lagoon will be disappeared.

As this sand mining project adjacent to a reef lagoon, this can be considered as a highly environmentally sensitive project, and also the dredging activities were carried from 2Km from the coastal area (outside of the coastal zone). Thus, the project should be conducted regarding the laws that are provided by the National Environmental Act No.47 of 1980(NEA). According to Section 23AA of the National Environmental (Amendment) Act N0.56 of 1988, it has provided that all the prescribed projects that are decided to carry out is required to obtain the approval from an appropriate Project Approving Agency (PAA). That duty of PAA as mentioned by Section 23BB of the amended Act is to require the authorities to provide an Initial Environmental Examination (IEE) or an Environmental Impact Assessment (EIA) including all the particulars required by the Minister.

However, the commentators enunciate that responsible authorities for the sand mining project which correlate with the main project of Mount Lavinia beach nourishment has not conducted a required EIA or IEE under the NEA which could be deemed as an absolute violation of the law.

Public trust doctrine

As it was consolidated by the above-mentioned facts the Mount Lavinia beach nourishing project is a total violation of the Coast Conservation Act and the National Environmental Act can be verified as a total abuse of powers by the authorities. According to Article 3 of the 1978 constitution, the sovereignty is in the people and it is inalienable. The governmental authorities are representatives who are appointed by the people as trustees for a prescribed period of time to hold the powers on behalf of the general public and as their representatives in the parliament. However, if these governmental authorities use their powers ultra virus it involves the violation of the Constitution and the rule of law. The doctrine of Public Trust was introduced as a remedying process for the people in a contravention of their power. However, the Constitution of Sri Lanka has not expressly recognized the Public Trust Doctrine (PTD) and courts generally refer to the Articles of 3,4 and 12(1) of the constitution in applying PTD regarding the situations where the governmental authorities breach the trust of

the general public. Basically, the Supreme Court in Sri Lanka apply the PTD other than the abuse of discretionary public power, upon an exploitation of the natural and national resources for private benefit and in a violation of the sovereignty of the people (Samararatne, 2010)

Focusing on the limb of exploitation of the natural resources *Bulankulama and six others v. Ministry of Industrial Development and seven others [2000]* (Eppawala case) case Amarasinghe J elaborates the exact scope of the PTD in the law of Sri Lanka by explaining its connection between the Article 3 of the Constitution. It affirms that as the sovereignty is in the people and it is inalienable, holders of the governmental powers who are considered as the trustees by the general public, should exercise their powers solely upon the interest of the people. Further Amarasinghe J explains governmental authorities should act as guardians and protect the natural resources by relying on the approach adopted by Weeramantry J in the case of *Hungary V Slovakia, [1997]* which provides that natural resources are needed to be used by the authorities in trust of the public.

Further, the use of PTD for protection on natural resources which was identified in the Eppawla case was also adopted in *Watte Gedara Wijebanda V Conservator General of Forests and Others, [2009]*. Through this case, Shiranee Tilakawardena J. has clarified the connection between PTD, sustainable development, and intergenerational equity in taking decisions relating to natural resources. Moreover, the government has an obligation to protect and conserve the riches of the natural resources which are for the purpose of the public use from exploitation. As a part of this obligation, the government should make policies with a long term view relating to the useful utilization of the natural resources by protecting the interests of the general public and the intergenerational use of those resources. Further, it also mentioned in the said case that by adhering to the PTD state should pay its attention to the sustainable development demands through protecting, managing, and regenerating those resources.

Violation of the Public Trust Doctrine

Sovereignty of the people shall be exercised through the legislature, executive, and the judiciary and all the said actors should act on behalf of the people for their benefit. The Mount Lavinia beach is a natural resource that belongs to every citizen as a whole. Authorities cannot conduct any act which will adversely affect the said common natural resource. If the authoritative actors are violating the law that will result in the violation of the public trust.

In the Eppawala case through the Guide for Implementing the EIA Process, No. 1 of 1998 (P20), issued by the Central Environmental Authority has mentioned the purposes of environmental impact assessment (EIA) are "to ensure that developmental options under consideration are environmentally sound and sustainable and that environmental consequences are recognized and taken into account early in project design. EIAs are intended to foster sound decision making, not to generate paperwork. The EIA process should also help public officials make decisions that are based on understanding environmental consequences and take actions that protect, restore, and enhance the environment".

Case further states that "if they were to comply with the law they would have conducted an EIA" explains that lack of an EIA report and the proposed agreement seeks to circumvent the law and its implementation is biased in favor of the Company as against the members of the public.

As per the National Environment Act, the governmental authorities should require to conduct EIA prior to the carrying out of the mass development projects. However, there are a number of development projects that were conducted by the governmental authorities in Sri Lanka without satisfying the required

qualification of EIA, and the affected parties by the environmental impacts through these projects have been filled cases in the respective courts. Among them, the *Centre for Environmental Justice & Ports Authority & 07 Others., [2017]* (Colombo Port City Case) and *Center for Environmental Justice and 3 others V Secretary, Ministry of Mahaweli Development and Environment and 3 others, [2016]* (Uma Oya project case) can be named as two main case which took the advertence of the public. In the Uma Oya project case, the main consideration was the absence of a standard EIA before the carryout of the project which amounts to a complete violation of the National Environmental Act. Thus, it can be identified as an abuse of powers by the authorities and as a result of that, the project causes several adverse impacts to the environment and the residents of the areas of Badulla and Bandarawela.

The port city development project was also conducted without a proper EIA and the governmental authorities who are responsible for the project have given the approval irrespective of the adverse impacts to the 575 acres of the coastal area opposite to the port city. Thus, the natural resources of the country which belong to the general public have been exploited by the arbitrary use of the powers by the governmental authorities.

The Mount Lavinia sand mining project also a definite violation of law as in the above-mentioned projects which were conducted without holding a proper EIA. In the meaning of the principle of trusteeship over natural and national resources state should be trustee over the natural resources on behalf of the people. If the authorities are violating the law and abuse the powers of the people it involuntarily violates the principle of trusteeship (Samararatne, 2010). The existing remedies for the Violation of Public Trust Doctrine and Fundamental rights of the people are filing a Fundamental Right case or Writ Case. The other available remedy is to bring an injunction order to compel the party to refrain from carrying out the specific project.

The Centre for Environmental Justice (CEJ) has filed a court case against the entire Mount Lavinia Artificial Beach project holding the number of PCA/WRT/128/2020 in Court of Appeal against the Coast Conservation Department (DCC&CRM), Central Environmental Authority (CEA), Minister of Environment, Marine Environment Protection Authority (MEPA) and Attorney General based on sand pollution and failed sand filling in Mount Lavinia without following the due procedure. And also under this petition, CEJ seeks to grant a Writ of Mandamus based on eight points under the environmental degradation caused by carrying out this project (Press Release—CEJ Filed Legal Action on Mt. Lavinia Sand

Filling and Beach Pollution CA/WRT/128/2020 – Ejustice,2020). Moreover, the state is needed to be act upon the public benefit according to the role of trusteeship. Nevertheless, when the government exploits the natural resources through these so-called development activities it is clear that the public authorities neglect their obligation to act upon the benefit of the public. Thus, the abandonment of the public benefit can be used as a criterion to measure that the governmental authorities have violated the public trust.

V. CONCLUSION

Sri Lanka is an island surrounded by the Indian Ocean and it owns the world most attractive tourist destinations. Mount Lavinia is one of highly attracted coastal area which has a scenic beauty and natural benthos. An artificial beach project in Mount Lavinia is carried out by the Central Environmental authority to prevent the coastal erosion of Mount Lavinia beach. Due to the risk of environmental degradation enact the Coast Conservation Act and the National Environmental Act to protect and foster the coastal nature. Acts recommend Environmental impact assessment should be carried out prior to the projects of large scale and environmental

sensitivity area based projects. Sand pumping is the available soft solution for coastal erosion with minimum environmental harm. Authority used the soft solution method of sand pumping from the nearest sand mines by dredging to the coastal area. Even though the project is carried out for environmental protection the authority must be carried out proper EIA to examine and analyze the positive and negative impacts of the project. Most of the large scale projects carried out in environmental sensitivity areas in Sri Lanka did not carry out proper Environmental Impact Assessments and later on arises unexpected negative impacts. Central Environmental Authority is the responsible party for the environmental-related projects carried out within Sri Lanka because it is their duty to act according to the prescribed procedures and laws. Failure to perform their duty arise the responsibilities. Under the Supreme law of Sri Lanka sovereignty vested upon the people and is exercised by the parliament via the authorities. The sovereign power of the people is transferred to the authorities with the trust and failure to act or act in a wrongful manner will automatically breach the public trust. Protection of natural resources in its riches are not only a responsibility of authorities but also citizen. But the decision making, managing powers are entrusted with the authority. Mount Lavinia artificial beach project highlighted the despotic decisiveness of the authorities and failure to carried out proper EIA is a breach of the trust of citizens or the violation of the public trust doctrine. The main fact this research proposed is that the Central Environmental Authority and coast conservation authority should highly consider the fact that conducting a proper EIA prior to a project and try to enhance the positive impacts while mitigating the negative impacts unless the authorities violate the trust of the people and constitute the violation of Public Trust Doctrine.

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ACKNOWLEDGMENT

We wish to express our grateful thanks to Mr. Jagath Gunawardena, a veteran Lawyer and an Environmenralist for dedicating his valuable time and sharing his ideas on the research topic and also for the endless encouragement to make this research fruitful.

Also, debt of gratitude is granted to Ms. Asanka Edirisinghe, Lecturer, Kotelawala Defense University for the immense support and guidance that gave throughtout the effort that made to complete the research.

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Paper ID: 416

How the Offence of Rape has been Overshadowed by Marriage and its Impact on National Growth of Sri Lanka: A Critical Analysis from Legal and Economic Perspectives

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Abstract - Marital rape is no rape in Sri Lanka under Section 363(e) of the Penal Code. Apart from the slightest enlightenment furnished by the Prevention of Domestic Violence Act No. 34 of 2005, there are no significant legal provisions within the Sri Lankan legal framework with reference to marital rape. The main objective of this paper is to highlight the necessity of criminalizing marital rape in Sri Lanka rather than limiting it to a judicial separating mechanism followed by a judge's verdict which is prevailing at present. Apart from the legal perspective, the paper attempts to propose a better way in achieving this criminal reform through the address of marital rape from an economic viewpoint by emphasizing on how the externalities arising from the offense affects the national growth of Sri Lanka. In achieving this purpose, the doctrinal research methodology was employed and such qualitative and quantitative data which were collected by books, journal articles, and reports demonstrated the inadequacy of Sri Lankan legislative provisions on marital rape compared to foreign nations. International comparison research methodology was used for analytical purposes where UN treaties, case laws and legislations from USA and UK were cited. Information acquired through said sources provided that the marital rape victims in Sri Lanka are addressed by judiciary solely on the grounds of domestic violence which had no reference to marital rape which was ought to be the justifiable defence in a legal proceeding. As a result there would be a downgrade in national growth with the augmentation of private and social costs. With due respect to legal and economic perspectives, the author attempts to draw the diligence of the judiciary and the legal authorities to recognize a rapist as a rapist irrespective of the bond which they share with the victim.

Keywords - Marital rape, Criminalization, National Growth, Social cost

INTRODUCTION

Rape is viewed not merely as a heinous crime against women but also a felony which often impacts the victims' psyche as well. The crime is expressly forbidden in pursuant to section 363 of the Penal Code 1883 (No.2, 1883). However the exact identical crime is held lawful by S.363(e) if perpetrated against his own wife. There have been several customary ideas concerning the development of this clause within the legal history, including Blackstone's Spousal Unity Theory, which argued that husband and wife are deemed to be a single body after marriage of which the husband retains shared control and the privacy theory which claims that the conviction of husbands for spousal rape neglects the dignity and privacy in marriage. However it must be noted that all these concepts are antiquated and the laws relying on these philosophies need to be reassessed.

Since rape against married women is no rape in Sri Lanka, a Sri Lankan woman who is being victimized by marital rape would rarely speak out against her husband without an existing legislation to protect her, particularly in a

culture like Sri Lanka that is filled with a number of patriarchal lenses.

The prevailing modern justification for decriminalizing marital rape is based on the notions of irrevocable marriage consent, difficulty in proof and the likelihood of misuse. But it is to be considered that this vulnerable group who face both physical and mental trauma is more likely to cause a negative impact on the society which ultimately damages the national growth of the country. It is therefore of national importance that this group of women be permitted to access justice by giving solutions to override the said concepts.

RESEARCH METHODOLOGY

Methodology

The paper employed doctrinal research methodology to acquire secondary quantitative data and both primary and secondary qualitative data. Comparative research methodology was employed to gather secondary qualitative data and case laws from USA and UK jurisdictions were mainly utilized for analytical purposes. USA was chosen by the author to manifest the significance of economic and legal position of USA by pointing out that even the country which holds the nominal rank no.1 in year 2019 on its Gross Domestic Product has criminalized marital rape. On the other hand UK law was cited to point out that UK law from which Sri Lanka received many of the traditional justifications for not criminalizing marital rape has now developed its legal jurisprudence to a position where marital rape is no longer an exemption to rape.

Methods

Qualitative primary data were collected by UN treaties, the Constitution, Penal Code No.2 of 1883, Domestic Violence Act No.35 of 2005 of Sri Lanka, Sexual Offenses Act 2003 of United Kingdom and case laws of Sri Lanka, USA, and UK. Qualitative secondary data were collected by books and journal articles while quantitative secondary data were collected by pre done surveys and reports.

CURRENT SOCIAL BACKGROUND ON MARITAL RAPE AND ECONOMY OF SRI LANKA

Sri Lanka which is located in South Asia is comprised of a variety of cultural beliefs. Thus these cultural beliefs inevitably stand as barriers in achieving the rule of law. As a result, the legal framework of Sri Lanka is brimmed with a bunch of loopholes. Sexual harassment and marital rape falls under this category where cultural beliefs are in favour of the men. Consequently the data acquired by surveys (Fig.1) assess an elevation of rape incidents where most of the victims are not know.

TABLE 4.1 PERCENTAGE OF MEN REPORTING PERPETRATION OF RAPE AGAINST FEMALE PARTNERS AND NON-PARTNERS, BY TYPE AND SITE*

SITE		PARTNER RAPE (%)	NO. OF EVER-PARTNERED MEN	NON-PARTNER RAPE (%)	GANG RAPE (%)	ANY RAPE OF A PARTNER OR NON-PARTNER (%)		NO. OF MEN SURVEYED
						EVER	PAST YEAR	
BANGLADESH	RURAL	15.1	830	4.4	1.9	14.1	2.7	1 143
BANGLADESH	URBAN	10.4	742	4.1	1.4	9.5	0.5	1 252
CAMBODIA	NATIONAL	20.8	1 474	8.3	5.2	20.4	11.3	1 812
CHINA	URBAN/RURAL	19.4	970	8.1	2.2	22.2	9.3	998
INDONESIA	RURAL	17.9	769	5.8	1.5	19.5	6.7	815
INDONESIA	URBAN	24.1	820	8.5	2.0	26.2	10.6	868
INDONESIA	PAPUA	43.8	858	23.4	6.8	48.6	17.7	893
PAPUA NEW GUINEA	BOUGAINVILLE	59.1	741	40.7	14.0	62.4	25.2	864
SRI LANKA	NATIONAL	15.5	1 176	6.2	1.6	14.5	4.9	1 533
TOTAL FOR COMBINED MALE SAMPLE		**24.3**	**8 380**	**10.9**	**3.9**	**24.1**	**9.2**	**10 178**

Fig.1 – Percentage of men reporting perpetration of rape against female partners and non-partners, by type and site (Fulu *et al.*, 2013, p.31)

A bulk of rape cases in Sri Lanka are detected in remote regions where females are uneducated, unemployed, and poverty-stricken. Girls under these circumstances enter into marriage arrangements as soon as they hit their puberty and are not conscious of the society at all. They spend the remainder of their lives under the control of their spouses and they get harassed if they unconsent for sexual intercourse and such harassments are encountered as marital rape. However in the context of Sri Lanka 'sex' on its own being a taboo matter of subject, rape enclosed in a marital relationship is deemed to be an extremely privacy related topic. As a result, all the abused women usually duck out from getting exposed to legal and social

environments. There are a variety of causes which discourage those women from confronting this issue including anxiety, embarrassment, family rejection, fear of losing kids, hostile attitudes and potential abuse by the police.

The consequences in a court room is no different. The emotional anguish which a rape survivor undergoes through repeated cross-examination proceedings at courts is unbelievable. A woman compelled to provide details on how her husband raped her would be subjected to various discomforts by lawyers at the trial. Therefore, considering the current state of affairs, the women choose not to voice themselves against marital rape.

On the other hand as long as the economy of Sri Lanka is concerned, over the past three years, the growth rates of Sri Lanka have begun to decline. The rate was 3.4% in 2017, reportedly the biggest downfall in 16 years and a dropdown of 3.2% was reported in 2018 (Central Bank of Sri Lanka, 2019, p.4). It is clear that the economy of the country is rather decelerating than accelerating and thus the legislative branch of the country should perform their fair share in order to abet the economy.

How the criminalizing of marital rape could assist the upliftment of the country's overall national growth will be discussed by this paper under the economic viewpoint.

I. LEGAL VIEWPOINT ON MARITAL RAPE

In contrast of the traditional theories on marriage which showcase the features of domination, the modern theory of companionship indicates that the exercise of equality throughout the marriage contributes for a better marital satisfaction (Wilcox & Nock, 2006). Many recent landmark judgements all over the world have got influenced by this modern theory and as a result many laws have been implemented both nationally and internationally.

A. Case Laws

The importance of discussing the legal issue came into consideration along with the declaration by Lane CJ in the case *R v R* in which he said that it is the right time for the law to consider a rapist as a rapist irrespective of the relationship he shares with the victim [*R v R* (1991) UKHL 12]. Moreover it is important to understand that marital rape cannot act as an exception to equality and justice. In People v Liberta (1984) it was held that married women hold the right over their bodies same as of unmarried women.

Marital rape is an illegal offence in all states of the USA, which is considered as the most powerful country in the world. Amendments on criminalizing marital rape in the United States were enforced in mid-1970s. The first case in the United States that challenged marital rape was Oregon v. Rideout in 1978 (Jackson, 2015). Husband was offended for assaulting his own wife whereas they were living together. Since the state changed its law in 1977 to rule out marital rape immunity, the husband was discharged completely of raping his wife. However as a result of the increasing number of marital rape in the USA, the government in 1993 amended the marital rape as a crime in all 50 states. Along with the acknowledgement of marital rape as a crime by many developed states, the significance of criminalizing marital rape in Sri Lanka has arisen.

Manohari Pelaketiya v. Ministry of Education (2016) case held that, continuous threat and abuse against women could compel them towards both psychological and physical traumas. Although the judgments of Sri Lankan law have well recognized that the substantive enforcement of the human rights of women is important, this aim would not be accomplished with no existing penal laws to criminalize all types of rape against women regardless of the relationship shared with the offender.

B. International Law

When it comes to treaty law, A.16(1) of UDHR provides that, "men and women are entitled to equal rights as to marriage and during the marriage" (Universal Declaration of Human Rights, 1948) and it is been replicated by A.24(3) of ICCPR (International Covenant of Civil and Political Rights, 1966). A.1 of CEDAW states that "discrimination against women shall mean any exclusion made on the basis of sex ……., irrespective of their marital status" (Convention on the Elimination of All Forms of Discrimination against Women, 1979) while A.2 provides that state parties should disapprove all forms of discrimination against women by taking appropriate policy measure without any delay. A.16(1)(c) of CEDAW promotes equality of rights throughout the marriage.

CEDAW in its concluding observation on the 8th periodic report to Sri Lanka (2017) provided a recommendation to criminalize marital rape in the absence of consent. As a result, discussions were brought up to criminalize marital rape in 2017 by then Minister of Justice and Foreign Employment, Mrs. Talatha Atukorale. But unfortunately no concrete steps were implemented and the justice got diminished by getting limited to a mere discussion.

However as a member of CEDAW, Sri Lanka has indicated its mutual intention to cooperate with the Convention and, as such, ratification should be viewed as an obligation to meet the duties of the State to take effective steps that are consistent with the duties of the Treaty.

Moreover United Nations' Sustainable Development Goal 05 ensures to accomplish gender equality by 2050 (since it is unable to be accomplished by 2030).

C. Domestic Law

Currently marital rape is not a crime in Sri Lanka. Under the common law it is illegal only when the judiciary declares a legal separation. The Prevention of Domestic Violence Act No. 34 of 2005 furnishes a slight enlightenment in protecting women who get abused by the husbands. But these cases do not get recognized as 'marital rape' and as a result the issues are attempted to be settled through counselling.

There are constitutional guarantees established by the Sri Lankan Constitution under the notion of equality under which the concept of marital law could be discussed. Accordingly A.11 provides for the fundamental right of freedom from torture (*Constitution of Sri Lanka 1978,* s.11), A.12(1) protects all human beings before the law and are considered equal (*Constitution of Sri Lanka 1978,* s.12) and A.27(1)(a) guarantees to accomplish full comprehension of fundamental rights.

Regardless of the existing constitutional guarantees, there is a resistance of the legislators to criminalize marital rape as a penal crime, under all cases and it was demonstrated by the Report of the Leader of the Opposition Commission on the Prevention of Violence against Women and Girl Child, 2014 which stated that when Sri Lanka tabled the Penal Code Amendment in 1995, marital rape was mentioned by excluding the caveat on judicial separation, yet as a result of the Parliament's strong disapproval the clause turned out getting disregarded. (Commission on the Prevention of Violence against Women and the Girl, 2014, p.32).

D. Understanding the Reality

In opposition to what the majority tend to believe, existing law in Sri Lanka which safeguard husbands who rape their spouses is not a portion of Sri Lankan culture. In fact it was imported from British law at the time when Sri Lanka was a colony of Great Britain. A former British Chief Justice, Sir Matthew Hale in 1736 by publishing a treatise namely, History of the Pleas of the Crown, stated, the spouse of a wife cannot himself be blameworthy of an actual rape upon his wife, on consequences of the marital assent which she has given, and which she cannot withdraw (Hasday, 2000). The British colonies received independence a few years later but yet continued to cherish this slightest bit of male privilege within their own legal statues for centuries.

Unfortunately Sri Lanka being a country among them is still faithfully sustaining this colonial fixation while Britain (Sexual Offenses Act 2003) and many former colonies have realized that the marriage should not act as an ingredient which a woman will have to sign her body away to the husband. Therefore from the legal point of view, Sri Lankan law makers should not get disrupted by the cultural myths in between the procedure of criminalizing marital rape. Additionally with respect to A.27(15) of the Constitution, Sri Lanka holds a state obligation to ensure the protection of women from marital rape during marriage by implementing laws.

II. CRITICISM ON THE JUSTIFICATIONS WHICH EXCEPMT MARITAL RAPE FROM THE OFFENSE OF RAPE

A. Irrevocable Consent

It is quite interesting how Lord Hale has presented his claim with no valid logic, jurisprudence, case law, or legal justification. He stated that the wife instinctively gives her legal identity to the husband when she gets married and it enables for all sexual actions that would not be able to be withheld at a further stage due to any other cause. He implemented the principle of "implied consent" to be irrevocable throughout the union, which begins when the woman consents to begin the matrimonial relationship, and persists until the matrimonial agreement ends by way of a divorce. This confirms that once a girl enters into a matrimonial relationship, she eventually loses her freedom to deny sex at a particular instance with her spouse and since sex has been expanded as a marriage related obligation of a woman, her human right to bodily autonomy and right to consent hereby remains questionable. In R v R Lord Keith at House of Lords declared that the notion of Hale cannot be applied strictly in the modern context at all the circumstances.

This theory is incompatible with the concept of consent interpreted in other types of laws. There is no permission granted by law in order to permit another to cause a bodily injury to herself. Therefore there is no solid foundation to protect the notion of irrevocable consent in marriage. A woman should have the right to dissent for sexual intercourse when she's sick, pregnant or when the husband is intoxicated.

B. Blackstone's Marital Unity Theory

The English law concept of Marital Unity Theory and the Roman Dutch law concept of marital power where the wife was considered a minor within the matrimonial home remained valid until mid-19's and started to diminish along with the introduction of Married Women's Property Rights Acts in many jurisdictions.

In the context of Sri Lanka this concept remains contrary to the fundamental right, A.12 of the Constitution.

C. Lack of significance compared to non-marital rape

Marital rape is disregarded from criminalizing on the belief that it is not an extreme offense compared to non-marital rape and is not prevalent. But the results of a study done by WHO on Sexual Violence reveals that rape by an intimate partner is neither endemic to any specific area of the world nor it is uncommon (World Health Organization, 2011, p.1).

Another survey implemented in Sri Lanka shows a value of 15.5% of men having reported on raping their wives (Fig.1). Thus the situation should not be disregarded by law believing it to be insignificant.

D. Privacy in Marriage

The prevention of intrusion into the sacred union of marriage by legislation is a poor argument since under the modern day family law, divorces are already being handled by civil courts. Additionally the intervention by law is not harmful to relationships where non-consensual intercourse result in causing a harm, because the law has a legitimate concern in coping with sexual assault as the lawful

guardian of the fundamental right to life. Thus it is absolutely rationale for the law to interfere in coping with marital rape.

E. Difficulty in Proof

Initially, a felony should not be dismissed on the basis that it would be tough to verify. Secondly, marital rape is not hard to ascertain. Establishing rape is often premised on circumstantial evidence. And if the crime is perpetrated according to the prevailing perception, yet it is often hard to prove since in most instances the woman is being raped by an individual whom she probably knows and if a female is a survivor of marital rape it implies that there is a historical record on sexual abuse which in fact could be verified using forensic evidences.

Although forensic evidences might not be credible, the physical examination shall not be used as a basis to decriminalize the crime as there are many other mechanisms to assert it including testimonies of witnesses' digital evidences etc. and such mechanisms should be included in the Evidence Ordinance.

F. Probability of Misuse

One of the major justification that goes parallel with the previous justification (difficulty in proof) on not initiating marital rape as an offense is by relying on the contention that women might use the law to accuse the husband based on egocentric motives. Although the case law has provided a relatively fair rationale on this, the legislation is intended to recognize misleading allegations and therefore such notions are not able to be conjectured until laws surrounding marital rape are enforced. Moreover the malicious prosecution could be proved by the defendant in a case of misuse by the plaintiff.

III. ECONOMIC VIEWPOINT

A. Coase Theorem

The theory of Coase is a legal economic theory that clearly claims that if the transaction cost is nil, there would be an efficient distribution of capital, irrespective of the original allocation of entitlements, as long as the entitlements are well specified (Medena 2009). Assumption of the transaction cost as nil also has important consequences on law. Regardless of the original distribution of entitlement and regardless of the law regulating the usage of capital, the parties must bargain with no cost for the maximally efficient resource distribution (Cole & Grossman 2011).

Coase tackles with a variety of key issues including the efficient sharing of land rights, property within the negotiating parties, the question of shared social cost and externalities. According to the theory, a minimum of two parties are required for production of an external cost, i.e. a person to create it and the other to bear it.

On the application of the theory to the case of marital rape, the first is that the woman has the right to her private property, which is her body, and the second is that the husband has the marital right to have intimate intercourse with his wife. There is a question of concern at this moment of time when the woman does not agree to sexual intercourse. Following the principle of Coase, the author attempts to allow the participation of the two parties by seeking to guarantee the most effective division of rights. The outcomes of such participations differ according to the existing laws on marital rape.

- In a country where marital rape is illegal

Initially the property privilege at this point rests within the wife by overriding the marital right of the husband. Accordingly if the husband seeks intercourse without the permission of his wife by exceeding his marital right, he'll be offended by the felony of marital rape. The husband hereby endures a heavy cost by getting imprisoned and by having to compensate the spouse. On the other hand if he outdo his right yet with the consent of his wife the cost will be comparatively lower than the former. The author therefore validly concludes that the

coercion implies a greater burden for the husband relative to not committing marital rape. Thus the exercise of marital rape is not economically efficient under this legal framework.

- In a country where marital rape is legal

At this point, neither party has an overriding privilege on the exercise of their rights over the other. On the belief that the husband holds the right over his wife's property and if he asserts his marital right to intercourse despite the wife's approval, it is extremely probable and inevitable that she may incur a range of private expenses that would potentially harm her private property. Additionally the psychological trauma and loss of feeling of protection on getting assaulted by a close companion would often result in an unbridgeable harm and a social cost. The crime of marital rape thus results in a large social cost causing a reduction in the overall national growth.

When we equate the expense incurred by the woman to the husband's expense of not having the opportunity to satiate his desire, the author may soundly conclude that the wife's cost will be greater. The least cost alternative will thus in not letting the wife being raped, i.e. by criminalizing marital rape. Consequently, regardless of the regulatory context and the original distribution of individual rights, author observes that the marital rape is not cost effective. Marital rape therefore should be criminalized in Sri Lanka for that cause.

B. Cost Analysis

The economic cost of marital rape is of two types, i.e. private and social cost. Private costs are the expenses that only impact on an individual with no interference of the society. Social cost is the overall cost of the society, i.e. the combination of all the private costs and external costs.

The burden of the husband's assault in the first place will have to be borne by the woman and therefore the cost is private. It has no direct implications on the society but might impact the society depending on the circumstances. However a variety of externalities could occur specifically in a country like Sri Lanka where the law does not criminalize marital rape and which most of those externalities happen to be negative costs rather than benefits. For instance, the wife's sense of anxiety will make her feel gloomy resulting a pressure towards her to kill herself or to cause a detrimental harm on her kids. Thus the private costs in combination with externalities contribute to create a collective social cost, which has a profound impact on the entire community.

- PMC = Private Marginal Cost
- XMC = External Marginal Cost
- SMC = Social Marginal Cost
- PMD = Private Marginal Benefit
- SMD = Social Marginal Benefit
- S = Supply
- D = Demand

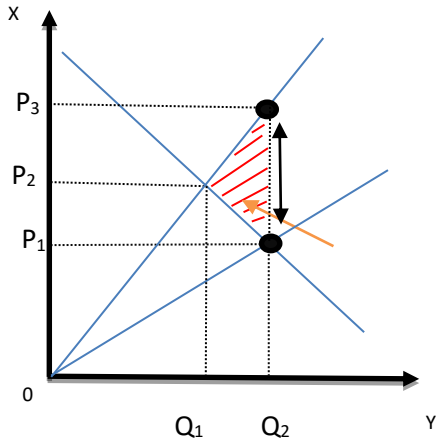

Fig.2 – Graph on marginal social cost of marital rape

As shown in the figure above, if the private cost is solely regarded, the expense generated would be minimal (a). Yet along with the augmentation of such privately owned cost by the victimized wife, negative externalities are been created (XMC). When such negative externalities get combined with the private

cost, the social cost increases (a + XMC= b) and as a result the overall social welfare decreases by having a negative impact on the national growth of the country.

But if we place a law at the exact similar setting, the negative externalities will not generate any impact, since the laws contribute towards the positive externalities. Owing to the criminal offense of marital rape, the husband will be rigid in exercising his deeds, while the wife would feel secured. As a result a happy family background will be created by reducing the overall cost at the end.

CONCLUSION

Regardless of marital rape being not recognized as a crime, Sri Lankan women put up with the ongoing issue which is most frequently unreported.Due to the lack of legal provisions these victims tend to experience various post-trauma symptoms that encounter many types of extreme abuse by creating a private cost. Along with the generation of negative externalities by marital rape, a social cost is produced (private cost + negative externalities) that economically affects the whole community by having a negative impact on the national growth. Notwithstanding this economic viewpoint, many traditional and modern theories obstruct the path towards criminalizing marital rape. The author concludes the theories to be invalid since there is no law which permits a person to cause bodily injuries to a woman. For that reason, the United Nations has declared the importance of the practical realization and understanding of women's rights. Nonetheless the practical realization of women rights become an unachievable goal if no laws exist against all forms of harassments and violence faced by women despite of the relationship she shares with the to its Optional protocol 1, to ICCPR and to UDHR holds a responsibility to fulfil and protect the international women human rights embodied in the treaties The positive outcomes on criminalizing marital rape could be cited from economically developed countries such as USA and UK. Finally by considering the severe implications of the crime, the author concludes marital rape as a gross breach of fundamental human rights guaranteed by the supreme law of the country and it should be avoided by the establishment of an economically efficient law which preserves the victims' rights and privileges in order to increase the national growth of the country by way of a holistic approach.

RECOMMENDATIONS

The following recommendations are formulated by the author depending on the findings and conclusion.

A method needs to be implemented to collect statistical data on marital rape cases and the authority collecting such data should analyze the private costs and the social cost causing thereby separately for the law making bodies to understand the significance of introducing a law to criminalize marital rape.

Amendments to the penal code shall be brought out by criminalizing marital rape under any circumstance whether they are living together and not separated or the victim is under a de facto separation.

Burden of proof in Sri Lanka with reference to marital rape should be beyond reasonable doubt unless the victim can provide evidences such as digital evidences i.e. CCTV footage, independent eyewitnesses, forensic evidences, vicious history of husband and previously reported sexual crimes by husband etc. Accordingly the Evidence Ordinance needs to be amended.

Government guidance should be provided for institutions to implement social practices in order to change the attitudes of the society related to marital rape. Additionally gender sensitive pedagogy practices for law makers, law students, lawyers and judges should be provided.

Victims should be authorized to enter the litigation process by supplying necessary legal aids along with the fulfillment of medical

requirements and counseling services and whilst the litigation procedure the dignity and anonymity of the victim should be safeguarded in order to encourage the victimized parties to make a voice by breaking the current social norms on marital rape.

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Paper ID: 379

Establishing Rule of Law to Achieve Sustainable Development: The Pathway for National Growth in Sri Lanka

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Abstract - Rule of Law is a fundamental constitutional principle that should be respected by all states. The importance of establishing rule of law to achieve sustainable development is highlighted in international law. United Nations mechanisms have also identified that establishing rule of law through the protection of human rights, eradication of poverty and equitable exploitation of resources would lead countries to achieve sustainable development. Thus rule of law, while ensuring social and economic development guarantees environmental protection through the proper operation of law. The role of the government and its effective functioning is considered paramount within this scope and all citizens owe a duty to enjoy their rights without causing damage to the environment. In this manner it is seen that rule of law becomes the centre point for sustainable development and Sri Lanka should be concerned in establishing rule of law to facilitate the achievement of sustainable development goals 2030 set by the United Nations. Thereon this paper discusses the importance of establishing rule of law in the pathway of achieving sustainable development. Attention is paid to international standards on the concept and thereby loopholes in the existing national legal framework have been identified. Moreover the role of judiciary and administrative institutions in enabling justice and proper enforcement of law is highlighted. It is noted that Sri Lanka must develop a comprehensive national framework with an effective monitoring procedure and responsible institutions for the achievement of sustainable development which would lead its way to comply with international standards and ultimately to national growth.

Keywords— Rule of Law, Sustainable Development, National Growth

INTRODUCTION

Rule of Law establishes that every person is subject to law and is bound by the laws and regulations of the country and held accountable in its face. Rule of Law ensures the equal distribution of resources, protection of human rights and access to justice. Rule of Law becomes a crucial aspect in sustainable development which aims to meet the development needs of the present generation while conserving the resources for the future generations. Though the importance of establishing rule of law in order to facilitate sustainable development has been broadly identified in international law, in Sri Lanka it is seen that certain barriers are imposed in ensuring rule of law which has thereby caused a hindrance in the achievement of sustainable development. This research has attempted to address this research problem by evaluating the international and domestic frameworks of rule of law and sustainable development. In such a background this research has been conducted with the main objective of analysing the relationship between rule of law and sustainable development and discussing how establishing rule of law would lead to sustainable development thereby national growth in Sri Lanka through the compliance to international standards and effective functioning of the government. The research has identified the loopholes in the existing legal framework and thereby would suggest mechanisms to stabilize the law related to the concepts.

METHODOLOGY

To achieve the said objectives the black letter approach has been adopted with the aid of primary sources such as international instruments forwarded by the UN, international and national statues covering aspects of sustainable development, the constitution and judicial precedents which has applied the established laws with a view to recognize the law related to the two concepts. Secondary data has been collected through scholarly articles, text books which have elaborated the legal aspects of sustainable development. Working papers and review reports of public authorities of Sri Lanka have also been used to analyse the progress and mechanisms of attaining sustainable development in Sri Lanka. Through such analysis conclusions have been reached as to how Sri Lanka could facilitate means to establish rule of law with a view to achieve sustainable development thereby lead the country to national growth.

Rule of LAW

Rule of Law is a basic constitutional principle which states that every individual is subject to Law and all citizens are equal before Law. The principle enumerates that the government itself is subject to Law and cannot act arbitrarily in its own will. The concept was first enumerated Dicey whereby he provided three basic definitions to Rule of Law. Accordingly the principle establish that no man could be punished unless in accordance with the law in a formal court of law, no man is above the law and a person of whatever rank or status is subject to the ordinary course of law and that the English Constitution is mostly a court based constitution which has recognized the rights of private persons that any other written law.

Detaching from the initial interpretation many scholars developed the concept to include the absence of arbitrary power of the government, the supremacy of parliament, independence of the judiciary. Hence latter developments of Rule of Law have established an umbrella term which embeds long standing constitutional principles. The United Nations Secretary-General defines rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, measures to ensure adherence to principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency (UNSC Report 2004).

International Standards on sustainable development

The concept of sustainable development has been bought to light with the various economic developments across the globe and the recognition of the possible environmental threats of such developments. The World Commission on Environment and Development defines sustainable development as the development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Rio Declaration in the same manner recognizes the rights of states to exploit their resources in a manner that does not cause harm to other jurisdictions and recognizes that right to development must be enabled in an equitable manner to meet developmental and environmental needs of present and future generations. (Rio Declaration 1992). Through various other developments such as Agenda 21 which was specifically aimed at sustainable development by implementing developments goals for the 21st century and The Millennium Development Goals for 2015, the international standards on sustainable development has constantly been developed. As the law stands today Agenda 2030 has specified the sustainable development goals for all UN member states calling for a national and

integrated approach to achieve the 17 sustainable development gaols which concerns many social and economic aspects.

LINK BETWEEN SUSTAINABLE DEVELOPMENT AND RULE OF LAW

Sustainable Development suggests integration between economic development, social development and environmental protection. It includes protecting natural resources, having equal access to resources, eradication of poverty and the protection of human rights. Establishment of Rule of Law on a national basis would ensure that the rights of equality of all citizens are protected in all aspects through the elimination of inequalities and disparities which would lead to sustainable development, in turn achieving national growth. The relationship between the two concepts were agreed on in The Declaration of the High-level Meeting on the Rule of Law which highlighted that "rule of law and development are strongly interrelated and mutually reinforcing, advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law". Further Sustainable Development Goal 16 articulates the key role that governance and the rule of law play in promoting peaceful, just, and inclusive societies and in ensuring sustainable development (UNDP 2016).

Rule of Law is discussed in a multiplicity of aspects within the scope of sustainable development. Protection of the property rights of citizens, creation of business opportunities and elimination of income disparities would assist states in reducing poverty, achieving economic development. Equal access to justice, protection of human rights and equal access to public services being components of rule of law lead countries for social justice and development. Rule of Law enables the physical safety of people along with satisfaction of their needs. Strengthening penal legislation and the criminal justice system as a whole alongside achieving transitional justice would enable sustainable development through establishing peace and stability. Rule of Law ensures accountability, fairness and reducing corruption. Arbitrary actions of public authorities are avoided through check and balances within the three organs of government. Protecting natural resources is integral to sustainable development. Rule of law guarantees that environmental rights and regulations, administrative protection of the environment are in line to sustainably protect the environment.

In this way rule of law becomes the centre point of sustainable development in ensuring equality of distribution of all resources, providing equal access to justice and eradication of poverty. States should work towards establishing rule of law through integrated policies and such would lead to economic and social development thereby achieving sustainable development.

BARRIERS ON ACHIEVING SUSTAINABLE DEVELOPMENT IN SRI LANKA

The Sri Lankan law on sustainable development was silent until the enactment of the Sustainable Development Act No 19 of 2017. Sri Lanka's vision for sustainable development involves "Achieving sustained economic growth that is socially equitable and ecologically sound, with peace and stability" (National review report on the implementation of the sustainable development goals of Sri Lanka 2018). Though the act has been introduced in par with the introduction of the sustainable development goals of UN in 2015, the act does not contain explicit provisions on enabling sustainable development. Sustainable development in Sri Lanka mainly focuses on eradication of poverty, ensuring economic competitiveness, social development, good governance and ensuring a clean and healthy environment. Though Sri Lanka has been able to achieve the set goals to a certain extent problems exist in relation

depletion of the environment due to development projects, improper land usage due to increase in urban population, regional income disparities and poverty, fiscal disparities and the ineffectiveness of the delivery of public services. (National review report on the implementation of the sustainable development goals of Sri Lanka 2018)

It is seen that the absence of a proper legal framework, non-adherence to the existing administrative and legal regulations are the main barriers for achievement of sustainable development in Sri Lanka. The establishment of rule of law through a strong legislative and judicial framework would compel every stakeholder to comply with the standards of environmental regulations which would establish equality and reduce the damage caused to the environment. Rule of law thereby becomes a mechanism of achieving sustainable development through a system of regulation and justice. (Desai & Berg, 2013). It imposes restrictions on the use of power through fair and equal rules and focuses on the rights of poor and marginalized in seeking redress for grievances through legal and social institutions (UNDP 2016). Hence a greater role in enabling sustainable development falls on the government and other regulatory bodies to establish equality in access to justice and resources through transparent policies which will lead to intra generational and inter-generational equity part and parcel to sustainable development.

JUDICIAL ACTIVISM

The role of the judiciary in Sri Lanka has been minute in the arena of sustainable development. Citizens should be given equal access to justice enabling public interest litigation on the basis of the collective rights of the citizenry. In the judicial history of Sri Lanka public interest litigation has enabled citizens to raise their voice against unsustainable development activities of the government and private institutions subjecting such actions to judicial review. Public interest litigation allows citizens to voice their concerns collectively on the basis of equality enabling rule of law and achieving sustainable development.

As noted in Bulankulama and others vs. Secretary, Ministry of Industrial development and others (2000) (SC Application No 884/99 (FR)), citizens should be allowed to forward applications on the breach of fundamental rights as the court should not only be concerned on who forwards the application rather on the fact that the matter is bought before court to ensure justice. The concept of sustainable development has been discussed in the case following the position that UN principles and conventions on sustainable development though forms a part of soft must be adhered by Sri Lanka being a member state of the UN either through express recognition or the adoption to the domestic law through superior courts in their decisions. Similarly in the case Ravindra Gunawardena Kariyawasam vs Central Environment Authority (2019) (SC Application No 141/2015) superior courts have established that the courts does not exhibit any hesitation in applying the Rio Deceleration in the domestic context to ensure that development projects are initiated in environmentally sustainable manners. The case Watte Gedara Wijebanda v Conservator General of Forest and eight others (2007) (SC Application No. 118/2004) has also elaborated that irrespective of the fact international instruments are nonbinding in character they form a greater part of the environmental proetcion law regime of Sri Lanka. Thus the role of judiciary in giving domestic recognition to international principles on environmental law is highlighted.

The importance of recognition of the concept was further understood in Gabčikovo-Nagymaros Project, Hungary v Slovakia (1997) ICJ Rep 03, where it was discussed that new concepts have been developed within the scope of environmental law and they must be given due recognition not for the mere purpose of it but for that they attempt to reconcile the environment and development with respect to

human happiness and welfare. Further the courts should ensure equality in property ownership, gender equality and human rights empowerment so that equal opportunities are provided for business and occupation providing for economic development which would ultimately lead to sustainable development. Facilitating access to legal information and to institutions of the rule of law provides means for the poor to take advantage of economic opportunities and resist exploitation, particularly by making local institutions accessible (Golub, 2010).Thereon the need of judicial interference in unsustainable development projects would protect natural resources for the present a future generation with respect to international and domestic standards. Judicial decisions on environmental related issues must safeguard the health and safety of people, ensure viability of their occupations and protect the rights of future generations (Eppawala case).

The judiciary has a role to play in ensuring the effectiveness of the criminal justice system as a means to facilitate peace and security of the citizens. Analysis within this purview suggests that among the different determinants rule of law, the control of violence has exhibited the strongest connection to economic growth particularly in developing countries (Haggard and Tiede, 2011). Ensuring the security of the citizens is to be achieved both in the aspects of establishing peace by avoiding conflict and violence and the fulfilment of basic needs on the basis of equality. The judiciary should work towards avoiding corruption and arbitrary actions by public authorities. The exercise of executive power is subject to judicial review and the judiciary shall maintain its independence in deciding on matters that affect the rights of public. This mechanism is enabled through the system of checks and balances embedded in the concept of separation of powers part and parcel of rule of law. Thus judicial activism would enable equality of resource distribution, ensuring peace and stability and avoiding arbitrary use of power paving its path to rule of law there achieving national growth in the long run.

MENDING THE LOOPHOLES

Though the role of legislation and judiciary in the process of achieving sustainable development is understood there are practical problems in its implementation. Even though the sustainable development act has been enacted in the year 2017 vagueness as to the achievement of sustainable development and the procedure for such achievement has remained a doubt. Thus the mere enactment of laws is not sufficient to lead the country towards sustainable development. The role of the government is paramount in providing incentives and other subsidiaries to the people with low income levels, providing for their basic human needs, reducing financial disparities to enable equality. Accordingly short term goals should be set guiding the procedure through which the long term goals could be achieved. Furthermore in such goal setting international standards must be respected and followed. Agenda 2030 has identified the need of establishing rule of law as paramount to the achievement of sustainable development, thereon these procedures must establish rule of law leading to national growth and achieving its ultimate goal 'leaving no one behind'. Hence an integrated national approach of establishing the law, ensuring social and economic development while preserving the natural resources is called for.

Policies for sustainable development should be framed to strengthen the laws on over exploitation of resources, formation of institutes to administrate the enforcement and practise of such laws and empowering people on their rights. Limits should be set on consumption and production so as to retain sustainability. Sri Lanka could take lessons from countries such as New Zealand, Mexico and Norway who have imposed such regulations with the aim of suitability. Further the resources in the country should be protected effectively through proper administrative

functioning, independent from political motive. Administrative regulations should be practised effectively to ensure that corporate bodies are given the jurisdiction to act against harmful effects to the environment. Organizations both and public and private should be established under government regulations and authority with the aim of functioning as independent institutions to afford a greater protection to the environment. Empowering citizens on their community rights would provide them the opportunity to voice their concerns and participate in decision making process. Thereon they will understand the role they play through a balance of rights and responsibilities towards the achievement of sustainable development.

As an independent judiciary the courts should always be led by the constitutional principles aimed at protecting the rights of the citizens and the environment. The shared responsibility in protecting the environment should be upheld in all circumstances. International standards and instruments on sustainable development should be expressly recognized by the judiciary through application in superior courts. Criminal sanctions should be imposed on environmental misconduct and public interest litigation should be enabled. Similarly jurisdiction should be given for civil authorities to take actions against unfavourable environment actions. Sri Lanka should initiate a proper mechanism which would guide the achievement of sustainable development goals by the year 2030 along with a proper monitoring and evaluation procedure. Such procedures would ensure that Sri Lanka stands in line with the UN regulations on environmental protection and sustainable development through the achievement of peace, stability and strong institutions (Sustainable Development Goals Goal 16)

It is evident that the government of Sri Lanka has a critical role to play in enacting proper laws, monitoring compliance to them and in administering justice in relation to the achievement of sustainable development. Respect upon the fundamental constitutional principles would in itself lead the country towards equality and justice achieving rule of law which ensure an equal distribution of resources, peace, stability and environmental protection which would ultimately lead the country towards sustainable development thereon achieving national growth.

Conclusion

Sustainable development aims the satisfaction of the needs of the present generation without compromising the needs of the future generations. Though states aim towards sustainable development they are met with obstacles due to environment depletion, lack of social and economic development. Hence establishing rule of law would be the main mechanism through which countries could create an environment of equality, satisfaction of human rights and establish peace and stability. Rule of law would ensure that disparities in income distribution are eliminated, citizens are provided equal opportunities to exploit resources, peace and stability is provided and that their rights are protected while conserving the environment. Thereby rule of law is paramount as it respects the constitution and the laws of the country which are in fact aimed towards protecting the citizens and ensuring their welfare.

To establish rule of law in Sri Lanka the government must implement laws for environmental protection, ensure administrative authorities are in proper function taking actions against environmental malpractice and the judiciary works towards the establishment of rights of the people and the environment. Compliance to international standards would signal that Sri Lanka is on its way to the achieve the sustainable development goals by 2030. Hence it can be concluded that establishing rule of law is integral to sustainable development and Sri Lanka complying to international standards must work towards establishing rule of law through an integrated national approach with specified tasks, monitoring and evaluation so as to fulfil

the needs of the present generation and conserving its resources for the future in order to facilitate national growth and security in the long run.

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Acknowledgment

I would like to offer my sincere gratitude to the lecturers in the Faculty of Law, General Sir John Kothelawela Defence University for their constant guidance and support throughout the compeletion of the paper.

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Thamasha Walgama is a final year undergraduate in General Sir John Kothelawela Defence University. She takes a keen interest in the areas of Constitutional Law, International Law and Administrative Law. This research deals with the concepts of Rule of Law and Sustainable Development with a view to archive National Growth in Sri Lanka.

Paper ID: 732

Application of the Concept of Reparation in Transitional Justice in Sri Lanka

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Abstract - This study discusses the application of the concept of Reparation as an element of Transitional Justice (TJ) in the social transformation process especially after fragile circumstances in the society.The objective of this study is to analyze the application of Reparation in TJ processes in Sri Lanka in the post-conflict context.The term reparation refers to the measures to satisfy victims, such as revealing the truth, holding perpetrators accountable, and ceasing ongoing violations. Sri Lanka recognizes the concept of reparation aiming to assist victims by way of providing material and symbolic support.This recognition empowers affected communities to claim their legal rights as equal citizens. The study, therefore, emphasizes the needs of a Victim Centric Approach and the need to restrict politically initiated administrative measures in the reparation process.Introduction of the Reparation Act No 34 of 2018 to establish the Reparations Office can be regarded as a significant move to synchronize the reparations process in Sri Lanka with international standards.However, inconsistency in the application of the concept of reparation is still noticeable.This study is a library study based on the secondary sources of domestic and international legal instruments, scholarly articles, and judicial decisions.The study elaborates International standards on the concept of Transitional Justice (ICTJ) to find a gap in the Sri Lankan process of reparation in the light of the Victim Centric Approach.The study emphasizes issues related to international standards and domestic applications within the concept of reparations.Finally, this study suggests that the reparation process in Sri Lanka should adopt the Victimcentric Approach,therebyable toaddress the individual cases equally and effectively rather than addressing the grievances of specific communities.

Key Words - ***Transitional Justice Reparation, Victim Centric Aprroch***

I.INTRODUCTION

Transitional Justice (TJ) consists of Judicial and non – Judicial processes in order to address public grievances by way of Criminal Prosecution, Truth Commissions, Reparations and different kinds of Institutional Reformations. The concept of TJ came into practice in the aftermath of World War Two (WWII). Further, it has been applied in the case of organized genocide, ethnic cleansing, or apartheid of South Africa. Reparations are often a piece of the corrective recommendations made in the TJ processes. It has been used systematically and alternatively to correct certain well-orchestrated injustices by one community over other communities in the form of forcible family separations, systematic sexual abuse, systematic genocide or mass killing and prolong colonialism. The International Centre for Transitional Justice defines reparations as "measures to satisfy victims, such as revealing the truth, holding perpetrators accountable, and ceasing ongoing violations" in cases of massive or systemic rights violations.Therefore, reparation is an essential part of TJ and assists victims by way of providing material and symbolic support which helps to treat victims as equal citizens and build trust among discriminated and marginalized communities with others. Sri Lanka had applied the concept as a tool to assist victims of both man-made and natural disasters. The effort to provide justice to the victims of the three-decades -long warand reformation inthe Meetotamulla garbag

e dump tragedy, resettlement and restitution provided to victims of the 2004 Tsunami and the Meeriyabedda landslide are a few examples of that. Further, an institution such as the Rehabilitation of Persons, Properties and Industries Authority (REPPIA) and other government entities had also worked to grant reparations for the people. However, Sri Lanka has never dealt with the entire gamut of reparations but merely addressed particular aspects of it by providing inconsistent forms of compensation or restitution. Reparation is a multi-faceted process which is not restricted to financial payment but includes acknowledgment of previous abuses, rehabilitation of victims, and moreover, recognizes their dignity with rights. The Sri Lankan application of the concept of reparation for victims of ethnic or religious-based violence had further escalated the fragile situation of its execution challenging the equal application of the concept among all communities.

II. METHODOLOGY

This research is mainly a qualitative research carried out by the reference of scholarly textbooks, journals, conference papers, and statutes.Open domain data were used for the analysis.This is a reform-oriented legal research. Further, the study has referred to the present Constitution of Sri Lanka, administration circulars and national policies especially the Office for Reparations Act No 34 of 2018.Moreover, international standards, international legal instruments like the United National Principles of Reparation, reports of the United Nations Human Rights Council,and International Law Commissioned reports were used for the comparative analysis of the study.

III. DISCUSSION

Reparation is a critical component in TJ within a transition expectation to correct previous wrongs and prevent future repeats.If designed and implemented in a holistic,comprehensive, and complete manner, reparations treat all citizens equally and direct the transition towards a peaceful and just society treating victims at its foremost.Therefore, victim-centric approach with equal and fair application of the concept is at a greater challenge.

C. *International Law Aspect of Reparations in the Transitional Justice Process and Its Issues*

The application of the concept of reparation in International law goes back to the Permanent Court of International Justice (PCIJ) decision in the *Factory of Chorzow Case* and in this case, it was stated that "Reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have".Further, it is stated that any act contrary to international law would give an obligation to restitution and this dictum has been widely accepted and reaffirmed in later ICJ decision in the cases of *Gabcikovo – Nagaymaros*, *the Armed Activities on the Territory of the Congo* and *Papamichalopoulos v. Greece*.Later,the United Nations Commission on Human Rights also recognized the right to remedy and reparation for victims in its guidelines in 2005.Further, the annual session of the General Assembly adopted these principles in March 2006. Accordingly, reparation mechanisms include restitution, compensation, rehabilitation, satisfaction and guarantee of non – repetition.These principles were adopted in the Roman Statute of the International Criminal Court (ICC) and the International Convention on the Protection of All Persons from Enforced Disappearances later.

Restitution refers to actions restore the victim to the original situation before the gross violation of International Human Rights Law and International Humanitarian Law.Compensation refers to providing any economically assessable damages as proper and proportional to the gravity of the violation and circumstances of each case.Rehabilitation refers to medical and psychological care as well as legal and social services. Satisfaction refers to a

broad range of measures such as verification of facts and full and public disclosure of the truth. Finally, Non – Repetition refers to include broad structural measures of a policy nature such as institutional reforms to avoid the recurrence of such incidents.

Accordingly, certain countries legally established the concept of reparation through Truth Commissions such as the Truth Commission of South Africa, Colombia, and Sierra Leone. Moreover, the concept of reparation included in the regional Human rights treaties such as the European Convention on Human Rights and American Convention on Human Rights and the South African Coalition for Transitional Justice (SACJT). They affirm the rights to legal remedy and state that right to remedy and fair compensation in the form of reparations. SACJT includes reparations, prosecutions, pardons, and truth-seeking and payment by way of urgent interim reparation for health, education, and economical loses. Further, reparation actions were empowered with the introduction of the National Unity and Reconciliation Act.

However, international legal instruments do not clearly articulate or interpret the term victim for reparations. It is therefore flexible in application to different contexts. For example, the International Humanitarian Law does not define the term victim while some legal regimes prefers to use the term survivor instead of a victim. Further, the four pillars of TJ are interdependent on each other. Therefore, efforts at truth and justice are meaningless if victims find no answers to their issues, and their perpetrators are not being punished. Therefore, reparations on their own can be seen as merely paying off victims if they are not complemented with efforts to provide meaningful measures of truth and justice. These insights of international legal instruments reflect that reparation helps victims to rebuild their lives in a situation where the state gets its obligation towards its people. Therefore, reparation focuses on the victims as its foremost consideration.

D. The Reparations Policies in Sri Lanka and identified issues.

1. *Ad hoc Reparations Initiatives*

Since the end of the war, several man-made and natural disasters have resulted in death, displacement, and devastation, consequently leading to the provision of compensation. Further, authorities involved in that have used inconsistent schemes. Although reparations are largely focused around the war, ethno-religious conflict, and other forms of violence, it has been used in the post-disaster situations to avoid discrepancies creating discrimination and inequities of victims. Ad hoc in nature compensation could be observed in both man-made and natural disasters in Sri Lanka as illustrated in Table 1 below.

Table: Different Reparations Schemes in Sri Lanka.

Incident	Damage	Compansation
Aluthgama and Beruwala Incident in June 2014	4 Deaths, 80 injured and 23 homes were fully damaged and 2,017 homes partially damaged	Rs. 2 million each as compensation for deaths, while those who sustained injuries during the clashes would receive Rs. 500,000.
Koslanda Landslide in October 2014	39 deaths and nearly 100 homes buried	Rs.100,000 for death and Rs.10,000 each for school children
Explosion in the Armory at the Salawa Army Camp in	1 death and several others injured, 174	Rs.100,000 provided for the deaths and Rs.25,000

June 2016	houses completely destroyed, 1,032 houses partially damaged and 1,325 residents displaced	each for injuries
Meethotamulla garbage tragedy in April 2017	32 deaths and 145 houses and destroyed or damaged	Rs.100,000 as compensation for a death which was subsequently increased to Rs.1,000,000 with cabinet approval after protests by the victims
Ethno-religious violence in areas in Kandy in March 2018	3 deaths and property of 465 persons damageed	Rs.100, 000 was paid for each death
Easter Sunday attacks in April 2019	290 deaths and over 500 persons injured	Government promised to pay Rs 1 million each for a victim and Rs 100000 each for funeral expenses.

Source: National News Papers in Sri Lanka

Other than that REPPIA was established in 1987 as a consequence of the 1983 July riots with the objective to assist affected people with financial assistance. It had several schemes - one was the 'Most Affected Persons Compensation Scheme for General Public'. The maximum compensation amount granted for a death under this scheme was Rs.100,000 and Rs.50,000 was given for an injury. On the other hand under the scheme 'Most Affected Persons Compensation Scheme for Government Servants', the maximum compensation amount granted for a death was Rs.200,000 and Rs.100,000 was granted for an injury where lack of uniformity could be observed. The examples mentioned above show the lack of uniformity in terms of compensation to the victims. Reasons for this lack of uniformity could be identified as public outcry, pressure, and political influence etc. These influences decided the final outcome of the reparation effort.However, the National Involuntary Resettlement Policy (NIRP) was introduced to discuss shortcomings related to resettlement and compensation. Finally, the Lessons Learnt and Reconciliation Commission (LLRC) also stated "restitution and compensatory relief", which emphasizes the adoption of a Victim-Centric Approach while ensuring the transparency and equality in the reparation process despite the ethnic background of the people.

2. ***Office for Reparations***

The present constitution of Sri Lanka guarantees the equal right and equal protection before the law under its fundamental right chapter. Further, statutory protection of the breach of such right also provided with effective remedy dignity of all victims of past conflicts and protection of their rights is also available in the Sri Lankan legal system. Further, Sri Lanka accepted and recognized the right to reparation as a component of the Sri Lanka transitional justice process in line with the United Nations Human Rights Council Resolution 30/1 in 2015. Accordingly, the Office for Reparations was established under Act No 34 of 2018 as an independent authority.Accordingly, the Office is empowered to formulate, design and implement reparations policies in Sri Lanka.The Office receives the applications from an aggrieved person of a wide range such as children, youth, women and disabled.The Act refers to both individual and collective reparations. However, reparations will not be

granted to individuals or groups because they belong to a certain political party, movement, state institution, or formation. Section 12(2) and (3) of the Act states that reparations shall not prevent victims from pursuing legal remedy against violations and such victims shall be advised by the Office's outreach units of their ability to appear before any other proper authority, person or body.

Further, section 10(2) of the Act, states that the office for reparations may set up a number of (temporary or mobile) regional units as deemed necessary to ensure that reparations are accessible to all aggrieved persons. Therefore, it is important to keep the Office for Reparations under the central government to discharge fair and equal execution of its duties to the people. However, the execution of the work through the provincial council is possible under the present framework.However, there were several criticisms against the office for reparation as it was mainly focused on the matter of rehabilitation of ex – combatants. Further, there were other issues relating to the planning and budgeting stages. Other than that this study highlights several existing actors including REPPIA and others who have a role in administering some forms of reparation. As this paper has repeatedly highlighted, reparations in SriLanka areadministered through numerous p olicies and bodies, resulting in an ad hoc system that does not meet the needs of victims in any comprehensive manner. Other than that those decisions are subject to change based on public outcry and political interests which always damage the trust and confidence of the people about the conduct of the reparation office.Some inconsistency in the government efforts at reparations also raise questions as to whether successive governments provided reparations as a substitute to genuine attempts at truth and justice in Sri Lanka.The main issue of the reparation in Sri Lanka is nothing else but public outcry and political interests where those reparation schemes come as an attractive political promise or political agenda in the election manifesto.The schemes introduced have the indirect ethno religious interest which contributes to lose public confidence.

E. ***Comparative Study with International Standard.***

International legal instruments have accepted that reparation is a state responsibility in which it gets a legal obligation to provide reparation for its actions. International Coalition of Justice Process (ICJT) has recognized that different victims have different needs and those needs can be changed over time. Therefore types of reparation also vary according to the victim's economic status, social class, gender, age, and identity.For example, women and children's needs differ from the needs of a disabled person as the need additional care. Accordingly, the Sri Lankan application of the concept of reparation is far distant from this understanding of the Victim-Centered Approach. A victim-centered reparations program ensures that victims and their needs, interests, and rights are always at the center of attention and constitute the goal of each policy. Here, "victims" are not just a homogeneous group or specific ethno-religious groups. Sometimes victims can be a certain people or community in general.

An inclusive approach recognizes the political right of every victim in common. However, it is a challenge to find victims in an equal way in a diverse society with the complexity of their situations. For example, the distinction between victim and perpetrator is difficult in the light of the child soldiers. Therefore, the discretion of concerned authorities may lead to inconsistent and non-comprehensive reparation process. Further, the examples mentioned above also show clear discrepancies in response and reparations provided due to factors such as political influence, public outcry, and victimisation. Accordingly, institutions like ICJT affirm that the transitional justice process should give access to victims for legal remedies such as a claim for their Fundamental Rights (FR). Sri Lanka can learn from the South

African Coalition for Transitional Justice (SACJT) model which constitutionally empowered body in order to make sure the efficient function of the newly established office for reparation in this regard other than the expensive and complex process available to claim FR with the help of Article 126(2) of the Sri Lankan constitution.

IV. CONCLUSION

Sri Lanka had administered the concept of reparation through numerous policies and administrative institutions. Yet, the absence of the key principles such as equity, non-discrimination, and gender sensitivity in the process still can be observed. Comprehensive application of the TJ, therefore, encourages truth, justice, reparation, and non-recurrence of such events and reparation will be the one major element bringing justice to the victims. Setting up the office for reparations raises expectations which still need care, consideration, and commitment to address the grievances of victims and affected communities in order to direct the reparation process in the victim-centric approach. Moreover, it needs legal and policy frameworks to integrate international law and standards of victim-centric and rights-based framework in the reparation process that avoids the creation of victim hierarchies. Office for reparations should adopt an inclusive process with transparency where all the communities have their trust and confidence towards it. The confidence-building between the institutions and the communities could be done through policy reforms and as well as healthy execution of its duties. Further, continuous application of the concept of reparation in a victim-centric approach when and where needed would generate experiences and lessons learned that further develop the concept. Finally, as the public trust doctrine encourages victims, the affected communities and civil society should monitor the workings of the designated institutions with regular interaction to raise concerns to improve the process.

Acknowledgment

This study would not have been conceivable without the generous support given by numerous individuals throughout. We extent our thanks to every one of them. Most importantly, we would like to express sincere gratitude to the Mrs.B K M Jayasekera AAL, the Head of the Department(Civil), Faculty of Law, KDU for the kind support and assistance given to make this study a success.

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Technical Session III: Session Summary
Session Theme: Contemporary Challenges and the Role of Private Law

Session Chair: Dr. Dan Malika Gunasekera

Technical Session III of Law was themed 'Contemporary Challenges and the Role of Private Law'. it was chaired by Dr. Dan Malika Gunasekera. Dr. Gunasekara passed Examinations of the Incorporate Council of Legal Education (Bar) from 1993-1995 at Sri Lanka Law College, Colombo and called into the Bar in December, 1996. He Obtained Master of Laws (LL.M) in International Law with "honours cum laude" from University of Utrecht, the Netherlands in 2001, and Doctor of Philosophy (Ph.D) in International Commercial Maritime Law between 2002-2005 with "honours cum laude" from University of Hamburg, Germany in 2008. He received a scholarship from International Max Planck Research School for Maritime Affairs, Hamburg, Germany from 2002-2005 to complete his PhD studies. Currently he renders his services in diverse disciplines such as Senior Visiting Lecturer, Faculty of Management, Humanities & Social Sciences at Colombo Nautical & Engineering College (CINEC) Campus, Malabe, Sri Lanka, Senior Visiting Lecturer: Department of Economics, Faculty of Arts, University of Colombo, Faculty of Law, Dalian Maritime University, China, Senior Visiting Lecturer for University of Bedfordshire, UK in its LLB Programme conducted at CINEC Campus, University of Staffordshire, UK in its LLB Programme conducted at APIIT Sri Lanka and University of New Buckinghamshire, UK in its LLB Programme conducted at IDM Nations Campus, Sri Lanka.

First research presentation was on a very timely topic during the pandemic situation. Title of the presentation was 'Work-From-Home – The Legal Status of Sri Lanka' and it was authored by AA Edirisinghe and NKK Mudalige. They recommended an overarching statute to provide legal guidelines to the Work From Home condition of Sri Lanka.

Another labour law aspect which is timely during the pandemic situation was addressed by the research titiled 'A Critique of Available Remedies for Industrial Disputes Arising out of COVID-19: A Comparative Analysis' by HGS Rosairo and HD Jayaweera.

Third presenter of the session III was BAR Ruwanthika Ariyarathna who presented her research on 'Employment Security of Probationary Workers in Sri Lanka: A Comparative Legal Analysis'.

'Impact of Covid-19 to the National Economy of Sri Lanka: A Comparative Analysis with the United Kingdom on Employees' Rights' was the final presentation of the session which also focused employees' rights during the COVID situation.

All the research presentations were on contemporary issues on Labour Law in this session.

Paper ID: 651

Work-From-Home – The Legal Status of Sri Lanka

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Abstract — Work from Home (WFH) is not a novel concept theoretically. However the practical application of WFH did not impact on many types of employment in the world until the COVID 19 situation. During WFH, the contract of employment still exists between the employer and the employee, subject to few modifications. The place of work is different from usual employment and still the employer has the control over the employee's service. However, it is pertinent to identify the legal framework with regard to WFH, specifically in Sri Lanka due to many reasons. During the last few months, it was observed manipulation of labour, deduction of salaries, lay offs and unlawful termination which have not been addressed though a solid legal protection. WFH is also such initiation that was operated during COVID 19 situation without much expressed legal basis or guidelines. Therefore, the problem addressed in this research paper is whether the legal status of Sri Lanka with regard to work from home condition is adequate enough to protect the interests of both the employer and the employee. Methodology followed in the research was the black letter approach predominantly. However, the socio legal approach was also followed through observation and semi structured interviews conducted. Moreover, the international standards on work from home was taken as a prototype to recommend a proper legal mechanism for work from home condition. Analysis revealed that both the private sector and the public sector lack proper legal guidelines in terms of work from home condition. Moreover, the types of employment which cannot be functioned through work from home should also be considered and provided with a relief to protect the interests of both parties to the employment relationship. On the other hand, the implementation of management and control during work from home, working hours, contacting hours and facilities should be considered when formulating legal guidelines to work from home. Finally, a proper legal guideline for both private and public sector in Sri Lanka was recommended in the research in order to protect all the parties in the employment relationship which is a much needed gap that required to be filled.

Keywords – Work from Home, Employment Relationship, Protection of Labour Interests, Legal Guideline for work from Home

I. INTRODUCTION

The year of 2020 has surprised the conventional lifestyle of the society including the job market. Although concepts such as work from home (WFH) has already been recognized as a method of doing jobs by management studies, it wasn't good enough to obtain attention until the lockdown situation due to Covid 19 pandamic (International Labour Organization, 2020).

Dingel and Neiman (2020) use occupational descriptions from the Occupational Information Network (O*NET) to estimate the degree to which different occupations in the United States can be done remotely (International Labour Organization, 2020). They then aggregate these estimates using US employment in occupational categories as weights. Their preferred estimate is that 34% of American jobs "can plausibly be performed from home." (International Labour Organization , 2020). South Asia's case is different from the above statistics, but is relatable. Based on data from labour force surveys, the ILO estimates that 7.9% of the world's workforce worked from home on a

permanent basis prior to the COVID-19 pandemic, or approximately 260 million workers (International Labour Organization, 2020). The ILO estimates that while not all occupations can be done at home, many could– approximately one in six at the global level and just over one in four in advanced countries (International Labour Organization, 2020).

Obviously the law on WFH was silent in many jurisdictions and Sri Lanka is no exemption to it. In the meantime the requirement of proper guidelines with regard to WFH popped up due to unfairness and unbalanced experiences faced by the actors in the contract of employment; namely, the employer, employee and the State. It was observed that none of the abovementioned stakeholders were upto the standard level of performance due to lack of guidance from legal framework in terms of WFH.

WFH is considered in this research, employment in which the work is fully or partly carried out on an alternative worksite other than the default place of work, specially at the residence of the employee.

II. METHODOLOGY

The research was carried out using three methodological approaches. The black letter approach of research and the international and comparative research methodology were used based on legislative enactments and international legal standards as primary sources and books, journal articles, conference proceedings, theses, and online resources as secondary sources. The international standards are used as the yardsticks or benchmarks against which the efficacy of the Sri Lankan law is ascertained. The empirical research methodology was used to analyze the law in context through the observations made by the researchers.

III. ANALYSIS

The usual 'Contract of Employment' sometimes is not compatible with the needs of WFH. According to the common law theories introduced by cases such as Regina vs. Walker (1958) and Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance (1968) the element of control and other related facts considered to seek the contract of employment is inapplicable in a situation of WFH. However the 'right to control' should be established by the employer in the WFH situation also in order to continue the contract of employment, instead of 'actual control'. Therefore the WFH guidelines should include provide the authority to the employer to maintain the 'right to control' the employee for a certain extent.

Moreover it is required to expressly mention about the The default place of work which can be understood as the place or location where the work would typically be expected to be carried out, taking into account the profession and status in employment (International Labour Organization, 2020). In case of WFH situation the default place of work will be different. However in order to maintain the same contract of employment with the same level of control, it should be mentioned 'home' of the employee as the alternative place of work during the WFH.

Hours of work during WFH is another aspect that requires consideration in this research. In Sri Lanka, for the private sector employees who are covered under the Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), the maimum hours of work is stipulated as 08 hours according to Section 3 (1) of the Act. However there is no practical way of calculating the hours of work of an employee in a WFH situation. Therefore the conventional requirement of hours of work should be dispensed with in a WFH situation. Instead it can be adopted a 'dealine system' protecting both the employer and the employee. Assigning a task with all the responsibilities and clear instructions should be the duty of the employer and the employee should achieve it

within the given timeframe. Technology can be used as a tool to communicate in this regard. However the law can prescribe a minimum hours of work to selected employements such as administration, clerical ect, in which the hours of work can be calculated using technology. According to Harvard business review, there can be several challenges in self management under the WFH condition (Carucci, 2020). Therefore the understanding of the situation should be mutual between both the employer and the employee. Otheriwise it may trigger industrial disputes due the unsatisfied workforce in the country.

Moreover, the telework law of Chile, the employer is allowed to operate a mechanism for recording compliance with working hours will be at the employer's expense. However the it is limited to selected types of employments only. Other employees are free to allocate their hours of work and they are entitled to the right to disconnection. The right to disconnection consists of the fact that workers are not obliged to respond to communications, orders or other requests from the employer for a period of at least 12 consecutive hours in any given 24-hour period (Koehier, 2020). On the other hand the ILO's Home Work Recommendation (R184) of 1996, provides that a deadline to complete a work assignment should not deprive a homeworker of the possibility to have daily and weekly rest comparable to that enjoyed by other workers.

Costs of operation, functioning, maintenance and repair of equipment should be borne by the employer in case of WFH. According to the ILO's Home Work Recommendation (R184) of 1996, it is required to keep records of the employees who are working from home, time allocated, rate of remuneration, costs incurred, deductions of remuneration (if any) by the employer. The administration would be effective in such record keeping according to the international standard.s

During WFH situation, there should be a proper mechanism to prevent, settle and investigate industrial disputes. The State should be vigilant on this regard since both the employer and the employee are under a lot of pressure from challenges in the employment. Industrial Dispute Act No. 43 of 1950, should be amended accordingly to cater such needs of the employer and the employee.

It is prohibited that the application of this modality implies a reduction in the rights of the worker, especially in their remuneration according to the telework law of chile. However when the WFH situation occurred due to a pandemic situation, the employer might also be in trouble in terms of the income. Therefore the employer may also need a relief in terms of payment of wages or salary to the employee.

According the ILO's Home Work Recommendation (R184) of 1996, it can be regularize a mimimum wage to be paid to the employees or if the situation permits the minimum wage must be a result of collective bargaining and mutual understanding.

Types of Employment which cannot be functioned through WFH is also a pertinent discussion in this research. There should be a proper mechanism to manage those industries. Both the employer and the employee are not in a position to perform and to serve or produce, if the situation doesn't support to work at the default place of work. Such industries include but not limited to, hotel, plantation and manufacturing.

Finally the employer's duty of care to check on the worker should be established through a proper legal guideline apart from the above analysed factors.

IV. CONCLUSION AND RECOMMENDATIONS

In conclusion it is important to address following aspects in a proper legal guideline sponsored by the State; to both employer and employee:

Default place of work and the alternative place of work should be defined within the contract of employment

Parameters of WFH arrangements and performance objectives and expectations should be clear and discussed on a regular basis.

Hours of work and the right to disconnection should be clear.

Facilities provided by the employer should be clearly communicated and the costs should be borne by the employer.

The employer should have the duty of care towards the health and safety, welfare and other related aspect.

Remuneration should be expressly agreed upon by the both parties.

It is suggested to follow the guidelines provided by the ILO's Home Work Recommendation (R184) of 1996, apart from other international standards to create a proper legal mechanism to cover WFH in order to protect the interests of all the parties in the industrial relations.

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A Critique of Available Remedies for Industrial Disputes Arising out of COVID-19: A Comparative Analysis

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Abstract- The recent pandemic due to COVID-19 has affected the whole world at large. Aside from the obvious health issues arising from COVID-19, there is also another less obvious issue; unemployment. Sri Lanka initiated curfews on 20th March 2020, a week after the first confirmed patient was discovered. This was followed by almost two months of continuous curfews, with the announcement of businesses partially re-opening close to mid-May. This clearly amounts to almost two entire months that businesses in Sri Lanka were not allowed to operate, except those deemed essential commodities. This has resulted in a vast array of Industrial Disputes. A key example would be workers being laid off in many businesses, simply because there is no revenue to pay salaries. This work is a doctrinal and library research of a qualitative nature, and, shall consider the just and equitable remedying of Industrial Disputes arising out of COVID-19, as an unforeseeable circumstance. Therefore, the goals of this work are, firstly; to verify whether the ADR methods award more just and equitable reliefs rather than general courts. Secondly, to discover whether the ADR methods are the sole alternative to address the aforementioned issue. An important question to answer in this context is whether the ADR methods prescribed by the Industrial Disputes Act No. 43 of 1950, namely Labour Tribunals ("LT"), Industrial Courts ("IC") and Arbitration continue to fulfil the aforesaid purposearisingfromunforeseeable circumstances. The authors firmly believe that the yield of this work will be instrumental for responsible policy-making authorities to better discern the best legal approach to remedy labour disputes arising out of similar unforeseen circumstances in the future.

Keywords- Contract of Employment, Unforeseeable Circumstances, Industrial Disputes, COVID-19, Emergency Regulations

INTRODUCTION

With the drastic loss of businesses, many employers were forced to cull their workforce to significantly lesser numbers in order to meet quarantine standards as well as ensure that the business makes ends meet.

With this aforementioned situation, many industrial disputes ("ID") arose, and continue to arise, which fall within the definition of an ID given within the Industrial Disputes Act (Industrial Disputes Act No. 43 of 1950) (hereafter "IDA").

The justifications for the restriction of this work purely to industrial disputes which occur due to unforeseeable circumstances arising from COVID-19 are as follows; firstly, it being the latest such unforeseeable circumstance to affect Sri Lanka on a nationwide level. Secondly, the global impact of the said pandemic. Thirdly, the implicationsandimpactsofCOVID-19 particularly to industries on a global scale. Fourthly, the extended duration of inability to perform industrial functions due to the said pandemic. Fifthly, the primary as well as secondary effects of industrial breakdowns arising from COVID-19.

This work shall analyse the IDR processes within the IDA, namely LT, IC and Arbitration, in contrast to the ordinary litigation processes of Sri Lanka with the ultimate objective of discovery/ settling the question of whether the IDR processes are competent to grant equitable reliefarisingduetounforeseeable circumstances, namely grievances arising due to COVID-19 in contrast to the ordinary litigation process of SL.

Therefore, the goals of this work are, firstly; whether the Alternative Dispute Resolution ("ADR") methods award more just and equitable reliefs rather than general courts. Secondly, to discover whether the ADR methods arethesolealternativetoaddressthe aforementioned issue.

It is noteworthy that although this work addressed the presumption that the IDR process awards greater justice and equity in comparison to ordinary litigation within the initial portion, it is a necessity to examine whether in the present context, the aforementioned presumption prevails true. Furthermore, in the event that the aforementioned presumption is disproved, this work tests whether an alternative method exist, which is capable enough to cater for resolution of an industrial dispute with justice and equity in light of the present context, namely industrial disputes occurring due to unforeseen circumstances arising out of COVID-19.

Research Problem

Whether the IC, LT and Arbitration processes are competent to remedy industrial disputes arising due to unforeseeable circumstances; namely grievances due to COVID-19, in contrast to the ordinary judicial process?

THE SITUATION OF THE ORDINARY COURTS IN RELATION TO INDUSTRIAL DISPUTES DURING THE COVID-19 PANDEMIC TIME

The ordinary courts are bound to a great extent to apply positivistic approaches to legal issues. In this context, if a valid contract exists between the parties of the dispute, the ordinary courts would be compelled to follow such contract.

As mentioned above, the COVID-19 pandemic has left many employees incapable of performing the obligations under the contract of service. However, the pursuance of litigation by an employee for an industrial dispute carries the risk of void of contract via frustration. The effect of frustration is to discharge the parties from all future obligations (Is your contract frustrated2020).

A frustration of a contract was defined within Davis Contractors Ltd v. Fareham Urban District Council. The facts of this judgement are, in brief, that the appellants contracted to build houses for the respondents. However, due to the shortage in labour and material (due to the Suez Canal conflict in which the UK was involved) the contract took longer to complete, as well as being more expensive than that anticipated within the aforesaid contract. The court held that the contract was not frustrated, since the fact that a contract becomes difficult to perform is not sufficient to prove frustration (Davis Contractors Ltd v. Fareham Urban District Council, [1956]).

It was declared in the aforesaid judgement that "frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract" (Ellis, 2020). In essence, from the point of view of the party moving for frustration; Non haec in foedera veni; 'it was not this that I promised to do' (Davis Contractors Ltd v Fareham Urban District Council: HL 19 Apr 1956 - swarb.co.uk, 2019).

The central aspect of this principle is what constitutes'radicallydifferent'.Inthe aforementionedjudgement,LordReid determined the test of 'radically different' to be considered as follows; the contract must change in the obligation undertaken to the extent that the performance is different from the obligation contracted for, and contain a significant change in circumstances of performance (Ellis, 2020).

The danger this causes is the result of a frustration of contract; if frustration of contract is proved before courts, the contract of service of an employee could potentially be terminated, which is the opposite of the outcome that the employee seeks by pursuing litigation (to preserve the contract of service).

The relationship between an employer and employee contains a vast power difference, in which the employee holds significantly less power than the employer (bargaining power). In addition to this, the situation generated by unforeseen circumstances such as COVID-19 increase this power gap, by which the employee is in some instances unable to perform his contractual obligations. In this context, if the employee was to seek remedy for an ID via the ordinary judicial process, the ordinary courts, by the threat of frustration of contract, pressurise the employee even more than the contract of service already does. This significantly reduces the chance of the employee obtaining relief which is due, and is clearly a significant restriction to the goal of achieving justice and equity.

It is therefore clear that an employee with a valid contract of service is not likely to be successful in obtaining a just and equitable remedy via the ordinary courts of the land, especially in unforeseen circumstances such as COVID-19. Therefore, this work will now address the assurances within the IDR mechanism, which greatly increase the ability of just and equitable relief, in contrast to the aforementioned litigation method.

THE USE OF JUST AND EQUITABLE PRINCIPLES WITHIN THE INDUSTRIAL DISPUTE RESOLUTION PROCESS TO MITIGATE THE RIGIDITY OF THE ORDINARY LITIGATION, IN RELATION TO COVID-19 SITUATION

THE MINISTER'S ROLE AND ITS EQUITABLE NATURE

The reference to compulsory arbitration by the minister is a decision subject to administrative discretion. This is evident in the wording of Section 4(1) ["the minister may..."]. This would entail that if the minister is of the opinion that the parties are capable of settling the dispute via conciliation, without a lengthy arbitration process, this discretion may enable him to allow them to do so.

In Aislaby Estate v Weerasekara case, it was held that, should the minister, at a later date, decide that a certain industrial dispute should be referred to arbitration, he may do so. It was held further that the mere fact that he has refused to exercise his power does not mean that he has exhausted his power for a later stage (Aislaby Estate v Weerasekara, [1973]).

It was again held in Wimalasena v Navaratne & Two Others that the minister also has power to refer a dispute for settlement even though an inquiry was pending in the Labour Tribunal for the same dispute (Wimalasena v Navaratne & Two Others, [1979]).

Upon analysis of the above powers of the Minster of Labour, it may seem that he has a considerable power to interfere in the industrial dispute settlement process. However, he is bound to do so within the constraints of justice and equity. This is especially applicable to the plethora of ID arising out of the COVID-19 crisis.The aforementioned crisis has resulted in large numbers of persons aggrieved from similar situations. In this situation, the Minister is bestowed with the unique ability to use aforementioned discretion to streamline the process (e.g. where feasible, refer parties to conciliation) and prevent congestion of the both the IDR process and court logs.

Therefore, it can be said that, the ultimate goal of just and equitable principles is better facilitated by the powers of the Minister.

JUSTICE AND EQUITY IN ARBITRATION

Section 3(1) (d) of the IDA[1] states that the Commissioner of Labour is empowered to refer any dispute of an industrial nature for

[1] "if the parties to the industrial dispute or their representative consent, refer that dispute, by an order in writing, for settlement by arbitration to an arbitrator nominated jointly by such parties or representatives, or in the absence of such nomination, to an arbitrator or body of arbitrators appointed by the Commissioner or to a labour tribunal".

settlement via arbitration (Industrial Disputes Act No. 43 of 1950). Section 4(1) of the IDA[2] details the power vested in the Minister of Labour to refer any dispute to an arbitrator or labour tribunal (ibid).

There is a significant difference between the two forms of arbitration. Regarding compulsory Arbitration, it is noteworthy that parties of a dispute can only be entered into compulsory arbitration by the Minister's authority only if there is a dispute actually existing, and not for additional matters apprehended by the Minister to be resolved. In the context of a crisis such as COVID-19, as well as proximity of the election, the Minister is left considerably vulnerable to influences.However,concernoversuch influencesisunfounded,sincethe aforementioned distinction acts as a barrier to creating imagined disputes/ disputes fabricated with ulterior motives, and thereby ensure justice and equity.

It is noteworthy that the role of arbitrators is not identical to that of judges of the ordinary courts. The arbitrators will inevitably use their own inherent beliefs of justice in line with their own morality in giving awards. Such humane and moral consideration is especially vital in resolving ID arising from unforeseen circumstances such as COVID-19. Therefore, they can go beyond established legal principles and common law principles used in the ordinary courts of Sri Lanka to give more just and equitable awards, compared to the rigid and positivistic approaches used by common law, as per the present line of argument of this work.

JUSTICE AND EQUITY IN LABOUR TRIBUNALS

A specialty of a labour tribunal is their power to grant relief to a workman beyond the agreed terms of a contract he/she has entered[3] (Industrial Disputes Act No. 43 of 1950). This becomes a specialty when considered in light of the fact that the ordinary courts can only enforce existing legal and contractual obligations and rights and duties, unless such terms are determined by the court to be harsh and unreasonable.

Therefore, although the ordinary courts are restricted to consider equitable principles only in the event that the terms of a contract are harsh and unreasonable, the LT is kept free from such restrictions, and can better consider the point of view of the workman in order to grant relief that best meets equitable principles required in a crisis such as COVID-19.

Another special attribute is the binding upon the LT to hear every material in question. Failure to do so will be considered an error in law. Furthermore, the LTs are bound to make all inquiries and hear all evidence as they consider necessary[4] (Industrial Disputes Act No. 43 of 1950). This duty of the LT raises an issue as to whether the labour tribunals are in fact a judicial body. It has been established by both Walker Sons and Company Ltd v Fry[5] and U.C. Panadura v Cooray[6] that although an employee's plea must be heard by a LT with sympathy and understanding, the tribunal must nevertheless act judicially (Walker Sons and Company Ltd v Fry, [1967]) (U.C. Panadura v Cooray, [1971]). This is a stark contrast between ordinary courts and the LT, the ordinary courts employ a purely positivistic approach, but the LT remains free to consider other aspects such as sympathy and understanding for the grievances, especially in situations such as the COVID-19 crisis, wherein it is necessary to place heavy emphasis on humanity and morality, instead of positivistic approaches.

[2] "the Minister may, if he is of the opinion that an industrial dispute is a minor dispute, refer it, by an order in writing, for settlement by arbitration to an arbitrator appointed by the Minister or to a labour tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference".

[3] Section 31B(4), Industrial Disputes Act No. 43 of 1950 (as amended)

[4] Section 31C(1), Industrial Disputes Act No. 43 of 1950

[5](1967) 70 N.L.R 71

[6](1971) 66 N.L.R. 14

JUSTICE AND EQUITY IN INDUSTRIAL COURTS

There is a stark contrast between the ordinary courts and the IC in terms of the ability to refuse a hearing, and lack thereof, respectively. This was addressed in the judgement of The Shell Company of Ceylon Ltd V. H. D. Perera[7], wherein it was held that the Industrial Court has no inherent absolute jurisdiction due to the fact that it derives its jurisdiction from the order of reference made by the government (through the minister) and therefore it does not have the power to ignore the order of reference (The Shell Company of Ceylon Ltd V. H. D. Perera).

It is clear that if those who hear a dispute are also vested with the ability to refuse a hearing for a dispute, the objective of justice and equity is defeated. This is apparent, for an example, within the Supreme Court. According to the Constitution of Sri Lanka[8], the SC has the aforementioned power to refuse a hearing for a breach (or imminent breach) of fundamental rights occurring within an industrial dispute arising out of COVID-19, if the 30-day limit from the date of knowledge of the breach (or imminent breach) is exceeded (Constitution of the Democratic Socialist Republic of Sri Lanka). In such an instance, the aggrieved party simply loses the ability to have it grievances heard and remedied. If the IC is also permitted to determine whether the dispute is heard, the aforementioned goal of justice and equity is once again perished. It can be said that the LT, IC and Arbitral Tribunals are in existence purely to prevent the possibility of a miscarriage of justice and equity mentioned above (if LT, IC or Arbitration were also empowered to refuse a hearing similarly to the ordinary courts, there would in fact be no use for them). Therefore, the judgement in The Shell Company of Ceylon Ltd V. H. D. Perera, aligns with the above argument to meet the ends of justice and equity. Therefore, another assurance of justice and equity is present to the parties of an industrial dispute. In thecontextoftheCOVID-19crisis,the aforementioned ability to refuse a hearing is a risk run by parties which are aggrieved by industrial disputes.

However, the inability of IC to refuse as aforementioned, ensures the performance of justice.

One of the most significant is the fact that an award by an IC cannot be repudiated. It is possible for any party to apply to the minister to set the award aside or replace it with a modification of terms and conditions[9] (Industrial Disputes Act No.43 of 1950). However, once the minister receives such an appeal, he can only refer it again to another (new) IC for consideration.

The revisionary jurisdiction of the IC in the above aspect is very much limited. The IC has 4 options in such a situation[10]. It may either confirm the award, set aside the award, replace the award with another, or modify the award to better reflect the principles of justice and equity (Industrial Disputes Act No. 43 of 1950).

What is worthy of recognition herein is the fact that the minister has no arbitrary power or right to affect the decision of an IC. The most he could do is to, in a way, request the IC to re-consider the decision. This is an important step in the process, and it ensures to a great extent that justice and equity is carried out in the ICs. The option to re-consider is a benefit for the offended party to seek equity, and uses the principle 'those who ask for equity must have acted equitably'. This is evident in the context of COVID-19; an employee who is ideally to be present at his place of employment cannot be reasonably expected to violate the curfew rules by being present at his place of employment. Therefore, he has in fact acted equitably as per his contract of employment in this particular

[7] 70 N.L.R. 108
[8] Article 126 (2), Constitution of the Democratic Socialist Republic of Sri Lanka
[9] Section 27, Industrial Disputes Act No.43 of 1950
[10] Section 28(1), Industrial Disputes Act No. 43 of 1950

situation, even if the only equitable act expected is to do absolutely nothing.

IN FACT: THE LIKELYHOOD OF IDR BEING IMPRACTICAL IN THE PRESENT CONTEXT

The aforementioned facts present that the IDR methods are in fact favourable in comparison to the ordinary litigation process, in consideration of the particulars of the issue. However, due the pressing need of circumstances, it is possible that the IDR, once again, may not be the ideal solution to further cater for practical issues arising, in terms of labour disputes, from the COVID-19 situation.

Individual analysis of each such dispute would result in a significantly longer period of time for parties to obtain relief, in such an unforeseeable situation. For example, as aforementioned under 4.1, the equitable role of the Minster, although commendable, is not the optimum solution to the issue due to the overburdening of the Ministry by reference of such disputes.

Although the role of the Minster in the IDR process, as well as the powers and mechanisms of the LT, IC and Arbitration proceedings would ordinarily greatly increase the ability to gain just and equitable relief, it is possible that the sheer volume of such ID due to the unforeseen circumstances arising out of the COVID-19 pandemic, the time taken for each and every aggrieved party to obtain just and equitable relief would increase by tremendous amounts.

The arbitration process is such that certain facts which would be inadmissible in ordinary litigation are admissible in an arbitration proceeding[11] (Allen, n.d.). Therefore, although such rules of evidence would greatly increase the possibility of equity, the requirement of scrupulous examination of a comparatively greater amount of evidence would greatly lengthen the arbitration process, which would once again contribute to the impracticality of the arbitration process, especially in light of the special circumstance arising out of the COVID-19 pandemic.

In such a situation, the saturation of the IDR process would render it unable to fulfil the goals of justice and equity in an ideal manner. Therefore, this work argues that the alternative methods addressed hereafter would present the ideal solutions to the objective of fulfilling the principles of justice and equity in the resolution ofIDoccurringduetounforeseeable circumstances such as COVID-19.

ALTERNATIVE SOLUTIONS OTHER THAN IDR AND OC TO ISSUES DUE TO UNFORSEEABLE CIRCUMSTANCES CREATED BY COVID-19

As aforementioned, there is a clear potential for a lack of proper equity by the ordinary courts due to its positivistic limitations, in the context oftheaforementionedsituationof unforeseeable circumstances. It is also clear by the arguments raised above that the IDR methods are one remedy to the issue, as it was seemingly intended by the IDA. However, there is another potential remedy for the situation, and one that carries a greater assurance of equity to those aggrieved by such unforeseeable circumstances. That potential remedy is simply to enact legislation which would remedy the issue. However, as addressed hereafter, this raises an issue as to whether enactment of a new legislation is a practical approach.

THE RIGORS OF ENACTING LEGISLATION TO REMEDYTHESITUATIONUSINGTHE ORDINARYPROCESSOFLEGISLATIVE ENACTMENT

The ordinary legislative process for an enactment of an Ordinary Bill, followed by the Legislature of SL, is briefly as follows;

After 14 days from the date of publication of the Bill in the Gazette[12] (Constitution of the Democratic Socialist Republic of Sri Lanka), a Bill is placed in the Order Paper for the First

[11] R. Clayton Allen, 'Arbitration: Advantages and Disadvantages' (Allen & Allen) < https://www.allenandallen.com/arbitration-advantages-asnd-disadvantages/#:~:text=in%20your%20browser.-,Disadvantages%20of%20Arbitration,is%20an%20erroneous%20arbitration%20decision.> accessed 2 July 2020

[12] Article 18, Constitution of the Democratic Socialist Republic of Sri Lanka, 1978

Reading. After the Bill is introduced, it is printed by Parliament and referred to a sectoral oversight committee[13] (Parliament of Sri Lanka, n.d.). This is followed by the Second Reading, within seven days from the aforementioned Fist Reading. A debate shall be conducted on the Bill[14] (Parliament of Sri Lanka, n.d.) at the end of which the Bill shall be passed by a vote[15] (Parliament of Sri Lanka, n.d.).. At this stage, the bill shall be referred to a committee of the whole Parliament (or to a select committee or to a legislative standing committee)[16] (Parliament of Sri Lanka, n.d.) Following this, when the committee of the whole Parliament has considered the Bill, the Chair shall report the Bill along with any amendments that were made[17] (Parliament of Sri Lanka - Government Bills, 2018).

This is followed by a Third Reading upon a motion made, and a vote of taken upon it. Approval is then sought for the entire Bill. The Bill then becomes law, upon receiving the endorsement of the Speaker[18] (Constitution of the Democratic Socialist Republic of Sri Lanka, 1978).

Although the average time taken for a legislation to be enacted would approximately be within several weeks, the gathering of the Parliament is further delayed due to the nationwide precautions taken due to the COVID-19 pandemic. Therefore, it can be reasonably expected that the time taken for an enactment of ordinary legislation would be significantly greater. Therefore, with the requirement of immediate relief such as in the particular context, the enactment of ordinary legislation would not be the practical solution.

Furthermore, many Ministries are experiencing a wide variety of unique industrial issues due to the pandemic. Therefore, it can be expected that the debate conducted upon such a Bill, in accordance with Standing Order 56, may raise many issues to be discussed which, when coupled with the potential feedback from the populace, may considerably increase the time taken for the Bill to obtain enactment. Therefore, it is clear that due to the time constraints, the approach of ordinary legislation is apparently not the ideal solution.

On the other hand, there may be negative repercussionsofanActbeingpassed expeditiously, without the proper necessary consideration. Such an Act would be rigid, and not possess the flexibility to deal equitably with the industrial disputes which may arise at the time of enactment, as well as in the very near future, due to COVID-19, during the attempts of the State to return to the norm.

One solution to an Act being rigid and inflexible to suit the dynamic requirements of a legislation would be amending the said legislation, as has been done in many instances. However, this would once again give rise to the same issue aforementioned,namelythattheproper consideration and debates arising therein would consume a copious amount of time.

Therefore, in light of the above arguments, it is abundantly clear that the enactment of an ordinary legislation does not meet the criteria of speed and versatility that is required to provide equitable relief to both existing as well as imminent industrial disputes arising from the unforeseen COVID-19 situation. Therefore, this work shall hereafter seek a more practical remedy to the aforesaid lacuna of law in respect of ID in an unforeseeable circumstance.

RECOMMENDATIONS

In an unforeseen situation such as COVID-19, the ideal method to enact legislations in a relatively expeditious manner, to fulfil the goals of justice and equity, is the enactment via Emergency Regulations.

[13] As per Standing Order 50(2)
[14] Standing Order 56
[15] Standing Order 47
[16] Standing order 57
[17] 'Government Bills' (Parliament of Sri Lanka, 25th April 2018) < https://www.parliament.lk/en/how-parliament-works/government-bills> accessed 3rd July 2020
[18] Article 80, Constitution of the Democratic Socialist Republic of Sri Lanka, 1978

The COVID-19 pandemic hit Sri Lanka at a critical weak instance of the legislative framework. Specifically, the time between a Presidential Election and the corresponding Parliamentary Election. Therefore, due to the COVID-19 pandemic, there had been a constitutional crisis regarding the date of parliamentary elections, and as of the moment of creation of this work, a date has been fixed for the election. However, it can be expected that the time taken for an enactment of legislation will be extended significantly until such new Parliament establishes its power. Therefore, this is another reason for which the ordinary legislative process is impractical, in such a context, for the required need. This is a time at which the President has been appointed, but the Parliament lies dormant in its ordinary functions. In such situations, the Presidential Powers by virtue of the Emergency Regulations are the best bet at justice and equity.

The president is vested by the aforesaid power tolegislatebythePublicSecurity Ordinance[19](hereafter "PSO"). The PSO declares the justifying threshold of such regulation to be appearance to the President as necessary or expedient in the interest of public security and inter alia, for the preservation of public order in the community, as well as for the maintenance of supplies essential to the life of the community[20] (Public Security Ordinance No. 25 of 1947).

Furthermore, among the areas regarding which the President may exercise such power, explicit reference is made to amending, suspending operation, or applying any law[21] (Public Security Ordinance No. 25 of 1947). In addition, such regulations are given immunity from the judiciary within the PSO itself[22] (Public Security Ordinance No. 25 of 1947).

The power given to the President via the PSO indeed enables for the swift enactment of legislation, which is especially required in a situationwhereintheParliamentlies temporarily dormant. Therefore, the President may enact legislation with the advice of the Ministries upon the pressing concerns arising due to the COVID-19 situation relating to ID, with the flexibility and versatility for just and equitable redress required for the present issue, especially in a situation where the power of Parliament is problematic.

CONCLUSIONS

This work addressed the limitations of the ordinary litigation process in the context of industrial disputes arising out of contracts of service, occurring due to the COVID-19 pandemic in Sri Lanka.

This work emphasized the potential disadvantages within the ordinary litigation process, such as frustration of contract, as well as the comparatively higher potential of just and equitable relief within the IDR process. However, as aforementioned, there are inherent impracticalities arising from this ordinarily far more equitable process, such as over-burdening of the IDR process, which condemns the IDR methods from being ideal solutions for addressing the issues at hand.

Furthermore, this work addressed relative temporary unavailable nature of the Parliament in order to enact legislation to remedy such issues, due to the critical transition period, namely the period between the assumption of office of a President and the corresponding election of the Parliament. Regardless of the above, this work also addressed the impracticality of the process of ordinary legislation for the proper settlement of the issues at hand in such a context as COVID-19 pandemic.

Thereby, in light of the above facts and arguments, this work argues in favour of the Emergency Regulations, in order to enact such a law which would demonstrate the versatility

[19] Public Security Ordinance No. 25 of 1947 (as amended)
[20] Section 5, Public Security Ordinance No. 25 of 1947 (as amended)
[21] Section 5(2)(d), Public Security Ordinance No. 25 of 1947 (as amended)
[22] Section 8, Public Security Ordinance No. 25 of 1947 (as amended)

coupled with expediency required to address and equitably settle such industrial disputes such as the context of the situation addressed within this work.

This work presents the stance that, in the event of an unforeseeable situation during which the Parliament is out of commission, the method prescribed within this work, namely the path of Emergency Regulations, rather than the other methods considered in this work, contain the ideal capacity to cater for the inevitable industrial disputes arising from such an unforeseeable situation.

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ACKNOWLEDGEMENTS

The authors give special acknowledgements to Dr. Chamila Thalagala and Mrs. J.A.D Jayakody as well as Mrs. Namudi Mudalige, for their invaluable guidance for the completion of this work. The authors further give thanks to all staff of the Faculty of Law, General Sir John Kotelawala Defence University, as well as our dear colleagues for their guidance and support in the completion of this work.

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Paper ID: 270

Employment Security of Probationary Workers in Sri Lanka: A Comparative Legal Analysis

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Abstract - Employment security is one of the most important factors which help to create an efficientandasatisfactoryworking environment. Probationary employment is one of the challenging employment types which indicates uncertain nature of job status in the labour relations. Although, the main objective of the probationary period is to assess the employee's suitability for the continuation of employment, some employers misuse probation employment by terminating probationers in mala fide. The underlying question is whether the employer has sole discretion to terminate a probationary employee without assessing him adequately or without giving proper reasons. In the Sri Lankan context, there is no proper legislative guidance to regulate probationary employment and therefore, a series of cases provide different interpretations with regard to the employer's discretion on deciding whether the employee's conduct is satisfactory or not. In contrast, the South African legal framework envisages clear statutory measures to safeguard the employment security of the probationary employees against the malafide acts of employers. The South African Labour Relations Act in 1995 contains specific provisions in relating to the duration of probationary period and dismissal of probationary employees. Therefore, this research aims to analyse the Sri LankanandSouthAfricanjurisdictions comparativelyandsuggestpossible recommendations forSriLankanlaw with regardtothe employment security of the probationary employees. Qualitative research method has been utilized to achieve the aforementionedresearchobjective.

Keywords— Employment Security, Probationary employees, contract of employment

I. INTRODUCTION

A contract of employment reflects the rights, duties and liabilities of the employer as well as the employee (Adikaram, 2009). However, based on the nature, terms and conditions of the contract, it can be categorized into different tyjpes of employment. Employees get different entitlements according to their employment categories. Though, in the legal sense, these categories or 'labels' may have significant consequences on employees rights and benefits because, employers use such categories to avoid and overcome certain statutory obligations (Egalahewa, 2018).

Probationary employment is one of the controversial employment types which indicates uncertain nature of job status in the labour relations. Probationary period is considered as a trial period and therefore, it raises a question whether the employer has unlimited discretion to keep or dismiss a probationer (De Silva, 1998). This research investigates how Sri Lankan and South African legal frameworks address this issue and finally it suggests possible recommendations to enhance the employment security of probationary workers in Sri Lanka.

II. METHODOLOGY

This Research is a normative research which consists of a literature review and a comparative analysis. As primary sources, relevant legislative enactments and decided case law have been used. Moreover, textbooks, journal articles, web resources and statistical analyses have been referred to as secondary

sources to enhance the research. The South African jurisdiction has been selected for the comparative analysis, considering their structural similarities to that of the Sri Lankan legal framework on industrial relations. Particularly, the Labour Relations (Amendment) Act No. 12 of 2002 in South Africa has been taken as the main legislative example for the comparative study.

III. RESULTS AND DISCUSSION

A .The definition of a probation

The definition of a probation is,

"a fixed and limited period of time for which an organization employs a new employee in order toassesshisattitudes,abilitiesand characteristics and the amount of interests he shows in his job so as to enable employer and employee alike to make a final decision on whether he is suitable and whether there is any mutual interest in his permanent employment…" (De Silva, 1998)

Thus, generally, the period of probation is fixed and limited period of time which is subjected to the supervision of the employer. Also it is notable that, the employer has the right to terminate the probationers and the only exception of this rule is where the employee can prove mala fide of the employer. The status of probationers was recognized by the Indian Court in *Venkatacharya v. Mysore Suger Co. Ltd* (1956, IILG 46) as "a probationer is not in the same position as others in service. He is in a state of suspense attended withtheuncertaintyofaninchoate arrangements." As observed by the Sri Lankan court in *Richard Piris& Co. v. Jayathunga* (Sri Kantha Law Report, Vol. 1, P 17), the probationer should satisfy the employer before the employer decides to affirm him in his employment which would place the employer under various legal restraints and obligations, and any employer should have the right to discontinue a probationer if he does not come up to the expectations of the employer. Accordingly, it can be witnessed that, the court also distinguish the period of probation as an uncertain period which is totally depend on the discretion of the employer.

However, Fernando J in *State Distilleries Corporation v Rupasinghe*(1994, 2 SLR 365) case stated that,

"The concept of probation is a period of trial, at the end of which the employer must judge the performance of the probationer; there can be no proper trial of probationer unless the employer has given him adequate information and instructions, both as to what is expected of him, and as to his shortcomings and how to overcome them…"

So, it is evident that, the court has emphasized not only the probationer's duty, but also employer's obligation to give particular instructions to the employee during this period of time.

B .Sri Lankan Legal Approach on the Employment Security of Probationary Workers

In the Sri Lankan context, there is no legislative provision or guidelines for regulating the status of probationary employments. Also, there is no clear provision of the labour laws on the duration of probationary period in Sri Lanka. The Employment of Trainees (Private sector) Act No. 8 of 1978 provides that employers and workers may enter a contract of training for up to maximum one year (Adhikaram,2009). This provision is not directly relevant for the probationary employment.

Therefore, a question arises as to whether a probationer's services could be terminated before the expiry of the probationary period in Sri Lanka? Usually, a period of probation is set out in the contract of employment for the purpose of enabling the employer to assess the capacity and capability of the workman. So, during this 'period of testing', except where the contract provides, the probationer should have a right to demonstrate his performance and skills to satisfy the employer without a risk of termination (De Silva, 1998; Egalahewa, 2018). However, a series of cases provide evidence for

accepting the dismissal of a probationary during the contractual period.

This traditional view has been clearly stressed in *Richard Piris & Co. v. Jayathunga* case. The Court of Appeal held that "if the employer could have terminated the services of the workman at the end of the term without showing good cause, I see no reason why the same provision should not apply he terminated his services during the period of probation.". According to this decision it can be observed that, the court considered that the probationer is almost at the mercy of the employers' whims and he has no remedies where he is terminated either before or at the end of his period of probation (Arulanatham and Dissananyaka, 2010)

Moosajees Ltd. v. Rasiah(1986, 1 S.L.R. 365)also shadowed the *Jayathunga* case and held that, "the employer is the sole judge to decide whether the services of a probationer are satisfactory or not. The employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation, or even before the expiry of that period." Therefore, in summary, Rasiah case emphasizes that, the court can only intervene the termination of a probationer, if there was mala fides. Where there is no allegation of mala fide the court could not intervene the employer's decision at all. In *CeylonCeramicsCorporationV.Premadasa* (1986,1S.L.R. 287 the courthas demonstrated the same view as "the services of the probationer can be terminated using the period of his probation if his services are not considered satisfactory. Such termination is not unlawful or unjustifiable provided it is bona fide".

The case *University of Sri Lanka v. Ginige* (1993,1 SLR 362) decided in 1993 re-emphasizes the dicta in *Richard Piris&Co. v. Jayathunga* above (Arulanatham and Dissananyaka, 2010) . Accordingly, the court has upheld the traditional approach and states that "during the period of probation the employer has the right to terminate the services of the employee if he is not satisfied with the employee's work and conduct. If the employer act mala fide, he will be liable for unfair termination". Thus, as expressed in the *Jayathunga* case the only remedy entitled by the probationer is compensation.

However, in *State Distilleries Corporation v Rupasinghe*casethecourthastakena progressive approach towards the probationary employees (Egalahewa,2018). As per the Fernando J pointed out,

"If the employer is found wanting in respect of his work, conduct, temperament, compatibility with the organization and his fellow employees, or any other matter relevant to his employment, the employer is entitled to dismiss him. However, that right is not absolute, unfettered or unreviewable.Whiletheemployeris undoubtedly the sole judge as to whether the probationerhasprovedhimself,yethis subjective decision is liable to limited scrutiny and review."

Accordingly, it is noteworthy that, After ten years from *Jayathunga* case, the *Rupasinghe* decision has challenged the traditional viewpoint of the court and emphasized that even though the common law recognizes an absolute right to terminate a probationary employee, under the Industrial Dispute Act of 1957 the legislature has restricted the powers of employerconsiderably.Therefore,the probationary employee now has aright to challengeanunreasonableterminationand demandre-instatement(Arulanathamand Dissananyaka, 2010).

Continuation of a probationer after the expiry of the period of probation is another question which arises in relating to probationary employment (De Silva, 1998). In *Hettiarachchi V. Vidyalankara University*(76 N.L.R. 47)it was held that, a person appointed to a post on probation cannot claim automatic confirmation on the expiry of the period of probation, unless the letter of appointment provides that the appointee shall stand confirmed in the absence of an order to the contrary. If a probationer is

allowed to continue on probation after the period has expired, he continues in service as a probationer. However, in *Rupasinghe* decision again challenged this traditional approach. As per the dicta of Fernando J, there is no inflexible rule providing for the automatic renewal of probation and that an inference of renewal can only be drawn in those cases in which the circumstances justify it.

B .South African Legal Approach on the Employment Security of Probationary Workers

The significant feature of the South African legal framework is, it has given statutory security for the probationary employees under the Labour Relations (Amendment) Act No. 12 of 2002 (Baloyi & Crafford, 2006) . According to the Section 186 of the definition of the term 'unfair labour practices include "unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee".

Moreover, Code of Good Practice – Dismissal, contained in Schedule 8 to the Labour Relations Act specificallyprovidesacomprehensive guidelines for the employment and dismissal of probationers.Accordingly,theActgives discretion on the employer to determine the length of the probationary period with reference to the nature of the job and the time it takes to determinetheemployee'ssuitabilityfor continued employment. Further, during the probationary period an employer should give an employee reasonable evaluation,instruction, training, guidanceorcounselling in order to allow the employee to render a satisfactory service (Baloyi & Crafford, 2006).

Most importantly, the Act provides very clear guidelines for the dismissal of probationers. As per the Guideline 8 (2) of the Schedule 8 of the Act,

After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has-

(a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and

(b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

This innovative provision of the South African Labour RelationAct isevidentthat,the employees of probation are still employees and the employer is not the sole judge to determine dismissal of probationers (The South African Labour Guide, n d). In *Palace Engineering (Pvt) Ltd vs Thulani Ngcobo and Others* case the South African Labour Appeal Court upheld the status of the guidelines enshrines under the schedule 8 as follows;

"Reasonsfordismissingprobationary employees less onerous but the dismissal must still be for a fair reason that passes muster against the entire provisions of the item 8 (1) of the Code of Good Practice"

The Act further emphasises that "the procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter. Also, in the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee."

C. Comparison of Sri Lankan and South African Approaches.

After considering the legal background of both Sri Lankan and South African jurisdictions in relating to the job security of probationary employees, the researcher has summarised all the findings in to the following comparative table.

Table 1. Comparison of Sri Lankan and South African Approaches

Key Factors	Sri Lanka	South Africa
Legislative Protection	No legislative protection	Regulatethe dismissalof

	for probationers	probationary employees throughthe Labour relation Act
Duration of Probationary Period	No specific provision	Schedule 8 of the Labour Relations Act gives discretion on the employer to determine the length of the probationary period
Dismissal (right to give reason)	Depends on the Court interpretations. ***Rupasinghe*** decision has taken some progressive approach	Statutorily make an obligation on employers to carry an appropriate evaluation and give reasons (Guideline 8 (2) of the Schedule 8 of the Act)
Right to be heardand assisted by a tradeunion representative	No specific provision or court decision	Statutorily provides that right (Guideline 8 (4) of the Schedule 8 of the Act)

IV. CONCLUSION AND RECOMMENDATIONS

According to the findings of the comparative analysis between Sri Lankan and South African legal frameworks it is evident that lack of proper statutory protection against the arbitrary conduct of the employers is the major drawback with regard to the employment security of probationary workers in Sri Lanka. Judicial decisions and interpretations regarding the employers'discretionofterminating probationary employees has been changed by time to time and as a result of this uncertain nature, employers are tending to misuse the probationary employment. In contrast, South African approach can be illustrated as a progressive way forward because it clearly makes an obligation on employers to conduct proper evaluation and give reasons before termination of the probationers.

Therefore, in order to enhance the employment security of the probationary workers in Sri Lanka, this paper suggests that the misuse of probationary employment should be prevented through a statutory intervention in Sri Lanka similar to the South African approach. Therefore, as a statutory intervention, the dismissal of probationary employees without proper evaluation and without giving reasons can be identified as an unfair labour practice. Hence, this paper recommends an amendment to the Section 32 A of the Industrial Dispute Act No 43 of 1950 in order to include the unfair dismissal of probationary workers as an unfair labour practice. Then it will be a good move for employment security of the probationary workers in Sri Lanka.

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State Distilleries Corporation v Rupasinghe (1994, 2 SLR 365)

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Venkatacharya v. Mysore Suger Co. Ltd (1956, IILG 46)

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Paper ID: 27

Impact of Covid-19 to the National Economy of Sri Lanka: A Comparative Analysis with the United Kingdom on Employees' Rights

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Abstract— Impact of Covid-19 on labour rights and national economy has become a prominent issue at present. Therefore, this research aims at finding out whether there are sufficient laws to secure labour rights in such unforeseeable situations. The effect of the lock down in the country due to the pandemic has caused the demand shock, supply shock and financial shock to occur at the same time which has adversely affected the national economy. The research problem is whether the prevailing labour legislations are adequate to address the issues arising out of unexpected situations, specifically due to Covid-19 while contributing to the national economy. The objectives of this research are to identify the impact of Covid-19 to the national economy and labour rights, identify whether the Sri Lankan labour laws are sufficient to address such issues and to propose necessary amendments to the existing legal regime to fill the gaps. The methodology of this researchisacombinationofBlack-Letter methodologyandComparativeResearch MethodologywiththeUnitedKingdom. Moreover,thisresearchwould employ a qualitative analysis of primary data including the 1978 Constitution of Sri Lanka, the Industrial Disputes Act No. 43 of 1950, Wages Boards OrdinanceNo.27of1941,Termination of Employment of Workmen Act No.45 of 1971, Employees' Provident Fund Act No.15 of 1958, Employees' Trust Fund Act No.46 of 1980 and the Gratuity Act No.12 of 1983 and secondary data including journal articles and web articles. Finally, the research concludes with a view that the existing industrial laws are insufficient to address unforeseeable situations in a way which would contribute to national economy and to the national growth.

Keywords— Covid-19, National Economy, Sri Lanka

I. INTRODUCTION

Sui generis nature of contract of employment in Sri Lanka promotes the ideals of social justice. Further, the welfare States have intervened to the employer-employee relationships since parties do not have equal bargaining power and the imbalance of bargaining power will lead to exploitation. In Sri Lanka, the private sector is the main contributor to the national economy.[1] Therefore, the private sector has the highest capability of influencing the national economy and the national growth.

As aresultoftheCovid-19 pandemic, the national economy of SriLanka was highly affected which led to the reduction of national growth.[2] Specifically, the Colombo Stock Market washighlyaffectedbythisunforeseeable pandemic which ultimately resulted in reduction of the national growth leaving both short term and long term issues. Additionally, profits of the companies were drastically reduced because of thetemporarysuspensionofbusiness transactions and therefore many issues relating to labour rights have arisen. Here, it should be noted that a balance should be struck between the interests of both employers and employees in order to overcome the issues arising out of

[1]Central Bank of Sri Lanka, (2019), *Economic and social statistics of sri lanka.* [online] Statistics Department. Available at://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/statistics/otherpub/ess_2019_e.pdf [Accessed 1 June 2020].

[2] Janz, J. (2020). *'The impact of covid 19 on the sri lankan Economy'*[online]pulse.Availableat: http://www.pulse.lk/everythingelse/the-impact-of-covid-19-on-the-sri-lankan-economy/ [Accessed 1 June 2020].

unforeseeable situations and reduce the impacts to businesses. Moreover, it would be effective to relax the existing labour legislations to balance theinterestsoftheemployer-employee relationship.

Furthermore, it is also significant to note that ILO standards and recommendations have also been introduced to cover the Covid-19 situation. Hence, workerswhoseemployment is terminated due to the economic impact of Covid-19 or for health and safety issues should be entitled to a severance allowance or other separation benefits, unemployment insurance benefits or assistance to compensate for the loss ofearningsincurredasaresultofthe termination. Additionally, workers who are absent from work for the purpose of quarantine or for undergoing preventive or medical care and whose salary is suspended should be granted a (sickness) cash benefits.[3]

II. METHODOLOGY AND EXPERIMENTAL DESIGN

The research methodology would be a combinationofBlack-Letter(Doctrinal) MethodologyandaComparative Research Methodology with the United Kingdom. The Black-Letter methodology is used to provide a descriptive analysis on the area. Under the ComparativeResearchMethodology,a comparative analysis between Sri Lanka and the United Kingdom will be conducted to identify the differences in both jurisdictions relating to the industrial law. Further, the research would employ a qualitative analysis of primary data including the 1978 Constitution, Industrial disputes Act No.43 of 1950, Wages Boards OrdinanceNo.27of1941,Terminationof Employment of Workmen Act No.45 of 1971, Employees' Provident Fund Act No. 15 of 1958, Employees' Trust Fund Act No.46 of 1980 and the Gratuity Act No. 12 of 1983 and secondary data including journal articles and web articles.

III. RESULTS AND DISCUSSION

A. Impact of labour legislations on national growth

Labour legislations are the laws authorised by the governments for the purpose of providing monetary and social equity to the employees in businesses. More specifically, these laws provide rules to businesses or industries to address issues that might arise relating to wages, E.P.F., E.T.F,paymentofgratuityandworking conditions of labours.

As indicated by Mr. V .V. Giri, labour legislation is "a provision for equitable distributions of profits and benefits emerging from industry, between individualists and workers and affording protection to the workers against harmful effects to their health safety and morality".[4] This highlights that a balance should be struck between the interests of employers and employees.

Labour legislations are formed upon the principles of social justice, social equality, national economy and international uniformity. Thus, when considering the above facts the importanceoflabourlegislationscanbe identified. In other words, the objectives of labour legislations can be identified. This includes improving industrial relations between employersandemployees,minimizing industrial disputes, reducing the possibility of workers being exploited by employers or management, assisting workers in getting fair wages, reducing conflicts and strikes, ensuring jobsecurityforworkers,promoting environmental-friendlyconditionsinthe industrial system, fixing working hours and also providing compensation to workers who are victims of accidents.

[3] International Labour Organization, (2020), *ILO Standards andCovid19.*[online]Availableat: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_739937.pdf [Accessed 4 September 2020].

[4] Chand, S. '*Necessity and Importance of Labour Law and Principles'.*[online]Availableat: https://www.yourarticlelibrary.com/law/necessity-and-importance-of-labour-law-and-principles/34381 [Accessed 4 June 2020].

Labourlawsintroducereasonableness standards in employment contracts to assist in defeating coordinating failures inside the business and can add to positive efficiency and work impacts over the more extensive economy. Generally,inindustrializedeconomies, legislations introduced mechanisms to reduce risks in labour market. In the present low-and middle income nations, labour law reforms can help to construct institutional limits in zones which incorporate social protection, aggregate dealing and debate goals and can add to the formalizationofemployment whichisa significantadvanceindecreasingfinancial instability implying the effect to the national growth.

B. U.K. legal regime on rights of employees pertaining to unforeseeable situations

Due to the consequences of Covid-19 pandemic, industrial law in the U.K. has undergone many changes.[5]ThisincludesCoronavirusJob Retention Scheme, Self-Employment Income Support Scheme, Changes to statutory sick pay, Emergency Volunteering Scheme and changes to Off-Payroll Working etc. More importantly, U.K. has passed the Coronavirus Act 2020 to grant emergency powers to the government to handle the pandemic.[6] The Act gives discretionary powers to the government to relax regulations in various sectors as a precautiontolimit the spreadingofthediseaseincludingnational health care services and social care.[7]

The Coronavirus Job Retention Scheme was introduced by the Coronavirus Act 2020 which indicates the eligibility and entitlements under it. It applies to all employers in the U.K. who have a U.K. bank account and who have started a PAYE payroll scheme on or before 28th February 2020. Moreover, the employees retain the right to statutory sick pay, unfair dismissal rights and rights to redundancy payments. Furthermore, the Self Employed Income Support Scheme was introduced to provide grants to self-employed individuals for three months. According to this, self-employed individuals or employees who are part of partnerships will receive a grant 80% of their gross average monthly profits.

Another important grant by the U.K. government is the changes made to Statutory Sick Pay in response to Covid-19. Currently, this is payable not on a permanent basis. This is payable to employees who have been advised to self-isolate under the guidance of the government. The Emergency Volunteering Scheme is also another initiative of the U.K. government to safeguard rights of employees in Covid-19 situation. This scheme allows employees to take emergency volunteer leave in two to four weeks statutory unpaid leave in any period of sixteen weeks and employeeswhovolunteerthroughan authorized authority will be compensated for lossofearningsduringthisperiod.
Simultaneously, the employees who have not taken their statutory annual leaves will be allowed to take it to the next two years with the introduction of the Working Time (Coronavirus) (Amendment) Regulations 2020.

Moreover, the employment tribunal service for England,WalesandScotlandhasissued guidance on conducting tribunals during the Covid-19 pandemic.[8] Accordingtoit,ifthe tribunal thinks it is just and equitable, hearings maybeconductedbymeansofelectronic communications to prevent parties from being interacted with others specifically in the Covid-19 situation. Sending applications to tribunal through electrical means is encouraged since

[5] JDSUPRA (2020). '*UK Employment Law Changes and Response to Covid-19'.* [online] Available at: https://www.jdsupra.com/legalnews/uk-employment-law-changes-and-response-13552/ [Accessed 4 June 2020].
[6]Coronavirus Act 2020. United Kingdom. Available at:http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted/data.htm [Accessed 4 June 2020].
[7] ibid
[8] CIPD (2020) *Recent and Forthcoming Legislation,* Available at: https://www.cipd.co.uk/knowledge/fundamentals/emp-law/about/legislation-updates [Accessed 4 June 2020].

judges need not to work in the tribunal building. Additionally, changes have been made to statutory rates and compensation limits and there is a rise in the national/ minimum wage in the U.K. Precisely, limits were imposed relating tocompensationlimitsincludingunfair dismissalandstatutoryredundancypay, statutory sick pay and national minimum wage rates.

Consequently, as a whole when analysing the U.K. legal regime on rights of employees relating to unforeseeable situations, specifically Covid-19 situation, it is clear that the U.K. has immediately taken many initiatives in response to the pandemic to protect rights of employees, at least to a considerable extent.

C. Sri Lankan legal regime on rights of employees pertaining to unforeseeable situations

The 1978 Constitution, being the supreme law of the country, recognizes the fundamental right of every citizen to 'freedom to engage by himself or inassociationwithothersinanylawful occupation,profession,trade,businessor enterprise' in Article 14(1)(g).[9] Further, this is strengthened by Article 27(2) (a) which states that "The state is pledged to establish in Sri Lanka a democratic society, the objectives of which include the full realization of fundamental rights and freedoms of all persons."[10] Even though according to Article 29, none of the provisions (Directive Principles of State Policy and Fundamental Duties) is enforceable before a court of law or tribunal[11] no part of the Constitution can be dismissed as redundant.[12] Simultaneously, Article 27(2) (c) has directed the state to ensure adequate standard of living to all citizens and continuous improvement of living conditions.

Moreover, under Section 31E of the Industrial Dispute Act (Part IVB), the Act shall not apply to workers in a workplace which has less than fifteenworkmen one month preceding the retrenchment of any workman, or to workmen in businesses which is seasonal in character or to retrenchment of any workmen who have been employed for less than one year in any industry. However, as per Section 31E(2), if the Minister is of the view that an industry is likely to affect that industry in a manner as to cause serious repercussions to it, the Minister shall either declare that this part shall not be applied or shall apply subjected to some conditions. Moreover, according to Section 31F, the employer holds a duty to give notice on retrenchment to the workmen or the union before one month and a copy shouldbesenttotheCommissioner. However,thesesectionsapplyonlyto disciplinary retrenchment.

Ontheotherhand,theTermination of EmploymentofWorkmenAct(hereinafter referred to as the Termination Act) would be important to identify the methods of termination of employees in a workplace including the rights of employees, specifically with regard to the Covid-19 situation. According to the Act, non-disciplinary termination occurs in relation to closureofbusinessandretrenchment.In pursuant to Section 2(2) (e), the Commissioner may, in his absolute discretion, decide the terms and conditions subject to which his approval should be granted including particular terms and conditions relating to payment by employer to the workman of gratuity or compensation for termination of employment. Section 2(4) (a) also accepts the ability to terminate employment of workmen on non-disciplinary grounds based on temporary(lay off)orpermanentnon employmentandnon-employmentdueto closure of the business, trade or industry.

Furthermore, according to Section 6A of the Act, the Commissioner holds power to order an

[9] *The Constitution of the Democratic Socialist Republic of Sri Lanka1978,C3.*Availableat: https://www.parliament.lk/files/pdf/constitution.pdf [Accessed 4 June 2020].
[10] *ibid*
[11] *ibid,* Article 29.
[12] *Ravindra GunawardenaKariyawasamv.Central Environment Authority and Others.* [2019] (Supreme Court of Sri Lanka).

employer to pay compensation to a workman on or before a specified date in consequence to the closure of business. Thus, it could be argued that this section can be utilized as a remedy available in unexpected and unforeseeable situations, in particular, the Covid-19 situation. Consequently, it could be argued that the Termination Act has impliedly promoted job security in ordinary situations to some extent but not to completely cover unexpected and unforeseeable situations.

When analysing the Sri Lankan context, it is important to identify the changes occurred in the stock market on 11th of May 2020 due to the Covid-19 pandemic which led Sri Lanka to experience a halting of trading at the Colombo Stock Exchange within a few minutes of its regular trading time after the lockdown on that day. It has occurred 5% dip within 10 minutes and according to the analysts, the market fell due to the fear of foreign investors exit from the risky assets which directly affected the national economy.[13] As mentioned above, since both local and foreign investors are looking at leaving from risky assets due to the global pandemic the end result would be the fall of the domestic economy which eventually will affect the rights of workmen which directly or indirectly connected to listed companies of the Colombo Stock Exchange and as a whole to the economic growth of Sri Lanka.[14]

Additionally, Covid-19 has led to imposition of curfews and reduction in demand for exports which has resulted in unemployment in Sri Lanka, especially with regard to small and medium businesses and industries. As a result, lower pay will be given to employees because of the low income of these businesses which will ultimately affect employee rights.

It could be identified that three main labour issues have arisen due to the pandemic. This can be categorized into issues under terms and conditions of contract of employment, issues relating to termination of employment and issues with regard to new forms of employment. When analysing the issues relating to terms and conditions of employment, salary issues, non-contribution of EPF and ETF and payment of gratuity issues have arisen. Thus, it is important to identify the legal aspect of these issues.

Firstly, there can be contracts in abeyance where contract is temporarily suspended and contracts due to frustration where contract is terminated due to a reason beyond the control of parties such as the Covid-19 pandemic. Here, both the employers and employees are not at fault. Even though frustration is not a part of the Sri Lankan legal system some argue that the supervening impossibility of performance has led to the termination of contract.[15] Another issue is with regard to the termination of services of probationers due to the pandemic by reason of the low income of the businesses. Thus, another issue arises as to whether an employer is bound to contribute to EPF and ETF which is basically calculated on the basis of earnings of the month where the pandemic has resulted in low income of businesses. In addition, Section 5(1) of the Gratuity Act[16] states that an employer who employees fifteen or more workman during twelve months preceding termination of services of workman and workman who has completed five completed years under the employer shall pay gratuity to such workman. However, here a question arises as to whether what will happen if there is a break in the services of employees due to absence from work due to the pandemic because to be entitled for gratuity workman

[13] News1st. (2020). The colombo stock market closes within a few minutes of trading. [online]. Available at: https://www.newsfirst.lk/2020/05/11/the-colombo-stock-exchange-stops-trading-within-seconds/ [Accessed 5 June 2020].
[14] ibid.

[15] Law Net. '*Frustration of Contract (Termination of Service by Operation of Law and Impossibility of Performance) The Legal Consequences'.* [online] Available at: https://www.lawnet.gov.lk/1960/12/31/frustration-of-contract-termination-of-service-by-operation-of-law-and-impossibility-of-performance-the-legal-consequnces/ [Accessed 5 June 2020].
[16] *Payment of Gratuity Act 1983*, Available at: http://www.mostr.gov.lk/web/images/pdf/acts/payment_of_gratuty.pdf [Accessed 5 June 2020].

should complete a continuous five years period in employment.

When considering the issues relating to termination of employment relating to the pandemic, employees are terminated on non-disciplinary grounds such as closure of the business,retrenchmentandlay-off.Some employers may even issue letter of vacation of post due to absence of workers even if there is non-availability of curfew passes and non-availability of transport facilities to workmen due to the pandemic. The legal aspect of this can becoveredundertheTerminationAct. AccordingtotheAct,noemployershall terminate the scheduled employment of any workmen without the prior consent in writing of the workman or prior written approval of the Commissioner.[17] Further, it is important to note that employers cannot simply issue a letter of vacation of post to an employee unless the employeeisabsentfromworkbeyond a reasonable time periodortimeperiod mentioned in the letter of appointment or employee has the intention to abandon the employment.

On the other hand, the main issue regarding new forms of employment such as online workers is whether they can be regarded as employees. In *Uber London Ltd, Uber Britannia Ltd v Mr. Y Aslam, Mr. J Farrar, Mr. R Dawson and Others*[18] the issue was whether Uber taxi drivers were employees or not where the Court of Appeal of England and Wales held that they were employees even though they work using digital technology apps. However, it should be noted that with regard to the present situation, not only the rights and interests of employers and employees should be considered, but also the businesses should also be protected. Hence, a balance of interest should be stuck between the two.

The proposal introduced in Sri Lanka in relation to the pandemic suggests that employees should notbeterminatedduetothepandemic, employment should be continued with social distance and contributions shall be made to EPF and ETF. It is of importance to note that even thoughatemporaryproposalhasbeen introduced in Sri Lanka to address the issues on employee rights arising due to the Covid-19 pandemic, it does not effectively address all the employee rights.[19]

On this basis, the necessity to repeal the current domesticlegalframeworkwhichprotects workmen rights with a view to the future to face such unexpected situations such as Covid-19 is visible and it should be recognized as a legal lacuna that should be filled undeniably.

IV. OBSERVATIONS AND RECOMMENDATIONS

When comparing with the U.K. legal regime, it is clear that there's a clear gap in the Sri Lankan legal regime with regard to providing recourse to safeguard rights of employees in unforeseeable situations, especially with regard to Covid-19 situation which has highly affected the national economy. Therefore, following recommendations were made in order to effectively address the prevailing gap in the existing legal regime of Sri Lanka while comparing the both jurisdictions.

- When considering the industrial relationship between employer and employee, it is evident that employees are generally unaware of their labour rights. Hence, it could be suggested that an effective mechanism or programme should be introduced to make awareness among employees in businesses or industries by supporting greater social protection while balancing the interests between employers and employees. This could be

[17] *Termination of Employment of Workman 1971,* Available at : http://www.commonlii.org/lk/legis/consol_act/toeow154449.pdf [Accessed 5 June 2020].

[18] *Uber London Ltd, Uber Britania Limited v. Mr.Y Aslam, Mr.J farrar,Mr.R Dawson and Others.* [2018] Employment Appeal Tribunal Appeal No. UKEAT/0056/17/DA.

[19] DailyFT (2020) *Ceylon Federation of Labour Fumes over tripartite deal on pro-rate wages during Covid-19,* Available at: http://www.ft.lk/front-page/Ceylon-Federation-of-Labour-fumes-over-tripartite-deal-on-pro-rate-wages-during-COVID-19/44-700422 [Accessed 6 June 2020].

achieved by enhancing health and safety in the work place by adopting occupationalhealthandsafety measures, adopting work arrangements such as flexible working hours and by safeguarding rights of the migrant workers.

- In Sri Lanka, there are many labour legislations to address issues relating to industrial relations in various aspects. However, when analysing the Sri Lankan context it is clear that there is no single labour legislation to address the rights of employees arising out of unforeseeable situations.Thus,itcouldbe recommended that a new legislation be passed to protect the rights of both the employerandemployeesin unforeseeable situations, specifically with regard to the wages and to secure the retirement benefits of the private sector. Thus, it would be effective to include a provision on providing employees with paid sick leave for employees of covered employment including duration of the leave and calculation of pay which is to be effective fromaspecificeffectivedate. Additionally, it should include an interpretationclausewithoutany ambiguities.Itshouldcoverthe definitions of 'covered employees' to be applicable to both public and private sector and 'eligible employees' to be applicable to all employees of covered employment.

- Due to the Covid-19 pandemic, it was identifiedthatthereweremany violations of employee rights specifically duetonon-disciplinary termination, whichviolatesemployeerights. Therefore, it could be suggested that the existing legal regime on industrial law shouldberelaxedtoinclude unforeseeable situations, because firstly therightsofemployersshouldbe protected in order to protect the rights of employees.

- To address this issue, at least an online parliament could have been convened to pass a special labour legislation which is also to be applicable retrospectively based on the concept that prevention is better than cure.

V. CONCLUSION

The study reveals that the existing industrial laws are not sufficient to address the issues relating to rights of employees in unforeseeable situations including Covid-19 in a way which would contribute to the national economy and national growth. In Sri Lanka, even though a proposal has been introduced as a remedy to address employee rights, it has failed to address many employment issues within the practical context.

Therefore, as a whole when analysing the above facts it is clear that there are many unaddressed issues that have arisen due to the Covid-19 pandemic which should be addressed promptly in order to protect employee rights while balancing the interests of employers and employees. Hence, it would be effective to relax labour legislations to effectively address these issues.

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ACKNOWLEDGEMENT

We would like to extend our sincere gratitude to our parents who assisted us in successful completion of this research.

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Technical Session IV: Session Summary
Session Theme: Role of Law in Pursuit of Justice

Session Chair: Shavindra Fernando, PC

Theme of the technical session IV which was the final session of the day 02 was 'Role of Law in Pursuit of Justice'. It was chaied by Shavindra Fernando, PC. Rear Admiral (Retd.) Shavindra Fernando PC holds a Master of Laws in Public InternationalLawfromtheUniversityof Colombo and Master of Laws in Corporate and Commercial Law from Kings College, University of London. He is currently in active practice as a President's Counsel practicing in both Superior Courts and Courts of First Instance in the areas of Criminal, Civil, Corporate and Public Law. He also appears before other judicial tribunals for state and non-state entities. He has held many prestigious positions both at international and domestic levels, including the posts of Additional Solicitor General of the Attorney General's Department of Sri Lanka, Justice of Appeal at Court of Appeal of the Republic of Fiji, Senior State Counsel at Attorney General's Department of the Republic of Seychelles and Legal Advisor at the Ministry of Foreign Affairs in Sri Lanka. He has been awarded North Humanitarian Operation Medal and East Humanitarian Operation Medal for his service rendered to the Sri Lanka Navy as Judge Advocate General and Director General Legal Services.

First presentation of the session was titled 'National Security and Freedom of Expression in Sri Lanka: Friends or Foes'. It was presented by AN Bopagamage and PP Algama.

Seondly, Geethani Jeewanthi presented her research on food advertising that leads to childhood obeysity. Title of her research was 'Regulating Food Advertisement in Sri Lanka and Curbing Childhood Obesity: The Way Forward'. She addressed about the lacunas in the legal frameworkreadingthisissueonfood advertising and oberysity of chidren.

Third presentation titled 'Definitional and Interpretational Approach towards Economic Development on the Word 'Income' under Current Laws of Income Tax: A Comparison of Sri Lanka and India' was done by RPD Pathirana. She discussed the the vital role of income tax as a major income of the country and its impact on economic development, through the lens of interpretation.

Final presentation of the conference in the sessions of law was done by UAT Udayanganie. Her research title was 'Conceptualizing Local GovernanceintheContextofCitizen Participation: TowardsaParticipatory Approach of Local Government Institutions in Sri Lanka'. She provided a conceptual basis for institutionalizing citizen participation in the local government system under existing constitutional structure.

Sessionchairappreciatedtheeffortsof researches and wished well for their future endeavours.

Paper ID: 668

National Security and Freedom of Expression in Sri Lanka: Friends or Foes

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Abstract— Freedom of expression is a corner post of democracy. Article 19 (2) of the International Covenant on Civil and Political Rights provides the international norm. Second Republican Constitution of Sri Lanka guarantees the same in Article 14 (1) (a). It is subject to derogation in the interest of national security as accepted nationally and internationally. Sri Lanka has encountered three bouts of organized violence which endangered national security. This essay examines whether restriction of freedom of expression in the interest of national security in Sri Lanka was within international standards. Article 15 (7) of the Constitution, Public Security Ordinance (PSO), Prevention of Terrorism Act and Proscribing of LTTE Act provide limitations on freedom of expression in the interest of national security. Emergency regulations (ER) proclaimed by the President as per PSO have been employed predominantly to restrict the same. Such restriction has mostly been censorship exercised by presidentialy appointed bodies. Sri Lankan Judiciary is not empowered to consider validity of ERs unless a citizen petitions about an infringement of his fucndamental rights by the same. Judiciary has usually been deferential of administrative actions performed under ERs. Necessity and proportionality are two internationally recognized requirements for limiting freedom of expression in the interest of national security. Supreme Court recognized the requirement of necessity in Joseph Perera case though this precedent was not followed in later cases. It is concluded that circumscribing freedom of expression in the interest of national security was not within the international framework essentially. Employment of such restrictions has furthered national insecurities.

Keywords— Freedom of expression, national security, Emergency regulations

I. INTRODUCTION

Expression refers to the manners of communicating and sharing thoughts, feelings, experiences and opinions. “Freedom” is the absence of control, interference and restriction. (Jayamanne, 2004) Freedom of Expression is the ability to freely express oneself without being subjected to retaliation, interference, and partial or complete censorship or legal sanction. Most importantly, freedom of expression embodies the liberty to effectively seek and receive information for meaningful expression. Conscious restriction of the freedom of expression lest other personal liberties are infringed, is another element of the same. Freedom of expression is recognized as a fundamental human right. According to Westhuizen, it is regarded important as speech is an expression of self. The desire to communicate, to express one’s feelings and thoughts, and to contribute to discussion and debate is an essential characteristic of human nature. (Westhuizen, 1994) The freedom of expression is one of the main pillars upon which a free and democratic society is built. Thus, Thomas Jefferson in 1787 noted that “….were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. “ As a democracy necessarily implies the presence of a “market place of ideas”, it is universally accepted that freedom of expression is a sine qua non for a democratic political system. (The

Open University of Sri Lanka, 1998) In a democratic political system where sovereignty of the people is exercised by franchise, the freedom of expression is a salient determinant of such exercise. This is evident when perusing the shared history of democracy and freedom of expression.

Article 19 of the Universal Declaration of Human Rights provides that "Everyone has the right to freedom of opinion and expression" and furthers the same by stating that "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." (United Nations, 1948) Similarly Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) states that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." (UN General Assembly, 1966) Sri Lanka, a party to the ICCPR, guarantees the same by Article 14(1) (a) of the 1978 Constitution. Such constitutional guarantee has a direct relevance to the exercise of the franchise, without which the people's sovereignty cannot be properly exercised. (Marasinghe, 2018) Efficacy of Article 14(1) (a) was furthered by the nineteenth amendment to the Constitution which inserted Article 14A ensuring the Right to Access to Information.

Nonetheless, freedom of speech and expression is not absolute in Sri Lanka. Neither is it according to the ICCPR. National security, among some other factors, is a key consideration that may restrict the freedom of expression along with the right of access to information. Post-independent Sri Lanka has endured at least threecountsofinsurrectionsand/or insurgencies. Namely, 1971 insurgency led by Janatha Vimukthi Peramuna (JVP), second (1978- 1989) JVP insurrection and Sri Lankan Civil war (1983 – 2009). Subsequently, freedom of expression has been subjected to limitations for the benefit of national security during such insurgencies and other instances.

Hence this article endeavors to survey whether restriction of freedom of expression in the interest of national security in Sri Lanka was within international standards. In this context the authors have identified following research objectives: define the gamut of freedom of expression ensured by 1978 Constitution; survey legislation enabling restriction of said liberty in the interest of national security; and explore judicial review of such restrictions. This study is limited to eventualities post enactment of the 1978 Constitution and "public order" has also been considered an aspect of national security for the purpose of this study.

II. THEORETICAL FRAMEWORK

A.The State, National Security and Human Rights

Legitimacy of a State can be measured by the implementation and protection of natural rights. (Locke, 2014) According to Donnelly, state is simultaneously 'Principal Violator' and 'Essential Protector' of human rights of the people. Pacta sunt servanda (cooperation on the basis of honouring agreements) is an important universal goal of the international society (Bull, 1977). Article 26 of the Vienna Convention on the Law of Treaties 1969 establishes that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". Sri Lanka is a signatory to the ICCPR and has ensured constitutional guarantees for several key rights including the freedom of expression. But, freedom of expression is not absolute as mentioned above. It may be restricted in the context of national security as per the Johannesburg Principles and due to a state of emergency provided by Article 4 of the ICCPR. Said principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of

Human Rights Norms in a State of Emergency. (ARTICLE 19, 1996)

B. Constitution, Parliament and Judicial Review

Rule of law is the norm any State seeks to achieve and fulfill; and simultaneously the principle against which the legitimacy of a State can be measured and evaluated according to Locke. Constitution of a nation is "both a testament of a nationandaworkhorseofanation". (Marasinghe, 2018) The ideal of limited government, or constitutionalism, is in conflict with the idea of parliament sovereignty. (Kahn, 2002) This tension is particularly apparent where constitutionalism is safeguarded through judicial review. (Ginsburg, 2003) Oliver Holmes of the American realist school of thought asserts that law is a creation of the judiciary, as the statutory provisions assume substance only following interpretation and elucidation with respect to socioeconomic circumstances and adaption as appropriate by the judiciary. Hence, empirical data was drawn from the 1978 Constitution, Parliamentary Acts and case law in order to conduct this qualitative study within the aforementioned framework.

III. Discussion

A. Scope of Freedom of Expression in Sri Lanka

As discussed above Article 14(1) (a) of the Constitution entrenches that "Every citizen is entitled to –thefreedomofspeechand expression including publication"; though it does not provide which forms of expressions are covered. According to Article 19 of the ICCPR expression is not limited to speech and includes numerous other methods. In *Joseph Perera v. Attorney General* ([1992] 1 Sri LR 199), Sharvananda CJ described;

Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It includes the expression of one's ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes freedom of the press and propagation of ideas.

In *Amaratunga v. Sirimal and Others (Jana Ghosa Case)* [1993] 1 Sri LR 264, the Supreme Court observedthat"speechandexpression" protected by Article 14(1) (a) extends to forms of expression other than oral or verbal including drumming, clapping, placards, picketing, display of any flag or sign etc. In Karunathilaka v. Dayananda Dissanayake [1999] 1 Sri LR 157 the court held that right to vote is one form of "speech and expression" protected by Article 14 (1) (a).

In Visvalingam v. Liyanage [1984] 2 Sri LR 123 shareholders of a newspaper banned by the CompetentAuthorityunderEmergency Regulations claimed that freedom of speech and expression was infringed on the basis that freedom of the recipient is incorporated in the same. A five member bench of the Supreme Court held that Article 14 (1) (a) includes the freedom to receive information. Similarly, in Fernando v. SLBC [1996] 1 Sri LR 157 the court upheld the contention that sudden stoppage of Non-Formal Education Programme has infringed the petitioner's right entrenched by Article 14 (1) (a), if such stoppage was done without consent of the producers of said programme. In Joseph Perera case Sharvananda CJ observed that "Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read…" and the Court further held that

Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It includes the expression of one's ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes freedom of the press and propagation of ideas, this freedom is ensured by the freedom of circulation. The right of the people to hear is within the concept of freedom of speech.

In Environmental Foundation Ltd. v. Urban Development Authority SC (FR) Application No. 47/04 the right to information was recognized as part of the freedom of speech and expression. Right to access to information was entrenched in the Constitution as Article 14A by the nineteenth amendment.

B. Restrictions on freedom of expression in Sri Lanka

1) 1978 Constitution and International Instruments: Article 14 (1) (a) is subjected to restrictions provided in Article 15 (2) and 15 (7) of the Constitution. Article 15 (7), directly relevant to this study, provides that the freedom of speech and expression is subjected to limitations "prescribed by law in the interests of national security, public order…" Such restrictions are also sanctioned by international standards and obligations due to pacta sunt servanda. Article 19 (3) of the ICCPR similarly provides that exercise of freedom of expression is subjected to restrictions "provided by law" for the protection of national security or of public order". According to Article 29 of Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. (American Association for the International Commission of Jurists, 1985) Articles 30 and 31 describe that national security as a pretext for restricting enjoyment of freedom of expression cannot be vague or arbitrary, cannot be used to prevent merely local or relatively isolated threats to law and order and that adequate safeguards and effective remedies must be in place against abuse of such restriction. This is furthered by Johannesburg Principles (ARTICLE 19, 1996) which provides that:

No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

Threats to national security is a common guise employed by government mechanisms to restrict or repress derogable rights including freedom of expression. Nevertheless, the Supreme Court in Joseph Perera v. AG held that it is not competent for the President to restrict (via Emergency Regulations), the exercise and operation of the fundamental rights of the citizen beyond what is warranted by Articles 15 (1) to (8) of the Constitution. Rather than recognizing obvious problems of governance and the need for accommodation, the Sri Lankan state has frequently responded to expressions of grievances with repression and violence, which have been viewed simply as law and order or security problems. (Uyangoda, 2001) Although successive governments have stressed that militancy would be countered democratically, infusing authoritarian means into the country's democratic institutions has in practice been considered the best way to confront it. (Warnapala, 1994) Following legislations have been instrumental in restricting the freedom of expression and freedom during the period considered in the study.

2) Emergency Regulations and Prevention of Terrorism Act: Pre-independence Public Security Ordinance No 25 of 1947 (PSO) was passed as an urgent bill in ninety minutes amidst warning from the floor of the House that it requires careful consideration. (Manoharan, 2006) This legislation was enacted to deal with 1947 general strike. Emergency provisions, popularly known as "Emergency Regulations" (ER), are declared under the PSO "in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community". (Sri Lanka Parliament, 1947) The President of the Republic is empowered to proclaim a state of emergency as per Article

155 of the Constitution. The Parliament has 14 days to approve such proclamation and then the measure only has to be sanctioned monthly by the Parliament thereafter. Emergency regulations are valid for a month but the President is vested with the power to renew and modify a regulation. Therefore, the ER and the related orders automatically lapse. (Coomaraswamy & Los Reyes, 2004) Though Article 155 Parliament is only empowered to consider a proclamation's validity and not the actual emergency regulations, section 5(3) of the PSO provides that parliament may revoke, alter, or amend a regulation through a resolution of Parliament. However, the Parliament so far has not exercised that authority and has acted as a mere rubber stamp with regard to emergency regulations proclaimed by the President. (Coomaraswamy & Los Reyes, 2004) Further, as provided by Article 154J (2) of the Constitution judiciary cannot inquire any proclamation issued under the PSO, the imminence or grounds thereof. Such inability to test the appropriateness of emergency regulations has resulted in PSO being considered a draconian law. This disability of judicial review of ER is noted in landmark case Joseph Perera v. AG; "He [the President] is the sole judge of the necessity of such regulation and it is not competent for this court to inquire into the necessity for the regulations bona fide made by him." This disability has attached significance to fundamental rights chapter as the citizens have the locus standi to apply for redress as per Article 126, when emergency regulations may infringe rights assured by the Constitution. Nevertheless, the ERs with regard to restricting freedom of expression cannot be made "beyond what is warranted by Articles 15(1) to (8) of the Constitution". (Joseph Perera case)

Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organizations Act No. 16 of 1978 empowered the President to proscribe any organization which in his opinion "advocates the use of violence and is either directly or indirectly concerned in or engaged in any unlawful activity" and there was no provision for appeal or refute for any organization denounced as such. Section 4 (e) of the Act inhibited the freedom of expression by providing that any person who "makes, prints, distributes or publishes or is in any way concerned in the making, printing, distribution or publication of any written or printed matter which is or purports to be published by or on behalf of such organization or by any member thereof" is guilty of an offence. This Act was repealed as it did not produce the desired results; eradication of militant activities by such proscribed organizations or preventing people from joining them as then Justice Minister Devanayagam observed at the Parliament. (Parliament of Sri Lanka deb, 1979)

Prevention of Terrorism (Temporary Provisions) bill was introduced as "urgent in national interest" as per Article 122 (1) (b) of the Constitution and Supreme Court was to determine the constitutionality thereof within twenty-four hour (or a period not exceeding three days as specified by the President) according to Article 122 (1) (c). (Article 122 was repealed by the Nineteenth Amendment to the Constitution Sec.30) It was ruled that the bill did not require approval of the people at a referendum and that the bill was not within the scope provided in Article 83 of the Constitution. Manoharan (2006) notes that Tamil United Liberation Front (TULF) parliamentarians had boycotted the House in protest of redrawing Vavuniya electoral district during the passage of the bill. Eventually, this bill, viewed the key to tackling Tamil terrorism by Sinhala majority at the time (Balasuriya, 1987) was passed and Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) became law with a restriction on freedom of expression by virtue of Section 2 (h) which provides that any person who "by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different

communities or racial or religious groups" is liable for "imprisonment of either description for a period not less than five years but not exceeding twenty years". However, above provision was made law despite the fact that Article 15 (2) also dictates that freedom of speech and expression entrenched by Article 14 (1) (a) is subject to restrictions "in the interests of racial and religious harmony". But the PSO and PTA further restrict the freedom of expression. (Gunasekara, 2014) Judicial review of such instances where the petitioners alleged infringement of their fundamental rights and hence challenged administrative actions in accordance with Article 126 of the Constitution are discussed below.

3) Related Case Law: In above mentioned Visuvalingam v. Liyanage the order made by the Competent Authority under regulation 14 of ER, which empowers a presidentially appointed body to prevent or restrict publications in the interests of national security, public order and maintenance of essential services, to close the newspaper "Saturday Review" was challenged. The Supreme Court noted that said newspaper "highlights the atrocities and excesses of the police and the armed services." The Court held that during the state of an emergency the state is entitled to restrict freedom of expression and that judicial review should abstain from interference therein noting;

Freedom of speech, press and assembly are dependent upon the powers of Constitutional government to survive. If it is to survive it must have the power to protect itself against unlawful conduct and under certain circumstances against incitements to commit unlawful acts.

In Joseph Perera v. AG, Joseph Perera a member of the Revolutionary Communist League and organizer of the "Young Socialist" in Chilaw, his brother and the speaker who was to deliver a lecture on "Popular Frontism and Free Education" at a meeting organized by the Revolutionary Communist League were placed under a preventive detention on the allegation of planning an unrest during a public meeting following issue of a leaflet that criticized the government. Previous stance of the Court changed and freedom of expression and speech was held to be an enforceable right and that judiciary retained the prerogative to consider the validity of any restriction upon freedom of expression by President-made ERs. Therefore the ER 28 requiring the permission of the police for exercise of freedom of expression via distribution of any posters, handbills or leaflets was considered "pre-censorship" and hence ruled ultra vires. Hence the Supreme Court recognized the concept of necessity in deciding whether regulations restricting freedom of speech and expression are constitutionally valid. (Wickramaratne, 2013)

Petitioner claimed that his freedom of expression has been infringed as he was compelled to cease publication of news items, inter alia, relating to the conduct of military operations and related matters pertaining thereto in the "Janajaya" newspaper of which he is the Chief Editor and Publisher due to ERs proclaimed by the President as per Section 5 of the PSO, in Wickramasinghe V. Edmund Jayasinghe, Secretary, Ministry of Media, Tourism and Aviation [1995] 1 Sri LR 300. The Court veered from the perspective in Joseph Perera case stating that the facts therein are significantly different and refused leave to proceed stating "the impugned censorship has been imposed at a time of national crisis and in the context of an ongoing civil war. Its validity has to be considered having regard to the reality of the current situation". Similarly in Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority and Others SC Application No. 994/99 Court observed that the impugned regulations were framed at a time of national crisis and in the context of an ongoing civil war and hence validity of such has to be considered with regardto the reality of said circumstances. The Emergency(ProhibitiononPublicationand TransmissionofSensitiveMilitaryInformation) Regulation (1998) prohibited the publication of "any publication pertaining to official conduct,

morale, the performance of the Head or any member of the Armed Forces or the Police Force or of any person authorised by the Commander - in - Chief of the Armed Forces for the purpose of rendering assistance in the preservation of national security" and the petitioner alleged that objective of the disputed ER which restricted her freedom of expression was to prohibit publication of information embarrassing to the Government, than protection of national security. As mentioned above the Court upheld the ER in consideration of security interests given the circumstances at the time. "We must not lose sight of priorities" commented Amarasinghe J in Sunila Abeysekera v. Ariya Rubasinghe. (Wickramaratne, 2013)

In Siriwaedena v. Liyanage (Aththa case) FRD (2) 310 publication of the leftist newspaper "Aththa" was banned and the press in which the newspaper had been printed was closed by the order of the Competent Authority under ERs. The petitioners contended that this order, infringing the freedom of expression, was made to prevent "Aththa" from campaigning against the Government in the impending referendum through the pretext of "preservation of public order". The Court stated that the phrase "for the preservation of public order" should be interpreted to mean "for the purpose of preventing disorder". Wimalaratne J commented that "taking also into account the history of escalating post-election violence in this country, and the mounting tension prior to the Referendum I am of the view that the decision of the Competent Authority was not unreasonable…" Wickramaratne (2013) respectfully submits that above conclusions are untenable as the Court of law could not have taken judicial notice of "the history of escalating post-election violence" and "mounting tension prior to the Referendum" as Competent Authority had not stated that such were taken into account when making the impugned orders. Further, if only some of the material "could have incited persons to breaches of the peace" concluding that whole publication was prejudicial to preservation of public order is unreasonable. Hence, raising the necessity of applying the concept of necessity recognized in Joseph Perera case.

C. Sri Lankan Experience and International Standards

Sri Lankan practice of governmental interference with freedom of expression attracted far and wide criticism following the ban on publication or broadcast of war related news in 2000. And 2014 Tissainayagam incident too was condemned as beyond permissible restrictions set out by the ICCPR. Fact Sheet No 32 of the UN Office of the High Commissioner for Human Rights citing the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR states that any limitation to the human rights must be authorized by a prescription of law and the law must be adequately accessible so that individuals have an adequate indication of how the law limits their rights and must be formulated with sufficient precision so that individuals can regulate their conduct.

Article 4 of the ICCPR provides that in a "state of public emergency which threatens the life of the nation", a state "may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation" (Callarmad, 2015). The Article 4 of the ICCPR does not define the state of emergency and different States have different ways of dealing with the state of emergencies within their own domestic legal regimes. (Oraá, 1992) It purports to reduce and eventually avoid abuse of emergency powers by State parties through availing themselves of the right of derogation too easily. To invoke Article 4, two fundamental conditions must be met: the situation must genuinely amount to a public emergency which threatens the life of the nation and; the State must have officially proclaimed a state of emergency. States must also provide "careful justification for not only their decision to proclaim a state of emergency, but also for any specific measures based on

such a proclamation". (Callarmad, 2015) Any derogation to the freedom of expression otherwise is unlawful. In Sri Lanka, right to freedom of expression has been restricted under ERs in states of emergency, mostly in the form of "prior censorship" as mentioned above. The Parliament is empowered only so far as to consent or dissent the proclamation of emergency once issued by the President within 14 days. The Judiciary is not entitled to review the decision to proclaim emergency or the content unless a petition with locus standi is brought before it.

The ICCPR provides right to freedom of expression may be circumscribed only to the extent that is required by the emergency situation. Secondly, the principle of proportionality which came as a yardstick to determine the legality of State interference with the people's rights (Oraá, 1992) must be considered in this regard. According to Callarmad (2015) the Court is required to consider whether the restriction in question is the 'least restrictive means' for achieving the relevant purpose, in this case "in the interests of public security and preservation of public order". This question was raised by Wickramaratne (2013) with regard to the Court upholding the complete ban and closure of the Aththa newspaper and printing press in Siriwardene v. Liyanage, when only "some" of the material could have been injurious. Welikala (2015) states that "one of the major weaknesses in the way our constitution articulates the freedom of expression is that the requirement of 'necessity' in ICCPR Article 19 (3) for the restriction of this right is absent in the Sri Lankan framework for restrictions".

IV. CONCLUSION

Right to freedom of expression is assured to Sri Lankans by virtue of Article 14 (1) of the 1978 Constitution. Judicial review has established that said right can be exercised in numerous way and, is not limited to speech. As also established by the ICCPR, the Constitution asserts that said constitutional guarantee is derogable in the interest of national security. Sri Lanka in order to combat two youth insurrections and mainly the Civil War has enacted and enforced legislature that may restrict freedom of expression. The State has subjected the right to freedom of expression to circumscription in the name of national security and public order and; consequently attracted national and international criticism. A critical survey of such restrictions manifested that ERs proclaimed by the President under the PSO have been employed for the most part. A review of case law displayed that on most instances the Court upheld the restrictions on freedom of expression and speech deferential to the government security interests. Nevertheless, such restrictions were not unreservedly within the framework established by major international instruments on the same. The test of proportionality and approach of necessity, required by international standards, have often been overlooked in circumscribing the freedom of expression. The vicious and well –organized nature of the LTTE and having to counter organized violence from two fronts simultaneously, second JVP insurrection and LTTE, prompted stern action. Nevertheless, conveniently available limitation of freedom of expression curbed the urge for more democratic means of redressing the root cause of such social eruptions.

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Paper ID: 669

Regulating Food Advertisement in Sri Lanka and Curbing Childhood Obesity: The Way Forward

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Abstract- Advertising and marketing of unhealthy foods and beverages to children has affected the dietary preferences, food choices of children. Both foreign and local studies have also proved a positive relationship between the times spending TV advertisement with the junk food habit which leads to the obesity of children. In this context, this paper will discuss the legal frameworks at international level and Sri Lankan and the different practices adopted by othercountriesandwillsuggest recommendations for a better legal framework forSriLanka. Even though this study multidimensional by nature, this study only focuses on understanding the legal framework of Sri Lanka on this issue. This legal research is based on legal material and has utilized the qualitative methodology of data analysis to reach findings. The international conventions, WHO guidelines, journal articles and books have been used as primary sources and the research conducted by the other researches have been used as secondary data. Finally, it can be concluded that the Sri Lankan legal system has taken effort to address this problem. However, there are many lacunas can be identified in implementation level.

Key words- Right to safe, food Childhood obesity, Advertising regulations

I.INTRODUCTION

According to the World Health Organization (WHO) statistics, obesity has tripled since 1975 worldwide and it is noted that most of the world population dies due to overweight and obesity than due to underweight. These figures are quite similarly applicable to children across the world and it was reported that 38 million children below the age of 5 were obese or overweight in 2019. Even though once it was considered as a problem faced by developed (high income) countries, it is now even increasing in developing (low and middle income) countries. It is noted that the number of overweight children below age 5 has increased by nearly 24% in the African region. Furthermore, since 2000 almost half of the children below age 5 who lived in the Asian region were obese or overweight in 2019.

In the Sri Lankan context, a study done by Katulandaetalin2005reportedthat percentages of Sri Lankans being overweight as 25.2%, obese as 9.2% and abdominal obesity as 26.2%. Focusing only the urban population of Sri Lanka, Somasundaram et al has conducted a researchin2019 andconcludedthatthe percentages as overweight as being 37.5% and obese as 15.8%. A study done in relation to children the overweight and obesity prevalence among children in Sri Lanka shows different ranges with provincial and gender variations. According to that study, among boys and girls between 8 and 10 years this was 4.3% and 3.1% respectively and obesity prevalence among primary school children in Colombo district is 5.1%in 2008(Mohomad S.M, 2015).

II. RISK OF BEING OBESE

More than 75% of obese children will become obese adults (Litwin, 2014) and it can affect any organofthebodyfromheadtotoe (Wickramasinghe, 2016).Those who were obese at a very young age are at higher risks for associatingchronicdiseasessuchas hypertension, dyslipidaemia, type 2diabetes, heartdisease,stroke,gallbladderdisease, osteoarthritis,sleepapnoeaandrespiratory problems,andcertaincancers(Markus

Juonala,2011, Kelsey, 2010 , Singh A.S. ,2008). Research has also shown that childhood obesity can leave a permanent imprint on the health of the individual, so that even if the body mass index (BMI) is controlled later in life they have an increased risk for Non Communicable Diseases(NCD)relatedcomorbidities (Wickramasinghe,2016).Obesityaffects children physically, as well as psychologically. Psychological effects intensify with increasing age. Bullying, peer rejection, lack of friends and lack of self-confidence could be seen at school andlowjobopportunitiesandlackof companionship later in life (August GP et al, 2008). Moreover, this obesity epidemic also has many economic consequences (Wang. Y and Lim H, 2012). Therefore, addressing weight gain during childhood is an important priority for countries because doing so reduces the growing burden that obesity imposes on the health care system, on employers and the economy, and on affected individuals and their families (WHO report, 2016).

III. BAD ADVERTISING AS A CAUSE FOR OBESITY AMONG CHILDREN

Taking high dense of calories than required level will lead to obesity and therefore, selection of food that a child eats determines the BMI level of the child. However, in this context it is essential to see whether there is a positive relationship between the bad advertising of the food and the selection of food. Studies have proved that advertising and marketing of unhealthy foods and beverages to children as an important, modifiable risk factor affecting the dietary preferences, food choices, and weight of children(Gerard Hastings et al, 2006). Large, multinational food companies spend massive sums of money on advertising and marketing their products to young people (Jon Leibowitz et al, 2012, Lisa M. Powell et al, 2013), and the majority of this publicizing is for unhealthy goods such as sugar-sweetened cereals, soft drinks, confectionery, and fast food(Georgina Cairns et al,2008).

Children spend more time in front of different types of media including mobile phones, computers and television. Media is a powerful tool which leading to changing an idea and perception of individuals. It can be noted that in the Sri Lankan context, Television is the most popular media for which people have easy access. Different channels telecast varieties of programme on Television targeting different segments of the public. TV channels broadcast programme as a business and one of the best ways of earning a good income is the telecasting of advertisement in between programmes. The objective of publishing an advertisement is to promote a product or a service and the selection of the time slot for telecasting the advertisement varies according to the product. For example if the product is about a sweet food item for children, the advertisement telecast during a child programme If the advertisement is about sports items, it is telecast during a sports programme. The advertisements have the power to change the ideology of people,s mind compelling them to buy unnecessary things. Systematic reviews find moderate to strong evidence that these promotions influence children's food preferences, purchase requests, and actual consumption patterns, to the detriment of children's diet-related health (Gerard Hastings et al, 2003). The children tend to believe what is shown on TV. Another concern is that children are particularly vulnerable to advertising, with children under the age of seven years generally unable to distinguish between editorial and promotional content(SoniaLivingstone&Ellen Helsper,2004), and most children developing a critical understanding of advertising around the age of 12 years. When an advertisement shows that a child gets the power and flies in the sky after drinking some artificial drink the viewer, (the child) believes it as a truth and pushes their parents to buy that drink.

Fernando T et al (2019) proves the link between TV viewing and the obesity in a study conducted previously by using a Sri Lankan school aged children. This particular study was

done to investigate the connection between obesity among school children and television advertisements and further to see the link between the food habit and advertisement and it proves that there is a positive relationship between the times spending TV advertisement with the junk food habit which lead to the obesity of children. Fernando T et al (2015) again found by the other study that most of the advertisements on all television channels for children were food that contained high-fat and high-sugar foods. Further they found that children in Sri Lanka have a high-level exposure to advertising for unhealthy food products. By proving this positive relationship between TV viewing and childhood obesity, Samaraweera, G.R., & Samanthi, K. (2010) also found that, food demand of children is created by children by themselves and by parents for their children.

Any government of any country has the responsibility of protecting children of their jurisdiction and the enabling proper legal regulationstominimizeadvertising malpracticesisoneofthewaystoprotect children.

IV.OBJECTIVE OF THE STUDY

In this context this paper will discuss the legal frameworks at international level and Sri Lankan level. Finally, this paper will discuss the different practices adopted by other countries and suggest recommendations for a better legal framework for Sri Lanka. The main research questions will be: What is the level of state part obligations to address this issue? What are the laws implemented in Sri Lanka on this issue? How far we can appreciate the Sri Lankan law? What are the good practices of other countries and how far we can adopt those in Sri Lanka?

V.METHODOLOGY

Even though this study is multidimensional by nature, this study only focuses on understanding the lacunas of the legal system of Sri Lanka which has contributed to this food safety problem. This legal research has been based on the documents and has utilized the qualitative methodology of data analysis to reach findings. Selecting of qualitative approach could be justified as it allows the author to provide a complex textual description on the different texts writing on the subject matter. Among the differentmethodsunderthequalitative methodology, the author utilized the content analysis method for this research. The author used many contents which are in different places for this study. The international level and the practices of the other countries have looked out by the international human rights instruments, WHO guidelines and different other reports. The domestic situation has been analyzed using the Constitution, other statutes, case reports and other studies done in the same area. Apart from that books and journal articles have also been used for the analysis.

VI. DISCUSSION AND FINDINGS

A.State party obligation under international law

Sri Lanka is not an isolated country in the world, and it has immense responsibilities, obligations and recognition throughout the world by accepting and ratification many of the major international conventions. This state obligation to take actions to regulate advertisement seen by children has discussed in international convention and Convention on the Rights of the Children (CRC) can be named as one of the best instrument dealing in this aspect. According to the provisions of the CRC parents or the guardian are under the primary obligation to safeguard their child's health and development. It is also the duty of the state to assist and provide facilities and services (Article 18(2)). Article 24 of the CRC specifically focuses on the Right to health of the children. The General Comment 15 issued by the United Nation Committee on the Child Rights which provide a wide interpretation to the Article 24 of the CRC defined in article 24 as an inclusive right, extending not only to timely and appropriate prevention,healthpromotion,curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live in conditions that enable

them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health. The state responsibility initiated under the term 'adequate nutritious foods' written in the Article 24(2)(c) has been broadly interpreted as follows.

"States should also address obesity in children, as it is associated with hypertension, early markers of cardiovascular disease, insulin resistance, psychological effects, a higher likelihood of adult obesity, and premature death. Children's exposure to "fast foods" that are high in fat, sugar or salt, energy-dense and micronutrient-poor, and drinks containing high levels of caffeine or other potentially harmful substances should be limited. ***The marketing of these substances – especially when such marketing is focused on children – should be regulated*** *and their availability in schools and other places controlled."*

Further by giving particular reference to the responsibility that should be fulfilled by private

sector under the CRC the general comment emphasis that

*"All business enterprises have an obligation of due diligence with respect to human rights, which include all rights enshrined under the Convention. Among other responsibilities and in all contexts, private companies should: comply with the International Code of Marketing of Breast-milk Substitutes and the relevant subsequent World HealthAssemblyresolutions;****limit advertisementofenergy-dense, micronutrient-poorfoods,anddrinks containing high levels of caffeine or other substances potentially harmful to children****."*

Further the Special Rapporteurs on the Right to Health and Food, identified as the central person working on this Right, has highlighted the link between an unhealthy diet, obesity and non-communicable diseases in his annual report. He supplementary that "**states have a positive duty, under their duty to protect, to regulate advertising of unhealthful foods**". Partnership between commerce and government was suggested as a substitute to self-regulation.

Additionally, The World Health Organization (WHO), in 2010 issued some recommendations on **Marketing of Foods and Non-Alcoholic Beverages to Children** that invited all member states to initiate policy measures to call on member states to decrease children's exposure to, unhealthy food marketing.

Further,theInternationalChamberof Commerce also set some observations which shouldbeutilizedwhenusingmarketing communicationsaddressingchildren. It emphasis that: the particular communication should not undermine positive social behavior, lifestyles and attitudes; the Products unsuitable for children or young people should not be advertised in media targeting them; and advertisements directed to children or young people should not be inserted in media where the editorial matter is unsuitable for them.

B.Sri Lankan legal framework

The current regulatory framework of Sri Lanka pertaining to regulating of advertisement can be listed as follows. The Food Act No 26 of 1980 can be identified as major legislation in this regard. Section 3 (1) of the Food Act stating that, "No person shall label, package, treat, process, sell or **advertise** any food in a manner that is false, misleading, deceptive or likely to create an erroneous impression, regarding its character, value, quality, composition, merit or safety." It is also mentioned in the Section 4 of the Act that, "Where a standard is prescribed for any food, no person shall label, package, sell or **advertise** any food which does not confirm to that standard in such a manner as is likely to be mistaken for the food for which the standard has been prescribed.

Under provisions of the Food Act the ministry has the power to issue gazette notification regarding any matter concerning to this Food Act and up to now many gazette notifications

have passed. Food (Colour Coding for Sugar levels) (Gazette Number 1965/18) is one such important regulation. This regulation is effective from from 01-08-2016. According to this regulation "No person should **advertise** carbonated beverage, Ready to serve beverages other than milk-based products, Fruit Nectar and Fruit Juices unless it labeled in with the numerical description of the sugar content, description of the relative sugar level and colour code (Red, amber and Green).

Food (Sweeteners) Regulation 2003 (Gazette NotificationNumber1323/1issuedon 2004.01.12) is also important in this aspect. It stated that "No person shall **advertise** any sweetener other than a permitted sweetener for use in or on any food. It is also recommended to display in writing on the label of the package contained that food about the description about the sweeteners used in clear and legible manner. It is also mentioned in the gazette that even thoughsomesweetenersarepermitted (example: aspartame), since it is not good for children and the word 'not recommended for children' should be printed in clear and legible letters.

Secondly the Consumer Affairs Authority Act also provides certain regulations in this regard. According to one such regulation, advertising of infant (below 1 year) milk powder is totally banded. Further Direction number 7 issued on 2007 required every advertisement in respect of the sale of any article published in any media to mention the retail price of such an article.

Thirdly, Health Ministry together with the Education Ministry has approved the Canteen Policy in Sri Lanka by maintaining the norm that, when school food environment can be made healthy, it influences students to make healthy food choices and develop healthy eating habits (Mensink F, 2012). The initial Policy was approved in 2007 and late in 2011. Another Circular number 2011/03 was issued by the Ministry of Education regarding the foods which should be available in school canteen. One of the key objectives of this policy is to optimize the educational performance among school children by improving their nutritional status. According to the provisions of the above circular, while it promotetheavailabilityofhealthyfoods, (grains,vegetables,fruits,foodscontain proteins,porridgeandhealthydrinks) it is clearly banded from selling high fat foods (Sausagespastries),Highsurgeitems, (Chocolate, Toffees, Donuts, ice packets and syrups and flavored drinks), High salty food items (Pizza, Tipi Tip, Bites, Vegemite and Marmite), Junk food and Zero Calorie Items. Further it is required to limit the Deep-fried food items such as roles and cutlets.

National Child Protection Authority has recently developedtheNationalPolicyonChild Protection (2017) and one of the objective of this draft policy is to ensure delivery of effective services and secure a supportive environment that prevents and reduces harm to children from a wide range of threats to their protection, and promotes their safe and **healthy** development, with benefits for individuals, families and wider society. Creating an environment which helps vulnerable children to choose their healthy food, rather than get caught into food advertisements can be considered as one such initiative taken by relevant parties.

In additiontotheabovelegislations,The Intellectual Property Act, 2003, protects the trademarks of the industry and if anyone uses their trade names to mislead consumers that companycansueagainstthewrongdoer according to the provisions of the Act. Likewise, Cosmetic, Devices and Drugs Act, (1980), and Obscene Publications Ordinance (1983), also addressesthemisleadingadvertisementin general

One of the other approaches which need to be addred in this study is the legality of using childreninadvertisements.Inthecurrent context where the promotional strategy has shifted from 'marketing for the children' to 'marketing by the children' (Sudeep. L, 2017) andthetimewhenmarketershavebeen

researching for the best tool to influence children it is vital to study the regulatory framework which concerns using children in advertisements.Whenparentswere questioned about this, 43 % of parents, agreed while 40% of them were neutral. Currently Sri Lanka does not have any of the law to regulate this matter. As children are in capable of providing consent according to the general principles of law, parents or guardian's consent is required before a child is taken for an advertisement.Otherthanthis,SriLankan Rupavahinie (Television) corporation code of advertising standards and practice code, which was drafted long time back (1985) has some guidelines in this regard. It emphasizes the following:

"No products or service may be advertised and nomethodofadvertisingmaybeusedin association with a programme intended for children or which large numbers of children are likely to see, which might result in harm to them physically, mentally or morally, and no method of advertising may be employed which takes advantage of the natural credulity and sense of loyalty of children." However,weshould understand that, these are only guideline or practicewhichdoesnothaveanylegal enforceability. Therefore,itisverymuch important to regulate this area of law.

C. Good practices of other counties

Whenlookingatthepracticesofother jurisdictions the following observations can be noted. In Turkey "Regulation on Procedures and Principles of Broadcasting Service" was amended in 2018. With the amendment it has been explained how the advertisements on foods and beverages which can lead to bad health of the children are limited when children program is broadcasting. They have taken the Food Profile Model and the prepared Foods and Beverages List from the Ministry of Health and according to that they have classified all the advertisement into three categories by allocating red, orange and green colours. Red category (foods such as "chocolate, sugar, fruit juice, cake, energy drink, biscuits, cookies, chips,) was determined as the foods and beverages that are not allowed to be advertised during children programs, orange category (foods such as "nuts, breakfast cereals, crackers, whole milk, dough products, dairy products, fat...) as foods and beverages allowed to be advertised if the specified criteria are satisfied and green category ("fresh fruits, vegetables, meat, fish, eggs...") as foods and beverages allowed to be advertised.

Sweden has the strictest regulation with a ban on radio and television commercial advertising which targets below the age of 12 .Furthermore; in 2013 all the companies' came to an agreement of self-regulation which banned advertising of unhealthy foods and beverages for children below 16 years old. In Belgium it is not allowed to broadcast any commercial 5 minutes before and after the Children's programe. In Chile, promotional and advertising targeted children below 14 years old for High Fat, Sugar and salt foods (HFSS) foods is limited in media. The Quebecgovernmentimplementedalaw controlling junk-food advertising for kids under 13 years old in both electronic and print media in 1980. In Mexico,aregulation passed to restrictpromotingofunhealthyfood advertisements in specific time of the day if the 35% of the audience under 13 years old. By going a step further, in 2017 the United Kingdom introduced stringent their rules limiting child's exposure even for virtual spaces. According to this new law it is not allowed to advertise HFSS food advertisementsonwebsitestargeting children.

VII. CONCLUSION AND RECOMMENDATION.

Even though international regime suggests an obligation that should be fulfilled by the State party it cannot be seen that the responsibility is fulfilled in an equal manner everywhere. One of the major reasons for this failure can be identified as the level of enforceability of such international recommendations. The General Comments issued under the Conventions on the

Rights of the Child (CRC) are considered as a broader interpretation for the articles of the convention, but general comment is not *per se* enforceable before law. This quite similar with the implementation of right to safe food under the International Covenant on the Economic, Social and Cultural Rights (ICESCR) where it required state party 'take action' in 'progressive to full realization' of the rights mentioning in the ICESCR. Furthermore, the recommendations issued by the WHO belong to the category of soft law whichdoesnotarisehighpower f enforceabilitylikehardlawssuchas Conventions. Referring to the WHO guideline of 2012 the WHO in 2016 at the Global Commission on Ending Childhood Obesity highlighted the letdown of WHO member states in implementing the above WHO's recommendations.

Nevertheless, it is apparent that, even though Sri Lanka has taken some efforts to regulate the advertising it is not sufficiently effective to address the bottom-line problems in Sri Lanka. In their study, Reeva and Magnusson (2018) comparedthelegalframeworksofsix jurisdictionandidentifiedthreemodelof regulatoryframeworkswhichrestrictfood marketingforchildrennamely:statutory regulation, where a government develops and implements the regulation; co-regulation, where the regulatory procedure is shared by public and private bodies; and self-regulation, where the industry itself writes, monitors, and enforces the rules. Sri Lanka has few statutory regulations anditisonlytheRupavahinie (Television) corporation code of advertising that can be named as self-regulation which they limit themselves in using children in advertising. Many of the statutory regulations prevailing in Sri Lanka are not much effective in protecting the health right of the children. Even though thereareregulationsaboutthefood standardizing, banningofcertainchemicals, listing out approved chemicals that could be added to food, the awareness of the public is less, and details of this regulations are not displayed intheadvertisement.Forexample,itis compulsory to mention the level of the sugar content and the relevant color codes in the label of any artificial drinks. However, showing these details is not compulsory and it is only the displaying pricethatiscompulsoryinthe advertisement.

Finally, it can be concluded that Sri Lanka can learn many lessons from other jurisdiction to regulate the advertising targeted on children. In this context the government, as the main and the most capable body implementing rules and regulation, should come front and take the initiative of drafting new rules and regulations. It is also the duty of the private commercial sector to take prompt actions by enabling self-regulations aiming of cultivating healthy food habits among children rather that running behind only profit.

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Paper ID: 672

Definitional and Interpretational Approach towards Economic Development on the Word 'Income' under Current Laws of Income Tax: A Comparison of Sri Lanka and India

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Abstract- *The research paper looks at the vital role of income tax as a major income of the country and impact to the economic development, through the lens of interpretation. Hence, the primary aim of this paper is to set out the conceptual framework within the parameters of its definitions. The paper advances the argument that Sri Lanka should establish an inclusive taxpayer friendly approach definition to effectively address many issues relating to income tax law.*

Key Words- Income, conceptual Framework, interpretational spheres

I INTRODUCTION

In any legal context, definitions lay the foundation of its applicability and decide its scope. The judiciary through its interpretations has undertaken subsequent development. By the rules of interpretation, judges can widen its scope. Therefore, the paper addresses two sub research questions. Firstly, how have both jurisdictions defined the concept through countries legislations and Case Law jurisprudence? Secondly, this paper addresses the question that, the alterations that need to be interpreted to income tax law within these definitional and interpretational spheres.

II DEFINITION OF THE TERM ACROSS JURISDICTION

A. The Common Law Jurisdiction: Both Sri Lanka and India are based on Common Law Principles.

Firstly, it is necessary to examine the gradual development of the definition. The term 'income' in English is based on Common Law jurisdiction

developed for judges' interpretation. Towards the 19th century, judges formulated many rules identifying eight features that income must show. However, the main weakness of the English based concept of income is that it even excludes gains on the recognition of investment assets, but does not include unrealized changes in asset values.[1]

Most strikingly, the definitions adopted by the authorities in relating to the word 'income' is far from clear and does not offer a precise definition.[2] In the leading case of *London County Council* v *Attorney General*[3],

"The question was whether the Council was bound to account to the Crown for the whole of the Income Tax deducted from the dividend on Metropolitan Stock, or only for so much as was attributable to the sum raised by rates. That question was ultimately determined in favor of the Council after two adverse decisions. A further question has now arisen. The Council is the owners of property, which they occupy themselves and use for their statutory purposes. It is valued at £118,000 a year, and assessed at that value under Schedule A. Having paid Income Tax under Schedule A in respect of this property the Council claim to recoup them by retaining an equal amount out of so much of the Income Tax

[1] Kevin Holmes, *Supra* note 6, p 240
[2] Ibid
[3] *London County Council* v *Attorney General* 1901 AC 26

deducted from the dividend on Metropolitan Stock as is attributable to the sum raised by rates."[4]

Lord McNaughton has emphasized that, 'Income tax, if I may be pardoned for saying so, is a tax on Income. Therefore, if an item of money is not income within the meaning of the act, it is not subject under the IRA. In addition, income tax is a tax on income and not a tax on anything else.'[5]

Emphasizing the uncertainty of the term; in the case of *Bond V Barrow Haematite Steel Co*[6], Farewell J. stated that,

'The word 'income' is of such elusive import that it cannot be defined in precise terms, which would adequately meet legislative requirements.'[7]

Arguably, the judge did not want to restrict the definition and he kept it as open to include wider scope. Therefore, it is observed that, there is indeed no concise and complete form of expression, which would adequately serve for taxation purpose.[8]

Judicial interpretations emerging from tax cases has unanimously pointed out that the term 'income' is used in the taxing statutes in its ordinary sense, except where it expressly extends or restricts that sense. In taxation, unlike in economics, the term 'income' has been much discussed by judges of eminence. 'The definition of 'income' is not a term of art in the context of taxation.'[9]Further, economists have divided the subject of income into two groups as flow of services from wealth and human beings and flow of commodities and services.[10]

In *Tennant* v *Smith*[11] where, in evaluating the concept of income, it was held that,

"No doubt if the Appellant had to find lodgings for himself he might have to pay for them. His income goes further because he is relieved from that expense. However, a person is chargeable for Income Tax under Schedule D, as well as under Schedule E., not on what saves his pocket, but on what goes into his bank brings in nothing which can be reckoned up as a receipt, or properly described as income."[12]

In *AG of British Columbia V Ostrum*, the Privy Council held that, there is no way to cutting down the general and plain meaning of the word income. That was the argument established by the court with regard to this case.[13]

In addition,

'The expression was intended to include, and does include, 'all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation.'[14]

Further, in *Vander Berghs Ltd* V *Clark*[15] and Lord Macmillan the Court held that,

The income tax Acts nowhere define 'income any more than they define 'capital', they describe sources of income and prescribe methods of computing income, but what constitutes income they discreetly refrain from saying.'[16]

The decision in every case seeks to answer the question on income and sometimes ended by deciding what not income is. When the nature of a receipt is not explicit, in the absence of a comprehensive definition, the true nature of the receipt has to be ascertained by reference to principles laid down in decided cases to distinguish income from capital. There is no

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5 Ibid
6 *Bond V Barrow Haematite Steel Co* 1902 – 1Ch 353

7 Ibid
8 Ibid
9 A term of art has a particular meaning in its own special context.
10 William Hewett, *The Definition of Income,* (vol15, American E.R.,1925)
11 *Tennant* v *Smith* 1892, 3TC 158

12 Ibid
13 *AG of British Columbia V Ostrum*12 TC 586
14 Ibid
15 *Vander Berghs Ltd* V *Clark (*1935) UKHL TC_19_390
16 Ibid

simple definition of the words profits, which will fit all cases.[17]

The income tax is a tax on income, which from various sources, estimated according to sets of *pocket and the benefit which the appellant derives from having a rent-free house provided for him by the* rules.[18]There are three types of income; 'Namely, Personal service, property and trade, profession or vocation.'[19]According to the meanings, labour defines as, 'personnel labour salary or wages' the second represents income from 'capital' alone and the third category combines both 'capital' and 'labour'. These categories are helping to assess the income easily.[20]

"*The income tax, 'whatever way it is charged, is however, one tax. In every case, the tax is a tax on income, whatever may be the standard by which the income is measured under different heads.*"[21]

Decided cases suggest that, it is to the decided cases that one must go in search of light, while some case is found to turn upon its own facts. On that point is no reliable criterion emerges, even so the decisions are useful as illustrations. The concept of income is a very wide and vague term, which has been covered in all other concepts of Income Tax law alone.[22]

A Comparison of the Definition of 'Income' Under Both Legislations

The Sri Lankan Context

The 2017 Act of Sri Lanka does not define the word Income. Accordingly, the interpretation section 217 of the 2006 Act provides a definition to the term 'income' as 'profits or income'.[23] Similarly, the 2017 Act does not present the proper definition under the interpretation section, but enumerate sources under section five to section eight.

Accordingly, it is significant to identify that, section 3 of the 2006 Act and sections 5, to 8 of the 2017 Act stipulate a source – based approach; income chargeable to tax. However, these illuminations have been further illustrated in the next chapters of the thesis. The sources of income include in the above- mentioned sections of the both Sri Lankan 2006 Act and 2017 Act. They are only the income from any of these sources that can be charged to income tax.[24] The above sections do not attempt to define the 'income', but has stated the characteristics of each source.[25]The lists are not an exclusive list and provide a precise answer to concept of income in this regard. However, both the acts do not provide a wide and a precise definition of income alone.[26] Therefore, it is observed that, there is no definition of the words 'profits and Income' in the Sri Lankan Act, but only an enumeration of its sources, which is heads of income.

The Indian Context

In 1939, the Indian Income Tax Act defined the word 'income' under Section 6 (c) of section 2 of the 1922 Act for the first time. Later, the Finance Act, 1955, substituted the definition and its scope expanded. Further, the 1961 Act broadened the scope of this definition and develops the idea of the concept. According to the definition of 'income', 'it starts with the word

[17] It should be distinguished from the term 'capital' as illuminated by Pitney J in the American case of *Eichon v McComber*.1919, 252 U.S. 189, at 206-207-"The

fundamental relation of capital to income has been much discussed by economists. The former (Capital) Being likened to a tree on the land, and the latter (income) to the frits or crop"

[18] Manukriti Nandwa , 'Top Three Concepts of Income (With Measurement'http://www.accountingnotes.net/financial-statement/income-concepts/top-3-concepts-of-income-with-measurement/5302 accessed on 04 -05 -2016

[19] Ibid

[20] Definition of All-Inclusive Income Concept', ,https://www.investopedia.com/terms/a/all-inclusive-income-concept.asp. Accessed on 04 -05 -2016

[21] Ibid

[22] *Lord Macmillan in Vander Berghs Ltd V Clark* 19 TC 390

[23] Inland Revenue Act 2006, S. 217

[24] M.S.M.T. Samaratunga, *The Main Principles of Income Taxation in Sri Lanka,* (a Stamford publication, 2013),Pp8- 10

[25] The Inland Revenue Act 2006, S. 3
Trade, business, profession, vacation and etc.

[26] Cecil Aluthwela, *A critical Appraisal of some Aspects of Income Tax,* (A Stamford Lake Publication, 2011), Pp 3-5

'includes'.[27] Therefore, the list is considered as an inclusive list. The reception of this principle in Indian Law is illustrated by the section 2 (24). The part of the definition is reproduced below.

"The Section 2 (24) "income" includes-(i) Profits and gains; (ii) Dividend (ii) voluntary contributions received by a trust created wholly or partly for charitable or religious purposes or by an institution established wholly or partly for such purposes [or by an association or institution referred to in clause."[28]

It merely enumerates certain items, 'some of which cannot ordinarily be considered as income but are statutorily to be treated as such.'[29] The expression of income does not in the context of the Income Tax Act 1961, 'mean only realisation of monetary benefit. Therefore, the definition of 'income' under the above section being an inclusive definition, the meaning of the word 'income' is undoubtedly very wide.'[30] Whether a particular type of receipt is income or not has to be decided having due regard to the nature of the receipt by applying the relevant test. Thus, in Indian context, the well settled concepts, interpretations and meanings have been identified after the evaluation of Indian Income Tax Law.[31] The concept of income is broadly defined and interpreted by Section 2 (24).

'Hence, any kind of income earned by the assesse attracts income tax the point of earning and tax law is not concerned with how the income is expended.[32] The Act makes an obligation to pay tax on all income received. According to the Indian Act, income earned legally, as well as tainted income alike.'[33] Unless a particular category has been specifically mentioned in the numerous clauses of Section 2 (24), the inclusive definition of 'income' will only include 'real income', that is, income, which has really accrued or arisen to the assesse.

The above provision, conferring to Indian Law, some of the broad aspects under the concept has been incorporated to the section.[34] The word 'income', '*in the context of the 1961 Act, is an expression of art, but even the Act does not attempt to define the term exhaustively*.'[35] Arguably, the definition in Section 2

(24) of the Act can be considered as a comprehensive definition.

It is very important to consider the statutory interpretations for deep explanation as to follow the guidelines for Sri Lankan context. Sri Lanka does not

have such definitional approach on the concept. It is well established that under the Indian Law, the concept of income is an inclusive definition and not an exhaustive definition. It is important to perceive through case interpretations why it should be exhaustive.

C. Explore the Concept under the Case Law Jurisprudence: An Interpretational Approach

Sri Lanka

Sri Lankan legislations has failed to provide a precise definition for the word 'income', which is in long usage has made every one familiar with the ordinary meaning in Sri Lanka. The meaning given by usage is sufficient in most cases to distinguish between income and capital. The

[27] The Income Tax Act 1961, Ss. 2 (24)
[28] Ibid
[29] Ibid
[30] Sukumar Bhatacharya, *Indian Income Tax Law and Practice*, (18thedn. Indian Law House, New Delhi, 1995- 96), 1-3
[31] S Narayanam, 'The Literal Rule revisited', (2013), vol 262, Current T.R., 57 -64
[32] Thomas Piketty & Nancy Qian, 'Income Inequality and Progressive Income Taxation in China and India1986- 2015', (2009), vol 63, American E.J., 53 -62
[33] *CIT* V *Thangamani* 309 ITR 15
[34] "Income is a periodical monetary return with some sort of regularity. It may be recurring in nature. It may be broadly defined as the true increase in the amount of wealth which comes to a person during a fixed period of time". Kanga & Palkiwala, *The Law and Practice of Income Tax*,Arvind P. Datar (ed) (10thedn, Sanat Printers, Haryana, 2014),
[35] Ibid

difficulty of definition is apparent from the classification of profits and income under the sources of the Inland Revenue Act. Therefore, with regard to the Sri Lankan Law, profits and income for the purpose of tax is not conterminous with the ordinary meaning of profits and income.[36]

Moreover, the decisions in every case Sri Lanka seeks to answer the question, what is income and sometimes ended by deciding what is not an income is. Therefore, most receipts are readily identifiable as being either the receipt of income or receipt of capital. Nevertheless, differentiation of income from capital by definition is difficult. Therefore, a receipt is of an income or capital nature has to be answered after considering all the relevant facts.[37] Consequently, when the nature of a receipt is not explicit in the absence of a comprehensive definition, the true nature of the receipt has to be ascertained by reference to principles laid down in decided cases to distinguish income from capital.

Furthermore, profits and income are used intermixed but are not synonymous. Profits have its antithesis. There can be a loss instead of profit. Therefore, the difference between income and source of income assumes importance when tax is charged income.

In the Supreme Court case of *Thornhill*v *Commissioner of Income Tax*, '*was a case stated for the opinion of the Supreme Court by the Board of Review constituted under the Income Tax Ordinance*.'[38]

According to facts, as stated, are as follows,

"The appellant was assessed under the Income Tax Ordinance for the year of assessment 1937-38 as being liable to pay a tax of Rs. 5,258.16 on a taxable income assessed at Rs. 19,159. The appellant claimed an allowance of Rs. 8,893 being the amount of the depreciation in the value of the buildings on his tea estates as being deductible in computing his income, which is liable to taxation. The Assessor refused to allow the deduction, which was claimed. The appellant appealed to the Commissioner of Income Tax who upheld the assessment of the Assessor and refused the deduction for the 'reasons given."[39]

Soertz J opined that,

'when ascertaining the profits or income of any person from any source by deducting all outgoings and expenses incurred in the production thereof, no allowance can be made in respect of premises such as a tea-factory building employed in producing income, for depreciation by wear and tear. Therefore, no allowance can be made in respect of premises such as a tea factory building employed in producing income for depreciation by wear and tear.'[40]

In *Commissioner Inland Revenue* V *Tea Propaganda Board*[41],

"The Tea Propaganda Board money was mainly derived from monthly contributions from the Principal Collector of customs out of the special export duty levied on tea exports under Tea Propaganda Ordinance. At the hearing before the Supreme Court, it was held that the Tea Propaganda Board was not a 'Governmental Institution' within the meaning of 'income' under Income Tax Ordinance. Several non – Governmental institutions received assistance from the Government and the contributions from the Customs Export Duties. The Tea Propaganda Ordinance did not make the Tea Propaganda Board a Government undertaking and it was not liable to exemption under Income Tax Ordinance. The receipts from the export duty were not 'profits' within the meaning of Income Tax Ordinance. They

[36] E. Goonaratne, *Supra* note 193, p 14
[37] Ibid
[38] *Thornhill*v *Commissioner of Income Tax* CTC Vol. 1 (1940)
[39] Ibid
[40] Ibid
[41] *Commissioner Inland Revenue* V *Tea Propaganda Board 3 Cey TC 213*

were not an advantage or pecuniary gain from business carried on by the Board."[42]

The question was to answer whether the contribution made by the government to the funds of the Board was assessable to tax as profits of business. The decision of the Court was that the contribution by the government was a receipt of income of the Board but not a profit of business.

In *Commissioner of Income Tax* V *J. Cowasjee Nilgiriya*[43]

"The respondent assesse, who was a partner in a firm of architects in terms of the partnership agreements purchased the deceased partner's share from his widow for a sum of Rs. 106,000. Provision was made, however, for monthly instalments of $ 50, which in the aggregate would almost amount to the purchase price. The instalments were to be paid only for a period 13 years. There were also other variations, such as the firm ceased to carry on business or if the assesse – respondent ceased to be a partner in either event for reasons beyond his control his liability was to terminate. The assesse respondent had been assessed to Income Tax and Profits Tax and claimed the payment of $ 600 per annum to the deceased partner's widow as deductible 'annuities' within the meaning of the Income Tax Ordinance and the Profits Tax Act."[44]

Therefore, the above payment was not an 'annuity' under definition of income of the Income Tax but was of a Capital nature and therefore not deductible.

In *V.N. Shockalingam Chettiar* V *A.K.R. Karuppan Chettiar*[45]*"The appellant and respondent, who are related to each other as father in law to son in law, owned an estate known as the Kalugala Estate in equal shares. The appellant was residing in India and only rarely visited Ceylon. The respondent was resident in Ceylon; he managed the estate and sent monthly accounts to the appellant. In 1956 the appellant and the respondent desired to terminate their association and following upon some discussions which took place in India between them, a written agreement was prepared and executed in Ceylon by an attorney for the appellant and by the respondent personally."*

The appellant was assessed to Ceylon Profits Tax in respect of his share of the estate for three years: each of these assessments related to the previous accounting year. He claimed that the respondent was liable to pay this sum under the terms of agreement. The respondent denied the claim contending that agreement was limited to income tax and did not extend to profits tax'[46]

The Court held that, 'they would have done the latter and that the omission to do so is consistent only with an intention that Profits tax should be covered. In view of the above discussion, several observations were made based on judicial interpretations in Sri Lanka.'[47]

The Sri Lankan Inland Revenue Act does not define income and profit and it merely enumerates the sources of profits and income that is chargeable with income tax. In the absence of any definition of what is profit or income in the Act, the principles to be adopted 'must be considered according to the general concepts and meanings. Commercial principles and practices and accounting standards will be applied subject to the over application of the tax law.

India

Comparatively, number of cases in Indian law illustrates the phenomenon of interpreting the word Income. This part emphasized the significance of the definition through selected cases.

[42] Ibid
[43] Ibid
[44] Ibid
[45] *V.N. Shockalingam Chettiar V A.K.R. Karuppan Chettiar*, privy Council Appeal No. 30 of 1964, S.C. 517 / 1960
[46] Ibid
[47] Ibid

The Supreme Court in *CIT V Karthikeyan (G.R.)* held that,'the use of the inclusive definition is not to restrict the meaning only to widen its network.'[48]

According to the case,

'The assesse participated in an All India Highway Motor Car Rally and on being declared a winner, received an amount of Rs. 22,000 as prize money. The Income-tax officer included the prize money in his income for the relevant assessment year relying upon the definition of 'income 'in clause (24) of Section 2 of Income Tax Act. On an appeal

preferred by the respondent-assesse the Appellate Assistant Commissioner held that as the Rally was not a race, the prize money cannot be treated as income within the meaning of section 2(24) (ix). The Tribunal on an appeal by the Revenue held that the Rally was not a race and as it was a test of skill and endurance, it was not a 'game' within the meaning of Section 2 (24) (ix). The High Court on a reference at the instance of the Revenue, upholding the findings of the Tribunal, observed that the expression 'winnings' connotes money won by betting or gambling and therefore the prize money not represent 'winnings' Allowing the Appeal, the Court held that, the expression 'income' must be construed in its widest sense. The definition of 'income' is an inclusive one. Even if a receipt does not fall within sub-clause (ix) or any of the sub-clauses of Section 2

(24) of the Act it may yet constitute income. The idea behind providing inclusive definition in Sec. 2(24) is not to limit its meaning but to widen its net.'[49]

The case emphasized that, 'this Court has repeatedly said that the word 'income' is of widest amplitude and that it must be given its natural and grammatical meaning. Hence, it partakes of the nature of income and the several clauses therein are not exhaustive of the meaning of income.'[50]

In *Navinchandra Mafatlal v CIT*[51],

"The Supreme Court observed thus: What, then, is the ordinary, natural and grammatical meaning of the word income'? According to the dictionary, it means a thing that comes in'. In the United States of America and in Australia both of which also are English speaking countries the word income is understood in a wide sense to include a capital gain. In each of these cases very wide meaning was ascribed to the word income 'as its natural meaning.

Under the relevant observations of learned Judges deciding the case clearly indicate that such wide meaning was put upon the word income' not because of any particular legislative practice either in the United States or in the Commonwealth of Australia but because such was the normal concept and connotation of the ordinary English word income. Its natural meaning embraces any profit or gain, which is actually received. The argument founded on an assumed legislative practice being thus out of the way, there can be no difficulty in applying its natural and grammatical meaning to the ordinary English word income. As already observed, the word should be given its widest connotation in view of the fact that it occurs in a legislative head conferring legislative power. Since the definition of income in Section 2(24) is an inclusive one, its ambit should be the same as that of the word income occurring in Entry 82 of List I of the Seventh Schedule to the Constitution."[52]

In another decided case the Court held that, 'the full scope of the expression should not be limited to the technical concept of income in contradiction to capital as understood in the Income Tax Act. It is important to highlight that all receipts are not assessable to tax. The income tax authorities cannot assess all receipts; they can assess only those receipts that amount to income.

[48] *CIT V Karthikeyan* (G.R.) (1993) AIR 1671, (1993) SCR (3) 328

[49] Ibid

[50] Ibid

[51] *Navinchandra Mafatlal v. CIT*, AIR (1955) SC 58.

[52] Ibid

Therefore, before they assess a receipt, they must find that to be income. They cannot find so unless they have some material to justify their finding.'[53]

The profits and gains chargeable to tax under the Act are those which have been either received by the assesse or have accrued to the assesse during the period between the first and the last day of the year of account and are receivable. Income received or income accrued is both chargeable to tax. It can be concluded that whether the income has really accrued or arisen to the assesse must be judged in the light of the reality of the situation.[54]

The main process is to follow for being understood to that mater should comprehend the judgments, which has already explained the concept. The word income is wide and vague in its scope. It is a word of elastic import and its extent and sweep are not controlled or limited by the use of words "profits and gains". The Court reiterated very clearly by the cases mentioned above.

It is expanded, no doubt, into income profits and gains but the expansion is more a matter of words than of substance. 'The word "income" is of the widest amplitude and it must be given its natural and grammatical meaning.[55] It is very clearly understand that, the word "Income" is very difficult to define than other concepts after researching number of cases. Thus, there is no doubt that the existence of the concept is an essential requirement and that this requirement has been received in the Indian Jurisdiction. It might still be income, if it partakes of the nature of income. Income is not restricted to the classes of receipts mentioned in the definition but also includes in its ambit the meaning of the terms as generally understand.[56]

Further, in *Emil Webber V CIT*[57], the Supreme Court held that,

"The definition of 'Income' in clause (24) of Section 2 of the Act is an inclusive definition. It adds several artificial categories to the concept of income but on that account, the expression 'income' does not lose its natural connotation. It is repeatedly said that it is difficult to define the expression 'income' in precise terms. Anything, which can properly be described as income, is taxable under the Act unless, of course, it is exempted under one or the other provision of the Act."[58]

'However, the inclusive definition adds several artificial categories to the concept of Income but on that accounts, the expression "income" does not lose its natural connotation. This decision makes sense, as it is obvious. It has been held that the *Terminology* used by the parties in describing a particular receipt as income or otherwise in their correspondence or the treatment by the parties in their accounts of the receipts as income receipts, though helpful, is not decisive of the character of the receipt.'[59]

Whether a particular type of receipt is income or not has to be decided having due regard to the nature of the receipt by applying the relevant test. Nevertheless, 'anything, which can properly be described as income, is taxable under the Indian Act unless expressly exempted.'[60]

[53] *Lal Chand Gopal Das V CIT* (1963) 48 ITR 324 (India)
[54] Ibid
[55] Ibid
[56] GirishAhuja& Ravi Gupta, *A Compendium Of Issues On Income Tax And Wealth Tax*, (7thedn, Bharat Law House Pvt Ltd, New Delhi 2015),Pp 25 -30

[57] *Emil Webber V CIT* (1993) 200 ITR 483
[58] Ibid
[59] Ibid
[60] In *Rani AmritKunwar v CIT* , (1946) 14 ITR 561 (All) (FB) Braund, J. observed that the simple test is whether in the ordinary parlance of language what the assesse receives is "income' or not. One cannot dream of suggesting that every payment made by one person to another is necessarily, the recipient's income, since it may be as Viscount Dunedin said in Maharajkumar Gopal Saran Narain Singh v CIT, (1935) 3 ITR 237 (PC), merely a casual payment or as Sir George Lowndes

It is mentioned that, 'the Act does not provide that whatever a person receives must be regarded as income liable to tax.'[61]It may be mentioned here that Section 10 of the Act enlists certain items, which are not includible in the total income of the recipient. The fact that a specified receipt is shown as exempt from income – tax may *prima facie* indicate that it is income, but it is not inclusive.[62]

In *Diwan Rahul Nanda vs. Deputy Commissioner of Income Tax[63],* stated that

"Any kind of benefit or perquisite given by the company which enriches the pocket of the director or person having substantial interest in the company is included in his taxable income with regard to the Section 2(24) of the Act. However, it is further applicable on the situations when the benefit or perquisite is directly enjoyed by the individuals referred in the said provision and for those situations when sum is paid by the company to a third person."[64]

Moreover, Section 2(24) (IV) of the Income Tax Act, 1961, defines the term 'perquisite' under the definition of Income,

"It has been included the value of any benefit or perquisite, which convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company. Further, it has been incorporated that a relative of the director or such person, and any sum paid by any such company in respect of any obligation, which has paid by the director or other person.'[65]

Moreover, the section 2 (24) of the Act is a complete definition and it merely enumerates, 'certain items, some of which cannot ordinarily be considered as income but are statutorily to be treated as such.'[66]Moving on to the other terms used in Section 4, the term "income" has been defined in the Act in section 2(24). Instead, income has been defined as *including* a number of enumerated items such as profits and gains, dividend, the value of perquisites, capital gains, winnings from lotteries, and sums received under insurance policies. The 1961 Act has included some very specific matters in the definition of income, when it is after all an inclusive definition. The reason perhaps is to avoid any future litigation over whether these items are income or not. That apart, the courts have liberally construed the concept of income and always followed this thumb rule: if anyone has earned it, it is income. Be assured that whatever comes into hands because of the sweat of your brow or the application of your multifarious talents, it is going to be considered as income. A number of cases illustrate the phenomenon of interpreting of concept of income within the income definition.[67]

However, the research concluded that Indian law has defined the concept of income in an inclusive way under the section 2 (24).

Analysis

Chapter three discussed the concept of income under both countries perspectives. The profits or income under the income tax is the net profits and income calculated in accordance with the provisions imposed by the Inland Revenue Act of

suggested in the same case, a mere windfall. Such a sweeping proposition would be absurd. Many things have to be considered. Sukumar Bhatacharya, *Indian Income Tax Law And Practice*, (18thedn. Indian Law House, New Delhi, 1995- 96), Pp 1-3

[61] Chaturvedi and Pithisaria, *Income Tax Law*, Vol 5 (7thedn, 2004), Pp66 -67

[62] Ibid

[63] *Diwan Rahul Nanda Vs. Deputy Commissioner of Income Tax*, *[2008] 25 SOT 454 (Mum) at para 14.*

[64] Ibid

[65] Ibid

[66] Income Tax Act 1961, Ss. 2 (24)

[67] Ibid

Sri Lanka and by applying the legal and commercial principles and practices.

The Sri Lankan Inland Revenue Act does not define income and profit and it merely enumerates the sources of profits and income that is chargeable with income tax. In the absence of any definition of what is profit or income in the Act, the principles to be adopted 'must be determined in accordance with the ordinary concepts.'

The research identified that, the Indian Income Tax Act attempts to provide an inclusive definition under section 2 (24). 'Section 2 (24) of the Indian Act starts with the words 'income includes' and any kind of the income earned by the assesse attracts income tax at the point of earning and tax law is not concerned with how the income is expended. The Act makes an obligation to pay tax on all income received. The Act considers income earned legally as well as tainted income alike. Anything which can be properly described as income is taxable under the Act unless exempt under one or the other provisions of the Act.'

The Indian Income Tax Law has given a wide scope and interpretations through the Act and case law jurisprudence on the area of concept of income, compared to Sri Lankan Income Tax Law. All parties who are interested in the income tax would be able to get different perspectives and concerns with relating to such explanations. It should be given its widest connotation in view of the fact that it occurs in a legislative head conferring legislative power. It is not the gross receipt but only the net receipts arrived at after deducting the related expenses incurred in connection with earning such receipts, which are made the basis of taxation under the Indian Law.

Hence, under the Income tax Act, 1961 the word income has been comprehensively defined, though in an inclusive way. Therefore it is important to recommend that, Sri Lankan law should be amended with a section similar to 2(24) of Indian Act. Moreover, the section 2(24) is more systematically drafted and is far wider in scope than the Sri Lankan context. Indeed, income is artificially defined to include various items. Any kind of income earned by the assesse attracts income tax at the point of earning and tax law is not concerned with how the income is expended. The latter are statutorily fixed for a specified purpose. An analysis and judgement of the facts of the cases would help to determine the different aspects of the concept of income, the situation of improvement was involved in those cases, and how the Courts dealt with them. Most importantly, neither the English Law, on which the Sri Lanka's tax law has largely relied, nor the authorities from most other jurisdictions provide a precise answer to concept of income in this regard.

This confusion could result in vagueness and can have different meanings and interpretations at different times. Since the term 'income' is not defined in the Act, one has to rely on its ordinary meaning as used in society and render it accordingly. Yet, in keeping this confusion in mind, one should realize that this definition in the Act and dictionaries is adequate to recognize the term 'income'. Therefore, it is noteworthy to follow the Indian cases and their interpretations for determine the different aspects.

D. the Summary of the paper

This paper emphasized that Sri Lankan law does not define income but it merely enumerates the sources of profits and income that is chargeable with income tax. In the absence of any definition of what is profit or income in the Act, the principles to be adopted 'must be determined in accordance with the ordinary concepts.'

The research identified that, the Indian Income Tax Act attempts to provide an inclusive definition under section 2 (24). With regard to the cases decided under Indian Income Tax Law,

the word 'Income' has given its ordinary, natural and grammatical meaning.

Paper ID: 677

Conceptualizing Local Governance in the Context of Citizen Participation: Towards a Participatory Approach of Local Government Institutions in Sri Lanka

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Abstract: This paper, provides a conceptual basis for institutionalizing citizen participation in the local government system under the existing constitutional structure. To achieve this objective, the study employs the assumption that effectivemechanismofdecentralization accommodates more spaces for citizens for engaging in the process of decision making and as a result, participatory democracy could be institutionalized. In the discussion, two sub-questions need to be addressed as to how decentralization facilitates the promotion of citizenparticipationandwhycitizen participation is significant in the context of local government. Answering these questions, this paper seeks to advance the argument that due to weaknesses of the existing representative democratic system, the necessities of local communities have not been represented and therefore there is a requisite for an alternative mechanism throughwhichentirelocal communities can be participated and represent their needs. The bottom-up approach of decentralization facilitates the creation of such a mechanism. Accordingly, the paper seeks to provide an overview, scope and applicability of the concepts of participatory democracy and decentralization by reviewing their definitions and critically assessing both their conceptual coherence and utility as realistic and policy tools. It seeks to analyze these concepts to assess the extent to which such practices are being implemented; and the problems and challenges faced during their implementation. This analysis facilitates to understand how, and under what conditions,citizenparticipationand decentralized governance can contribute to the more inclusive local governance system. In particular, this conceptualization will assist in the evaluation and understanding of the patterns of decentralization and citizen participation in local governance in Sri Lanka. After discussing these issues from a theoretical perspective, the author examined a complex relationshipbetweendevelopment, decentralization and citizen participation in democratic local governance with specific reference to Sri Lanka. The study employs a qualitative method and uses secondary sources such as journal articles, working papers, legislation etc.

Key Words: Participatory Democracy, Local Government Institutions, Decentralization

I.INTRODUCTION

The local government system of Sri Lanka has a long history which dates to the 3rd century B.C. In the advent of the colonialism, the British rulers changed the traditional system of local administrationwithoutconsideringthe characteristics of the home-grown system of it. Even thoughthecountry wasgranted independence from the British in 1948, Sri Lanka continues to live with the colonial heritage of an imposed local government system. Perceived from a policy perspective, the idea of reforming the current local government regime has been on the political and policy agendas of the Sri Lankan Government since independence. However, such reforms have not materialized to date. Particularly, the Chocksy Commission of 1954, the Moragoda Committee of 1978, the Presidential Commission on Reforms of Local Government of 1998 and the National Policy on Local Government in 2009 can be cited as important policy initiatives in

this regard. Nevertheless, the potential of a multilevel system of the governance to empower the people and the nation is yet to be realized. Theoretically,localgovernmentsshould facilitatepeople'sparticipationinlocal administration. Though, other than electing their representatives at local government elections, people's participationatthe grassroot level falls far behind when compared with other countries such as India and the UK.

II.METHODOLOGY

Local governance and participatory democracy-related literature provide some guidance for the use of different types of methodologies when researching issues connected with citizen participation. Theoretical, comparative and empirical methods have all been used to researchlocalgovernanceandcitizen participation. It appears that there is no specific limitationastothetypesofresearch methodologies that can be applied to address issues relating to local government institutions and citizen participation. Arguably, this means that research on issues associated with LG's and people's participation is an open field from a methodological perspective. Hence, this paper purely based on doctrinal research including a literature review and comparative legal research method.Asmethodsofdatacollection, secondaryresourceswere mostly used and primarysourcessuchasconstitutions, legislativeenactmentswereusedwhere necessary.

III.DISCUSSION

A. ConceptualUnderstandingof Participatory Democracy

The original view of citizen participation goes back to the times of Aristotle. Modern political theory gives democratic participation by teaching that government is legitimate only if it originates in the consent of the governed. But the socialcontracttheorythatinstitutes government signifies the surrender of natural rights to govern or not to govern ourselves as we choose (Winthrop 1978). In that approach, the democratic citizen is defined as 'one who has the right(power)toshareintheofficeof deliberating and judging with skill'. Accordingly, a citizen is defined as 'one who participates in judgingandruling' (Winthrop 1978). This participation makes democrats more able citizens, and participatory democracy is made better because the participants are made better. Aristotle emphasized participation by judging. The lawmaker is sovereign in theory, but the judge is sovereign in practice (Winthrop 1978).

Tracing the historical evolution of the concept, modern participatory democracy was developed during the 1960s and 1970s in America. According to Mansbridge, the term was used for the first time as the Student for the Democratic Society (SDS) (1975). The whole idea of the concept is that in the decision making process, onissueshavingsocialimplicationsand consequences must be conducted in public and participative ways. Further, the revitalization of the concept could be seen with the new global movement in the late 1990s and early 2000s with some innovative experiences such as participatory budgeting in Porto Algerian Brazil. Thenewapproachoftheconceptis concentrated on local and communitarian views of democracy by highlighting bottom- up social protagonism (Florida 2013).

Moreover, the idea of Barber's strong democracy (1984) facilitates to shape the concept in a different approach with an inherent view. This approach identified democracy as 'Politics in the participatory mode'. His approach is greatly practical due to its suitability to mix with participatory institutional structures. According to him, 'Strong democracy tries to revitalise citizenship without neglecting the problems of efficient government by defining democracy as a form of government in which all the people govern themselves in at least some public matters at least in some of the time'(Barber 1984). It is clear that in some phases citizen participation

should be encouraged but at the same time, there should be a balancing approach towards it. Therefore, this approach provides a platformforbringingrecommendations towardswaysweshouldincorporate participatorydemocraticmethodsintothe legislationandtheidealstage. Following statement is justifies the central part of his idea.

"I have insisted that strong democracy entails both the intimacy and the feasibility of local participation and the power and responsibility of regional and national participation[…]This is not to say that strong democracy aspires to civic participation and self-government on all issues at all times in every phase of government , both national and local. Rather it projects some participation some of the time on selected issues. If, all of the people can participate some of the time in some of the responsibilities of governing, then strong democracy will have realized its aspirations" (Barber 1984).

Above explanation proves the participatory democracy is not a new concept that has been reshaped over the years per contemporary requirements.

Concerning the process of participatory policy making, *A.N.K.Michels& Laurence DeGraaf* (2010) have traced the idea that citizen involvement has many positive effects on democracy and it upgrades the quality of the democracy. Threefold effects emphasize; more responsibility for public matters, increase public engagement encourages diversity of opinions and contributes to the higher degree of legitimacy of decisions. As devices of citizen participation,theyemphasizecollaborative governance, citizen advisory committees and participatory budgeting as valuable elements of democratic decision making.

However, it is important to consider the idea presented by Dhal. He encountered, an increase in political activity among the lower socio-economic classes which could lead to more authoritarian ideas and thus to a decline in consensus on the basic norms of democracy (1956). Democratic citizenship is the most important aspect and apart from that the development of civic skills, the increase in public engagement, and the opportunity to meet and discuss neighbourhood issues and problems are some of the other issues which can be taken into consideration.

When directing the definition of Habermas on participatory democracy, at the level of abstract principles and that is characterized by the autonomy of the discourse, the equality of participants in the discourse and the openness of the discourse in more specific ways. According to Pateman'sbookon'Participationand Democratic Theory' the aim is to reconstruct a tradition in political thought that is committed to the idea of institutionalizing opportunities for participation. Here, the equal opportunity to participate in decision making becomes a defining criterion of the participatory ideal as well as an institutional means for realizing this ideal. When considering all these discussions, five essentials have been identified to the concept; that is promotion of a new mode of decisionmaking(deliberation);the strengthening of the direct mode of decision making; the democratization of the local level (local democracy);thedemocratizationof functionally defined units of the political system (segmentation);andtheimplementationof representation as delegation (1970).

Fung & Wright in their article on *Deepening Democracy:InnovationsinEmpowered Participatory Governance (2001)* have explored fivecasesofrecentdevelopmentsin participatorygovernancewhichare neighbourhood governance council in Chicago, WisconsinRegionaltrainingpartnership (WRTP), Habitat Conversation Planning under Endangered Species Act, participatory budget Porto Alegre, Panchayat Reforms in West Bengal and Kerala India. Considering these five initiatives authors have identified the common concept which is called Empowered Deliberative Democracy (EDD). He further, explains that these four reforms differ

dramatically in the details of their design, issue areas, and scope; they all aspire to deepen how ordinary people can effectively participate in and influence policies which directly affect their lives (Fung and Wright2001).Those mechanisms are participatory because those were initiated based on the commitment and capacities of ordinary people to make sensible decisions through reasoned deliberation and empowered because they attempt to tie action to the discussion. As he observed, the institutional reform strategy was considered as the prime success of these mechanisms.

John Gaventa (2001) has taken a different point of view on citizen participationinlocal governance. His approach is closely related to rights of citizenship and democratic governance. Concerning grass root level participation, two factors are essential, the nature of democracy and skills and strategies for achieving it. He has pointed out six prepositions to achieve participatory democracy and the six propositions and some of them are as follows; building up a new relationship between ordinary people and the institutions and rebuilding relationshipbetween citizen and local government focused on new forms of participation, responsiveness and accountability (Anarchies communitarian model on radical grassroot democracy and optimist conflict model) and new forms of citizen engagement should be encouraged. According to Gaventa, the forms participation hasgonebeyondits traditional approaches and it is necessary to introduce new forms.

It is worth quoting the idea mentioned by Clark andStewart (Gaventa2001)that 'Representative democracy and participatory democracy have been argued as mutually exclusive opposites. An active conception of representative democracy can be reinforced by participatory democracy all the more easily in local government because of its local scales and its closeness to the local communities'. This statement reflects that participatory democracy can be interpreted broader manner.

The recent discourse of people-centered development underlines the assumption that people should be the architects of their own future (Burkey 1993). Sen and Nussbaum argue that the role of social capital,capabilities, freedom and the ability of ordinary people to manage development themselves should be focused in this discussion (Clark 2005). Under the capability approach provided by them, the ten capabilities are *goals* that fulfill or correspondtopeople'spre-political entitlements. Therefore, they say of people are entitled to the ten capabilities on the list (Nussabaum 2011). By defining them as objectives, Nussbaum highlights their politically normative character. Each of these ten practical orientations of human lives must be part of the political programmes of all the countries in the world with variations, thresholds, particular highlighting of certain particular capabilities, etc. According to Gaventa, 'a first key challenge for the 21st century is the construction of new relationships between ordinary people and the institutions especially those of government which affect their lives.

Based on the above investigation of the significance of the concept, it is suggested that by providing more spaces for citizens in the governance process it enhances the quality of democracy while protecting the rights of the people. Therefore, in assuring local democracy citizen participation is placed as a core component.

B. Participatory Democracy in Action

The application of participatory democracy can be seen in certain mechanisms that are implementing by local government authorities. One of the mechanisms is participatory planning. Many countries have provided institutional space for public participation through their legislation in grass- root level. The State of Kerala in India has put forth a prominent example of the People's Plan Campaign (PPC) that offeredapro-active methodology for decentralized planning with direct participation by citizens. Many other

countries including South Africa, Ghana, Uganda and Tanzania are some of the countries which experiencing community based planning.

Participatory budgeting is another instance of the applicability of PD. It is a different way to manage public money and to engage people in government and a democratic process in which community members directly decide how to spendpartofapublicbudget.Itenables taxpayers to work with the government to make the budget decisions that affect

Mini Publics are one of the mechanisms which provide an opportunity for citizens to deal with public issues. The concept of mini-public was first proposed by Robert Dahl in 1989. However, the roots of such processes can be traced back to the Greek political system when positions of political authority, including the selection of magistrates and council were often made by random selection. It is the random selection of citizens which is one of the defining features of the mini-public. Escobar and Elstub (2017) identified several features which characterize mini publics. Firstly, the purpose of the approach being to gather together a 'microcosm of the public' with each citizen having the same chance of being selected to take part, secondly, those that take part are remunerated for their efforts, thirdly, discussions are facilitated and finally a number of so-called experts provide evidence to the participants who in turn question (or cross examine) them. Goodin (2008) described them asdemocraticinnovationsconsistingof ordinary, nonpartisan members of the public designed to be 'groups small enough to be genuinelydeliberativeandrepresentative enough to be genuinely democratic'. These examples depict a picture as to how to apply PD in action.

C. DecentralizationandLocal Government

Gomez (2003) proposes that a cross- regional analysis of decentralization process should be based on vertical and horizontal relationships which can be established among the executive, politicalpartiesandinstitutionsthatare responsible for the design of decentralization policies. He rationalized his examination of this factor on three variables: whether the legal framework and the informal relationship established allows for future changes within decentralizationpolicies,thesequenceof decentralization;andtheeconomic circumstances under which national and sub-national governments negotiate.

Local government can be defined as 'a sub-nationallevelofgovernment,whichhas jurisdiction over a limited range of state functions, within a defined geographical area which is part of a larger territory. The term refers to the institution, or structures, which exercises authority or carry out governmental functions at the local level. On the other hand, the term local governance refers the process through which public choice is determined, policies formulated and decisions are made and executed at the local level, and to the roles and relationships between the various stakeholders which make up the society'(Mirror 2002).

These two concepts are different. Decentralization reinforces and legitimizes local governance processes when it is correctly done. Therefore, the decentralization is identified as a facilitator to effective local governance. In line with the main objective of the research, further discussionrelatestothelinkbetween decentralizationandtwosignificantissues whicharelocaldevelopmentandcitizen empowerment.

D. DecentralisationinSriLanka:A General Overview

The public debate over local government in Sri Lanka has been dominated by the ethnic conflict in the country. For the last 20 years, efforts to change and reform local governments in the country have focused on devolution as a means to provide increased representation for the Sri Lankan Tamil ethnic minority and resolve their demand for an independent state. As a result, there have been few efforts over the last fifteen years to improve local

representation and development. Although there have been many changes in local government over the last 25 years most have been *cosmetic in nature, changing the names of offices, and councils but having little impact on the power relations between the national government and local governments or in the efficiency of local governments.* Robert C. Oberst (2003)

It is significant to examine the applicability of the concept of decentralisation under the existing legal framework. After the 13th amendment to the Constitution, provincial Councils were established as the second tier of the government within the unitary framework.Close examination of this devolution process reveals that the functions of Provincial Councils were not considered as a whole. Though the process of devolution is a matter of addressing through the entire system of governance, it did not consider other related matters rather than providing a solution to the ethnic problem. As a result, local government became the subordinate institutions of Provincial Councils withoutconferringanyadditionalpowers.
However, constitutional recognition was gained through a statutory provision. Item 04 of the Provincial List, Local government specify the scope of devolution to provinces. However, 13th amendment would seem to have marginalised the local authorities in the intergovernmental contexts of multilevel governance it established.

The 'provincialization' of the supervision of local authorities did not lead to a service delivery relationship with the provincial council. The establishment of a provincial tier was essentially a transfer of state powers hitherto exercised at the national level to the new governance entities at the provincial level. However, setting out the role and functions of the primary level of government comprised of the local authorities is neglected in the process of devolution.

These issues lead to failing the system of local government in Sri Lanka. Though the 13th amendmenttotheConstitutionaimsto introduceanewsystemofmulti-level governance, it has become a superimposition of new devolved structure on an existing de-concentrated one. Ambiguity in the division of powers and functions has allowed the centre to conquer the powers of local authorities. As a result, both provincial councils and sub-national governance system (Local Government) have become complex and fragmented.

1. *Problematizing citizen participation in Local Government*

One of the basic justifications for decentralization is building up a close relationship with other levels of governments such as provincial and local governments by creating a sophisticated environment. Citizens know their problems better and represent the best channel for people to take part in the decision-making process that affects their daily lives. Local level participation will provide citizens as agents to claim their rightful places as makers and shapers of development initiatives rather than users and choosers (Cornwall and Gaventa 2001). Sneddon and Fox argue that the broadening of State initiated forums of participation 'to more overtly political actions' and connecting geographically specific local state-society engagement practices to wider political economic processes at the national and transnational level. The arguments that call for increasing citizen participation related to local governance are threefold. Firstly, it is argued that it will improve the efficiency and efficacy of public services. Secondly, it means to render local government more accountable. Finally, it should deepen democracy as it will reinforce representative democratic institutions with participatory forms (Gaventa and Valderrama 1999). Participation should be aligned to the notion of citizenship, social justice and development as social change rather than its use as a technical fix for problems of poverty and inequality. The implementation of

approaches to enhance the citizen participation within the local sphereisvariedindifferentscenarios. Therefore,itisproblematictoconceptualize (Veltmeyer 1997).

However,therepresentativegovernment gradually neglected active citizenship. People becameactiveduringelectiontimeand thereafter they are totally neglected by their elected representatives from the governance process.Inarepresentativedemocracy, theorists like, Dhal, Berelson and Eckstein argue for the importance of the electoral system in maintaining the democratic process. Dhal asserts that ordinary citizens can have some sort of control over the Universal Suffrage through the vote. Though Bentham and Mill have the same arguments, Mill has gone beyond that and argued for the need to have a well-informed citizenry which was very active in public life-in voting, in local government and jury service.

According to Rousseau, democracy depends on the participation of each citizen in the process of decision making. He argues that the relations established between citizen and the state institutions were absolutely crucial for the democratic process. Therefore, citizens must be educatedtoparticipate. Cole'smodelof participatory democracy was based on a vertical and horizontal structure of government, which had to be, organized 'from the grass roots upwards and (be) participatory at all levels in all its aspects'. Further, he emphasizes that the purpose of the vertical structure was the control of the economy and the horizontal structure encouraged the participation of whole society (Pateman 1970). Therefore, participatory forms should carefully institutionalize when designing the legal framework for it.

Legal and policy frameworks for participation are considered as an important aspect or enabling conditions for interaction between citizen and local government (McGee and LOGO 2003). This legal framework work will provide citizens' legal basis to demand to be involved in planning, budgeting and administration of local government.

Sri Lankan legal framework on local governance does not provide a proper institutional and legal space for citizen participation in the decision making process. The only decision they can take at the election when they are choosing their representatives. Constitution as supreme law of the country does not guarantee the participation of marginalised people in the country. Similarly, the relevant legislation of local authorities is silent on this issue. Though, the discussion had emerged in the recent past, it also was limited for a debate only. In this context, designing a new legal framework for citizen participation in local governanceisimmenselyrelevantand important for securing democratic governance in Sri Lanka. Specially, the paper advocates to institutionalisingparticipatoryformsin development planning and budgeting.

2. *Conceptualizing Decentralization and CitizenParticipationinLocal Governance in Sri Lanka: An analysis*

2.1 Analysis under the Constitution

The well-designed constitution might help democratic institutions to survive, whereas a badly designed Constitution might contribute to the breakdown of democratic institutions. The preamble of the constitution set out the goals of the constitution. According to the preamble of theSriLankanConstitution,following aspirationsshouldbefulfilled;Strengthens institutions of governance; assures a wider sharing of power; enshrines democratic values, social justice and human rights; facilitates economic, social and cultural advancement; and promotes peace, ethnic harmony and good governance.Ifweprovideabroader interpretation of the phrase which 'strengthens institutions of governance', it will justify the central argument of the thesis. Further, the preamble providesthatSriLankaisa Democratic Socialist Republic. The opening words of the preamble, 'We the people of Sri Lanka' signify

that the power is granted by them, and are to be exercised directly on them and for their benefit. This raises a question that is all the constitutional provisions to cover the needs and interests of entire Sri Lankans or is it for the class of people who have drafted. The underpinning concept of social contract theory is upheld by the Constitution. However, the question is whether the preamble is a part of the constitution or not. In search of an answer to this question, Sri Lanka doesnotclearlyprovideananswer or interpretation for this.

Generally, Preambles often outline a society's fundamental goals. These may be universal objectives, such as the advancement of justice, fraternity, and human rights; economic goals, suchasnurturingasocialistagendaor advancing a free market economy; or others, such as maintaining the union (Orgad 2010) .

But,undertheIndianconstitutional jurisprudence, in *Kesavananda Bharathi (1973 4 SCC 225)*, the Supreme Court held that the preamble was as much a part of the Constitution as any other provision therein. The supreme court of India enunciated the doctrine of the basic structure of the Indian Constitution in this case. It was decided that there are certain principles within the framework of the Indian Constitution which are inviolable and hence cannot be amended by the Parliament. These principles were commonly termed as Basic Structure.

In the light discussed above aims, it can be argued that Constitution accommodates the establishmentof amechanismfor decentralisationwhileassuringcitizen participation in the decision making process in local governance in order to provide a value coherent based interpretation to enshrine its vales. However, it is doubtful whether values set out in the preamble are legally binding or not in the Sri Lankan context.

Therefore, though it is necessary to assure democratic and republican values under the Constitution, enforceability has become an issue yet. Republicanism simply means that the supreme power rests in the body of citizens entitled to vote and exercised by representatives they elect directly or indirectly and by an elected or nominated president. Republicanism as an ideology will, therefore, be considered as being centrally concerned with 'political participation, civic virtue and mixed constitution' (Laborde and Maynor 2005). However, the ultimate goal of the system was not simply to encourage the actofcivicinvolvementthroughpolitical participation, which purely served as 'a means or an intermediate end' (Brett and Bleakley 2006). Though, the framers did not define the word 'republic' they undoubtedly meant a form that relies on the consent of the people and function throughrepresentativeinstitutionsand distinguished form of monarchy and aristocracy.

Article 3 of the Constitution designates the sovereignty of the people and Article 4 sets out the exercise of sovereignty. It may be argued that the phrase 'The people' mentioned in the preamble of the constitution further re affirmed when reading Article 3 and 4 together. It has stated that 'In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.' These provisions underlie that popular sovereignty is the basis of Sri Lanka's constitutional system. The concept asserts that sovereign power is vested in the people and that those chosen to govern, as trustees of such power, must exercise it in conformity with the general will. Benjamin Franklin expressed the concept when he wrote, 'in free governments, the rulers are the servants and the people their superiors and sovereigns' (Jefferson 2018). In describing how Americans attempted to apply this doctrine prior to the territorial struggle over slavery that led to the Civil War, political scientist Donald S. Lutz noted the variety of American applications: To speak of popularsovereigntyistoplaceultimate authority in the people. There are a variety of ways in

which sovereignty may be expressed. It may be immediate in the sense that the people make the law themselves, or mediated through representatives who are subject to election and recall; it may be ultimate in the sense that the people have a negative or veto over legislation, or it may be something much less dramatic. In short, popular sovereignty covers a multitude of institutional possibilities. In each case, however, popular sovereignty assumes the existence of some form of popular consent, and it is for this reason that every definition of republican government implies a theory of consent (Lutz 1980).

2.2 Analysis under the legislative framework

Local government system in Sri Lanka is mainly based on three major legislations which are Municipal Council Ordinance, Urban Councils Ordinance and Pradeshiya Sabha Act. However, exceptPradeshiyaSabhaActothertwo legislation dated back colonial period. Except for few amendments, there were no substantive amendmentswithregardstopowerand functions of the Councils. These two legislation do not support to better decentralization due to its narrow scope of powers and functions. Due to the out dated nature of major legislation, they do not have any capacity to promote local economic development or citizen participation. In service delivery aspect, they are success to some extent. UnderthePradeshiyaSabhaAct1987,its preamble has stated that '…Pradeshiya Sabhas with a view to provide greater opportunities for the people to participate effectively in decision-making process relating to administrative and developmentactivitiesatalocallevel;…'.
According to the preamble, one of its prime objectives was to enhance citizen participation in the development related decision making process. However, the weakness was the Act doesnotclearlyarticulatethenormative background relatedtoit.Therefore,itis submitted that the principal legislation should beamendedinordertoincludenecessary principles of autonomous local government.

2.3 Analysisundertheinstitutional framework

Decentralized structure of the political system in Sri Lanka, especially with regard to the policies and institutions at the local level and their capacitiestomanage diversity,tomitigate ethno-political tensions and to accommodate the interests of different identity groups have not accomplished its primary objectives (Bigdon 2003). Therefore,itrequiresaproper institutionalization, which means strong local administration,strongdemocratic representativeinstitutions andvibrantcivil society. One of the main problems associated with the institutional structure is that there is no space to obtain the citizen's contribution in the governance e process. Though, it has recognized as a significant feature, any reform does not attempt to establish such an institutional flat form. In this background, it is reasonably argued that after voting, people have deviated from the institution and their general will not get the necessary representation.

On the other hand, local representatives have to depend on financial support provided by the Central Government and Provincial Councils. Therefore, sometimes, they cannot implement development progrmmes according to the requirements of local communities. In such a situation social contract is under a threat and no properagreementexistsbetweenthe government and citizens. Institutional structure is key to assure a good contract between the government and the citizen.

3. TowardsParticipatoryLocal Governance: Issues in Sri Lanka

Local governance is widely recognized as the best training ground in which the citizen can learn the art of governance through their own experiences and the reality that exists around them. Local government which is the third layer of country's administration is also always, in all circumstances,consideredastheimportant vehicle and the only the means to provide state benefits and services to the local citizens In fact, "no political system is considered complete and

democratic if it does not have the system of local governance

-Havenga-2002,UniversityofPretoria
(Wijesundara 2017)

Abelson proposes four key basic elements of deliberative participation; (1) representation; (2) structure of procedure; (3) Information; (4)The outcomes and decision arising from the process (Abelson et al 2003). What is missing is public involvement in project implementation which is important to make sure what is being implemented is decided in accordance with decisions taken in the participatory meetings. The corollary is being the gradual emergence and integration of the voices of ultimate beneficiaries of development plans; local citizen's voices, their participation and into the decision making process. Such relationships sharpen the active civic participation or engagements in the decision making process of development activities while opening doors for participatory governance.

Perhapsthebestplacetoobserveand understand the impact with the broad forms of active engagement by citizens in policy formulation approval, implementation, monitoring and overall decision making is at the local level, where the concerns of the 'grassroots' orlocalityintersectmostdirectlywith governance and the government. Hence, local government as the most suitable administrative structureanddecentralizationasthemost powerfulreformingmechanismopened influential space for the wider and deeper active participation of citizens at the local level, and would laythemostviableand sustainable foundationforoveralldevelopmentefforts. However,participatorygovernancewillnot become a reality if there is no distribution of resources to the local communities in parallel.

Withinahighlycentralisedgovernment structure, local government has been subjected to the dominance of the centre in Sri Lanka. At present, it is an item under the list of Provincial Council. Therefore, local governments are to be controlled and supervised by the provincial councils.Inaddition, various other central government establishments such as District Secretariat, Divisional Secretariat, and *Grama Niladari* are directly involved in local government affairs undermining the autonomous status of local government institutions. This dualistic control of the Centre and Provincial Council not only undermines, but also defeats the fundamental objectives of the Local Government system. Therefore,itis argued that the role of the Central Government shouldbebasedonthe'Principle of Subsidiarity' with the direct and continuous involvement of citizens in the process of decision-making at local levels. However, this issue has never been challenged even before the Supreme Court of Sri Lanka.

Other weaknesses of the existinglocal government system in Sri Lanka include political dependence for resources, lack of dynamism, lack of accountability and responsiveness as well as the absence of peoples'participation. Whatever theoretical underpinnings are embedded in the system of local government, Sri Lanka has not developed a culture of governance with a pre-requisite of citizen's participation (Social Scientists Association 2011).

Though it should be a voice of all social and ethnic groups in the society, SriLanka represents the lowest participation rate of women in local politics (Kodikara 2009) and is less than 2% (Women and Media Collective 2015). In the present framework, estate Tamil workers and indigenous community people are severely ignored by the system. Against this backdrop, it is necessary to investigate whether the local government has the potential to facilitate social transformation and provide opportunities for local communities, as well as marginalised, and socially-excluded groups to enjoy equal benefits of democracy through promoting their participation in the decision makingprocess.Arguably,theexisting framework of local government institutions in Sri Lanka does not serve this purpose. In this context, it is

essential to provide a legal and policy framework for ensuring citizen participation at local level.

IV.CONCLUSION

Autonomy, accountability and citizen participation are core components of local democracy.Both representative and participatory democracy provides a room for strengthening local democracy. An examination of the applicability of both concepts revealed that they have their own merits and demerits. Further, the discussion proved that representative democracy in itself has failed to ensure local democracy by accommodating citizens to involve decision making process.

While recognizing the valuable contribution made especially local government and participatory democracy scholars, the following two observations can be drawn in light of the overall review which is conducted in this paper in the context of institutionalizing participatory democracy. First, the representative democracy has failed to involve citizens in the decision making process at the local level within its traditional setting and institutional framework suggested for accommodating citizens to involve with it. Second, the existing literature provides evidence for the need to search for a suitable approach for institutionalizing citizen participationandparticipatorydemocracy builds a foundation for providing legal, policy institutional framework. Social Contract Theory has been integrated by the Constitution of Sri Lanka and it is articulated as people's sovereignty. Hence, through a decentralization mechanism the power can be enjoyed by the citizens either by themselves or by their representatives. Therefore, the legal framework is based on both participatory and representative democratic approach is not contradicted with the constitutional setting.

In light of these theoretical underpinnings, this paper advanced the need for adopting a cooperative approach for strengthening the local government system for institutionalizing citizen participation. Hence, representative democracy is established, participatory approaches are essential.

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