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This book contains the proceedings inclusive of a peer reviewed section of papers presented at the 11<sup>th</sup> International Research Conference 2018 of General Sir John Kotelawala Defence, University Ratmalana held on 13<sup>rd</sup> and 14<sup>th</sup> September 2018. No part of this Publication may be reproduced stored in a retrieval system or transmitted in any form or by any means including electronic, electrostatic, magnetic tape, mechanical, photocopying, recording or otherwise without prior permission in writing of the publisher. The contents published in this book do not reflect or imply the opinion of General Sir John Kotelawala Defence University or any other agency of the Ministry of Defence of the Government of Sri Lanka. They reflect and imply the opinions of the individual authors and speakers.

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ISBN number: 978-955-0301-44-7

Published by  
General Sir John Kotelawala Defence University  
Ratmalana, 10390  
Sri Lanka

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## FOREWORD

The International Research Conference 2018 of General Sir John Kotelawala Defence University (KDU IRC-2018) was on the 13th and 14th of September on the theme, Securing Professional Excellence through Collaboration. It was held for the 11th consecutive year under the guidance of the Vice Chancellor, Rear Admiral JJ Ranasinghe. The inaugural ceremony of the conference was held at the auditorium of the Faculty of Graduate Studies, under the patronage of the Secretary to the Ministry of Defence, Mr. Kapila Waidyaratne. Many distinguished guests: Tri-service Commanders, members of the Board of Management of KDU, representatives of the Diplomatic Corps, Vice Chancellors of other state universities, senior officers of the Tri-services and the Police, graced the event.

The session was opened by the Vice Chancellor, and he warmly welcomed all the dignitaries and participants. Further, he briefly explained the significance of the theme of the conference and KDU's commitment to fulfill national responsibilities. KDU IRC-2018 awarded honorary professorships to two internationally eminent Sri Lankan born scientists, Professor Mohan Munasinghe and Dr Sarath D Gunapala, in recognition of their contribution to their respective fields of science, and to mankind.

Delivering the keynote address, Mr. Waidyaratne commended KDU for playing a leading role in moulding the future of the military as well as civilian youth who are in pursuit of high quality tertiary education in Sri Lanka. He also stated that KDU contributed immensely to the much needed research and innovation, despite being an excellent institution for learning and disseminating knowledge that empowers the youth by helping them to develop sound attitudes and skills.

KDU IRC - 2018 continued with the tradition of bringing together researchers, academics and professionals from all over the world. This conference particularly encouraged the interaction of scholars to present and to discuss new and current research. Their contribution helped to make the conference as outstanding as it had been. A significant

increase in the number of research papers received was noted at this conference. Out of 573 research papers received from both local and international scholars, 370 research papers were selected for presentation through the double blind peer review method. Each paper was reviewed by two independent experts in the field prior to selecting them for either oral or poster presentation. The selected papers were presented in nine research sessions, such as, Defence and Strategic studies, Basic and Applied Sciences, Engineering, Medicine, Allied Health Sciences, Computing, Built Environment and Spatial Sciences, Law and Management Social science and Humanities.

Technical Sessions were conducted on the first day of the conference in each faculty which drew approximately 55 guest speakers internationally and locally. Similarly, on the second day, parallel Plenary Sessions were conducted in the faculties under sub-themes, with the participation of approximately 370 experts delivering speeches related to their respective disciplines. The international guest speakers numbering more than 14 represented countries such as Japan, United States of America (US), United Kingdom (UK), India, New Zealand, Malaysia, Pakistan, Philippines, Burma, Indonesia, Bangladesh and Maldives,

KDU IRC-2018 was a unique research conference due to reasons, such as, international authors were facilitated to present via Skype remaining in their country; articles were automatically uploaded to Google Scholar in order to generate individual citations (H-indexing); the best papers of each category were published in the KDU Journal of Multidisciplinary Studies; and the best oral and poster presentation of each session were awarded.

This book contains proceedings of the sessions conducted under the disciplines of The plenary speeches and selected research papers presented at the technical sessions of the faculty are also included in this book, in addition to transcripts of the speeches delivered at the inaugural session. These Proceedings will no doubt furnish scholars of the world with an excellent reference book. I also trust that this will be an impetus to stimulate further study and

research in all areas. I also trust that this would stimulate enthusiasm among scholars to engage in further study and to demonstrate the national and international importance of conducting research. I thank all authors, guest speakers and participants for their contributions.

A conference of this magnitude could not have been realized without the tremendous and generous support of the academic and administrative staff of KDU, who contributed to making it all happen.

**Dr. Upali Rajapaksha**  
Editor  
Conference Chairman 2018

# Content

PAGE	
ix	Welcome Address
xi	Speech of the Chief Guest
xiii	Keynote Speech
xvii	Guest speech
xx	Vote of Thanks
	<b>Technical Session I</b>
<b>2</b>	The Protection Afforded to Well-known Trademarks in Sri Lanka: A Critical Analysis KAAN Thilakarathna
<b>10</b>	Legal Protection of Products Identified by Geographical Indications Having Weaker Link With the Origin LM De Silva
<b>17</b>	Beware if you are a 'Digital Consumer' – Intangible Digital Goods and Consumer Protection in Sri Lanka WAC Perera
<b>22</b>	Beyond 'More Economics-Based Approach': A Legal Perspective on Competition in Sri Lanka Dianarthy Suthakar
<b>27</b>	Protecting Consumer Rights in Electronic Contracts : A Lessons from European Union and United Kingdom BAR Ruwanthika Ariyaratna
	<b>Technical Session II</b>
<b>36</b>	Majestic Giant, yet Abroken Spirit : Legal Protection of Captive Elephant in Sri Lanka HMMC Herath <sup>1</sup> and WMASB Wijethunga <sup>2</sup>
<b>42</b>	Corporate Responsibility for Environmental Protection with Reference to the Companies Act No 07 of 2007 of Sri Lanka YP Wijerathna <sup>1</sup> , AA Edirisinghe <sup>2</sup>
<b>48</b>	A better Approach to Animal Welfare Law; A Critical Analysis of the Law on Prevention of Cruelty to Animals in Sri Lanka MH Pasqual
<b>55</b>	Pursuing a better National Water Policy Endowed with Substantial Rights on Water: Case Study of Sri Lanka DP Aluthge

PAGE	
<b>61</b>	Applicability of the Defence of Act of God in Environmental Damage : A Critical Appraisal Udapadie Liyanage
	<b>Technical Session III</b>
<b>67</b>	Austrian Minds: Examining how Vienna Circle Influenced on Hans Kelsen's Notion of "Grundnorm" and 20 <sup>th</sup> Century Legal Positivism Punsara Amarasinghe <sup>1</sup> , Anastasia Glazova <sup>2</sup>
<b>71</b>	The Space Between Promises and Results: Thoughts on regulating Use of Force by the UN Charuka Ekanayake
<b>79</b>	ILO Decent Work Agenda and Sri Lanka: Teeth for Tiger BKM Jayasekera <sup>1</sup> and NKK Mudalige <sup>2</sup>
<b>85</b>	The Bitter Cookie: Right to Cyber Privacy in Sri Lanka vs. the Misappropriation of Data Gathered Using Cookies Gananath Gunawardena
<b>92</b>	Governance of HIV in the Aviation Industry : Analysis of Multilateral Labour Rights Regimes Madara Ranmuthugala
	<b>Technical Session IV</b>
<b>99</b>	The Effect of Stem Cells Research on One's Right to Life: Ethical and Legal Controversies in the Domestic and the International Arena. BS Senanayake
<b>105</b>	Dilemma of Creating a Constructive Trust on Illegal Purpose SW Siriwardena
<b>110</b>	Analysis of International Instruments in Relation to Vessel Source Marine Pollution with Special Reference to Marine Pollution Prevention Act of Sri Lanka S Thalakiriyawa
<b>117</b>	Power and Ideology of Professions: A Critical Analysis of the Role of Judiciary and Laws Delays in Sri Lanka SM Anuruddika G Senevirathne
<b>122</b>	Offence of Enforced Disappearance : Enhancing the Parameters of Criminal Law of Sri Lanka Ishara Kumudumalee Munasinghe

PAGE	
	<b>posters</b>
<b>130</b>	Admissibility of Computer Evidence Under Sri Lankan Criminal Proceedings : A Comparative Analysis HMMC Herath
<b>136</b>	A study of Criminal Recidivism in Sri Lanka Compared to Norway EMN Perera
<b>141</b>	The 19 <sup>th</sup> Amendment to the 1978 Constitution of Sri Lanka : is it a Mockery to the Concept of Democracy ? SSH Dharmasiri <sup>1</sup> , PSS Senarath <sup>2</sup>
<b>145</b>	Testimony through Skype promotes Best Interest of Justice Janith Jayasinghe <sup>1</sup> and Chathumini Samarasinghe <sup>2</sup>
<b>149</b>	The General Agreement On Trade in Services (GATS) and The Rational of the Cooperation and Commitments : An Empirical Approach E Nadeesh R de Silva
<b>155</b>	Marriage Cannot be Slavery; An Analysis on Forced Marriages and Grounds for Nullity in Sri Lankan Context BMGD Balasooriya
<b>160</b>	A Critical Analysis Relating To Implementation Of Environmental Law In Sri Lanka: Marine Pollution DUBM Madushika <sup>1</sup> and EE Chandrasena <sup>2</sup>
<b>165</b>	Rights and Duties of State Parties to UNCLOS III Regarding Marine Pollution Prevention: A Global Legal Perspective with Regards to Vessel Based Pollution and Ocean Dumping MIU Manikarachchi
<b>169</b>	Child Sexual Exploitation and Child Prostitution in Sri Lanka: A Legal Perspective. FAM Basheer
<b>174</b>	The Impact of Uma Oya Multifunctional Project on Human Rights DMTGR Samarakoon <sup>1</sup> , WMSC Bandara <sup>2</sup>



## WELCOME ADDRESS



**Rear Admiral JJ Ranasinghe VSV, USP, psc, MSc(DS) Mgt**  
Vice Chacellor

A very good morning to you!

I cordially welcome the Hon. Secretary to the Ministry of Defence, Mr. Kapila Waidyaratne, and I pay my gratitude to you Sir, for accepting our invitation and for being with us today at this 11th International Research Conference of General Sir John Kotelawala Defence University.

Next, I wish to extend a warm welcome to our Keynote Speaker, Prof. Mohan Munasinghe; and the Guest Speaker, Dr. Sarath D. Gunapala, both of whom are very eminent and distinguished Sri Lankan scholars who have made their imprint in the international arena. We are proud of your achievements and we consider your presence here today, as truly encouraging and inspiring us at KDU, as well as for all conference participants.

Let me also warmly welcome the Tri-service Commanders and all the other Members of the Board of Management of KDU.

Also it is my pleasure to welcome Your Excellencies of the Diplomatic Corps; Vice Chancellors of other State Universities; and Senior officers of the Army, Navy, Air Force, and the Sri Lanka Police.

I also wish to extend a warm welcome to all dignitaries, scholars and participants; especially those of you from our friendly countries, who have come all the way to adorn this international conference in Sri Lanka.

Ladies and gentlemen, let me bid all of you present here today a very warm welcome this morning; and extend our appreciation for participating in this important event of our calendar.

We at KDU consider this annual conference very seriously due to several reasons. First, it is instrumental in establishing and strengthening the much needed research culture within the university, and it permeates the same into other universities and higher educational institutions in the country as well as into the industry through collaborations. Secondly, it gives local participants and institutions invaluable opportunities to establish links and networks with international counterparts, which is essential for progression in respective fields of specializations. Thirdly, it directly and indirectly contributes to the national growth and development in the long run. So, we consider this international research conference as an investment for the future.

As you are aware ours is primarily the National Defence University of Sri Lanka and our primary mandate is to produce academically and professionally qualified officers for our defence services, and we have been doing this for the highest satisfaction of the services. But today KDU has identified the need to establish firm civil military relations to face the complexities in national defence today, and hence the commencement of day-scholar programmes has helped us to achieve that goal while reducing the burden of the other state universities in providing adequate

higher educational opportunities for our youths. The well-developed infrastructure, state-of-the art facilities as well as the dedicated human resources at KDU are now being meaningfully utilized to extend its services to deserving civilian youths to follow standard degree programmes in diverse disciplines, and the success of our achievement is seen in the increasingly higher number of foreign students who join our courses from countries, such as, the Maldives, India, Pakistan, Bhutan, Nepal, Uganda and Japan; along with expatriate students from Australia, Canada and the Middle East.

Ladies and gentlemen, in the modern times, it is essential not to compartmentalize varied fields, but to instill multidisciplinary collaboration among them. Hence relationships with different fields of innovation help to bridge gaps and inculcate professional excellence, which is the challenge of the 21st century. This explains the validity of the theme of our 11th International Research Conference, “Securing Professional Excellence through Collaboration”.

KDU IRC is an ideal opportunity for the academia and professionals, to meet, discuss and exchange views in an academic environment. What is special about our conference is that, it is enriched with the participation of many local and foreign academics in varied disciplines; along with individuals from all three armed forces and the Police Department. Therefore, this is the only conference in Sri Lanka that brings together civilian professionals and their military counterparts.

I extend a warm invitation to the local and foreign students, academics and professionals present here today, to present their research findings; engage with other researchers in your field of study; have fruitful discussions and build life-long friendships with each other.

I welcome all to the 11th International Research Conference of KDU.

Have an inspiring and unforgettable day at KDU!

## SPEECH OF THE CHIEF GUEST



Mr. Kapila Waidyaratne  
President's Counsel Secretary

Good morning, everyone !

Chancellor, Vice Chancellor, Secretaries to the Ministries, Commander – Sri Lanka Navy, Chief of Staff of the Army, Dampath Fernando and the Air Force, Sumangala Dias, Your Excellencies of the Diplomatic Corp, international organizational scholars and other distinguished invitees.

It is my privilege and honour to be present here as the Chief Guest of the inauguration ceremony of the 11th International Research Conference organized by the Kotelawala Defence University, at which I happen to be the Chairman of the Board of Directors of its management. Let me first express my thanks to the Vice Chancellor, and conference organizers for inviting me as the Chief Guest of this very significant event.

Ladies and Gentlemen, as the Defence Secretary and also the Chairman of the Board of Management, I am aware of the outstanding role played by KDU in the tertiary landscape of Sri Lanka. With the donation of this beautiful estate along with the Kandawala mansion by the late General Sir John Lionel Kotelawala, the third Prime Minister of Sri Lanka, KDU was founded in the 1980s as the only tri-service academy in the country to provide much needed university education to the officers of the tri-services. Since then, KDU has come a long way over the last several decades reaching heights that may not have been dreamt at its inception.

For the last thirty years, KDU has produced thousands of graduate officers of very high calibre to lead the Army,

the Navy and the Air Force, as highly disciplined and professional forces. In most recent times with its expansion to provide higher education opportunities to deserving civilian students, KDU has earned a name within and outside the country as a university that provides high quality tertiary education in diverse fields in a disciplined environment.

Today, with nine academic faculties, the Southern Campus and the recently established University Hospital, KDU has come to the forefront with determination to serve the nation in the best possible way. Therefore let me congratulate the Vice Chancellor and his able staff for the tremendous job, the excellent job done by them. Also let me take this opportunity to salute the pioneers of the university, specially the late General Sir John Lionel Kotelawala and Deshamanya Late General Dennis Perera, and let me not forget the political leadership of His Excellency the former President, J.R. Jayawardena, for the foresight to establish this University far back in the 1980s. Ladies and Gentlemen, the 11th International Research Conference that we are inaugurating today is a testimony for the significant role played by KDU in the field of higher education of Sri Lanka. As you are aware, it is not at all an easy task to successfully organize an annual conference of this magnitude considering the previous years. This itself indicates the strong commitment and responsibility of KDU to provide opportunities for the all-important task of knowledge creation and dissemination.

As you have already heard, and what I gathered from the Vice Chancellor, every year the number of research

papers submitted for this conference is on the increase. It is heartening to know that thousands of researchers from all over the country as well as the world consider this conference an appropriate platform to present their papers. Therefore in my capacity as the Chairman of the Board of Management of KDU, I too share with KDU the pride of the leading role played by this defence university in popularizing research, which I believe is an essential, key aspect in the nation's growth.

Ladies and Gentlemen, the conference theme, Securing Professional Excellence through Collaboration, is timely particularly for countries like ours in our quest for appropriate development strategies in the face of new global challenges.

We do need meaningful collaborations across diverse professional bodies, and we cannot be completely looking after our own interests in isolated compartments. So time has come for all professionals to unite in sharing the burden of developing our nation economically, socially and culturally, so that the future generations will have a safer world to live in.

I believe it is our professional responsibility, irrespective of labels of distinction such as scientists, doctors, engineers, lawyers, academics, administrators, military professionals or any other, to find opportunities for innovative collaborations. And in such initiatives we all must reach excellence in our own professional domains and it is in this respect that universities and higher education institutions play an important role.

Ladies and Gentlemen, it is my belief that in this respect General Sir John Kotelawala Defence University is discharging its duty to the nation in a commendable manner. So let me conclude without taking much of your precious time as there are two eminent internationally recognized Sri Lankan intellectuals to deliver key note addresses at this conference. Let me once again thank the Vice Chancellor and the organizers for inviting me as the Chief Guest this morning. And let me also congratulate them for organizing a conference of this nature on a very timely and an important theme. Finally let me wish the two-day conference and both national and international participants a highly productive conference with intellectually stimulating deliberations.

Thank you very much.

## KEYNOTE SPEECH



### Professor Mohan Munasinghe

Professor of Sustainable Development, Sustainable Consumption Institute,  
University of Manchester, UK

Founder Chairman of the Munasinghe Institute of Development, Sri Lanka

Good Morning to everybody!

Distinguished Audience, Vice Chancellor, Secretary, Service Commanders, Distinguished Guests Excellencies and of course fellow academics - I'm going to talk to you very briefly about Sri Lanka's sustainable mission and how we can achieve security, peace and prosperity through the green growth path. I would like to emphasize that we are looking for win-win solutions for people, the planet and prosperity for the entire globe. Now let me talk very briefly about the major issues that we face, i.e. threat for global security, and threats, such as, poverty and inequality due to resource shortages, shortfalls in the financial sector, disasters, conflicts and unfortunately weak leadership at the global level.

There is a concept called ecological foot print of humanity, which tells us how much of the planet resources we are using in total. In 2012, we were using one and a half times the equivalent of what the earth can sustainably produce, and by 2030 If we continue our present pattern of development we will need two planets! We know that we have only one planet. Sri Lanka is also exceeding its own ecological balance; it means we are chopping down the forests, polluting the water and so on. Now we have another question. It is the question of over consumption because if you look at who is doing the consumption, the richest people on the planet or the top 20% is consuming 85% of the resources, which is sixty times more than the poorest.

Sri Lanka has a dynamic nonaligned strategy; friend of all and enemy of none, which is something the President emphasized to me very much. The multipolar world order will be hopefully much more dependent on soft economic power rather than military power. And you have many poles of influence in the world. As we move to that, there will be disturbances, but Sri Lanka has a very key geostrategic position, and we can play a role in this. In case of climate change and global warming, there are two key facts which are the most important. The first point is; poor countries in poor groups suffer the most, which is manifestly unfair because the poor countries and the poorer people had the least to do with creating the problem. The problem was mainly created by the rich countries but the poor suffer. The second important point is that we follow this balance inclusive of a green growth path and make development more sustainable.

We can meet the challenge of climate change, as well as, all the other problems like poverty and so on. In the history, we have had many civilizations which lasted thousands of years. Whilst the Han civilization in China, Maurya Gupta Empires in India, Mesopotamian and the Roman Empire collapsed, eventually because of environmental and social factors, mainly over consumption of resources, there will be social divisions between rich elites and poor masses. So, these are very important aspects. We can learn a lot from the past history. If you take for example the hydraulic Systems in Sri Lanka, we had a wonderful

sustainable vision. For example, we believe that land belongs to the people and all living things while the ruler is only the guardian of the land; and King Parakramabahu had said not even a drop of rain water should flow into the ocean, without serving the man. If you look at the old dam anicuts, you will see that they were positioned exactly where the modern instruments tell us where they should be. They were ecofriendly and we had systems like the Velwidhana system and social system, controlling the flow of water which was extremely sustainable. So we have to be very much aware of these environmental and socio economic factors, scarcity of resources, inequality and conflicts which can also affect our present civilization. It could lead to some process of Barbarization where you have unrestrained market forces combining various problems like poverty, inequality and climate change, which would lead to a total breakdown of the planetary system. We also see the mass movement of refugees and other people which is more and more difficult to control, which is really a threat to global security in the future.

So, we now come to the last hope for mankind in a sense in this era, which is the 2015 sustainable development goals and the UN 2030 Agenda. How can we move forward towards a 21st Century Earth Eco-Civilization for a safer and better future? It is through the Balanced Inclusive Green Growth (BIGG) Path. The “Inclusive Green Growth Path”, if you analyze the words- ‘inclusive’ means social; ‘green’ means Environment; and ‘Growth’ means Economy. These three elements are in the sustainable development triangle. And one of the core concepts that are extremely important here is, making development more sustainable. It is a call for empowerment and action. It basically says that sustainable development maybe very mysterious like a mountain peak covered with clouds. But we don’t need to be discouraged. We will take one step at a time and climb up the hill, and eventually, we will reach the top. And the important thing here is that you and I, individuals, can make a difference.

We don’t need to wait for Presidents, Prime Ministers and others to tell us what to do. Many of us know what we need to do. When we leave this room we switch off the light, we can turn off a tap, we can plant a tree, many things we can do that are extremely sustainable; so empowerment is extremely important. At the company level, we have corporate social responsibility and many other things. At the city level we can practice sustainable cities, and we come to the second core concept which is essentially what I told you before, that we need a prosperous economy specially with many millions of poor people in the world,

we need to bring them out of poverty, but we also need to look at the environmental side that is the process of growth. So we don’t want to destroy the environment and we need the social side which is the most neglected part. Unless we have social harmony none of the other things will be helpful. We can understand nature quite well, such as, forests, lakes and the air we breathe. But we have neglected social capital, human and cultural capital, and we had a 30 year war which eroded a lot of our social capital, this is the glue that binds the society together. All of us have a major role to play in that.

Just to remind you of the 2004 Tsunami in Sri Lanka, which is a shining example of social capital work. We were in the middle of a civil war, a poor country, one in every five hundred people was affected by the Tsunami, and other countries thought our society would collapse. But we rallied; people went out onto the beaches, voluntarily helped other people and cleared the bodies. There was social capital at work. If you look at the following year, in Hurricane Katrina in 2005 in one city New Orleans, what happened? There was no social capital: there was a complete breakdown of law and order, looting, raping and other things were going on. It was shocking because it’s a very wealthy country and a small city. Hence social capital is not necessarily the property of the rich. Poor countries have effective social capital networks; we have it in Sri Lanka; we must build it and we must continue with it. I must also tell you very briefly that we need to transcend boundaries within our own mind; also this is for innovation that is what universities have to do.

Values are extremely important. We have to replace unsustainable values with more ethical values. We need to think in terms of multi-disciplinary issues. We need to think in terms of the whole planet and not just our own backyards. We have to think in terms of long time spans, decades and centuries; and as military practitioners, I’m sure you understand that it should be a long range plan, not just today or tomorrow. And we need to work with all stakeholders, i.e. the Government, not only the Government but also the civil society and businesses. Just to emphasize the question of social values, it is unethical social values that actually drive our society towards injustice, violence, greed and selfishness. That has created the state of what I call not as economic development, but as maldevelopment. We are growing based on debt, poverty, inequality and so on, which is not a very healthy way to go, and that has created what is called the environmental death over-using our planetary sources and also causing climate change. When we deplete our natural resources,

there is more conflict. So, you have unethical social values. That is a vicious cycle. If you look at the pattern of wars today, there are no wars on weapons of mass destruction, the wars are all for resources for oil, water and land.

So, this cycle has to be broken, and we have to transcend disciplines to do that, we need to think in multi-disciplinary terms, and we need to bring the civil and business societies to work with the government to push them to strengthen democratic space and provide good governance. So, let me just briefly tell you that climate change is in a precarious situation today. We have 280 parts per million, and the main indicator is the Co2 level in the atmosphere. That was at a safe level 100 years ago or more. Today it's over 400. So, we are exceeding the safe level of Co2, and what will happen is that we will have global warming, we will have more rainfall in wet areas so you have more floods, landslides; and more droughts in dry areas and more deserts; and we will have storms, cyclones and other things in addition to sea level rise and overall temperature increase. So the economic damage over the last 50 years is rising and it's going to continue to rise. We need to survive climate change, specially to protect the vulnerable people, poor children and the elderly, in some parts of the world, such as, small islands like the Maldives, and others which will be completely submerged, and particular sectors and systems like agriculture, coral reefs and so on, but unfortunately we are not doing those things.

Talking of sustainable production, there are two key points to consider. The first one is sustainability and triple bottom line, i.e. finance and economy, environmental and social. Those three have become much more important, it's not only a question of profits any more. The second one is effective usage of resources. If you are producing shoes, if you can produce shoes using less leather, less energy and less water; it is a win-win situation, because you are reducing the burden on the environment, and also reducing your cost. So this is very attractive and now we have technologies, which are win-win. There are many technologies which we have applied, for example, in case of a garment factory in Sri Lanka, MAS Holdings, which shows you how resource efficiency works. We have looked at how carbon and energy are used in the life cycle of the product from raw material to manufacturing, to distribution to use and disposal. The main carbon emissions of a garment come from raw material, not only from manufacturing. What is the lesson for us? If you want to reduce emissions of carbon, you are not going to tinker with the manufactory process; you are going to talk to your procurement officer. The procurement officer must

buy raw material from the sources, which uses the least amount of carbon. It is not an engineering problem, it's a procurement problem. So this kind of analysis tells you where the hot spot is.

For energy, the hot spot is in manufacturing and distribution and in final endings. Why? Because people wash garments, that is energy, because of hot water. So these are methods on improving production processes; and let me just tell you that what we are planning here is to have sustainable consumers and sustainable producers working together because what you see in advertising today in the TV is mainly very unsustainable; it tells you to buy more and tells you to buy very unsustainable products. We have to break that side and eventually if we get these sustainable consumers and sustainable producers working together, we can eventually have a sustainable society and use modern tools. Traditional markets fall, so we can have organic markets and other things, where you go and buy the stuff, but for young people, it's online marketing. I'm supporting start-up companies which have huge sustainable online markets. Most young people who are in their twenties do not want to visit a shop; they go to the computer and shop online. So you have to have the tool to do the right thing and through these sustainable markets you can build a sustainable society.

In the sustainable Sri Lanka vision, we have hope for a thriving economy. We don't want to be poor. Being green and inclusive does not mean poor. We want to be prosperous and to lead a high quality life in an advanced stable economy, but it is green; it should be built on our traditional respect for nature, use resources efficiently and in an inclusive society. If you look into cross cutting issues, it has things like values, gender, international relations, security and peace; so all of these are integrated. This is one of the failures of Sri Lanka in every department of the Government. It is up to people like you, thought leaders, who can contribute to bring this integration about.

Let me just finish by saying we need to harmonize the economy, society and environment to build the democratic space in Sri Lanka. We need to work with the business society, civil society, the government, or all working together; and let me just end by reminding you that the situation in Sri Lanka has to be improved quite substantially because inequality has become much worse in the last two decades. Although GDP is growing, it is not reaching down. That is a very important aspect. Spatially also, the western province and so on are much better off than for example - the dry zone. We are not

investing enough in health; we are not investing enough in education rather low as a percentage of GDP.

There are also other things, for example, the Belt and Road Initiative (BRI). The Chinese government is very important for us strategically. If you want to be an Indian Ocean hub, we have to understand that we are right in the middle of the maritime BRR. So we need to be a friend of everybody and enemy of none. We have two major ports, Hambantota and Colombo right in the middle. So Sri Lanka's geostrategic position allows us to play a key role and the investments in the BRI will also help us to bring that about. But we have an important balancing act to play. And I think, the Foreign Ministry and security forces establishment of the country have a very important role in maintaining that balance and bringing prosperity to Sri Lanka. So, for the defense services you have to be good professionals; as professionals you have to be the best. But you have to also understand the economic, social and environmental dimensions of your job. And you have to broaden your perspective to bring those aspects this is difficult.

Although it is a difficult task, our graduates and others need to narrowly focus on their expertise and to be the best in the world. I think you can do much for building the nation, one nation and one flag, protecting the democratic space. And you have to understand the concept of National Identity. We all are Sri Lankans. We have a role in disaster, this is a peace time role going from conflict to resolution; through education and training, raising the standard of national conduct especially among young people; service to the nation; honesty; integrity; respect for nature and environment; respect for the society; law; tolerance and harmony; discipline; leadership; accountability; effectiveness and impartiality, and all of these values have to be rebuilt. My final message is that we face multiple problems, but we know how to address them. Unfortunately we need to do more; we have to go on the balanced inclusive green growth path. The Indian Ocean is a key area where we can do this. We need also to bottom up leadership; we don't have to wait for global leaders to tell us what to do. I think KDU and the Sri Lanka Defence Services can lead the way to peace and prosperity in the 21<sup>st</sup> century global civilization.



## GUEST SPEECH



### Dr Sarath D Gunapala

Solid-state Physicist and Senior Research  
Scientist, Jet Propulsion Laboratory, NASA, USA

It's my pleasure to be here today, and I'm going to talk about the exploration of our solar system and beyond in the next thirty minutes or so. I have small stories to make it memorable, and I hope you will enjoy it.

I work at NASA Jet Propulsion Laboratory (JPL). Our main business at NASA is exploration of solar system and beyond, using robotic space-crafts. If you hear anything in the news, such as, going to Mars, Rovers, Jupiter, Saturn or beyond solar system, that is what we do.

We design and build space-craft, and seven minutes after launching we take control of it. With the space network, we can listen to our satellites even beyond the solar system. Two of our satellites, Voyager 1 and Voyager 2, are stationed about sixteen billion miles away, so if you have to send a radio signal at one hundred and eighty six thousand miles per second, it takes twenty six hours to go and then acknowledgement comes twenty six hours later, and it keeps changing.

Our deepest space network system has three antennas set in Basku in California, Madrid in Spain and Canberra in Australia. So when the earth spins, we have 24/7 coverage. Why do we do this? When I fly for a long ride, if my neighbour sitting next to me somehow learns that I am a physicist working for NASA, ten out of nine times, irrespective of gender, colour of skin, religion or ethnicity, they ask, "Are we alone? Is there life in outer space?" Looks like the question, "Are we alone?" is somehow genetically

quoted into us. It's fascinating! It's interesting to note as to why we call this a solar system and not an earth system!

For nearly a few million years we believed the earth was flat, we were at the centre and everything and the universe spun around us. Normal people, also called Homo Sapiens; in Latin, homo is "man" and sapien is "wise" – "wiseman" – were very egocentric and less tolerant, so they thought everything was around us; but some people thought otherwise. Some thought there were other worlds, and they were put to silence very quickly by execution. Aren't we glad we live in more tolerant times today? We can say, "It's flat", "It goes around or not", "I don't believe in it", etc. People may argue with you, but not get physical. I'm going to talk about different types of space-craft we use, one example for each satellite class, such as, Voyager, Cassini, Phoenix and Curiosity. Then I'll talk about the hunt for other earth-like planets and recent developments in the search for life in our solar system and beyond.

JPL was formed by the California Institute of Technology in 1936 as a graduate student experiment with the involvement of six students. JPL gave the first orbiting spacecraft called Explorer 1 to the United States of America in 1958. The first two Russian spacecraft were Sputnik 1 and Sputnik 2. We have about 9000 staff, located in Pasadena in California at the foot of St. Gabriel Mountain. In 1940, JPL's first claim to fame was the development of something called jet assisted takeoff, during the World War II, for planes to takeoff at very sharp angles, so in enemy

territory it was very helpful. In 1950, they developed the first guided missile for the United States Army, and in 1958, they designed the first orbiting satellite called the Explorer. Today, we have thirty one robotical spacecraft, two beyond the solar system and the balance twenty nine are around different planets. The four types of spacecrafts we use today are: Flybys, Orbiters, Landers and Rovers. Sometimes planets align; in that case it is much more cost effective to send one satellite to observe few planets. It happens once in one hundred and seventy six years; they are the major planets: Jupiter, Saturn, Uranus and Neptune. Voyager is a Fly-by. We built two voyagers, Voyager 1 and Voyager 2; and launched them to Jupiter in 1976. Jupiter, the largest planet, is a thousand times larger than the earth and does not have a terrestrial land; instead it's just a gas bowl with many moons. Before sending the Voyager, we knew of only four moons, discovered by Galileo called Galilean Moons, bigger than our moon, but Voyager 1 discovered fifty four moons, so Jupiter has fifty eight moons. It's fascinating! In one of the Galilean moons, we observed a big volcanic eruption. This was the first time we observed a volcanic eruption beyond the earth. All the planets of the solar system are on one plain called the Solar Plain.

Voyager 2 was sent two weeks behind, in case something goes wrong with Voyager 1. Saturn is a magnificent planet, also a gas bowl. It has a fantastic ring system, first observed by an Italian astronomer. Its density is so low, if you can take this serene and beautiful Saturn to the ocean, it will float. Its rings are formed with ice particles; some are like sand pebbles and some are big chunks of ice, as big as ten meters. Close to about sixty moons were observed in Saturn; the biggest moon is Titan, at which temperature is very low and ice water is frozen. Another moon of Saturn is called Enceladus. It is a very small moon covered in ice and it has water-rivers. Hence, it has a lot of interest. Voyager is very interesting. Professor Carl Sagan, Professor of Cornell University, encouraged JPL to put a message if there is any intelligent life elsewhere. So we made a copper record quoted in gold with greetings from fifty five languages including "Ayobowan", one hundred and fifteen pictures, a variety of natural sounds of birds, whales, giraffes, lions, etc., and also President Carter's and the then UN Secretary General Waldheim's message, classical and western music, and also we put a needle and sign language if intelligent life captures it they will figure out how to play it. We put a map of the solar system so that they would know from which planet it came from. We also put sign language indicating where we are and where it came from. It is hoped for someone to find it; similar to

in early days when people got lost in the ocean or stranded on an island, they would put a message to a bottle, hoping someone would find it.

The first Lander was launched to Mars in 1975. An Italian astronomer found canals in Mars. So, Hollywood movie makers hypothesized Marshians; little men with big heads, complied with Darwin's theory of evolution. We believed Martians were more brainy. Of course now we know Mars does not have intelligent life, but there could be microbial life.

Curiosity is the largest rover we built; it has ten instruments, cameras and very powerful lasers, which would analyze signals coming from vapour to find out what kind of minerals it has. Curiosity has been working on Mars since 2012, and we are building the next one called Mars 2020, and it will be launched in 2020, it will take eight months to go to Mars. We will launch when Mars and the earth are close, so it doesn't have to travel across the solar system, which would otherwise take years. Mars and earth get close every other year. We are about one hundred million miles away. One Martian year is two earth years. We landed on a crater with a five kilo metre high mound. Why did we select this location? From previous Rovers, Landers and Orbiters there is evidence that Mars has running water. We know on earth, life was formed as soon as it had water. So we thought if Mars has running water, this crater could have water. We wanted to explore whether there are rivers. There were pebbles without jagged edges, instead they were circular, because for millions of years they would have rolled over. One hundred to two hundred years ago Mars had frozen ice like frozen mud, so in Summer times, it melts. The question is if it had water, what would have happened to it? Scientists believe that when the inner core gets colder and becomes solid, it is called a dead planet as nothing moves, and there is no current and no magnetic field. Therefore, due to blasting of high energy solar wind, the water would have vapourized.

Cassini orbiter launched in 1997 on a journey to Saturn, landed in Venus. Until Cassini, we didn't know Enceladus had rivers. We sent Cassini five miles above the surface of Enceladus. It was a very risky maneuver. We found it has geysers, everything that a primordial soup needs. Now we know of four places that have water: Mars, Europa (icy moon of Jupiter), Titan and Enceladus. We want to investigate all four. We are very much interested in sending a very specific satellite to Titan to explore the possibility of life. We encourage NASA to fund. Actually NASA funded Europa Clipper Mission last year. Europa

is one of the large moons of Jupiter discovered by Galileo. In Europa ice cracks all the time, but we don't know the cause. By 2020 we are going to find out whether there is life.

In 2009 we launched the Kepler telescope to find extra planets orbiting around our neighbouring stars. So far we have found five thousand planets. Out of three thousand five hundred of them we found only two earth-like planets; and in one we think there is water. We shouldn't get discouraged; as the Galaxy has two hundred and fifty billion stars. So far we have discovered about two hundred and fifty billion galaxies. If each star has ten planets, there are so many planets more than all the words uttered by human beings in the last several million years; probably one hundred thousand planets in our solar system that can probably have life.

Now we are building a lot of big telescopes for astronomy. The current largest telescope is a ten metre telescope located in Hawaii. We think with large space telescopes we can hopefully find life elsewhere, within our neighbourhood and in the near future. When looking for life, we look around for earth-like blue planets (blue for water), medium in size, hovering around. Bigger stars or giant red stars burnout fast as their life time is short. Medium size stars like us survive longer for about a million years and their biological process is lengthy, so there is plenty of time to evolve.

The building blocks of life are carbon and hydrogen. There is plenty of these in the universe found by NASA's Spitzer space telescope developed about twenty years ago, still in space. Life must be around carbon and water base. Life can come in surprises. Look at life on earth? Take a bird, lion, jelly fish, human, snake and a giant tree. To explain a snake to a person from another planet – how do you explain? We have this animal as long as a rod, no hands, can swallow his prey five times bigger than his mouth, can move two feet per second, can kill a person like me in a couple of hours by biting and injecting some proteins allergic to us, etc. So when we look for life, it can be in different forms, but water and carbon base.

Our ancestors, probably two and a half million years ago, never thought we would walk on the moon; escape the gravity of earth; become the second kind of species, not the first generation, etc. What's happening? Scientists are making new life! A couple of years ago, French scientists made an artificial rabbit. They took the glowing fluorescent of a jelly fish and mixed and made a glowing rabbit or a luminous rabbit. Now homosepians are creating life. Many cultures or societies in the East and mostly the West thought only God can create life. Homosepians can play the role of God, too! A question for you!

## VOTE OF THANKS



### **Dr Upali Rajapaksha**

The Conference Chairman,  
KDU International Research Conference 2018

Honourable Secretary to the Ministry of Defence, Mr. Kapila Waidyaratne, Keynote Speaker, Professor Mohan Munasinghe, Guest Speaker, Dr. Sarath D. Gunapala, Tri-service Commanders, Members of the Board of Management of KDU, Your Excellencies of the Diplomatic Corps, Vice Chancellors of other State Universities, Senior Officers of the Tri-forces and the Police, Our most valued invited guests, Academic and Administrative Staff of KDU Distinguished Ladies and Gentlemen.

It is my privilege to propose the vote of thanks on this occasion. An event of this magnitude cannot happen overnight. The wheels started rolling months ago. It required planning and a bird's eye view for detail. I have been fortunate enough to be backed by a team of motivated and dedicated colleagues, who were willing to take on the completion of tasks beyond their comfort zones.

It is with pride I announce that we received more than 573 manuscripts, from local and international authors, and approximately 350 of them are published. Moving with the times, this year's conference offers great opportunities to presenters, such as the ability to deliver presentations via Skype; and to upload Google Scholar in order to generate individual H-indexing citations.

It is with utmost pleasure I announce that we have also given many opportunities to internal and external undergraduates to share their research findings at our conference, as either poster or oral presentations.

On behalf of KDU, or let me call it fraternity of the one and only Defence University of Sri Lanka, I extend very hearty thanks to our Chief Guest, Honourable Secretary to the Ministry of Defence, Mr. Kapila Waidyaratne; for gracing this occasion. The Support we received from the Ministry of Science & Technology and Bank of Ceylon was immense.

It is my pleasure to acknowledge our gratitude to the Guest Speakers, Professor Mohan Munasinghe and Doctor Sarath Gunapala, for sharing with us their findings and opinions. We are all inspired by your great words. You are an enormous pride to our motherland.

My special thanks go to our Vice Chancellor, Deputy Vice Chancellor Defence and administration and Deputy Vice Chancellor Academic, for your consistent guidance throughout this journey.

Ladies and gentlemen, we thank you for being with us this morning.

Have an inspirational and fruitful day!



# THE PROTECTION AFFORDED TO WELL-KNOWN TRADEMARKS IN SRI LANKA: A CRITICAL ANALYSIS

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**Abstract** - A trademark which helps to distinguish goods of one undertaking from that of another is an important stimulus for manufacture of goods and services. In particular when it comes to well-known trademarks, the value attached to the mark exceeds the total value of assets of such an undertaking. A strong protection for these trademarks are required to protect the interest of the owners of these trademarks. The Intellectual Property Act No 36 of 2003 governs the law relating to the protection of both trademarks and well-known trademarks. As a member state to the TRIPS agreement, Sri Lanka is obliged to meet the minimum standards set out in the TRIPS agreement regarding the protection afforded to intellectual property rights in order to enjoy the benefits granted by the agreement. This paper is aimed at answering the questions of, what is the current status of the law relating to the protection of well-known trade marks in Sri Lanka, its international obligations, protections afforded to well-known trademarks through exclusive and additional measures, the limitations of the current system and some possible reforms that could be made. The research is conducted using a qualitative method, where it uses the primary legal sources of the Intellectual Property Act No 36 of 2003, the Trips Agreement and the decided case law. As secondary data, it uses the commentaries given on the relevant sections by reputed authors. The results of the research indicate that, most of the provisions of the IP Act are compatible with the TRIPS agreement. However, the results also indicate that, with regard to the protection of well-known trademarks there are some lacunas, such as unregistered marks not having exclusive rights, non-registrability of sound marks and the non-availability of a single application process for multiple registration in different countries. It is therefore suggested that these lacunas be remedied.

**Key Words:** - Intellectual Property, Trademarks, Well-Known Trademarks, TRIPS, IP Act No 36 of 2003

## I. INTRODUCTION

Alpin<sup>1</sup> explains that, for certain entities, trademarks are their most valuable commercial assets. For an instance, 'Coca Cola' a globally known trademark and it far exceeds the worth either of the company's tangible assets or of the trade secret which is the Coca Cola recipe.

The law relating to trademarks in Sri Lanka is mostly governed by the Intellectual Property Act No 36 of 2003<sup>2</sup> (IP Act). Unregistered trademarks can still be protected by the tort of passing-off or under unfair competition law where 'contrary to honest practices' are outlawed. The IP Act defines a "trademark" as any visible sign serving to distinguish the goods of one enterprise from those of another enterprise<sup>3</sup>. This is a traditional definition of the

function of a trademark. However, it was decided by the Court of Appeal (Approving the decision of the ECJ) in *L'Oréal SA v. Bellure NV*<sup>4</sup> that, "the modern function of a trademark include not only the function of the trade mark, which is to guarantee to consumers the origin of the goods or services, but also its other functions, in particular that of Guaranteeing the quality of the goods or services in question and those of communication, investment or advertising"<sup>5</sup>.

With the expansion of global trade and globalization, a customer will normally come across many brands of the same goods and will have a greater variety to select from. However, this may lead the customer to greater amounts

<sup>1</sup>T Aplin and J Davis, *Intellectual Property Law. Text, Cases, and Materials* (2nd, Oxford University Press, London 2013) 317

<sup>2</sup>Chapters XIX to XXIII (This mainly deals with registered trademarks)

<sup>3</sup>Section 101

<sup>4</sup>[2010] EWCA Civ 535

<sup>5</sup>Per Lord Jacob at Para 27

of confusion in deciding which brand to choose from. This is where the trademark or the trade-name will help the customer to distinguish the goods/services which have brought him/her greater satisfaction from those which have not. A trademark that has greater distinctiveness will help the customer to identify that specific product and “marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character”<sup>6</sup>.

Schechter<sup>7</sup> writing sometime back states that, “the mark actually sells the goods. And, self-evidently, the more distinctive the mark, the more effective is its selling power”. The distinctiveness is the rationale that underlines the law relating to trademarks.

In *Abercrombie & Fitch Co v Hunting Word Inc*<sup>8</sup> the US Federal Court established the ‘Abercrombie Spectrum’ where, it categorized the trademarks in to five different pigeon holes. Fanciful and/or Arbitrary<sup>9</sup> marks were given a greater opportunity of registration; suggestive marks being put on the fence and neither descriptive (unless it has been able to acquire a distinctive character in the market) nor generic terms being afforded much or any opportunity of registration. The Abercrombie spectrum thus can be seen as embedded in the Chapter XX of the Act which deals with the admissibility of marks.

## II. SRI LANKA’S INTERNATIONAL OBLIGATIONS REGARDING WELL-KNOWN TRADEMARKS

Sri Lanka is a member state of both the TRIPS (1994)<sup>10</sup> (The Agreement on Trade-Related Aspects of Intellectual Property Rights) and the Paris convention for the protection of industrial property (1883)<sup>11</sup>. However, Sri Lanka is not a member state to the Madrid Agreement Concerning the International Registration of Marks (1891) or the Protocol Relating to the Madrid Agreement (1995).

Both of the latter agreements deal with the international registration of trademarks where the trademark owner can get his mark registered in several countries via a single application.

If a country is to reap the benefits of global trade, where the developed countries dominate, one must have in place the minimum standards of IP protection laid down by TRIPS.<sup>12</sup> It could be seen that most of the law relating to trademarks in Sri Lanka are TRIPS compatible.

TRIPS agreement in Article 15(1) states that “any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark”. However, this does not require a member state to register every mark that is distinctive. The same Article provides for visual Perceptibility to be a prerequisite for registration. The Sri Lankan Act does require visual perceptibility as a condition for registration of a mark under section 101 which requires all the marks to be an “any visible sign”.

A problem would then arise as to whether or not a well-known trademark which is registered (telle-quelle mark) in a union country<sup>13</sup> which is not a visible sign in a traditional sense is capable of being registered. Article 2 of the TRIPS agreement provides that “in respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).” Since part II of the TRIPS agreement also deals with trademarks, a member state must discharge their primary obligation towards to the Paris Convention. As to the current status of the trademark laws, such a mark would not be capable of being registered in Sri Lanka.

Under Article 6 quinquies of the Paris Convention it is stated that, “where a mark is duly registered in the country of origin (country of origin being a union country), it shall be accepted for registration in another union country and shall not be denied registration except when it, infringes the acquired rights of third parties where the registration is sought, or is lacking in descriptiveness, or it is contrary to the morality or public order”. The sign not being visible is not a ground for denying registration. If and when

<sup>6</sup>Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc [1998] All ER (EC) 934  
<sup>7</sup>FI Schechter, ‘The Rational Basis of Trademark Protection’ [1926-1927] 40 Harv. L. Rev 813, 819

<sup>8</sup>537 F.2d 4 (2nd Cir. 1976)

<sup>9</sup>The IP Act No 36 of 2003 recognizes fanciful and arbitrary marks as being capable of registration under section 102 (3)

<sup>10</sup>Sri Lanka becoming a party to the TRIPS Agreement from its commencement on 01.01.1995

<sup>11</sup>Sri Lanka Accessing on 09.10.1952

<sup>12</sup>A Marsoof, ‘TRIPS Compatibility of Sri Lankan Trademark Law’ [2012] The Journal of World Intellectual Property 51, 51

<sup>13</sup>A country which is a member of the Paris Convention of Industrial Property 1883



a telle-que mark that is not traditional in nature is requested to be registered, Sri Lanka's obligation would not be fulfilled if it denies registration. It could be argued with the Article 2(1) of the TRIPS agreement as it gives the Paris Convention the utmost importance, that, failing to adhere to those standards will result in Sri Lankan law becoming incompatible with the TRIPS agreement regarding the registration of well-known trademarks which are not visible.

### III. WHAT IS A WELL - KNOWN TRADEMARK AND THE PROTECTIONS AFFORDED TO THEM.

The IP Act of 2003 under sec 104 (2) gives a non-exhaustive list<sup>14</sup> consisting of 8 limbs in order to decide whether a trademark is well-known or not (which includes particular facts and circumstances regarding the mark, degree of knowledge and recognition, duration extent and geographical area, successful enforcement of rights and the value associated with the mark). It is in verbatim of the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks.<sup>15</sup> However, the IP Act does not define a 'well-known trademark'.

A suitable definition is also hard to find. The Indian Trademarks Act No 47 of 1999 defines the term "well-known trademark" in section 2 (zg) as "[well-known trade mark], in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services".

In *McDonalds Corporation v Joburger Drive-Inn Restaurant (Pty) Limited*<sup>16</sup> the South African Court held that "the term well-known should be tested on the basis of whether sufficient people knew the mark well enough to entitle it protection against deception or confusion". This could be

adopted in a Sri Lankan context in determining whether the mark is well-known or not.

The IP Act of 2003 does give the protection at the registration stage to a well-known trademark in a negative form. Sec 104 of the Act which in general tries to protect the interest of third parties regarding the registration of trademarks (which are called the relative grounds for admissibility of a mark) in subsection 104 (d) states that, when a trademark that is presented for being registered is "identical with, or misleadingly similar to, or constitutes or translation or transliteration or transcription of a mark or trade name which is well known in Sri Lanka for identical or similar goods or services of a third party" irrespective of the first (well-known) mark being registered or not<sup>17</sup>, the second mark (or the latter mark which is sought to be registered) is to be denied the registration which it seeks.

However, in the case of *coca cola Company v, Pet Packing Ltd*<sup>18</sup> where the defendants used the mark "My Cola" which was challenged by plaintiffs who used the famous mark "Coca Cola" the Court declared that, since coca cola is a very famous mark, a purported mark that is even slightly different from it is distinguishable for the customers as the mark used by the defendants also had a smiling cherubic next to it My Cola mark. This reasoning is however hard to reconcile as it could lead to free-riding on the reputation of another.

However, a problem arises with regard to protection afforded at the registration stage when the subsequent mark is intended to be used for different kinds of goods or services, other than the types of goods and services for which the well-known mark is used for. The Act stipulates that where, if the subsequent mark is to be denied registration in the above mention situation the original mark must be both well-known and registered in Sri Lanka.<sup>19</sup> According to Dr. Karunaratna these subsequent marks are generally acceptable apart for the exceptions which the Act lays down. He states that "where such well-known mark or trade name is registered in Sri Lanka for the goods or services which are not identical or similar to those in respect which the registration of the profound mark has been sought, the profound mark is generally admissible".<sup>20</sup>

<sup>14</sup>D M Karunaratna, Elements of the Law of Intellectual Property Law in Sri Lanka (1st, Sarasavi Publishers , Nugegoda 2010) 227

<sup>15</sup>Case No: 07/2004(3) In the provincial High Court of Colombo.

<sup>16</sup>Section 104 (d) "... or such mark or trade name is well known and registered in Sri Lanka for goods or services which are not identical or similar to these in respect of which registration is applied for, provided in the latter case the use of the mark in relation to those goods or services would indicate a connection between those goods or services and the owner of the well-known mark and that the interests of the owner of the well-known mark are likely to be damaged by such use"

<sup>17</sup>D M Karunaratna, Elements of the Law of Intellectual Property Law in Sri Lanka (1st, Sarasavi Publishers , Nugegoda 2010) 227

<sup>14</sup>Please refer the Attachment 1

<sup>15</sup>Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization (WIPO) at the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO September 20 to 29, 1999

<sup>16</sup>1997 (1) SA 1 Para 38



However, the Article 16(3) of the TRIPS agreement states that, “Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use”.

Article 6bis of the Paris Convention further states that, “the countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods”. Under these provisions the registration of the mark is not a prerequisite for it to be afforded with the necessary protection. Therefore, it can be seen that by requiring the registration of a mark as mandatory for it to be accorded with the protection as provided by the IP Act, the Sri Lankan law is incompatible with the TRIPS regime on this particular aspect.

Where the profound mark is to be used in connection to different goods and services in Sri Lanka, to prevent the profound mark from being registered the well-known mark must be both well-known and registered in Sri Lanka. This may be falling short of the Sri Lanka’s international obligations towards protecting well-known marks as this is neither compatible with the TRIPS agreement or the Paris convention. Neither the Article 16(3) of the TRIPS agreement nor, the Article 6bis of the Paris convention requires registration. In this kind of an instance one may have to resort to the law of unfair competition which is embodied in section 160 of the IP Act of 2003. However, the protection afforded under unfair competition is very limited when compared with the protection afforded to registered trade-marks under the IP Act.

Article 15(3) of the TRIPS agreement allows the members to make registrability dependent on use. However, the IP Act does not require the use of a trademark for it to qualify for registration. However, use may be necessary under the section 104(2) (IV) to prove that the mark is well-known in Sri Lanka. With regard to the above, it can be found that, Sri Lanka has provided a TRIPS plus protection as the IP

Act does not make registrability dependent on use. Article 15(5) of the TRIPS Agreement provides for a mechanism for opposing the registration of marks and the section 111(10)<sup>21</sup> of IP Act enables this obligation to be full filled. Under this section, not only the owner of a mark but any person can oppose the registration of the mark based on the grounds provided in Sections 103 and 104. Therefore, a well-known trademark owner can use this protection to object to any mark that is going to be detrimental for his/her interest. However, this must be done within 03 months from the date of publication of the profound trademark, which is sought to be registered.

#### IV. EXCLUSIVE RIGHTS GRANTED FOR REGISTERED TRADEMARK OWNERS

Under the IP Act of 2003 only the registered owners of a mark are given the opportunity of enjoying the exclusive rights that comes with registration. Rights granted under this are not time bared like patents or copyrights, it runs eternally (based on the eternal protection principle). According to section 121(1) a registered owner has three distinct rights. Which includes, (a) to use the mark (b) to assign or transmit the registration of the mark (c) to conclude license contracts in respect of the mark. According to Dr. Karunarathna ‘use’ in this context embraces a wider meaning. It may mean the right of the owner to affix or apply the mark on such things as his goods, containers, packaging and labels and to use the mark in any other manner in relation to his goods and services. It may also include the right to market the goods via advertisements.<sup>22</sup>

Section 121 (2) (a) enables the registered owner to stop others from using the mark if it is likely to mislead others. “[T]he question whether a mark is likely to mislead the public is a question of fact and a Court is entitled to exercise its own mind on this question in the absence of witnesses, representative of the public, to give evidence on this matter.”<sup>23</sup> The test adopted by Courts in deciding the likelihood to mislead was neatly put in *Thiagarajah v. Majeed*<sup>24</sup> where it was held that “a case of this sort cannot

<sup>21</sup>The section 111(10) provides that “Where any person considers that the mark is inadmissible on one or more of the grounds specified in section 103 or 104 he may, within a period of three months from the date of publication of the application, give to the Director-General in the prescribed form, and together with the prescribed fee, notice of opposition to such registration stating his grounds of opposition accompanied by evidence to substantiate such grounds”.

<sup>22</sup>D M Karunarathna, Elements of the Law of Intellectual Property Law in Sri Lanka (1st, Sarasavi Publishers, Nugegoda 2010) 247

<sup>23</sup>James Fernando v. Officer In charge SCIB Negombo [1994] 3 SLR 35 (SC) at page 40  
<sup>24</sup>(1935) 4 CLW 41

be decided by simply totting up and weighing resemblances and dissimilarities, upon a side-by-side comparison: the issue is whether a person who sees one, in the absence of the other, and who has in his mind's eye only a recollection of that other, would think the two were the same.<sup>25</sup> The Court has also held that “the Court should not compare the two marks meticulously.”<sup>26</sup> Dr. Karunaratna<sup>27</sup> points out that, “this section does not preclude third parties from using the mark or a resembling sign provided (a) the goods or services are not similar or (b) even though the goods or services are similar, there is no likelihood of misleading the public”. In an unreported case<sup>28</sup> a Sri Lankan spice company used the term “McCurrie” for their products and this was challenged by the fast food giants McDonalds as being misleading or likely to mislead the public because of the use of the prefix “Mc”, however, the Courts rejected this contention and held that, since the use of the mark “McCurrie” was here long before McDonalds came and since it did not have any exclusive rights to the prefix “Mc” no harm has been caused.

The registered owner is given a broader protection under section 121 (2) (b), where the third parties are precluded from using the registered mark without a just cause and in conditions likely to be prejudicial to the interest of the registered owner. This is a sweeping provision which can help the registered owner to protect his interest in peculiar situations. As Dr. Karunaratna points out “section 121 (2) (b) is particularly competent to counter the use of a registered mark or a sign similar to such a mark as a domain name”<sup>29</sup>. However, for a particular mark to enjoy these rights the registration of the mark is mandatory and even well-known marks which are not registered would not be capable of enjoying these rights. Accordingly, Dr. Karunaratna states that “[T]he Act specifically recognizes and protects only the rights of the owners of registered marks. The exclusive rights to a mark under the Act can also be acquired only by registration”<sup>30</sup>

It must be also noted that the section 121 (4), which declares that the ‘Courts shall presume the likelihood of misleading the public, where a person uses a mark identical to the registered mark for identical goods or services’ is compatible with the Article 16(1) of the TRIPS agreement which states that “in case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed”.

## V. ADDITIONAL PROTECTION AFFORDED TO TRADEMARKS

An owner of a trademark or a name is also able to protect his/her interest through the law relating to unfair competition and the action of passing-off. The section 160 of the IP Act deals with the law relating to unfair competition law and, undisclosed information. The main connection between unfair competition law and trademarks is the hindering of free-riding on the reputation of another. This was neatly put in *L'Oréal v. Bellure*<sup>31</sup> where the Court stated that “free-riding is to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark”.

Section 160 (1) (a), declares that “any act or practice that is contrary to honest practices shall constitute an act of unfair competition”. The wording of this section, clearly suggest that intention, knowledge or any other similar element on the part of the defendant [mens rea] is not required for [imputing] liability.<sup>32</sup> Accordingly, the interests of an unregistered mark owner could be protected under this section.<sup>33</sup> Section 160 (1) (b), clearly states that, the provisions of this section shall apply independently of and in addition to other provisions of the Act. Therefore, it is clear from the wording of the section that, these protections are available for any type of intellectual property in addition to the exclusive rights that a particular type of an intellectual property may enjoy.

Dr Karunaratna opines that, “due to the extremely complicated nature of commercial and industrial activities, it is hard to define the phrase ‘contrary to honest practice’ in this context”<sup>34</sup>. Fernando J, in *Sumeet Research and Holdings v. Elite*<sup>35</sup> Radio held that, “what is meant by contrary to honest practice entails something much more than existing legal obligations already recognized by law”. In *M.D Gunasena & Co. Ltd v. Sri Lal Priyantha*<sup>36</sup> the plaintiffs were the publishers of the newspaper “දවස” and it was a registered mark. The defendants used the mark “ඉඳි දවස” on their newspaper and the Court held since the mark “දවස” was a familiar mark with the people who read newspapers, the purported mark used by the

<sup>25</sup>Ibid atpage 42

<sup>26</sup>Viacom International Inc v. Maharaja Organization and Others [2006] 1 SCL 140 (SC)

<sup>27</sup>D M Karunaratna, Elements of the Law of Intellectual Property Law in Sri Lanka (1st, Sarasavi Publishers , Nugegoda 2010) 249

<sup>28</sup>McCurrie v. McDonalds (Found on the Sudath perera Associates Web page a case that they have handled)

<sup>29</sup>Ibid page 250

<sup>30</sup>Ibid page 272

<sup>31</sup>C-487/07 Judgment of 18th June 2009

<sup>32</sup>Sumeet Research and Holdings v. Elite Radio [1997] 2 SLR 393 (SC)

<sup>33</sup>Ibid

<sup>34</sup>D M Karunaratna, Elements of the Law of Intellectual Property Law in Sri Lanka (1st, Sarasavi Publishers , Nugegoda 2010) 323

<sup>35</sup>[1997] 2 SLR 393 (SC)

<sup>36</sup>43/2003(3), K.T. Chithrasiri, Decisions on Intellectual Property Issues (Vishwaleka Publishers 2005)136-141

defendants were confusing or likely to confuse the public and that, the act of the defendants amounted to an act of unfair competition.

Section 160 (2) taken as a whole preclude third parties from engaging in activities which cause or is likely to cause confusion with regard to that particular activity or industry where the innocent party is going to be adversely affected. Under unfair competition, unregistered marks can be protected against these kinds of activities. Section 160 (3) deals with activities which could cause damages or are likely to cause damages to the goodwill and reputation of an enterprise. This is a useful protection with regards to the protection of well-known trademarks as they enjoy a higher amount of goodwill and reputation.

The use of a well-known mark registered or not, by a third party without the authorization of its owner results in confusion as to the source of the goods or services concerned. Thus, the unregistered well-known marks are a clear beneficiary of these provisions. Under the section 160 (3) (b), it specially recognizes the concept of dilution. The Act defines dilution as “lessening of the distinctive character or advertising value of a mark, trade name or other business identifier, the appearance of a product or the presentations of products or services or of a celebrity or well-known fictional character”<sup>37</sup>

However, the concept of dilution has its critics, and Farley<sup>38</sup> argues that “the main problem with dilution law is that it provides a remedy without a supportable theorization of the harm”. However, DR. Karunaratna argues that “anti-dilution law is very helpful with regards to the protection of unregistered trademarks and especially with regards to the protection of well-known trademarks”<sup>39</sup>

The law relating to the tort of passing off also afford unregistered (or even registered) owners of a mark to protect their interest. According to Fleming<sup>40</sup> “it is passing-off, for him to claim that his goods are yours.” The requirements for successfully implementing an action of passing-off was laid down by Lord Oliver in *Reckitt & Colman Products Ltd v Borden Inc*<sup>41</sup> where, his Lordship held that, “first he [infringed person] must establish

a goodwill or reputation attached, second, he must demonstrate a misrepresentation by the defendant to the public, third, he must demonstrate that he suffers or that he is likely to suffer damage”.

However, there is a great debate as to whether the law relating to passing-off should be abolished since the law relating to unfair competition can cover the ambit of the former. Dr. Karunaratna<sup>42</sup> is of the view that, ‘the code of Intellectual Property Act of 1979 and the Intellectual Property Act of 2003 has not expressly abolished the action of passing-off. Consequently, it appears that both the common law remedy of passing of and the statutory remedy under the unfair competition co-exist in Sri Lanka’.

In general, the law relating to unfair competition deals with the situation where the third party wrongfully misappropriates (a mark with regards to trademark law) and uses it to the prejudice of the owner. “Unfair competition’ is an extension of the doctrine of passing off, or, possibly, is a new and independent cause of action. It consists of misappropriation of what equitably belongs to a competitor<sup>43</sup>”. However, in an action of passing-off the third party is misrepresenting his goods as of someone else. Hence it can be said that the ambit and the protection afforded under unfair competition law is broader than the protection afforded under an action of passing-off.

## VI. CIVIL AND CRIMINAL RESPONSIBILITY

### *Civil Proceedings*

Only an efficient and cost-effective enforcement mechanism makes the rights of the registered owner of a mark practically meaningful<sup>44</sup>. Under civil litigation it would be imperative to look at the section 170 of the Sri Lankan IP Act. Under section 170 (1) the person who is granted with the rights according to the Act may ask the Court if he/she “proves to the satisfaction of the Court that any person is threatening to infringe or has infringed his rights or is performing acts which makes it likely to infringe a right granted under this Act, to restrain that person from doing such and act”. A Court can in such circumstances issue an injunction to stop the infringer

<sup>37</sup>Intellectual property Act No 36 of 2003, Section 160 (3) (c)

<sup>38</sup>C H Farley, “Trademark Dilution Law: What’s Behind the Rhetoric?” [2006] Fordham Intellectual Property, Media & Entertainment 101, 110

<sup>39</sup>D M Karunaratna, Elements of the Law of Intellectual Property Law in Sri Lanka (1st, Sarasavi Publishers, Nugegoda 2010) 331

<sup>40</sup>J G Fleming, The Law of Torts (8th, The Law Book Company, Sydney 1992) 714

<sup>41</sup>[1990] 1 All E.R. 873

<sup>42</sup>D M Karunaratna, Elements of the Law of Intellectual Property Law in Sri Lanka (1st, Sarasavi Publishers, Nugegoda 2010) 344

<sup>43</sup>Hexagon Pvt Ltd. v Australian Broadcasting Commission (1975) 7 ALR 233 13

<sup>44</sup>D M Karunaratna, A Guide to the Law of Trademarks and Service Marks in Sri Lanka (2nd, Vishva Lekha Publishers, Ratmalana 2007) 204

from continuing the infringing act or prevent the infringer from doing any act which may lead to an infringement of recognized rights or another. Section 170 specifically deals with the rights recognized under section 121 (1) of the Act. According to the wording of the sections 121 (1) and 170 only a registered owner can sue the defendant.

Under section 170 (1) the Court can issue (a) injunctions (b) damages (c) or any other relief as the Court may deem just and equitable. An injunction may be interim or permanent. Even a *mareva* type injunction maybe available<sup>45</sup>. The *mareva* injunction is issued to restrain a defendant living outside the jurisdiction of the Court from removing the assets within the jurisdiction<sup>46</sup> to defeat a claim. Under some circumstance according to section 170 (4), the infringer may be required to reveal the persons whom he has received the alleged goods from. Under section 170 (6) the Court is authorized to make ex-parte interim orders “where any delay is likely to cause irreparable harm to the rights holder or where there is a demonstrable risk of evidence being destroyed”. This may lead the Court to issue an Anton Piller order. This order is granted ex-parte allowing the plaintiff to inspect the premises of the defendant and seize, copy or photograph the material relevant to the alleged infringement<sup>47</sup>.

It is also important to note that the Act has introduced provisions with regard to ‘statutory damages.’ The affected owner of a registered mark in certain situations may be benefitted under this scheme where he is unable to prove the actual damage. Section 170 (10) deals with this issue. The minimum is 50,000 rupees and the maximum is 1 million.

## VII. CRIMINAL PROCEEDINGS

Sometimes the infringement of a mark may have adverse effects on the public at large as well. In such a situation, it would be advisable to have penal sanctions in order to protect those interests. Chapter XXXVIII of the IP Act of Sri Lanka deals with this particular aspect. Section 184 deals with the infringement of marks. Any person who willfully infringes the rights of registered owners, assignees or licensees, is deemed guilty of an offence. Here the term ‘willfully’ includes both the actus reus and the mens rea of the offence<sup>48</sup>. Section 185 deals with the making of

false representations regarding the mark and section 190 concerns with the forging of the marks. Section 197 empowers the Magistrate to issue search warrants. Under this section the magistrate can (a) issue summons and warrant for arrest (b) issue warrant for seizure, and (c) to forfeiture the goods and (d) dispose the forfeited goods. The criminal proceedings could be carried out either by a private plaintiff and/or by police prosecution. This is the situation with regards to all the offences in the IP Act.

Sudath Perera Associates a renowned law firm in Sri Lanka reports that<sup>49</sup>, there have been several cases where trademark violations have resulted in criminal proceedings being brought against the infringers. It included the use of Donald Duck and Mickey Mouse on stationary items which are registered character marks of Walt Disney. Infringing the ‘Victoria’s Secret’ trademark, which is the largest American retailer of lingerie on counterfeit ladies’ undergarments.

## VIII. LIMITATIONS ON THE RIGHTS CONFERRED

Section 122 lays down two main restrictions on the registered owner of a mark. Accordingly, under section 122 (a) bona fide third parties are not precluded in certain situations from using the mark if it does not result in customers getting confused. And using the mark on lawfully manufactured goods, provided that they have not undergone any change, is allowed under section 122(b). The doctrine of exhaustion of rights, also act as a limitation. Under this doctrine when goods are placed on the market by the owner (of the particular intellectual property right) or with his consent, such owner loses the ability to deploy the IP rights which has been used in the goods<sup>50</sup>.

Under section 122(b) of the IP Act, Sri Lanka only recognizes the national exhaustion of IP rights. It does not recognize International exhaustion<sup>51</sup>. Under unfair competition law even a registered owner of a mark is precluded from engaging in dishonest trade practices or use. These rights are also limited territorially, meaning that it only has effect within the boundaries of Sri Lanka. Under section 170 (2), a defendant who is sued for infringement, can still argue on the validity of the mark and if successful

<sup>45</sup>Ibid page 207

<sup>46</sup>See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (HL).

<sup>47</sup>*Anton Piller KG v. Manufacturing Processes Ltd* [1976] 1 All ER 779 (HL)

<sup>48</sup>D M Karunaratna, *A Guide to the Law of Trademarks and Service Marks in Sri Lanka* (2nd, Vishva Lekha Publishers , Ratmalana 2007) 233

<sup>49</sup>Available at [http://apaa2014.com/download/meeting\\_material/anti\\_counterfeiting\\_committee/SRI%20LANKA%20APPA%20Anti-Counterfeit%20Report%202014.pdf](http://apaa2014.com/download/meeting_material/anti_counterfeiting_committee/SRI%20LANKA%20APPA%20Anti-Counterfeit%20Report%202014.pdf)

<sup>50</sup>D M Karunaratna, *Elements of the Law of Intellectual Property Law in Sri Lanka* (1st, Sarasavi Publishers , Nugegoda 2010) 257

<sup>51</sup>Ibid page 260

avail himself of the liability. And even a registered owner of a mark cannot use that mark for passing-off. It could also be argued that since the 1978 Constitution of Sri Lanka under Article 14(g) amongst recognize the right to lawfully “trade” as a fundamental right, the limitations applicable to section 14(g) stated in Article 15(7) are also applicable to IP rights in general.

In *Ceylon Tobacco Company PLC v Hon Maithripala Sirisena, Minister of Health and others*<sup>52</sup> while recognizing the trademark owner’s right to use the mark, the Supreme Court held that, the right was not absolute. In this case the relevant minister made a regulation to the effect that 80% of the cigarette box cover should contain of pictorial health warnings regarding smoking. The Court held that this should be 60% as the owner also has the right to use the mark. It could be said that the Court struck a good balance between trademark owner’s rights and public health.

## IX. CONCLUSION

Regarding Sri Lankan law, most provisions are TRIPS compatible and are in conformity with the Paris Convention. Where a registered well-known mark (or any registered mark) is used by a third party to similar goods and services, the likelihood of confusion is presumed and the rightful owner is discharged with the burden of proof<sup>53</sup>. Since the Sri Lankan law does not recognize the international exhaustion, parallel imports of goods could be restricted by the rightful owner of a mark.

If the mark is registered, it enjoys many of the rights that unregistered marks do not enjoy and the registration process laid down under chapter XXI is easy and convenient. Since Sri Lanka also follows the Nice categorization for registering marks for goods and services, a single mark is capable of being registered under different categories. In particular both civil and criminal sanctions are imposed on an infringer as well. Even if a mark is unregistered, it could be protected under the umbrella concept of unfair competition or in certain instances under the law relating to passing-off.

However, there are many flaws in the system as well. First, unlike in India the term ‘well-known mark’ is not defined under our Act. Secondly, there are so many restrictions on the admissibility of a mark and especially non-traditional

marks are not allowed to be registered. This could be detrimental to un-traditional well-known marks as only registered marks are granted with exclusive rights which the unregistered marks do not enjoy. Thirdly, since Sri Lanka is not a member to the Madrid Agreements<sup>54</sup>, no owner of a mark can get his mark registered through a single filing of an application for multiple countries. This is detrimental to the well-known trademark holders of Sri Lanka as well. In Sri Lanka concepts such as trans-border reputation and honest and concurrent use are also not well recognized. Therefore, under this kind of a situation it would be interesting to see the approach that a Sri Lanka Court is going to take.

On a general comment, it would be quite advisable for an owner of a well-known trademark to register his mark in Sri Lanka, as it is the only way available for acquiring the exclusive rights regarding the use of a trademark which is of the most importance. While there might be a one-way or the other to bring a claim against infringements, it would be better to have the full protection given to well-known trademarks irrespective of them being registered or not. In addition, on a practical note when asked from the National Intellectual Property Office (NIPO), regarding the role they play with unregistered well-known trademarks, it was said that “they are treated like all the other unregistered trademarks; they are not accorded with any additional protection<sup>55</sup>”. There are always going to be sharp differences between law and practice, when this is the case one must not sleep on one’s rights, at times positive steps are needed in order to protect them and registering your trademark is one such occasion.

From the above, it can be concluded that, the protection afforded to well-known trademarks in Sri Lanka could still be developed to cater for the protection of unregistered well-known trademarks. Even though the existing provisions are mostly TRIPS compatible, more protection should be afforded to well-known trademarks as they serve the purpose of enabling the respective customers to enjoy quality projects without the need of exhausting their energies to find the best products.

<sup>52</sup>CA 336/2012 (Writ), Court of Appeal, Sri Lanka, 12 May 2014

<sup>53</sup>Section 121 (4) of the Act.

<sup>54</sup>Madrid Agreement Concerning the International Registration of Marks (1891) or the Protocol Relating to the Madrid Agreement (1995)

<sup>55</sup>This was a statement made by Mrs. Priyanthi an officer at NIPO, when interviewed regarding the protection of well-known trademarks.



# LEGAL PROTECTION OF PRODUCTS IDENTIFIED BY GEOGRAPHICAL INDICATIONS HAVING WEAKER LINK WITH THE ORIGIN

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**Abstract** - The link between the product and the place of origin gives the product a distinguishable identity. Nevertheless, the strength of the link based on human factors and natural factors of the geographical origin differs from one product to another. This research firstly aims to examine whether this link between the product and the origin has been taken into account by the International Conventions when granting protection. It is also aimed to analyse how the jurisdictions of European Union, India and Sri Lanka have granted protection for Geographical Indications (GIs) when the link between the product and the origin varies. The research further aims at evaluating whether both national and international legal frameworks should grant the same protection for GIs disregarding the strength of the link to origin. In achieving the objectives, the research mainly followed the black letter law approach, while empirical data analysis was conducted in order to glean the practicality of recognizing GIs with a weaker link to origin. As evidenced by the TRIPs Agreement, granting of protection is based on an irrational basis which disregards the link to the origin. The EU law even though mandates two types of GIs based on the link to origin, the two definitions are not considered in granting protection. Notwithstanding the recognition of products with a weaker link to the origin by Indian and Sri Lankan jurisdictions, it does not make any sense as it has not been taken into account in granting protection. Hence, it is suggested in this research that a product's link to the origin must be considered in determining the level of protection.

**Keywords** - Geographical Indications, Human Factors, Natural Factors, Link to Origin

## I. INTRODUCTION

Geographical Indications (GI) could be identified as indications which identify a good as originating in a region where a given quality, reputation or other characteristic is essentially attributable to its geographical origin (TRIPs, art. 22.1). The uniqueness of GIs is created with its link to the geographical territory. GIs not only describe where it comes from. Rather it mirrors the human factors and natural factors of the place it originates. Natural factors could be understood as biological or ecological factors which include soil, climate, source of raw materials and other environmental factors. Human factors could be understood as skills, practices and producers' know how. However, the strength of the link varies from one product to another creating an impact on the product's relationship to the geographical origin. Even though agricultural products are dealt with natural factors to a larger extent, it is not same with the handicrafts. They are composed mostly of human factors alone or a combination of human and natural factors where human factors are dominant. In the case of products which rely only on human factors alone of the defined geographical area, pose the question whether they can be recognized as valid GIs. The second part of this paper will discuss the methodology used in carrying out the research and the third part will examine the international legal framework in relation to the products with weaker link to the origin. The fourth part analyses the EU, Indian and Sri Lankan legal frameworks. The fifth section describes the recommendations, which will be followed by the conclusion in the sixth chapter.

## II. METHODOLOGY

This research was carried out mainly following the black letter law approach. To that end, qualitative data was used.

Statutes, judicial decisions and international conventions were used as primary qualitative data. As secondary qualitative data legal text books, legal treatises, journal articles and conference proceedings were utilized. The socio-legal approach was also followed in this research, since the researcher engaged in identifying whether the products which link to the geographical origin by way of human factors confer quality, reputation or characteristics to the product. In doing so, key informant interviews were conducted with the producers of potential GIs, legal academics, legal practitioners and administrative bodies. The main purpose of gathering empirical data was to analyse the impact of the current international and domestic legal frameworks in recognizing the GIs with weaker link to its origin. The comparative analysis was built based on the reason that the jurisdictions of EU and India have paved the way in recognizing the GIs with a weaker link to the origin.

### III. GEOGRAPHICAL ORIGIN OF GIS – INTERNATIONAL LEGAL FRAMEWORK

Products known as GIs more often travel beyond national boundaries. Therefore, extraterritorial protection for GIs became important to the world. The following paragraphs will discuss how four such international conventions define GIs.

Paris Convention of 1883 (as revised on December 14, 1900, on June 2, 1911, on November 6, 1925, on June 2, 1934, on October 31, 1958, and on July 14, 1967, and as amended on September 28, 1979) for the first time in the history, included ‘indications of source (IS) or appellation of origin (AO)’ – the concepts which enclose the idea of GIs, as its subject matters. Nevertheless, the Convention did not define ‘indication of source or appellation of origin’ Therefore, despite the fact that the international recognition has been given for IS or AO, it has been made difficult to identify the relationship between the product and the place of origin due to the non-availability of the definition.

The Madrid Agreement of 1891 (as revised on June 2, 1911, on November 6, 1925, on June 2, 1934, and on October 31, 1958 II. Additional Act of July 14, 1967) which came into force subsequent to the Paris convention of 1883, does not define IS even though it recognizes IS. Rather it has implied certain elements which make the parts of IS. Article 1.1 of the Agreement states,

“All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries”

In terms of the ideas expressed in this Article, it could be argued that the IS is an ‘expression or sign used to identify that a product originates in a particular place without reference to any element of quality or reputation’ (Addor & Grazioli, 2002). Like GIs, IS also describes that the product comes from a specific place. Nonetheless, it does not describe the qualities, reputation or characteristics that arise as a result of the geographical origin. In such a way, IS differs from GIs and stands as a broad concept than GIs. The IS only indicates the place which the product comes from. The examples for IS include the name of the country or mentioning such as ‘made in’.

The definition of AO was first introduced by the Lisbon Agreement of 1958 (As revised at on July 14, 1967, and as amended on September 28, 1979) similar to the French interpretation. AO is defined in Article 2 as ‘geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors’ Unlike the IS which was expressed under the Madrid Agreement, the Lisbon Agreement explains the relationship between quality, characteristics and the geographical environment. This definition also influenced the TRIPs definition of GI (WIPO, 2002). Unlike the IS which required the description of place of origin to qualify as an AO, the required strength of the link to the origin of products is stringer. To meet the requirements of an AO, firstly the appellation must be a name of a specific place. Next the quality or characteristics must arise due exclusively or essentially to the geographical environment, including human factors and natural factors. Due to the essential blend of human and natural factors, the definition under the Lisbon Agreement is stricter concerning the strength of the link (Marie-Vivien, 2013).

As evidenced by artisanal products and their registration, the distinguishing link has been created by human skill and local environmental conditions which have demonstrably shaped the product (Gangjee, 2016). However, the wording of the definition which includes ‘exclusively or essentially’ does not give rise to the meaning that the applicant must establish that the product is exclusive; which means that the product is unique to the place it originated in terms of natural science (Gangjee, 2016).

In this regard the Italian Supreme Court interpreted 'exclusively or essentially' as requiring product only available in the designated place alone. In the case of Budweiser (Budweiser, 2003) the issue arose over claiming exclusive rights to 'Budweiser' and 'Bud' for lager. The dispute was between US brewery and heuser-Busch (A) and the Czech state-owned Budějovický Budvar Corporation (B). The well-known unregistered marks 'Budweiser' and 'Bud' were challenged by B based on the Lisbon registration it possessed. The Supreme Court held that the appellants who were the registered owners of 'Budweiser' and 'Bud' did not satisfy the 'milieu géographique' for 'Budweiser'. The court came to such a decision, despite the fact that water, hops, barley and malt of Bohemia that are used for the production of beer carry excellent quality and possess specific characteristics. The court held that this does not give rise to the fact that

'[the] taste, colour and look of Bohemian beer derive exclusively and exactly from complex environmental conditions (climate, soil, etc.), unrepeatable in another place and considered a decisive factor, nor from complex manufacturing and production techniques that are not (or not especially) feasible in different environments; this does not mean that the natural and human factors are so closely associated to the environment that they are necessary influences on the product to render it absolutely unique and unrepeatable elsewhere' (Budweiser, 2003).

In another dispute between the same parties the Civil Court of Lisbon decided that 'Neither the raw materials, nor the manufacturing method are influenced by natural or human factors existing only in a determined place or exclusively or essentially related with that place or area. Therefore, it is perfectly possible to manufacture beer with the same qualities and characteristics in different geographical places and areas (Real, 2005).

The Strasbourg Court also decided that for the reason that beer intrinsically was an industrially produced commodity and its sensory or analytic properties could be replicated in different locations around the world, no beer could qualify as an AO (Krnenbourg Brewis v. Budějovický Budvar Národní Podnik, 2004).

The above discussion reveals that the interpretation given for AO by the courts is narrow. This leads to the question whether this is what was intended by those who signed up the Lisbon Agreement. Dev Gangjee suggests that drafters did not intend to require that physical product could be uniquely found in the designated place

by the term 'exclusive or essential'. He argues that what was required was an apparent link among the human and natural geography which essentially causes product's characteristics or distinctive qualities (Gangjee, 2016).

In contrast, the TRIPs Agreement of 1994 encompasses a broad definition for GIs. Before the TRIPs, the term GI was not recognised by an international agreement. The TRIPs Agreement Article 22.1 defines GIs as 'indications which identify a good as originating in a region where a given quality, reputation or other characteristic is essentially attributable to its geographical origin.' This definition is broader than the concept of AO which was defined under the Lisbon Agreement. It is evident that this definition includes the criterion of reputation which means that whenever the link between the product and the place causes only for the reputation but not for the quality or characteristics, still the product qualifies as a GI. Moreover, the terminology of 'geographical origin' also leads to mean that the combination of human factors and natural factors are no longer mandatory for a product to become a GI (Marie-Vivien, 2013).

The designing history of the TRIPs Agreement suggests that the more restrictive condition of requiring human factors and natural factors did not receive consensus among the old world and new world (GATT, 1988). However, the EU regulation recognized the products with weaker link prior to the establishment of the TRIPs Agreement. Therefore, the drafting history will be analysed under the EU law.

Despite the fact that TRIPs Agreement has established a definition to include the products which are not necessarily linked with natural factors, it grants two types of protection to the products by creating a discrimination among the types of products. This paper does not intend to discuss the two types of protection granted for products. Rather it argues that providing special protection for wines and spirits in terms of Article 23.1 of the TRIPs Agreement is meaningless where the same level protection has been granted for GIs disregarding the link to the origin.

#### IV. GEOGRAPHICAL ORIGIN OF GIS - THE LEGAL FRAMEWORK OF EU, INDIA AND SRI LANKA

As mentioned in the previous section, it is important to analyse first the recognition of GIs with weaker link to the origin under the EU law. This discussion will be followed by the Indian and Sri Lankan law.



### A. European Union

An extensive legislation for the protection of GIs was first introduced by the Council Regulation No. 2081/92 on the protection of geographical indications and designations for agricultural products and food stuffs. However, due to the contradictions with the TRIPs Agreement, Council Regulation No. 510/2006 was introduced. Later with the need to develop agricultural sector, Council Regulation No. 1151/2012 was brought.

The EU Regulation contains two definitions of subject matter; namely, Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI). Under the Regulation No. 1151/2012, PDO is defined as a name of an area where the quality or characteristics of the product are essentially or exclusively due to a particular geographical environment including natural and human factors and the production steps which take place in the defined geographical area (Article 5.1, TRIPs Agreement). PGI is defined as a name which identifies a product originating in a specific area which possesses a given quality, reputation or other characteristic essentially attributable to its geographical origin and at least one of the stages in the production which takes place in the defined geographical area (Article 5.2, TRIPs Agreement).

The requirements under the PDO are stricter than that of PGI. To qualify as a PDO, the qualities or the characteristics of the product have to be an essential or exclusive result attributable to its geographical environment. This link to the geographical environment was also a requirement under the Lisbon Agreement which defined AO. Moreover, for PDO all production steps should take place in the defined area where for PGI the minimum requirement is at least one step of the production should take place in the defined area. Additionally, for PGI the link to the origin may also arise due to the reputation. The reputation option of PGI is a nod towards the qualified IS recognised by German unfair competition law (Gangjee, 2016).

The cases decided by the ECJ suggest that only PDO received recognition as a legitimate category of GI during the period between 1970s and 1980s. The case of *Commission of the European Communities v. Ireland* ([1982] ECR 4005) and *Apple and Pear Development Council v. KJ Lewis Ltd* ([1983] ECR 4083) are two such examples which made doubt over labelling them as IS and considered them as restricting free transfer of goods. The IS which were based on reputation were not considered as an exception to the free movement of goods principle. Only

AO was considered as an exception to the principle (Wyatt, 1975). However, there is evidence to say that the later cases have recognized IS despite the fact that there was no terroir-based link. The court held that indication of provenance 'may nevertheless enjoy a high reputation ...' (*SA v. LOR SA and Confiserie du Tech SA*, 1992). According to Bier this situation led to the implementation Regulation 2081/92 which understood that AO does not suffice (Bier, 1994).

During the European Parliamentary debates, Germany came up with the proposal of a category which includes all geographical names. Nonetheless, at the negotiation level, they accepted PGI as an alternative. Later, the ECJ also established that the purely reputational link is a satisfactory basis to recognize PGI (*Bavaria NV, Bavaria India Srl v. Bayerischer Brauerbund eV*, 2009). EC became the driving force behind the GI provisions in the TRIPs (Gangjee, 2016).

The above discussion shows that subsequent to the EU recognition of the products which encompass weaker link to the place of origin as GIs, the TRIPs Agreement also has recognized a definition which combines both PDO and PGI.

As evident from the cases decided before the European Court of Justice, there is a flexible relationship between the product and the geographical origin. The case of *Spreewälder* reveals that notwithstanding all the raw materials are sourced from outside the region, since the production or process takes place in the defined geographical area, the product is given GI status (*Carl Kühne and Others v. Jütro Konservenfabrik GmbH & Co. KG*, 2001). However for PDO, the court has held in several cases that even packaging creates an imperative part of processing and therefore if it is not done accordingly, it may damage the quality and reputation of Parma ham (*Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd*, 2003).

Despite the fact that EU law identifies two types of GI, one layer of protection has been recognized for both types of GIs. Hence, the distinction between PDO and PGI is important only for labelling which ultimately passes the message to the consumers about the strength of relationship between the product and the geographical origin.

## **B. India**

As a more effective legal means to protect GIs, India adopted the Geographical Indications of Goods (Registration and Protection) Act of 1999 (hereinafter GI Act). The Indian economist Srivasta states that bringing of GI Act was an implementation of the minimum requirements of the TRIPs Agreement (Srivasta, 2003).

The Act under section 2(1) provides the definition of GIs in relation to goods

‘an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.’

While corresponding to the definition of GI under the TRIPs Agreement, the GI Act includes AO, European PDO and PGI as well, nonetheless it excludes IS. The wording used also suggests that the Act recognizes GIs similar to European PGI which is however limited to manufactured goods (Section 1(3) (e), GI Act 1999 of India). In terms of section 1(3) (e) of the Act, in the case of manufactured goods, to qualify as a GI ‘one of the activities of either the production, processing or preparation has to take place in the territory’.

Unlike the EU law, the GI Act of India extends its protection to non-agricultural products as well. The registered GIs in India shows that the Act has allowed for the GIs with weaker link to the geographical origin as well.

The Alleppey Coir (this designation is used on carpets and other goods manufactured out of coir yarn spun from coir fibre extracted from coconut husk) does not specify where the coconut originated. Alleppey is only the place where the professional weavers live (Marie-Vivien, *The Protection of Geographical Indications in India : A Perspective on the French and European Experience*, 2015). The wool used for Kahmir Pashmina is completely from Ladakh region. Hence, the product’s link to the origin is created through the traditional spinning and weaving knowledge. Moreover, in terms of the specification of Chanderi sari mentions that silk yarns come from China or Korea and cotton yarns

from south Indian town (Marie-Vivien, *The Protection of Geographical Indications in India : A Perspective on the French and European Experience*, 2015). In the case of Kancheepuram silk, the weavers are originally from Andhra Pradesh. They have migrated to such a place 400 years ago at a time when the village was swept away by the sea. Also, there is evidence that golden lace used for sarees is also brought from Gujarat. Therefore, the validity of the GI is created by way of historical depth of the localisation of the product (Marie-Vivien, *Protection of Geographical Indications for Handicrafts or How to Apply the Concept of Human Factors or Natural Factors*, 2013).

The above GIs registered in India demonstrate that India has paved the way for the registration of products where the natural factors are lacking to create the product’s link to the geographical origin. This situation is similar to PGI under the EU law.

Nonetheless, unlike the EU law, Indian law does not provide for two different definitions to recognize GIs. Also disregarding the steadiness of the link to the origin, Indian GI Act provides the same protection for all types of products. This scenario could be understood as providing a means to enhance the rural development in India while identifying the disadvantaged groups such as craftsmen and producers of labour intensive small businesses.

In answering the question whether the products based on know-how alone could be entrenched to a particular geographical origin, Delphine Marie-Vivien and Estelle Bienabe lay down several explanations. Firstly in the instances where the environment influence the know-how. Next when the know-how has been historically rooted with the geographical origin while conserving the quality. This is explicit in the Indian caste system where the specific groups have been skilled since ancient time for a precise activity which passes down from generation to generation. (Marie-Vivien & Bie, *The Strength of the Link to the Origin as a Criterion*, 2012) Despite the fact that such GIs exhibit a link to the origin, the link is weaker than the GIs based on the natural factors. Therefore, it could be suggested to recognize two levels of protection based on the strength of the link to the origin.

## **C. Sri Lanka**

The main legal instrument which applies to GIs in Sri Lanka is the Intellectual Property Act No. 36 of 2003. The Act defines GIs same as the TRIPs Agreement. According to section 101 a GI is an ‘indication which identifies any

good as originating in the territory of a country, or a region or locality in that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

The definition of GIs in Sri Lanka too suggests that there is no limitation to recognize GIs with a weaker link to the origin. Therefore, even at a time the product is solely based on human factors, still the product will receive the GI tag. Therefore, a case arisen before the court cannot be rejected recognizing the product as a GI for the reason of a weaker link. In addition to the well-recognised GIs such as 'Ceylon Tea' and 'Ceylon Cinnamon' which receive its uniqueness mainly as a result of the environmental factors, there are a number of potential GIs which are based on know-how and human skills. In the case of Ambalangoda masks it is evident that the uniqueness relied on the traditional methods of production passed down from generation to generation. Moreover, Beeralu lace making which is practised by mostly the women in Galle relied upon the human skills known by a limited community. Therefore, even though Sri Lanka does not have registered GIs with weaker intensity to the origin due to the absence of an implemented GI register, it has the potential GIs which could be emerged with a weaker link. However, unlike the TRIPs Agreement, Sri Lankan GI law does not discriminate among the products in granting protection. Rather it even goes beyond the TRIPs agreement and awards special protection given for wines and spirits under TRIPs, for all products. Nevertheless, it creates the question whether the products that are solely connected to the geographical origin via human factors are also entitled for the same protection as the products with more strong intensity to the origin with natural factors alone or with a combination of human factors and natural factors. Therefore, two definitions as in EU with separate scope of protection could be suggested.

## V. RECOMMENDATIONS

As evident above, the question is not whether the products having weaker link to the geographical origin must be considered under the purview of GIs, but whether same protection must be granted for all GIs disregarding the strength of the link to origin.

The division of wines and spirits and other products created by the TRIPs Agreement is based on no justifiable rationale without even considering the intensity of the linkage between the product and the origin. Therefore, wines and spirits which possess a weaker link to the origin

are even entitled for the special protection granted by the TRIPs Agreement. It could be proposed that the level of protection under the TRIPs should be based not on the type of the product, but on the link to the origin.

In Europe even though two types of GIs have been recognized, the protection granted for both types is the same. Hence, the products with weaker link to origin also acquire the same level of protection. The analysis shows that recognition of two stages of protection for two types of GIs only passes the message to the consumers about the intensity of the product's link to the origin but does not provide any justice to the producers of the products with stronger link. Hence, protection based on PDO and PGI could be suggested in granting the protection for GIs.

Both legal frameworks in India and Sri Lanka provides a definition of GIs, which complies with the TRIPs Agreement. The Indian system of GI registration already evinces the existence of a considerable number of products with weaker link to the origin. In terms of the definition under the IP Act, Sri Lanka too has the potential of recognising GIs with weaker link to the origin. However, for both these jurisdictions, it makes sense if two types of GIs are recognized based on link to the origin created via human factors and natural factors with two distinct levels of protection.

## VI. CONCLUSION

The distinct characteristic of GIs is created with its link to the geographical origin. However, this link varies from one product to another. The TRIPs Agreement even covers GIs with weaker link to the origin where products based on human factors alone would also be qualified as GIs. Nonetheless, the protection which makes a distinction between wines and spirits and other products is not relied upon a justifiable rationale. The EU Regulation, which defines GIs in two levels based on the link to the origin, grants only one protection tier for all products not considering the benefits it would have attained if the protection varied based on the link to origin. The Sri Lankan and Indian jurisdictions too recognize GIs with a weaker link, but does not make any distinction like in EU law. Therefore, the products qualify as GIs with human factors alone without passing such a message to the consumers. As evident in the paper, it is noteworthy to mention that in granting the protection to GIs, the link to origin makes an important criteria both at international level and domestic level.

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# BEWARE IF YOU ARE A 'DIGITAL CONSUMER' – INTANGIBLE DIGITAL GOODS AND CONSUMER PROTECTION IN SRI LANKA

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**Abstract** - “First, the man was illiterate. Then he became literate. In recent times, he has even become e-literate”.

Justice Saleem Marsoof thus highlights, in a nutshell, the technological evolution of mankind which took place within a noticeably short period of time. Unlike in the past, where the sale of only physical, or rather tangible goods occurred, in the contemporary era, the consumers are well capable of buying goods which have no physical existence, such as computer software, from numerous online stores. These goods could broadly be categorised as intangible digital goods due to the fact that the entire transaction takes place on a digital platform without coming into contact with a human hand. Whether it be a mobile application, a video game, or even an office tool such as Microsoft word, the buying of which has become commonplace as a matter of convenience, since the purchaser can simply make the payment using his/her credit card at his/her leisure. Although this is the current social situation, from a legal point of view, it is highly doubtful as to what form of legal protection would be afforded to these digital goods under the existing overly outdated consumer protection regime. Thus, this research is conducted to analyse the legal system of Sri Lanka with regard to consumer protection using the black letter approach, with a comparative analysis of UK, and New Zealand legislations, in order to ascertain the extent to which a 'digital consumer' is protected in Sri Lanka in respect of intangible goods purchased.

**Keywords** - Intangible digital goods, consumer protection, Sri Lanka

## I. INTRODUCTION

Until recent times, goods sold and purchased in the market were those with a tangible, physical existence such as vegetables, fruits, and other similar domestic necessities. However, with the innovation of the internet,

following the technological revolution, the world woke up to a digital era in which the people in the society could purchase intangible goods from various online stores such as Play store, Apple store, as well as numerous websites which provide a consumer with the facility to download their digital products upon payment. These payments could also be made through online payment methods either directly via credit or debit cards or through facilities such as PayPal. These digital goods fall under various different categories. Some may belong to the category of software and include application software which are commonly known as 'apps' and widely used on mobile devices either to enhance performance such as camera quality, or to perform a specific task such as scanning documents, or purely for entertainment purposes such as simply playing a mobile game. In addition, some of these software are purchased for office use such as Microsoft Word, Excel, PowerPoint, as well as operating software such as Windows. Furthermore, these goods also include downloadable movies, music albums, e-books, magazines, online games, and even electronic tickets. Nevertheless, these digital goods could broadly be given the term 'intangibles' in distinguishing them from ordinary tangible goods for academic purposes.

In the year 2015, Sri Lanka ranked number one with regard to e-commerce readiness in South Asia and has been able to maintain that position in the Global Networked Readiness Index ever since (Attygalle, 2017). Moreover, as statistically proven, this small island has an ever-growing percentage of 30% internet subscribers out of the total population (Weerakoon, 2017). Thus, as it appears, Sri Lanka is at a significant position on the platform of digital consumerism.

Although the existence is in an intangible form, similar to tangible goods, digital goods also carry inherent defects with them. Some software do not perform the task for

which they were downloaded due to malfunctioning, and in other instances the purchaser may discover, upon downloading it by paying a considerable price, that the software cannot be installed on the particular device even though the description of it specifically states that it could be successfully installed. Moreover, some e-books could not be accessed, and movies could not be played. Nevertheless, whatever the defect maybe, it ultimately results in a situation where the digital good purchased cannot be regarded as being 'fit' for the purpose.

In such situations, with regard to tangible goods, the statutory law of Sri Lanka explicitly provides numerous effective remedies that can be used against the seller from whom the particular defective good was purchased. However, after a cursory glance at the wording of these legislations, it is questionable as to whether this protection afforded to tangible goods also extends to digital goods, in the same capacity. Thus, this research is conducted to analyze the existing legal regime with regard to consumer protection in Sri Lanka to find out whether the digital consumers are also protected in this south Asian top ranked e-commerce ready country, in the same capacity as ordinary consumers; and if so, to what extent. Moreover, the objectives of this study also include analyzing the relevant legislations in New Zealand, and the United Kingdom (UK) to make necessary amendments to that of Sri Lanka.

## II. METHODOLOGY

This research is conducted as a doctrinal legal research by using the black letter approach. As primary data, the author uses the existing legislations in Sri Lanka with regard to consumer protection. Moreover, newspaper articles, web articles, as well as opinions of jurists expressed in written forms are used as secondary data in order to support the legal arguments. In addition, the comparative research methodology is given effect, through an analysis of respective legislations in other jurisdictions for the purpose of making recommendations to improve the existing legal regime in Sri Lanka with regard to consumer rights.

## III. RESULTS

The main pieces of legislation that regulate the consumer protection regime in Sri Lanka with regard to the sale of goods could be identified as; the Consumer Affairs Authority Act No. 09 of 2003 (hereinafter referred to as the CAAA), and the Sale of Goods Ordinance No. 11 of 1896

(hereinafter referred to as the SOGO). In order to find out whether or not the application of the legal provisions of these legislations extend to digital goods as well, it is necessary to analyse the relevant interpretation sections of these legislations to ascertain whether or not the definition given to the term, 'goods' include intangible digital goods as well.

Section 75 of the CAAA interprets 'goods' to mean;

"Any food, drink, pharmaceutical, fuel, and any other merchandise."

Section 59 of the SOGO interprets 'goods' to include;

"All movables except moneys. The term includes growing crops and things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Thus, as it is apparent, a direct reference to intangible digital goods in any of the above definitions cannot be found. With regard to the former definition, the application of the *eiusdem generis* rule would undoubtedly suggest that the phrase 'any other merchandise' needs to be interpreted along the line of the specific classes referred in the definition (i.e. foods, drinks, pharmaceuticals, and fuel), all of which belong to the class of tangible goods. As a result, any legal protection given to a consumer against defective goods purchased, would not extend to intangible goods. Hence, as Ekanayake (2014) warns these "...intangible digital goods delivered in the process of downloading or streaming are exempted from the consumer's right to redress..." (Emphasis added).

With regard to the latter definition, it is to be noted that the SOGO was enacted in the 19th century even before the internet itself was invented. Thus, the intention of the parliament was clearly not to regulate the sale of digital goods. Moreover, the wording of the definition of 'goods' given under section 59, explicitly suggests that it refers to movable corporeal goods and not by any means to intangibles, as it specifically includes tangible goods such as crops.

Thus, as evidenced, with reference to the aforementioned factors, consumer rights jurisdiction in Sri Lanka, under the CAAA, and the SOGO, does not extend to intangible digital goods and as a result a digital consumer is barred from his/her legal right to redress. This could be identified as a significant lacuna in the Sri Lankan consumer rights



regime which has constituted a black mark on the platform of digital consumerism.

Without prejudice to the above, as an alternative approach, one could argue that the consumer protection afforded to 'services' under the CAAA could be invoked to protect digital consumers in Sri Lanka, due to the fact that section 75 interprets a 'service' to include several aspects of information technology industry as well. It states;

“Service’ means, service of any description which is made available to-actual or potential users, and includes; inter alia,

(g) The provision of information technology and communications.”

However, although it is arguable as to whether or not the provision of digital goods could be categorized under the heading of 'services' rather than 'goods', the generally accepted view is that they are classified as goods (Cave, 2015). This position was also upheld in the case of *The Software Incubator Limited v Computer Associates UK Limited* (2018) EWCA Civ 518 where the court decided that a sale of a software is a sale of goods, and not a provision of a service.

## IV. DISCUSSION

As iterated above, Sri Lanka lacks effective legal provisions to protect digital consumers due to the fact that the interpretation of the term 'goods' in both CAAA, and SOGO only includes tangible goods and not intangible digital goods. As mentioned above, although it could be argued that the sale of such goods could be regulated by categorising them as services, the legal authorities appear to affirm the negative. Thus, the only solution that is available to remedy the injustice that would otherwise be caused to the arena of digital consumerism by this lacuna is to amend the above mentioned legislations so as to also include intangible digital goods in their respective scope. In doing so, it is of paramount importance to observe the relevant statutory provisions in other jurisdictions, namely; New Zealand, and the United Kingdom (UK).

### A. New Zealand.

Firstly, with regard to New Zealand, it can be seen that it has a separate Consumer Guarantees Act No. 91 of 1993 (hereinafter referred to as CGA) which operates alongside with the Contract and Commercial Law Act No. 5 of

2017 (hereinafter referred to as CCLA) which repealed the provisions of the Sale of Goods Act. As it appears, in these legislations, the interpretation of the term 'goods' expressly includes inter alia software, as well as other intangible goods. For instance, section 2 of the CGA states;

“The term ‘Goods’,

(a) Means personal property of every kind (whether tangible or intangible), other than money and choses in action; and

(b) Includes -

(vi) To avoid doubt, water and computer software.”

Moreover, section 119 of the CCLA provides;

“Goods,

(a) Include;

(i) All kinds of movable personal property, including animals; and

(ii) Computer software.”

Thus, as manifested, both the legislations clearly recognize software as 'goods' under the respective sections. Moreover, other digital goods such as downloadable movies, and e-books could successfully be classified under the term 'intangible' goods in the CGA thereby establishing a doubt free legal environment for consumer rights in New Zealand.

### B. The United Kingdom

Secondly, with regard to the law of the UK, it appears that it regulates the sale of digital goods through the Consumer Rights Act of 2015 (hereinafter referred to as the CRA). Here, unlike in New Zealand, it is instructive to note that the law does not provide for the regulation of a digital good by merely interpreting it as a good in the ordinary manner, but rather it regulates it under a separate chapter of the Act, as 'digital content'. Section 2(9) of the Act interprets this term as follows;

“Digital content’ means data which are produced and supplied in digital form.”

Thus, as clearly interpreted, this umbrella term is wide enough to cover any type of digital goods as it only requires the products to be in digital form.

The legal protection given to a purchaser who downloads a digital product is specified under chapter 3 of the Act. Accordingly, it extensively deals with digital goods by giving numerous guarantees and rights to consumers who purchase such goods. Some of which could be discussed as follows.

Firstly, section 34 specifies that the digital content has to be of satisfactory quality. It further states that the quality of digital content is satisfactory only if it meets the standards that a reasonable person would consider satisfactory, taking account of; any description given, the price, as well as such other surrounding circumstances. To this end, it is instructive to note that under the SOGO in Sri Lanka, any such guarantee against quality is not even given to tangible goods as it follows the common law principle of caveat emptor (Buyer beware) unless under the limited circumstances specified under section 15 of the Ordinance. Thus, the consumer protection regime in Sri Lanka appears to be lagging far behind that of the UK.

Secondly, section 35 states that digital content has to be 'fit' for the particular purpose for which it was downloaded. It can be seen that this is a guarantee which is available to a consumer in Sri Lanka as well, under section 32(1) (d) of the CAAA as a warranty. Nevertheless, as discussed above, digital consumers are not benefitted from this warranty since the Act only applies to tangible goods.

Thirdly, section 36 of the Act stipulates that the particular digital content sold should match with the description given to it by the seller. As it is apparent, with regard to almost all the digital goods that are available online, there is a description column with all the details of the product on the webpage itself. Thus, if the buyer discovers that the functioning of the product does not match with the given description on which he/she relied, after downloading it, he/she can successfully invoke the provisions of this section and take a legal action. However, even though this is also another warranty given to Sri Lankan consumers as well, under section 14 of the SOGO, due to the very fact that its application does not extend to intangible digital goods, digital consumers are barred from invoking its provisions.

In addition, the CRA of the UK also provides various rights to digital consumers. These include; right to repair or replacement, right to price reduction, right to a refund, as well as, right to claim compensation for any damage caused to the device onto which the digital good was downloaded or to any other digital content that was

available on that device before the particular product was downloaded. Nevertheless, as demonstrated, such rights are not available to digital consumers in Sri Lanka under any legislation.

Thus, as it is evident, the Sri Lankan legal regime with regard to consumer rights appears to be far too inadequate in protecting digital consumers compared to the protection given in the UK, as well as in New Zealand. Thus, this could be viewed as a noticeable lacuna which calls for immediate action.

## V. CONCLUSION AND RECOMMENDATIONS

Unlike in the past, more than 30% of the total population in Sri Lanka is connected to the internet today. Being one of the top ranked countries in South Asia with regard to e-commerce readiness, people of this country engage in purchasing digital goods from various online stores on a daily basis. Due to the very fact that these goods fall under the category of intangible goods as exemplified, the applicability of legal provisions under the CAAA, and the SOGO to such transactions is highly doubtful as the interpretation of the term 'goods' in those legislations only includes the aspects of tangible goods. Although one could raise a question as to whether the digital goods could be brought under the broad auspices of the definition given to services, the legal authorities in the international arena appear to support otherwise. Thus, owing to this lacuna, it could be argued that the existing legal regime of Sri Lanka has become a 'toothless lion' in protecting the consumer rights in the digital age. Hence, it is strictly recommended that the respective legislations referred to above have to be amended in order to extend their scope to intangible digital goods as well. In doing so, it is recommended that the laws in other jurisdictions such as New Zealand, and the UK be taken as models due to the fact that the respective legislations in those countries have been successful in providing a strong, doubt free legal environment for consumer rights on the platform of digital consumerism. Whilst the statutory law of New Zealand regulates the sale of digital goods indiscriminate to that of tangible goods by simply including them under the definition of goods, it can be seen with regard to the law of the UK that digital goods are treated differently under a separate chapter of the relevant statute by specifically addressing almost all the potential issues that could arise out of a transaction which is purely a digital one. Thus, it could be stated that the law of the UK is one step ahead of



that of New Zealand in dealing with consumer protection in a digital era. Hence, it is recommended that Sri Lanka should take those aspects into consideration in drafting the amendment to include intangible digital goods within the league of the consumer protection laws in order to provide a safer platform to digital consumers in Sri Lanka.

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# BEYOND 'MORE ECONOMICS-BASED APPROACH': A LEGAL PERSPECTIVE ON COMPETITION IN SRI LANKA

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**Abstract** - The Competition and consumer policy of a nation could play an important role in promoting economic growth and reducing poverty. In the absence of perfect competitive market conditions, there must be a competition policy backed by necessary legislation. It is necessary to promote competition through institutional mechanism to enhance consumer welfare. In recent years, competition law has been viewed as a way to provide better services to consumers. The research focuses whether the existing laws are adequate to promote fair competition and prevent anti-competitive practices. The objective is to find out the effectiveness of the laws governing competition and to identify whether such laws are sufficient enough to prevent mergers, acquisitions, monopolies and other anti-competitive practices. The research is exploratory in character. Research data were gathered from primary, secondary and internet sources. It is observed that even though statutory mechanisms were taken by the legislature, the effective enforcement and monitoring mechanisms capable of establishing the effective competition legal regime have been lacking. The current legislation Consumer Affairs Authority Act No.9 of 2003 has not made a serious effort to provide for comprehensive coverage of matters related to competition and consumer welfare. The main loophole is the Act fails to make provisions governing mergers and monopolies. Prominently, the Act is criticized as a mixture of competition and consumer welfare policies. Compare to the previous legislations governing this area of law, this act is considered weaker in some aspects, particular which removed the provisions to investigate monopolies and mergers. However, many improvements could be effected in this new legislation, in conformity with the three core principles of transparency, non-discrimination and procedural fairness of competition legislation.

**Keywords** - Anti-competitive practices, Competition, consumer welfare, mergers, unfair trade practice.

## I. INTRODUCTION

'The Competition generates total consumer welfare'.<sup>1</sup> The term 'competition' in its ordinary meaning signifies a contest in which people strive for supremacy. In the corporate world, however, it denotes the process whereby firms strive against each other to secure customers of their products. Competition exists where there is a free play of market forces where a large number of buyers and sellers for a particular kind of product and there is no barrier for anyone to enter and exit from the market for that product.<sup>2</sup> This situation is considered as a perfect competition under which resources would be allocated more efficiently, productively, thereby maximizing the production. It also would maximize consumer welfare as prices settle at the lowest average cost to the producers, allowing the seller to only his normal profit or opportunity cost. In such markets prices would reflect social desires and the consumer is sovereign and his interest is protected.<sup>3</sup>

Perfect competition is an ideal situation. It does not exist anywhere. The real market is imperfect and the degree of imperfection ranges between perfect monopoly at one end and perfect competition at the other. In imperfect markets, depending on the degree of imperfection consumers have limited, or no power, to influence the market price. They are no longer sovereign, and their rights are in jeopardy. This imperfect situation arises due to several factors such as anti competitive practices, mergers and monopolies.

<sup>1</sup><http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx> ; Accessed on 23rd February 2018.

<sup>2</sup>ibid

<sup>3</sup>Professor A D V de S Indraratna , "Competition Policy and Law and Consumer protection: Sri Lankan case"

Competition Law promotes and maintains market competition by regulating anti-competition policies by Traders. The law has three main elements such as, prohibiting practices those restrict free trading, banning abusive behaviour of a firm dominating a market or anti-competitive practices that tend to lead to such a dominant position and supervising the mergers and acquisitions of large corporations.

Protecting the interests of consumers (consumer welfare) and ensuring that entrepreneurs have an opportunity to compete in the market economy are often treated as important aspects in recent years. Therefore Competition law aims to preserve and promote competition as a means of maximizing efficiency and achieving an optimal allocation of resources within an economy. The objective of the law is to prevent firms from protecting or expanding their market shares, except by means of greater efficiency in producing goods at the lowest possible prices. Competition law is closely connected with the law deregulation of access of market, state aids and subsidies, the privatization of state owned assets and the establishment of independent sector regulators among other market-orientated supply-side policies. In recent decades, competition law has been viewed as a way to provide better services. Therefore there is a need that the major market process which is in the hands of private sectors must be regulated by law as to prevent anti-competitive practices, mergers, acquisitions and monopolies.

## II. METHODOLOGY

The nature of this paper is exploratory in character. It specifically reviews the current law and available literature and critically analyses the law in order to identify the gaps in the present laws. It provides a better understanding of the present law. Since the law relating to competition is very new and developing area, it is appropriate to analyse the laws in an exploratory kind of research. There are several kinds of data such as primary data, secondary data and qualitative data gathered from library and internet sources.

## III. EVALUATION OF COMPETITION LAW IN SRI LANKA

The matter of Competition Law and policy is much talked in recent times; especially in light of the economic changes those took place around the world. There are about eighty

countries including Sri Lanka have adopted national legislative mechanism to promote effective competition policy. Competition law is known as antitrust law in the United States and anti-monopoly law in China and Russia. The two most influential systems of competition regulations are US antitrust law and competition Law of European Union.

Sri Lanka has not experienced such huge issues as in United States or European Union. As a developing country, the challenges for Sri Lanka within the competition policy arena are very different from those experienced by developed countries. The main agenda for many developing nations are economic development and sustainable growth. Therefore these are the overriding objectives of all policies, including competition policy. Economic development for many developing nations also translates directly into restrictive or protectionist policies which aim to promote economic welfare. The government of Sri Lanka has failed to formulate the measure for promoting competition policy through competition Law; instead they followed policy of consumer welfare through subsidies and price control. Thus, the competition policy and Law of the country has not been well developed as the laws in European Union or United States.

The first Legislation which introduced the concept of competition in Sri Lanka is the Fair Trading Commission Act No.1 of 1987 (FTC Act) which dealt with the control of monopolies and mergers and prevention of anti-competitive practices. Even though the origin of competition law has long history, the concept of competition law was introduced into Sri Lanka with the enactment of the FTC Act. The Act established a regulatory body known as Fair Trading Commission (FTC), a quasi judicial body under the Ministry of commerce and consumer affairs. The mandate of the body was to deal with monopolies, mergers and other anti-competitive practices while regulating the movement of prices of selected goods.

Even though the Act granted wide range of powers to FTC for control of monopolies, mergers and acquisitions and other sort of anti-competitive practices<sup>4</sup>, it is argued that the procedures introduced are in a way to provide possible interpretation to wrongdoers. Particularly, the act took a behavioural approach as opposed to structural approach. The Act provide that monopolies, mergers and anti-competitive practices were considered illegal only if

<sup>4</sup> Section-5 of FCTA

they were contrary to public interest<sup>5</sup>. This was the main defect in the law that the particular provision was used as a justification for non- intervention where there was anti-competitive behaviour and vice versa. It is said that the lack of guidelines to interpret the elements of the 'Public Interest test' was a major limitation of the FTC Act, which was heightened by the lack of judicial decisions in this area of Law.

In early 2000, the Government of Sri Lanka decided to have a unified law to deal with competition matters. The Consumer Affairs Authority Act (CAA Act) was enacted to fill the gaps in Law. The FTC Act was repealed and replaced by the Consumer Affairs Authority Act No.9 of 2003, which is the present principle piece of legislation regulates the promotion of competition in Sri Lanka.

Apart from The Consumer Affairs Authority Act, there are certain other legislations dealing with competition. The Code of Intellectual Property Act No.52 of 1979 recognises unfair competition as a wrong actionable action against the trader and defines unfair competition as an act of competition contrary to honest practices in industrial or commercial matters.<sup>6</sup> The code gave the power to the Judiciary to identify by considering the facts before it whether that acts of competition contrary to honest practice<sup>7</sup>. Trade mark piracy is mechanism under the code which prevents unfair competition. It is common in Sri Lanka and judiciary resolve many Trade mark issues in past. Limitation of labels and packing is another aspect of unfair competition in Sri Lanka. Traders with bad intention might confuse the consumers by trying to give his product an appearance that is very similar to other product by taking advantage of the reputation of that competing product. In *Lipton Limited v. Stassen Exports Limited*<sup>8</sup> the defendant used labelling, packaging and appearance which is so nearly resembled the Plaintiff's product as to be likely cause confusion. Even though court held negatively, the Managing Director of defendant is admitted his anti- competitive practice.

Further, the Takeovers and Mergers Code of 1995 as amended in 2013 promulgated under the Securities and Exchange Commission of Sri Lanka Act No.36 of 1987 seeks to ensure equal treatment of all shareholders of the same class in the company sought to be taken over. Public

Utilities Commission Act No.35 of 2002 contained detailed provisions on the regulation of anti-competitive position, monopolies, acquisitions, abuses of a dominant position and merger situation in identified utilities industries.

#### IV. COMPETITION UNDER CONSUMER AFFAIRS AUTHORITY ACT NO.9 OF 2003

The Consumer Affairs Authority Act was enacted by Parliament with several objectives such as to establish the Consumer Affairs Authority Act, protection of effective competition and the protection of consumers. The Act provides for both an investigative body and an adjudicative body in the form of Consumer Affairs Authority and Consumer Affairs Council respectively. It is less discriminatory in that it brings under its surveillance all goods as well as all services including professional services. It does not, as up to now, exempt from investigation enterprises, either approved under the BOI Law, or which enter into agreements with the Government. The law also more effective in that the penalties of fines and imprisonment prescribed for errant traders and manufacturers have been enhanced many fold and made very deterrent.

The three main previous legislations, the Fair Trading Commission Act No.1 of 1987 (FTC), Consumer Protection Act 1979 and Control of Prices Act 1950 were repealed by Consumer Affairs Authority Act. Amongst others it repealed the FTC Act, which has previously regulated the promotion of competition. The FTC Act has provided the law relating to monopolies, mergers and anti-competitive practices. It has defined the term 'merger' and provided a procedural guideline for a merger situation. Control or dominance of the market test and public interest test were the two mechanisms introduced by the Act to regulate merger. It is submitted that under FTC Act many positive attempts were taken by the legislature to promote competition policy. Unfortunately the Consumer Affairs Authority Act does not provide such measure; particularly it fails to deal with mergers and monopolies.

Consumer Affairs Authority Act mainly focuses on promotion of competition through consumer welfare. Consumer Affairs Authority was set up to maintain and promote effective competition between persons supplying goods and services and to investigate into anti-competitive practices and abuses of a dominant position. The functions of Authority are identical to those contained in the FTC

<sup>5</sup>ApsaraThurairatnam; Sri Lanka; Competition Regimes in the World- A Civil Society Report.

<sup>6</sup>Sec.142 of the Code of Intellectual Property Act.

<sup>7</sup>Sec.142

<sup>8</sup>CA602/92

Act. However, in contrast to Fair Trading Commission which had both investigative and adjudicative powers, CAA Act has conferred such jurisdiction to two different bodies. It was argued that a body, which engages in search, seizure and investigation, cannot perform judicial function in a fair and impartial manner; hence the need for the separation of powers.<sup>9</sup>

The objectives of Consumer Affairs Authority Act are to protect consumers against marketing of hazardous goods, protect against unfair trade practices, guarantees that consumers' interest shall be given due consideration, ensure the consumers adequate access to goods and services at competitive prices and to seek redress against unfair trade practice. It is stipulated that the functions of the authority are to control of restrictive trade arrangements, investigation of anti-competitive practices, promotion of effective competition between traders and manufactures and protection and promotion of consumers welfare. On the other hand, the Consumer Affairs Council performs adjudicative function which makes determination on the basis of the investigation report of the Authority.

On comparing the laws under Consumer Affairs Authority Act with previous FTC act, it has failed to deal with the major anti-competitive practices such as monopolies and mergers. Since these two are crucial to prevent by the law, omission of such even weaker and more undefined than the previous legislation on competition and consumer protection. Interestingly, it had been intended by the legislature at draft bill stage to include separate provisions to deal with mergers and monopolies. Those provisions were not, however, included in the Act and it is uncertain as to when new legislation will be enacted to deal specifically with monopolies and mergers.<sup>10</sup> Therefore in the circumstances, a merger is subject to control only if it amounts to the prevalence of an anti-competitive practice within the meaning provisions under Consumer Affairs Authority Act.

An anti-competitive practice is deemed to prevail under the Act where a person in course of business, pursues a course of conduct which of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition

of goods in Sri Lanka or the supply or securing of services in Sri Lanka.<sup>11</sup>

The Consumer Affairs Authority Act has failed to define the term 'unfair trade practices'. It is argued that the rationale behind this that there are other statutes which can make specific provisions for monopolies, mergers and unfair trade practice. However, the undefined term gives wide discretionary power to the judges to control a range of trade activities as unfair and anti-competitive. Although the concept of anti-competitive practice is possible of interpretation in wider terms under Consumer Affairs Authority Act, when interpreting the provision the court took a narrow and strict view. In the case of *Ceylon Oxygen Ltd. v. Fair Trading Commission*<sup>12</sup> the Court of Appeal refused to recognize that predatory pricing, discriminatory rebates or discounts in pricing policies and exclusive dealings fall under the category of anti-competitive practices.

The Consumer Protection Act No.01 of 1979 has been replaced by the Consumer Affairs Authority Act which combined both competition regulation and consumer protection provisions. It should be noted from the consumer welfare perspective; this is not an improvement as it does not make provisions to establish the institutions for consumer protection. The CAA Act resembles a Consumer welfare Law rather than a Competition Law. Even though one of the objectives of the Act is the promotion of effective competition, the Act fails to provide adequate provisions to achieve it. The lack of clear statutory provision and guiding principle meant that effective implementation of competition law in Sri Lanka has become more complicated.

The Authority investigates the prevalence of the anti-competitive practice either on its own motion or on a complaint or request made it by any person or organisation of consumers or an association of traders<sup>13</sup>. It is not bound to hear a merging party or an interested third party. For the purpose of such investigation, the Authority has the powers of a District Court such as to issue notices and require the attendance of any witness, to require the production of documents or records and to administer any oath or affirmation to any witness. Upon the conclusion of the investigation, the authority makes an application to the Council for it to make a determination on the matter investigated by the Authority.

<sup>9</sup> ibid

<sup>10</sup> D. C. Jayasuriya, 'Guide to the consumer Affairs Authority Act Sri Lanka'; 1st edition Asian Pathfinders Publishers and Booksellers, 2004, p.141.

<sup>11</sup> AluwihareGunawardene; "Merger control world wide- Sri Lanka"; <http://antitrustasia.com/> ; accessed on 23rd February 2018.

<sup>12</sup> SLR-Year-1997 -Vol.2p 372

<sup>13</sup> Section-34 of CAA Act

In an instance where the Authority decided not to make an application to the Council in respect of an investigation carried out and completed by the Authority, the person, any organisation of consumers or association of traders, as the case may be, on which complaint or request such investigation was carried out may, by application in writing.<sup>14</sup> The Council may carry out an investigation which deems necessary in order to make determination on the matter before it. Council is bound to hear the parties whose rights will be affected by its decision. It should be noted that although the Act does not contain express provision to this effect, the Judiciary generally implies into statutory provisions a rule that the principle of natural justice apply in instances where a statute is silent.<sup>15</sup>

The Act has been criticized for giving too much of powers to the minister. The minister has the power to prescribe the good or service, as 'Specified good or service' if he or she feels that it is essential to the life of the community.<sup>16</sup> The Act doesn't set out any guidelines for the determination of such goods or services as specific terms. Further, the appointment of members to the authority and the council is made by the minister. Thus it is alleged, it would deny the autonomy and independence, which a competition and consumer authority like this very much needed.

## V. CONCLUSION

From the forgoing analysis, it is observed that Sri Lankan government's approach on competition policy has not been accompanied by a clear-cut economic policy framework; as a result competitions concerns still tend to be dealt with in an ad hoc manner in response to sectoral needs. It is obvious; the absence of comprehensive competition policy has resulted in a weak competition regime that fails to effectively prevent market anti-competitive practice. Under a perfect competition, not only resources are allocated efficiently but also consumer welfare is maximised. Since this ideal condition does not exist and markets are imperfect to varying degree, a competition policy backed by legislation is necessary to promote competition.

To make this policy very effective, however, other Government policies must be in harmony with it. In instances of weak institutional enforcement capacity and regulatory authorities, there is a role for government to

do whatever possible to make conditions favourable for pro-competitive behaviour. Such measures include trade liberalization and avoiding the creation of monopolies via artificial barriers to entry and exclusivity clauses, as well as steering away from implementing ill-conceived protection policies.

Consumer Affairs Authority Act has not made a serious effort to provide for comprehensive coverage of matters related to competition and consumer protection. While the objectives of the government are to be infusing a better competition culture into the economy, the Act is a step back in many ways. The Act has the aspirations and the expectations of a number of stakeholders, including the private sectors as well as practitioners. It would be another matter whether it delivers its goals.

One thing is clear; the Act should not be another piece of legislation that lacks the support system to harness the objectives and goals outlined. The key to the effectiveness of the legislation lies in promoting an effective competition culture among business transactions or ethics of the private sectors as well among government sponsored transactions. Thus, competition law should be designed in a manner in which it is flexible enough to accommodate the dynamics of competition policy. In the future, this issue would need to be addressed in order to formulate a comprehensive and effective competition policy framework for Sri Lanka.

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<sup>14</sup> Section-37,38

<sup>15</sup> Ammsenci v. Lndd Reform Commission (1977) 79 NLR 505

<sup>16</sup> Section.18



# PROTECTING CONSUMER RIGHTS IN ELECTRONIC CONTRACTS : A LESSONS FROM EUROPEAN UNION AND UNITED KINGDOM

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**Abstract** - The nature and development of e-commerce cause many changes to the traditional legal conceptions. It has made a significant impact on the traditional role of the consumer as well. As a result, the modern consumer is no longer limited to the offline market but, in contrast, he is more explorative in electronic market platforms. On the one hand, these emerging changes facilitate the sophisticated lifestyle of the consumer. But, on the other hand, it is evident that online consumers are exposing more vulnerabilities in the electronic environment other than the offline consumers. Information disclosure, privacy, lack of system security and dispute resolution are some of the key challenging issues which online consumers have to deal with today. Accordingly, these issues have been addressed in both international and domestic legal systems. Amid, European Union and United Kingdom examples provide more advance mechanisms for protecting consumer rights in electronic contracts. However, in Sri Lankan context, the Consumer Affairs Authority Act or Electronic Transaction Act or any other legislation do not provide any specific protection against the violations of consumer rights in an electronic environment. Therefore, this paper aims to investigate the developments in the European Union and the United Kingdom legal system in the light of online consumer rights protection. Moreover, the findings will be compared with domestic legislative provisions in order to emphasize the lacuna in Sri Lankan consumer law as well as the information technology law regimes. The qualitative research approach used as the main research paradigm of the research.

**Keywords** - Consumer Rights, Electronic Contracts, European Union, United Kingdom

## I. INTRODUCTION

“Consumer Protection is not only important to parties in normal transactions but is also vital to electronic commerce” (Kavir, 2011,p.96)

As Kavir correctly opines, the development of the internet has expanded the traditional scope of consumer protection in various ways. Admittedly, electronic commerce modifies the way of transactions in traditional consumers. Therefore, today, a consumer can access goods and services by clicking on a single button of his computer. However, as Prins (2003) correctly argues even though the internet has improved the transparency of prices and brand selection, consumers are more vulnerable to receive less quality product and services. Therefore, it is necessary to safeguard consumer rights in electronic contracts in order to enhance the consumer trust in e-commerce (O’Hara, 2005).

Consequently, for the first time in 1962, the former United States President John F. Kennedy in his Congressional Statement declared that four basic consumer rights namely, right to safety, right to be informed, right to choose and right to be heard (Larsen & Lawson,2013). After that, many more rights were added such as the right to redress, right to consumer education, right to a healthy environment and etc. Accordingly, the United Nations Guidelines on Consumer Protection (UNGCP) has incorporated all these rights into single legislation and it defines the consumer as “natural person regardless of nationality, acting primarily for personal, family or household purposes”.

Notably, the European Union( EU) and the United Kingdom (UK ) approaches on protecting consumer rights in electronic contracts are significant for many reasons. The Consumer Right Directive (CRD) is the recent development of the EU law, which was enacted in 2011 and replaced in 2014. Information requirement, an extension of cooling off period, contract of digital content are some of the attractive features of the CRD which directly cause to safeguard the online consumer rights (Sullivan, 2016; Mc Clafferty,2012). As well, the Consumer



Rights Act (CRA) of the UK jurisdiction contains some significant provisions which can be facilitated consumer contracts in an electronic environment.

However, the contentious issue is that, the Electronic Transaction Act, No, 19 of 2006 (the ETA), the Consumer Affairs Authority Act (the CAAA) or any other legislation in Sri Lanka, do not address any specific issues faced by online consumers. The ETA was enacted to facilitate the formation of the contract, the creation and exchange of data messages, electronic documents and other communications in electronic form in Sri Lanka. Even though the ETA is a progressive initiative of Sri Lankan ICT law, it does not contain any provisions relating to online consumer protection. As Kariyawasam (2008) clearly argues, "the ETA is silent about online consumer protection in relation to, for example, information disclosure, delivery, transaction confirmation, cancellation and refund policy" (p.56).

Section 10 of the Computer Crime Act No, 24 of 2007 (the CCA) recognizes unauthorized disclosure of information as a computer crime. This provision affords some basic protection for online privacy issues. However, as Fernando (2013) opines, still there is a gap in Sri Lankan data protection law. Moreover, it can be argued that, though the CCA provides protection for unauthorized information disclosure in online transactions, that single provision cannot address the other complicated issues faced by online consumers, such as payment security, online fraud, dispute settlement and etc.

Furthermore, when examining the consumer protection law in Sri Lanka, the CAAA provides general protection for consumers and traders by establishing the Consumer Affairs Authority to promote effective competition and regulate internal trade. Nevertheless, as well as the aforementioned electronic transaction legislations in Sri Lanka, the CAAA is also failed to provide a mechanism for online consumer issues. Weragoda (2017) criticised that, CPAA is not adequate as a dispute resolution mechanism in the current digital era.

Therefore, this research attempt to investigate the developments of EU and UK jurisdictions in relating to consumer right protection in electronic contracts. Furthermore, the findings will compare with Sri Lankan legislative provisions and critically analyze the existing gap in Sri Lankan law.

## II. METHODOLOGY

This research is primarily based on the qualitative research approach. The main reason for selecting the qualitative approach is the critical and analytical nature of the research. Moreover, this research is a comparative study. EU and UK jurisdiction have been examined in order to investigate the new developments of online consumer protection mechanisms. As a normative research, both primary and secondary data were used in comparative analysis as well. The researcher has used International guidelines, EU Directives, Consumer protection and Electronic transaction legislations in selected countries and Sri Lanka as Primary Sources. Moreover, , textbooks, journal articles, research papers and statistical reports were extensively referred to as secondary sources.

## III. RESULTS AND DISCUSSION

### *A. Benefits and Risks in Online Context*

"The digital world has made individuals(consumers) both stronger and weaker. They are stronger as a result of features such as self-organization, self-help, and social interaction. However, in terms of threats to privacy, payment and concerns about new marketing techniques, access to infrastructure, services, and content as well as uncertainty about jurisdictional rules, consumers have become weaker." (Prins,2003,p.144)

As Prins (2003) correctly points out in the above statement, online consumers are having both benefits as well as risks in the online world which cause to make them stronger and weaker. Waite (1999) also brings a similar view and opines that "internet could bring about a radical change in distance selling by providing instantaneous, low-cost links for marketing and payment between consumers and suppliers worldwide; that there are resultant risks as well as benefits."(p.132)

When examine the positive factors of the online transactions from the consumers perspective, it is evident that since last few decades consumers attraction on e-commerce and online transactions have increased rapidly due to its flexible nature. Looking and comparing goods and products are easier on the internet other than the offline market (Prins, 2003). Therefore, consumers have more opportunities for selection and easier to access the information. As well, Khan (2016) highlights that consumers can save their time by just clicking a button

on the internet from sitting in the home or workplace. Thus, some scholars argue that, online transaction and e-commerce have improved the 'consumer sovereignty' and they regarded it as a positive force for consumer empowerment (Edward,2003).

However, it is observed that, though online consumers are enjoying significant benefits in the online world, they have to face a considerable amount of risk and vulnerabilities as well during their transactions. So, it is important to point out some issues and challenges faced by online consumers.

- Information disclosure- The major criticism for the online consumer protection is the lack of information disclosure from the retailers and vendors. In the internet, consumers have to deal with unknown sellers and vendors. Most of the time some of the essential information like vendor's identity, description of the product or service, cancellation return and warranty policies are not adequately disclosed to the consumers.
- Privacy – As Edwards (2003) points out the internet has posed the most serious threats to consumers privacy. Internet service providers collect, process and store vast amount of personal information of consumers like, names, addresses, marital, employment relationships and etc, which have enormous commercial value. As well, credit card information and other commercial and personal information might be misused by vendors and service providers.
- Lack of system security- The activities of the computer hackers are increasing recently and many software has been developed to make the task easy. Thus, online consumers are in great fear about stealing their credit card information, when they are engaging in an online transaction. Therefore, lack of cyber security mechanism is another challenge for online consumer protection.
- Dispute Resolution- When consumers are in a dispute with vendor or service providers it is more difficult to deal with it in an online context. Consumers cannot physically interact with vendors and when the two are in the different jurisdiction the situation becomes more difficult (Waite,1999). Therefore, searching for an appropriate dispute resolution mechanism is a major challenge and moreover, there are some other challenges such as applicable law, cost of litigations

and click-wrap terms and conditions (Liyanage, 2010). As Cortes (2010) argues, traditional courts are always not the best option for resolving online disputes, because lack of expertise and resources to deal with cross-border disputes.

### ***B. International Legal Framework for Online Consumer Protection***

The concept of online consumer protection also came into the global attention since 1999. The OECD has introduced separate guidelines for online consumer protection namely, the Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999. However, previous international instruments regarding e-commerce, like the UNCITRAL Model law and the Electronic Communication Convention do not pay adequate consideration for consumer protection issues (Rohendi,2015). United Nations Guidelines on Consumer Protection in 2016 is the most recent global attempt which addresses the consumer protection issues more broadly.

1) OECD Guidelines for Consumer Protection in the Context of Electronic Commerce: The OECD's Committee on Consumer Policy aims to address a broad range of consumer issues and helps public authorities to enhance the development of effective consumer policies. This Committee has introduced the OECD Guidelines for Consumer Protection in the context of Electronic Commerce, 1999 in order to facilitate the consumer protection in B2C commercial transactions. As Alsagoff (2006) indicates, the OECD guidelines "act as a platform for its member countries to develop their national law in tandem with the international standards"(p.82).

In 2016, the OECD's Committee on Consumer Policy revised the Guidelines and issued new OECD Recommendations for Consumer Protection in E-Commerce. The revised Recommendations include several sub-themes such as non-monetary transactions, digital content products, active consumers, privacy and security risks and product safety. As well, the Recommendations recognizes that "the need to address a number of consumer challenges related to information disclosure, misleading or unfair commercial practices, confirmation and payment, fraud and identity theft, and dispute resolution and redress" (OECD Recommendations, 2016)

Most importantly, as general principles, the Recommendations addresses the crucial issues faced by online consumers in a broad manner. Section A

recommends a transparent and effective protection for online consumers, as

“Consumers who participate in e-commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.”

When examine all the above important recommendations it is evident that, the OECD's Committee on Consumer Policy has paid a careful attention to cover up most of the challenges faced by online consumers such as information disclosure, privacy, dispute resolution and etc. In addition to that, the Committee provides implementations principles as the Part II of the Recommendations. Notably, this implementation mechanism suggests that, in order to achieve the purpose of this Recommendation, governments should, in co-operation with stakeholders, “review and, if necessary, adopt and adapt laws protecting consumers in e-commerce” Therefore, it can be argued that, the OECD Recommendations for Consumer Protection in E-Commerce is a comprehensive guide for all the states to develop a new legal framework for online consumer protection.

2)United Nations Guidelines for Consumer Protection in 2015:The UNGCP is the most recent major international step, towards the consumer protection. As Yu and Galligan (2015) point out, UNGCP provides an advanced global standard on consumer protection, for the purpose of delivering justice to every individual consumer. This opinion is very much highlighted in the objectives of the UNGCP

Notably, the UNGCP provides some special attention to the consumer protection in an electronic environment. The Consumer International stresses this as a major achievement when compared to the 1985 Guidelines (Consumer International, n d). As it further emphasizes, the new Guidelines provide parity of treatment between online and offline consumers. Article 63 of the UNGCP states that,

“Member States should work towards enhancing consumer confidence in electronic commerce by the continued development of transparent and effective consumer protection policies, ensuring a level of protection that is not less than that afforded in other forms of commerce”.

Also, it further emphasizes that, the Member States should review existing consumer protection policies to accommodate the special features of electronic commerce and ensure that consumers and businesses are informed and aware of their rights and obligations in the digital marketplace.

Therefore, it can be argued that the UNGCP encourage the consumer justice in the electronic environment as same as the offline environment. So, the UNGCP can be considered as a more progressive international instrument which encourages member states to facilitate online consumer protection mechanism in domestic level.

### ***C. European Union Approach to Online Consumer Protection***

Among the all other regional mechanisms, the European Union approach to online consumer protection is significant. According to the Finocchiaro (2003), the main objective of the European e-commerce legislation is promoting e-commerce. Therefore, he argues that consumer protection in an electronic transaction is an indispensable factor from this economic objective. The Consumer Right Directive (CRD) is the recent development of the EU law, which was enacted in 2011 and replaced in 2014. The CRD is considered as an umbrella legislation of repealing and replacing Distance Selling Directive, Doorstop Selling Directive, Unfair Terms in Contracts Directive and the Sale of Consumer Goods and Associated Guarantees (Sullivan, 2016; Mc Clafferty,2012; White, 2015).

#### **1)Directive 2011/83/EU on Consumer Rights:**

As Article 1 of the CRD indicates, the purpose of the Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market (Bezakova, 2013). Article 5 and 6 of the CRD provides the information requirement for both contractss other than the distance and off-premises contracts and distance and off-premises contracts. Accordingly, before a consumer is bound by a contract, the trader should provide the relevant information such as the main characteristic of the goods, the identity of the trader, the geographical address, the price of the goods and etc. in a clear and comprehensive manner.

As Sullivan (2016) opines, the rationale for this information requirement is an attempt to address the inherent

information imbalance that exists between consumer and trader who has more knowledge of the market. Therefore, it can be argued that the information provisions of the CRD are a tool to enhance the consumer confidence in the internet market.

Notably, another new feature of the CRD is an extension of the cooling-off period of a distance contract from seven to fourteen days. Article 9 of the CRD states that, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs. As Sullivan (2016) comments, “this extended period from seven to fourteen days was to increase legal certainty and reduce compliance cost for businesses dealing cross broader” (p.75). In contrast, some scholars argue that consumers’ mandatory rights of withdrawal as unjustified from the seller’s point of view (White, 2015).

The most attractive feature of the CRD is its potential to cover contracts for the supply of digital contents. According to the Recital 19 of the Directive, “digital content means data which are produced and supplied in digital forms, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means” Moreover, Recital 19, in connection with Article 6 (1) (2), imposes additional information obligations and requirements on the e-tailers supplying digital content. In particular, these obligations include information on the functionality and the relevant interoperability of digital content (Bezakova, 2013). Therefore, it can be argued that this pre-requirement of information with regard to the digital content makes the consumer more knowledgeable about the goods and services.

However, as Article 16 (m) stipulates, the consumer will lose his right of withdrawal with regard to the supply of intangible digital contents. Therefore, however, McClafferty (2012) argues, “some clarification may be needed in determining the status of digital content not supplied on a tangible medium”. Bezakova (2013) also supports the McClafferty’s argument about digital content and opines that,

“Clarification of the definition of intangible digital content, as well as a clear stipulation of the conditions for the non-existence of the withdrawal right shall be, in respect to consumer protection, welcomed. To the contrary, imposing different treatment of tangible digital

content than intangible content apparently creates two, distinct levels of consumer protection” (p.188).

Nevertheless, it is noteworthy that, though some additions are needed, the initiative taken from the EU to extend the protection for digital contents can be considered as a milestone in e-consumer protection law.

#### D. United Kingdom

The online market in the UK is growing at a remarkable rate every second. As some internet statistics highlights, approximately 87% of U.K. consumers have bought at least one product online in the last 12 months, and the United Kingdom is second only to Norway for making e-commerce purchases in Europe (emarketer,2016). In total, UK e-commerce sales grew from £115 billion (\$175.74 billion) in 2015 to £133 billion (\$203.26 billion) in 2016 (emarketer,2016).

Though UK has announced its exit from the European Union many EU legislation has tremendously influenced on developing e-commerce legal framework in the UK. Accordingly, after the introduction of the CRD in EU law, UK parliament also required to incorporate CRD into domestic law. As a result of that, the UK introduced the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 (the “Consumer Contracts Regulations”) as an interim mechanism and finally in 2015, Consumer Right Act (CRA) was introduced 1)The Consumer Rights Act - 2015: As El-Gendi (2017) opines, the CRA is the most significant piece of consumer right legislation in the decade with the aim of unifying previous legislation and establishing new rights for consumers. The CRA consolidated and repealed some previous key consumer legislations namely, Sale of Goods Act 1979, Supply of Goods and Services Act 1982, Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999. According to Giliker (2016), “prior to the Act, UK consumer law was unnecessarily complex, fragmented and, in places, unclear...”. Therefore, as many scholars point out, the CRA brings more clarity into the UK law. (Giliker, 2016)

Although the CRA is not a carbon copy of the CRD in EU law, the Government expressly stated that, “In developing proposals for the Consumer Rights Act 2015, the Government has taken into account the definitions and measures contained within the CRD and, as far as appropriate, has made the Act consistent with the CRD, with the intention of achieving overall a

simple, coherent framework of consumer legislation.” (Explanatory Note, CRA)

Therefore it is noteworthy that, the CRA has some positive influence from the CRD in order to regulate the high level of consumer protection including both offline as well as online consumers.

According to the preamble of the CRA, the main objective of the Act is to amend the law relating to the rights of consumers and protection of their interests; to make provision about investigatory powers for enforcing the regulation of traders..and etc. The Act defines the term ‘consumer’ as, “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”. This definition provides broader coverage of consumers. El-Gendi (2017) also supports this argument and states that “the Act has broadened the scope and lessened the criteria of who shall be deemed a consumer. This ensures that more people can receive the protection of the many provisions of this Act”(p.84).

Part I of the CRA applies where there is an agreement between a trader and a consumer for the trader to supply goods, digital content or services if the agreement is a contract. The most attractive provision of Part I of the CRA is, its applicability of the contract relating to the digital content. The Act defines digital content as “data which are produced and supplied in digital form” which is similar to the definition embodied in the CRD. This broad definition can cover not only the digital contents in a tangible form like a CD or DVD, but also electronically purchased and downloaded digital contents as well (Linklaters, n d).

Section 3 of the CRA provides the contracts covered by the Chapter 2. As described by the Explanatory note 55 of the Act, “any of the specific types of contracts defined in the Act, the provisions apply whether goods are supplied alone or alongside a service and/or digital content”. Therefore, it is evident that the CRA is applicable to all form of contract if it is online or offline. One of the leading economic experts in the UK, Sir Vince Cable opines the benefit of this new features of the CRA as follows,

“Consumers will now be much better informed and protected when buying goods or services on the internet. They will now be entitled to get for the first time a free repair or replacement for any faulty digital content.” (Barsby,2015)

Accordingly, CRA affords some significant statutory rights for consumers, such as

- Section 9 : Goods to be of satisfactory quality
- Section 10: Goods to be fit for a particular purpose
- Section 11: Goods to be as described
- Section 12: Other pre-contract information included in the contract
- Section 14: Goods to match a model seen or examined
- Section 16: Goods not conforming to contract if the digital content does not conform
- Section 20: Right to reject
- Section 23: Right to repair or replacement

All these rights are more important for enhancing the confidence of online consumers as well and particularly, with regard to the contract on digital contents, those contracts also subjected to the similar provisions. Among them, Section 11 and 12 deal with the information requirement from the suppliers and this requirement is much similar to the information requirement in the CRD. For the information purpose, the CRA refers that the information required from the Schedule 1 and 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, forms part of the Contract.

According to the Schedule 1 and 2 of the Consumer Contracts Regulations, before the consumer is bound by an on-premises contract or distance and off-premises contract, the trader must give or make available to the consumer the information regarding,

- the main characteristics of the goods or services;
- the identity of the trader;
- the geographical address at which the trader is established;
- the total price of the goods or services;
- the cost of using the means of distance communication and etc..

Therefore it is evident that, the CRA also attempt to regulate more comprehensive information requirement for the benefit of consumers. Moreover, as mentioned above, Section 20, of the CRA enable consumers to exercise the right to reject in three stages namely, short-term right to reject, final right to reject and the right to reject under Section 19 (6). Section 22 provides that the time limit for exercising the short-term right to reject is the end of 30 days. This right also strengthens the consumer’s sovereignty under the CRA. Particularly,



in online consumers' perspective, this is much effective as they are dealing with unknown sellers and vendors without physically touching the goods.

Furthermore, as El-Gendi (2017) argues, the CRA brings more protection to the consumers who enter into standard form of contracts. As he points out, only 7% of Britons read the terms and conditions of the contracts for products and services into which they entered online and therefore, businesses are, hypothetically, left with the opportunity to enforce unfair and unethical terms, reducing their obligations and increasing the burdens of the consumer.

This issue has been addressed by the CRA , through Section 65, which states that “A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence”. This provision strengthens the protection of consumers who are engaging with click-wrap or shrink-wrap agreements through electronic mean. Accordingly, it can be argued that, the CRA is a significant piece of legislation, which is carefully designed to address the both online as well as offline consumer protection issues.

In addition to the CRA, the UK parliament has introduced the Data Protection Act (the DPA) in 1998 based on the EU Data Protection Directive. As Mcfarlanes(2008) highlights the DPA regulates the processing of personal data by data controllers. The Data Protection Act (DPA) applies to “personal data”, which is data relating to a living individual who can be identified from this data or from a combination of this data with other information in the possession of..(Section 1(1), DPA, ). Moreover, the Act requires the data controllers to use the data held fairly and lawfully and not retain the data longer than is necessary for the stated purposes (Section 27 (4)). Accordingly, it can be argued that besides the CRA and other regulations, the DPA also entrust the consumer’s privacy in the online environment.

**E. Comparative Analysis of EU, UK and Sri Lankan Jurisdictions**

The following table presents a brief summary about how EU and UK laws adopted solutions for some of the major issues faced by online consumers and whether Sri Lankan law has any provisions to deal with those issues.

Issues	EU law	UK law	Sri Lankan law
Information disclosure	Article 4 of the DSD, the E-Commerce Directive and the CRD	Section 11 and 12 of the CRA  Schedule 1 and 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013	No specific provision  (Only, section 24 of the CAAA makes an obligation to traders to display price list)
Cooling-off period	Distance Selling Directive Article 6-7 days  CRD Article 9 – 14 days	Section 20, of the CRA enable consumers to exercise right to reject in three stages namely, short-term right to reject, final right to reject and the right to reject under Section 19 (6).	No provision
Privacy	The Privacy and Electronic Communication Directive recognizes the right to privacy as a part of the fundamental rights and freedom	Data Protection Act, 1998	No separate legislation for data protection.  Section 10 of the CCA recognizes unauthorized disclosure of information as a computer crime
Dispute resolution	Article 17 of the E-Commerce Directive encourage the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means  Directive on Consumer ADR and Regulations on ODR in 2013 established the ODR Platform in 2016	The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 – Section 19A provides that an online trader is obliged to use an alternative dispute resolution procedure provided by an ADR entity or EU listed body	No specific provisions. However, under the CAAA a consumer can make a complaint to the Consumer Affairs Council and it can be referred to the Magistrate Court  (Section 32 and 34 of the CAAA)

**Table 1. A comparative analysis of EU, UK and Sri Lankan Jurisdiction**

As mentioned in the above table, the findings of the comparative analysis with Sri Lankan legal framework demonstrates that there are some gaps in Sri Lankan law with regard to some of the major issues in online consumer protection. Therefore, it is necessary to find out speedy solutions to those issues in order to enhance the e-commerce growth in Sri Lanka.

## IV. CONCLUSION

Today, a country cannot go forward without applying the advancement of technology. The e-commerce sector of Sri Lanka is ready to boost in next few decades. However, the lack of proper consumer protection mechanism in an online environment creates a barrier to the growth of e-commerce. Therefore, as a developing country, it is necessary to take relevant steps to remove this barrier from the e-commerce sector in Sri Lanka. The EU and UK examples demonstrate that how those countries overcome this issue by enacting strong consumer protection mechanism for online consumers. This research attempts to emphasize this gap in Sri Lankan legal system and in order to enhance the online consumer protection in Sri Lanka.

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# MAJESTIC GIANT, YET ABROKEN SPIRIT : LEGAL PROTECTION OF CAPTIVE ELEPHANT IN SRI LANKA

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**Abstract** - Sri Lanka has a large-scale historical evidence for the captivity of elephants. Although historically this was carried out on cultural grounds, currently captive elephants are being misused as a commercial asset. This study seeks to answer the problem as to how adequate is the current legal framework on captive elephants in Sri Lanka in providing them with a due legal protection. The primary objective of the study is to assess the current laws applicable in Sri Lanka pertaining to the captive elephants and their implementation in practice. Determining the effectiveness of the existing legal provisions on captive elephants involves the secondary objective of this discipline. The scope of the study has limited to certain types of captive elephants, thus excluding the elephants in the National Zoological Gardens. The research was carried out using two methodological approaches. The black letter approach was used to undertake a deep analysis on the legal provisions pertaining to captive elephants. Empirical research methodology was used to gather information on the consequences on the captivation of elephants and its practical implication. Towards the end, this study seeks to address certain pertinent questions on captive elephants in Sri Lanka still remain unanswered.

**Keywords** - Captive Elephants, *Elephas Maximus*, Captivity, Protection, Sri Lanka

## I. INTRODUCTION

Captive elephants possess a prolonged history in Sri Lanka. Sinhalese Kings retained the elephants for military purposes and to amplify the dominion of their reign. Some chieftains who assisted the Sinhalese kings to seize elephants were allowed to retain an elephant or two for themselves. This practice was perpetuated by the Dutch. The tradition of tamed elephants came into Sri Lanka from the reign of King Narendrasighe. He has imported Indian-Muslims as mahouts in order to tame the elephants

for elephant battles which was wholly conducted for the enjoyment and as a sport. To this day custodianship of elephants prevails in Sri Lanka (Walisundara, 2018; Gunawardana, 2018). Unfortunately, the captivity of these wild giants now has been commercialized. Albeit numerous laws are available to protect these captive elephants, a drawback in implementation is occurred due to political, cultural, sociological and commercial reasons (Sukumar, 2011).

Today captive elephants in Sri Lanka are mainly being used for:

- A) Tourism – elephants are frequently used for back safaris, which is accompanied by a mahout. Habarana, Mineeriya and Kaudulla are considered as the most popular areas for back rides. The Pinnawela elephant orphanage governed by the National Zoological Gardens is yet another tourist attraction (Walisundara, 2018).
- B) Ceremonies and Temple Work – Elephants are engaged in processions all over the island. In 2017, an approximate number of 82 elephants were taken for the Esala Perahe. Certain elephants are kept in temples as a symbolic representation. Most present mahouts being uneducated and not being trained, often these poor animals are left out chained for hours which causes possible injuries (Walisundara, 2018).

Albeit the National Zoological Gardens also possess captive elephants which are being utilized for performances (Gunawardana, 2018), the main focus of the study revolves around the above two types of captive elephants. Hence, the captive elephants in the “National Zoological Gardens” are excluded from this study.

According to empirical data gathered by the Department of Wildlife Conservation (DWC), as at 31st January 2017, 265 elephants have been registered under private ownership from which 114 were dead and 06 were cancelled. Correspondently by January 2017 the number of privately owned elephants are recorded as 145 in number. Today elephants are mostly taken to temples to be used in processions, safaris or hotels for tourist rides. Whilst an elephant is supposed to work half a day, roguish mahouts make the elephants work longer hours (Gunawardana, 2018). Presently a mahout is compensated around Rs.3000 on daily basis inclusive of a fee of Rs.1000 for elephant's food (Mahout, 2018). The elephant is the first to suffer when the opportunities to work is reduced. Owner's or mahout's lower income result in the reduction of the quantity of elephant's food, physical injuries and medical negligence (Walisundara, 2018).

The government banned the seizure of wild elephants in the 1970s, afterwards the Pinnawala Orphanage became the main source of providing tamed elephants, mainly for temples. A programme for restraining the illegal ownership of elephants, many of which were seized from the wild feloniously within the island was initiated by the government in 2015. Illegal capture of the wild elephants was 47, out of which 20 were lodged at the Pinnawala Elephant Orphanage which were taken into custody of DWC (DWC, 2018). Meanwhile an interim order was acquired from the Colombo High Court suspending the release of 15 elephants to their alleged owners to take part in the Esala Perahera Kandy in year 2017 (Walisundara, 2018). Being productions of an ongoing case, it was illegal, irregular and bad precedent to make such order allowing the temporary release of those 15 elephants, held by the Wildlife and Nature Protection Authorities, after being confiscated from or surrendered by persons who had charges of falsely, fraudulently and nefariously holding those elephants purloined from the wild (Gunawardana, 2018).

According to the data in the elephant registry, from 2006-2010 as many as 95 tamed elephants have died. The tragic death of the elephant Kandula on the safari trail was a major concern among the other deaths of the captive elephants in 2017. As per senior environmental lawyer Jagath Gunawardana, this animal was malnourished and transported in an unacceptable manner. Stating the poignant situation of elephants which are supposed to be utilized for religious purposes, are being used for commercial activities, he noted that law has established it as illegal to use elephants for commercial activities directly

or indirectly. That is to say Section 49 (1) of The Fauna and Flora Protection Ordinance No 2 of 1937 (FFPO 1937) expressly elaborates the fact that carrying on or exercising the business or trade of a taxidermist, tanner, curer or trophy-dealer, or any other business or trade involving the purchase or sale of any dead or live animal or of any part of any dead animal is prohibited, unless otherwise a licence is obtained. Owing to malnutrition and neglect by temple authorities, one elephant was reported to be dead in 2017 and majority of elephants in Devalayas suffer from diabetes due to consumption of fruits in large quantities (Gunawardana, 2018).

The study comprises of two main objectives. The primary objective includes, critically analysing the present applicable legal regimes pertaining to captive elephants in the Sri Lankan sphere and their enforcement in the practical scenario. The secondary objective of the research involves ascertaining the breadth and the efficacy of the existing legal provisions on captive elephants. The paper will focus on the important provisions in the Constitution, FFPO 1937 and Prevention of Cruelty to Animals Ordinance No 13 of 1907 (PCAO 1907) and raise some pertinent questions that still remain unanswered. Whilst, looking closely into the fundamental provisions of the law under which captive elephants are being protected in Sri Lanka, the present paper will fashion it to quench the thirst of enterprising legal practitioners.

## II. METHODOLOGY AND EXPERIMENTAL DESIGN

Two methodological approaches were undertaken in order to gather data. The black letter approach was utilized to entertain a thorough and objective analysis on the current legal provisions pertaining to the captivating elephants in Sri Lanka, its impacts and implementation in practice. Black letter approach was carried out based on relevant legislations as primary sources and books, journal articles, newspaper articles, commentaries, electronic resources pertaining to elephant captivity as secondary sources. Empirical research methodology was used to gather information on the effects of captivity of the elephants in reality. Empirical approach was furnished through conducting semi-structured interviews with stakeholders in the Environmental Law regime such as lawyers, environmentalists, officials of DWC and additional data was gathered through private elephant owners and mahouts.

## III. APPLICABLE LAWS

Being one of the endangered, red-listed species in the world as per the International Union for Conservation of Nature and looking towards the present pathetic condition occurred to the captive elephants, it is important to analyse their legal status within Sri Lanka.

Sri Lankan Constitution, by virtue of “directive principles” (Article 27) and “fundamental duties” (Article 28) encompasses the protection of elephants as a shared responsibility. For inaugurating a just and free society the directive principle of state policy shall pledge directions to the Parliament, the President and the Cabinet in enacting the laws (Article 27(1)). Accordingly, the environment is ought to be protected, preserved and improved by the state for benefiting the community (Article 27(14)). Rendering the duties and entertainment of rights are interconnected thus the duty to safeguard environment and its resources is with every citizen (Article 28(f)). Nevertheless, Articles on the protection of elephants in the Constitution do not impose legal rights and obligations and cannot be enforced in any legal proceeding.

FFPO 1937 could be regarded as the primary legislation on the protection of domesticated elephants. Illegal seizure of wild elephants is an offence according to the Section 12 of the ordinance. An illegally caught elephant ought to be a captive elephant aged under 45 years that has not been released from Pinnawala. A prominent heed was given to the case of captive elephants in Sri Lanka with the incident involving the baby elephant which was claimed to have been deserted at the temple of Venerable Dhammaloka Thero. According to the FFPO 1937, possession of an elephant that is not licensed and registered is a punishable offence. DWC has been able to expose 30 cases of unregistered elephants since 2015. The Ordinance declares “no person shall own, have in his custody or make use of an elephant unless it is registered and unless a licence in respect of the elephant has been obtained”(Section 22A(1)). The Ordinance requires every private owner and custodian of an elephant to duly register their elephant in the register of elephants (Section 22A(2)) maintained by the Director (Section 22A(4)), paying the stipulated registration fee (Section 22A(3)) and correspondently procure an annual licence in respect of the elephant (Section 22A(5)).

The Ordinance further describes that “where a person becomes the owner, or obtains the custody, of an elephant

by virtue of sale, gift, the death of the previous owner or in any other manner whatsoever, such person shall immediately inform the Director or prescribed officer and, if the elephant is registered or licensed, take such steps as may be prescribed to have the previous registration and licence cancelled and to have a fresh registration made and a fresh licence obtained”(Section 22A (6)). Under Section 22A (7) of FFPO 1937, possession of an unregistered elephant is a punishable offence to which either a fine not exceeding five hundred rupees or a three months imprisonment or fine and imprisonment both are awarded.

Ordinance makes the unlawful possession of an elephant a punishable offence stating that “Any person who is in unlawful possession of an elephant shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand rupees or to imprisonment of either description for a term which may extend to one year or to both such fine and imprisonment ; and the court may on the conviction of any such person make order for the disposal of the elephant in respect of which the offence was committed, having regard to the rights of any other person who may appear to the court to be lawfully entitled to the possession of such elephant” (Section 23(1)). The term “unlawful possession” had been explicated in Section 23(2) under three types; those seized without a licence, a person not being the successor to the title of the custodian or is not retaining it under possession in lieu of a lawful owner. This undermines that substantiating the legally obtained right to have the elephant is with the owner.

An elephant is regarded as a property of a person, if the elephant is killed or taken by under a permit by such person as per Section 17(1) of the Ordinance. All other elephants are deemed as a property of the State (Section 17(2)) to be protected under the “Offences against Public Property Act No 12 of 1982”. The Ordinance provides that “Any person who (a) in contravention of this Part of this Ordinance or contrary to the tenor of any licence issued to him thereunder, hunts, shoots, kills, injures, takes, follows, or pursues any elephant shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand rupees or to imprisonment of either description for a term which may extend to two years or to both such fine and imprisonment”(Section 20(a)). In addition, an appropriate court order could be made to dispose the elephant. If it had been stolen and the rightful owner is known, it can be handed back, otherwise it can be either released to the wild or handed over to an elephant orphanage.

The case of elephants in captivity further extends to the inhumane treatment they are subjected to in captivity not restraining to the illegal possession alone. This is where the PCAO 1907 comes into play. Section 14 of the Ordinance elucidates the term “animal” to be included any domestic or seized animal. The Ordinance provides that “Any person who shall (a) cruelly beat, ill-treat, over-drive, override, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, over-ridden, abused, or tortured, any animal; (b) by any act or omission cause unnecessary pain or suffering to any animal; or (c) convey or carry, or cause to be conveyed or carried, in any ship, boat, canoe, or in any vehicle, basket, box, or cage, or otherwise, any animal in such manner or position as to subject such animal to unnecessary pain or suffering, shall be guilty of an offence, and shall be punished with a fine which may extend to one hundred rupees, or with imprisonment of either description for a term which may extend to three months, or with both” (Section 2). In certain occasions hauling of heavy loads of timber and other such goods are done by captive elephants. Overdriving of the animal by a custodian is a punishable offence which amounts to cruelty. The use of an elephant in any kind of work including riding when it is weak, ill or wounded or unfit due to any other reason is an offence.

The Ordinance further expresses that “If any animal is found in any place suffering pain by reason of starvation, mutilation, or other ill-treatment, the owner of such animal, and any superintendent or manager of such owner, shall severally be guilty of an offence (Section 4), and shall be punished with a fine which may extend to one hundred rupees, and in the case of a second or subsequent offence, with a fine which may extend to two hundred rupees, or with imprisonment of either description for a term which may extend to three months, or with both” (Section 3) . According to Section 12 of the Ordinance, all offences committed are cognizable offences which demarcates that a person apprehended committing any act unlawful under the PCAO 1907 could be imprisoned without a warrant.

Although the Extraordinary Gazette Notification No. 662/04 dated 14th May 1991 provides for the registration, escape/death and donation/sale of elephants, both the Ordinance and Regulations lack provisions as to the welfare of the elephants.

#### IV. RESULTS

Following shortfalls of the existing legislations on the protection of captive elephants were perceived as the key findings of the study gathered through the empirical data:

- 1) It stipulates more extensive coverage on welfare issues of the captive elephants.
- 2) The regulation for massacring the elephants, domestic or otherwise must go in line with humane practices adopted in modern communities.
- 3) There is no pronouncement for:
  - transportation of captive elephants
  - training of domestic elephants in particular events (especially in religious processions)
  - loads (including the count of passengers) to be hauled by a captive elephant
  - a proper training of mahouts
  - captive breeding
- 4) There is no provision for a third party involvement (Abeysekera v. Goonewardene (1938) 39 NLR 525) e.g. initiation or intervention by a registered animal welfare organization in any legal proceedings pertaining to a captive elephant.
- 5) The power of the police to implement the law is inadequate and the time period provided for making a complaint after committing an offence are inadequate , i.e. making a complaint after 3 months since the execution of an offence is insufficient.
- 6) Certain forfeits prescribed for any cruelty to a captive elephant is too low and outdated to have any deterrent effect e.g. a fine that may extend to hundred rupees, or an imprisonment up to 3 months or both as the penalty for the perpetrators of animal cruelty has intercepted the law from serving the purpose for which it was enacted.
- 7) In terms of administrating the legislations, there is no proper authority.
- 8) The definition given to “animals” in Section 14 of PCAO 1907 limits the solicitude, ought to be imparted to elephants to only those elephants under the custodianship of people, which in turn opens a path way to be ferocity to those that are not.
- 9) Authorities have no specific mechanism to periodically evaluate and monitor as to whether the interests of the elephants have been met. Consequently, DWC undertakes no statics or adequate information on the physical and mental status, nutrition and health of captive elephants.

10) The available animal cruelty offences are finite in amount and insubstantial in nature.

### V. DISCUSSION AND CONCLUSION

There are many cases subjected to the captive elephant cruelty gone unreported or ignored. Instances of mahouts overworking the animals, not giving them enough food, abusing with goad have been reported. Sri Lankan law on cruelty to elephants remaining abortive and lacking teeth. As highlighted by Mr. Jagath Gunawardana (2018), the need for reform on this front is a prompt necessity. Cruelty to animals defined by PCAO 1907 is a law that dates to over a century, and obsolete which fails to address the current situation in Sri Lanka. Further it was revealed that, the lack of implementation of the existing law and averting its impacts highlights the need to reform the law, and it pressurizes the requirement to pass the proposed Animal Welfare Bill which would depict cruelty issues and inhumane treatment which applies to elephants in captivity.

Moreover, Mr. Jagath Gunawardana (2018) proclaimed that the Law Commission initially drafted the Animal Welfare Bill in 2006 and conferred to the parliament in 2010. The Bill gives an extensive definition for “animals” and also recognizes duty of care for custodians. It further provides for compassionate treatment of animals and propounds the establishment of an independent National Animal Welfare Authority. Major areas of focus highlighted in the Bill include, sustaining the elephants’ health, responsibilities of their custodians and caretakers, maintenance of baby elephants born to such female elephants, employing elephants in work, reproduction, exploiting for perahera and video shootings, attires, perpetuate the places elephants are kept in a well-established manner. Although the Bill was expected to be finalized in 2016 with the proposed changes incorporated to it received by the public consultation, it has been over a year since the passing of Bill and its enactment is hindered by the corrupt administration and religious system in the country.

As revealed in the key informant interview with DWC (2018), despite the legal provisions, there have been approximate 30 reported incidents pertaining elephants whose origin cannot be properly traced or for whom forged registration documents were fertilized. According to Meyer (2015), having consumed approximately six gallons of milk per day, a baby elephant is attended for about two years and the calves in the wild inclined to stay with their

mothers until they are around 5 years. Interviews further revealed that many calves do not survive in confronting the separation from their mothers when taken away for entertaining humans. This showcases the flagrant abuse of the legal provisions which prohibits the capture of wild elephants.

Empirical data has unfolded the concern that most of the elephants are being physically suffered due to the prevailing safaris which provides for the elephants back rides. As per Mr. Jagath Gunawardana (2018) explicable safari is to see the elephants in the wild, in their natural habitats without inhibitions. Hence the tradition of elephant back safaris should be banned from Sri Lanka.

If Sri Lanka desires to safeguard elephants from being extinct, it should encourage natural breeding of the elephants. As per the census conducted by DWC in 2011, only 3 births in captive elephants outside the Pinnawala Orphanage have occurred while 70 natural elephant births took place at Pinnawala by 2015. Whilst acknowledging the fact that both private ownership and elephant orphanage are modes of captivity, empirical data discloses that the majority of the private owners are unaware as to the proper conservation methods. This situation is augmented by the silence of the law regarding the knowledge and resources to be procured by the private elephant owners in order to concede a proper protection to the elephants under their custody. Accordingly, it is discernible that the private ownership is extremely unpropitious to the natural breeding of the elephants.

On the other hand, it was revealed by the empirical data that lack of proper transportation measures, have resulted the elephants with severe injuries and in the worst case, loss of life. This position has been further worsened by the absence of legal provisions in this respect. Hence, a licensing process to transport elephants as well a permit to ensure the standards of the vehicle which transport the elephants need to be established in order to avoid tragic deaths of elephants, regardless if they are domestic, tame or wild.

A proper legal criteria as to the eligibility of private ownership of elephants should be established. In addition, contriving a legally authorized improved training method for mahouts is an essential requirement since the Mr. Walisundara divulged the fact that present day mahouts who are most likely to be college dropouts are not experienced in handling and controlling elephants and this has resulted in many incidents of animal cruelty



including drunken mahouts ill-treating elephants. Improved, humane veterinary services are essential for a well fostered elephant. The government should deploy and train veterinary surgeons and post them to districts where there are captive elephants for this purpose. Large scale planting of the captive elephant's preferred foods with the aid of suitable approved organizations is necessary to serve the supply of food of captive elephants periodically.

It is unambiguous that the private ownership of elephants can neither be justified on cultural nor religious grounds. Captivity of the wild animals upheld the theory of Anthropocentrism which indicates that the human beings are superior to the nature and human life has intrinsic value while other entities (including animals, plants, mineral resources, and so on) are resources that may justifiably be exploited for the benefit of humankind. This is exacerbated by the loopholes of the current legal regime governing the captive elephants and its execution. Hence Sri Lanka should deviate from relying on the egocentric perceptions which makes the elephants to become a property rather than a free spirit and must properly implement existing legal regime on the protection of captive elephants without any prejudice.

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# CORPORATE RESPONSIBILITY FOR ENVIRONMENTAL PROTECTION WITH REFERENCE TO THE COMPANIES ACT NO 07 OF 2007 OF SRI LANKA

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**Abstract** - With the increasing emphasis placed on the necessity of protecting the environment, the traditional perceptions of development have now been replaced with the concept of sustainable development. According to the Brundtland Commission's report sustainable development is the development which meets the needs of present generations without compromising the ability of future generations to meet their own needs. Irrespective of the growing consensus on the need to develop sustainably, it is sceptical whether the corporations in the contemporary world operate with due regard to the environment. The present research aims to ascertain whether the present Companies Act in Sri Lanka; Act No 07 of 2007 imposes a duty on the companies towards the environment, which will uphold sustainable development. The study further aims to analyse the lessons that Sri Lanka can learn from the Company legislations in the United Kingdom (UK) and Australia in making the companies accountable towards the environment. The research was carried out using the black letter approach of research using relevant legislations and judicial decisions as primary sources and books with critical analysis, journals, theses and electronic resources as secondary sources. The study concludes that Companies Act No 07 of 2007 does not expressly impose a duty on Sri Lankan companies towards environmental protection and therefore inadequate in ensuring sustainable development.

**Keywords** - Companies Act, Environmental Protection, Sustainable Development

## I. INTRODUCTION

"Earth provides enough to satisfy every man's needs, but not every man's greed"  
- Mahatma Gandhi

Until the latter part of the 20th Century, 'development' was looked at and measured only from an economic perspective. However with the economic oriented development resulting in many problems such as environmental pollution, environmental degradation, poverty, social injustice and marginalization, world realized that this conventional thinking should be set aside. Gradually, people aimed for a kind of development which is socially inclusive and environmentally sustainable. The concept that the environment and the development should be carried out in a mutually beneficial way rather than as separate issues first gained international recognition majorly in 1972 at the UN Conference on the Human Environment held in Stockholm. A decade and half later, in 1987 the United Nations World Commission on Environment and Development in a report called Our Common Future (Brundtland Report) provided the most recognized definition to the sustainable development as "development which meets the needs of current generations without compromising the ability of future generations to meet their own needs".

Companies as business entities directly contribute to the national development. Traditionally, companies are established with the sole aim of providing profits for the shareholders on their investments and Company law aims to ensure accountability of managers to shareholders. However, with the emerging trend of promoting sustainable development it is clear that this traditional role of Company Law should be widened to ensure much more than making of profits for shareholders.

The present research seeks to answer the question whether the present Companies Act in Sri Lanka; Act No 07 of 2007 imposes a duty on the companies towards the environment, which will uphold sustainable development?. In answering

the question, the research will analyse Australian and UK company legislations and their judicial interpretations in order to ascertain the lessons that Sri Lanka can learn from these two comparative jurisdictions.

## II. METHODOLOGY

The research was carried out using the black letter approach of research using relevant legislations and judicial decisions as primary sources and books with critical analysis, journals, theses and electronic resources as secondary sources.

## III. CORPORATE RESPONSIBILITY TOWARDS THE ENVIRONMENT IN THE UNITED KINGDOM

Unlike Sri Lankan Act, the Companies Act of 2006 of the United Kingdom (UKCA) has given consideration to environmental impact of the companies operation to some extent. The Act has expressly incorporated the duty to consider this impact on the directors.

S. 172 of the UKCA refer to directors' duty of good faith. S.172 of the Act specifies that directors should exercise good faith acting in a manner which according to his idea is most likely to promote the success of the company while specifying six factors to be given consideration when acting. The section states as follows;

- (1) "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to -
- (a) the likely consequences of any decision in the long term,
  - (b) the interests of the company's employees,
  - (c) the need to foster the company's business relationships with suppliers, customers and others,
  - (d) the impact of the company's operations on the community and the environment,
  - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
  - (f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company".

This section expressly makes directors duty bound to consider and care for the environment when they take business decisions and guide the operations of the company. This can be seen as a progressive step taken towards assuming companies' role in the modern world to protect environment. In addition to this express obligation, the specification that directors while promoting the success of the company for the benefit of its members as a whole, should give regard to 'the likely consequences of any decision in the long term', suggests that companies should be sustainable in its existence. This requirement will make it an obligation for a company not to harm the environment and the community for the sake of its short term economic development goals.

Nevertheless, it is noteworthy that, in considering environmental matters, directors will have to articulate a business case, viz. that such considerations would promote the success of the company for the benefit of its members as a whole, whether in the short-term or long-term.

Further, the S. 415 of the UKCA requires directors to prepare a director's report for each financial year of the company and as specified by S.417 (1), unless the small companies' regime, the directors' report must contain a business review. As per, S. 417 (5) (b) (i), in the case of a quoted company, this business review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include, inter alia, environmental matters (including the impact of the company's business on the environment). Further, S. 417 (6) (b) specifies, that the review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters. However, the S. S. 417 (7) states that when a company qualifies as medium-sized in relation to a financial year

directors report does not have to include non- financial information such as environmental matters and employee matters.

### IV. CORPOATE RESPONSIBILITY TOWARDS THE ENVIRONMENT IN AUSTRALIA

Whilst the traditional rule that directors only owe their fiduciary duties to the company is still embraced and applied by the Australian judiciary, in recent times there has been a tendency to expand this duty. So far, the judicial commentary has suggested that in certain circumstances director's duties may be extended towards shareholders and creditors<sup>1</sup>. This expansion of the director's duties gives the positive inclination that the judiciary will in the future, extend the obligations of directors towards the environment and its resources. This inclination is supported by the recent decision of *National Roads and Motorists' Association Ltd v Geeson* (2001) which highlighted that, in particular circumstances, directors may have a 'public duty' to act or refrain from acting in order to adhere to what is in the best interests of the community as a whole, rather than according to what is in the best interests of the company. According to Professor Robert Baxt (2002) 'the law of directors' duties may again be about to head down an 'uncharted road', where traditional principles such as acting in the best interests of the company and maximising profits for shareholders will be forced to interact with, and accommodate, contemporary considerations including CSR, triple bottom line reporting and, of course, sustainable development'.

### V. CORPOATE RESPONSIBILITY TOWARDS THE ENVIRONMENT IN SRI LANKA

S. 187 of the Sri Lankan act is similar to the S. 172 of the UKCA since it requires directors to act in good faith. However, unlike the s. 172 of the UKCA, Sri Lankan act does not make it a duty for the directors to care for

the environment or aim for sustainable development and it merely states that 'A person exercising powers or performing duties as a director of a company shall act in good faith, and subject to subsection (2), in what that person believes to be in the interests of the company'.

The duty of the director to act in the interest of the company can be interpreted to include environmental aspects. Traditionally this duty was given a conservative interpretation; director's duty is to raise profits for benefit of shareholders. However, now most of the jurisdictions have given a progressive interpretation to the duty of the director to act in the best interest of the company. For example, Supreme Court of Canada, in *Peoples Department Stores Inc. (Trustee of) v. Wise* (2004) held that "We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment". However, in Sri Lanka the directors' duty to act in good faith and in the interest of the company has not yet been expressly extended to include environmental concerns through a progressive judgement.

Further, the Companies Act in Sri Lanka does not contain provisions to disclose environmental impacts of companies through annual reporting. The Act imposes a duty on the companies to prepare financial statements (Section 150-153). According to section 150 (2) if the company failed to do so, every director of the company who is in default shall be guilty of an offence. Section 151 specifies the contents and form of financial statements. These sections, however, do not specifically mention that the environmental aspects shall be taken into account when making financial accounts of the company. They do not impose a duty or a requirement on the directors to take such factors into account with respect to annual reporting or as a general duty of the directors as well.

The Accounting standards introduced by the Chartered Institute of Accountants in Sri Lanka under the provisions of Sri Lanka Accounting and Auditing Standards Act No.15 of 1995 impliedly facilitate for environmental reporting and disclosure to a certain extent (LKAS 1, LKAS 8, LKAS 16). However, the application of these standards is confined only to a certain set of companies specified in the schedule to the act referred to as 'Specified Business Enterprises'.

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<sup>1</sup> For instance, in *Brunninghausen v Glavanics* (1999), the New South Wales Court of Appeal held that, notwithstanding the general principle established in *Percival v Wright* that a director's fiduciary duties are owed only to the company and that no fiduciary duty is owed to shareholders, where a transaction does not concern the company but only another shareholder, a director may owe a fiduciary duty to that shareholder. In *Peskin v Anderson*, it was confirmed that directors will owe a fiduciary duty to shareholders if there is some 'special factual relationship' between the directors and shareholders giving rise to fiduciary obligations. In *Jeffree v National Companies and Securities Commission* (1990) court accepted that the directors owe a duty to the creditors.

The Code of Best Practice on Corporate Governance which is a joint initiative between the Securities & Exchange Commission and the Institute of Chartered Accountants of Sri Lanka provides a considerably strong framework for environmental accountability. According to clause D.1.4. of the Code, annual reports of the Listed Companies should contain "Management Discussion & Analysis", discussing social and environmental protection activities carried out by the Company. Moreover, it provides for sustainability reporting and states that Environmental Governance of an organization should adopt an integrated approach that takes into consideration the direct and indirect economic, social, health and environmental implications of their decisions and activities, including pollution prevention, sustainable resource use, climate change, protection of environment, bio-diversity and restoration of national resources. The code insists that the products of the listed companies shall be environmentally friendly. However, the Code of Best Practice on Corporate Governance is not a legislation and it shall be mandatorily complied with only by the listed companies. For non-listed companies there is no such mandatory requirement to comply with the code.

## VI. A COMPARATIVE ANALYSIS AND LESSONS TO BE LEARNT

It is evident by the above discussion that UKCA of 2006 is many steps ahead of the SLCA of 2007 in promoting responsibility of companies to protect environment. However, it should be stated that the laws enshrined in the UKCA are not adequate in the current context to achieve the aim of sustainable development to a satisfactory level. Australia is also in a progressive path than Sri Lanka when considering the judicial expansion of the director's duties. Following the example given by English Company Law, Sri Lankan Act can impose an obligation on the directors to consider environmental impact of business operations and also the long-term impact of the business decisions when they act in good faith in the interest of the company. However, the issue to be analysed in this context is whether law should permit directors to take environmental concerns in to account even when they do not relate to the promotion of success of interest of the company, or in other words when such considerations gives no benefit to the company by increasing shareholder returns. In fact it can be argued that directors should be able to consider environmental sustainability side by side with interest of the company (Johnston, 2014).

With regard to companies' responsibility towards protecting the environment, the concept of Corporate Social Responsibility (CSR) plays a significant role. CSR can be defined as the responsibility of enterprises for their impacts on society. This concept is widely known as the "corporate citizenship" and it is an aspect of the corporate sustainability phenomenon (Marrewijk, 2003). CSR can demand bearing of short term expenses which will not result in instantaneous financial gains to the business, but rather will encourage positive transformation in societal and environmental aspects. According to CSR, the companies while advancing the profits of its shareholders are obliged to be accountable to the society and the environment and act ethically. In the decision-making process, companies should consider the societal, economic and environmental impacts of such decisions. Actions taken by the corporate citizens related to the preservation of the environment could be said to operate as the most important and common function associated with the CSR concept.

According to Silberhorn and Warren (2007) the concept of CSR progressed as a reaction to the interactions between organizational values and external influences. While some businesses voluntarily practice corporate philanthropy and chose to contribute to the social and environmental demands, the other business enterprises are forced to comply with the concept of CSR, as a result of social, governmental, political, and judicial pressure (Lambooy, 2014). In present, laws have been enacted to encourage the social responsibility of companies. For instance, S. 135 of the Indian Companies Act of 2013 specifies that all companies having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall establish a CSR Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director, while providing guidelines for companies to follow when they proceed with the CSR activities. Moreover, the S. 135 imposes a reporting obligation on the board of the company. Accordingly, the board is required to approve the CSR policy for the company after taking into account the recommendations made by the CSR committee and disclose its contents in their report and also publish the details on the company's official website, if any, in such manner as may be prescribed. If the company fails to spend the prescribed amount, the board, in its report, shall specify the reasons. Further, the Act encourages companies to dedicate at least 2% of their average net profit in the

previous three years on CSR activities. Among objectives such as protection of human rights and labour rights, sustainable development and protection of environment are two major objectives these kind laws intend to achieve. Further, the most justifiable approach towards sustainability is binding the company to bear the costs of their activities without leaving the affected members of the public to bear such cost. This approach is promoted by the Polluter Pays principle in Environmental Law which states that whoever is responsible for damage to the environment should bear the costs associated with it. Polluter pays principle not only advances fairness and justice, but also enhances economic efficiency. In Sri Lankan context, Polluter Pays principle was upheld in the landmark judicial decision *Bulankulama vs Secretary, Ministry of Industrial Development* (2000). In this case Justice Amerasinghe stated in clear terms that the cost of environmental damage should be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of a project. In economics, an externality refers to a result of a business operation that affects unrelated third parties. As stated by Buchanan & Stubblebine (1962), an externality connotes the cost or benefit that affects a party who did not choose to incur that cost or benefit. These externalities can either be positive or negative. While research and development conducted by a company is an example to a positive externality, air pollution, noise pollution or water pollution that results from the industrial activities provides an example to a negative externality. Negative externalities are also known as external cost or external diseconomy. If companies merely focus on generating profits while neglecting negative externalities, it will lead to inefficient markets. Therefore, it is important for governments to intervene to curb these externalities and Company Law to make regulations to internalize the externalities so that negative externalities such as environmental pollution will affect not only the third parties but mainly the parties who choose to incur such costs and benefits. As Justice Amerasinghe held in *Bulankulama Case* (2000) today environmental protection, in the light of the generally recognised Polluter Pays principle, can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity.

## VII. CONCLUSIONS

The idea that companies should be required by law to take responsibility for environmental costs and be committed for environmental protection goes against the conventional perception of the role of the Company Law. The Anglo-American view that company law should focus only on the agency relationship between the directors and shareholders (and creditors) narrows the role of the Company Law. However, the modern Company Law should not remain restricted by this traditional perception and rather it should promote sustainable companies which assume responsibility for environmental protection alongside their profit generation goals.

Sri Lankan judiciary playing an active role, in some instances has given effect to the Polluter Pays principle in cases relating to environmental pollution and thereby has attempted to bind the companies to some extent. However, the Polluter Pays principle addresses only post-pollution situations and it provides the remedy only after the damage has been done. However, 'prevention is better than cure' and specifically in case of environment cures can be difficult, expensive and sometimes just too late since in most cases the damage is irreparable. Therefore, it is always prudent to prevent the environmental damage than to fix it after it has been done. Companies should be obliged to follow a precautionary approach and comply with concepts such as CSR.

However, as evident by the above discussion, Company Law in Sri Lanka is steps behind many other jurisdictions, in its commitment to protect environment. Sri Lankan Companies Act does not enclose the progressive concepts such as CSR. In the modern context where environmental degradation and ecological imbalances have become one of the major problems or the most important problem that should be addressed by developed as well as developing countries, it is high time for Sri Lankan Companies Act to embrace this new concept and push the corporate community to perform their roles as responsible corporate citizens towards the environment and the society in the eyes of their customers. Further, Sri Lanka should take legislative steps to introduce requirements such as submission of a business review in to Company Law, with the legal obligation to report non-financial disclosures including environmental impacts of company's operations and such steps will establish the corporate responsibility to protect the environment for the sake of present and future generations.

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# A BETTER APPROACH TO ANIMAL WELFARE LAW; A CRITICAL ANALYSIS OF THE LAW ON PREVENTION OF CRUELTY TO ANIMALS IN SRI LANKA

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**Abstract** - While human rights play an important role in a country's legal system, the rights pertaining to the welfare of animals should be awarded a special status in the environmental law regime of a country. Animals deserve an inherent right, recognized by the animal welfare legislation of a country, which would safeguard them against cruel and inhumane treatment. The Prevention of Cruelty to Animals Ordinance No. 13 of 1907 in Sri Lanka intends to serve this purpose by establishing the law to prevent cruelty to animals. However, in recent years several incidents which resulted in the victimization of elephants and stray dogs as a result of cruel and inhumane treatment were highlighted through the media. These scenarios pose a question as to the adequacy of the current animal welfare legislation in Sri Lanka to address the issue of cruel and inhuman treatment of animals in the country. Resorting to the qualitative methodology this research intends to review and critically analyse provisions contained in the aforementioned Ordinance in order to identify four main deficiencies among the provisions namely; the lack of, a sound definition for an "animal", stringent and updated penalties, the recognition of the concept of 'duty of care' and a proper authority to monitor animal welfare matters and to make recommendations to improve the existing legal regime of animal welfare to rectify the aforementioned deficiencies, as well as to highlight the importance of expediting the implementation of the Animal Welfare Bill as a better approach to animal welfare law in Sri Lanka.

**Keywords** - Animal cruelty, Elephants, Stray dogs, Animal welfare.

## I. INTRODUCTION

"The greatness of a nation and its moral progress can be judged by the way its animals are treated. I hold that the more helpless a creature the more entitled it is to protection by man from the cruelty of humankind"

-Mahatma Gandhi-

During the last year many shocking incidents, with regard to animal cruelty that took place in Sri Lanka, grasped the attention of the public. These incidents gave rise to the discussion of animal rights and many protests claiming that animals should be free from torture and abuse took place due to the same reason. The hype that built up with the occurrence of many heart breaking incidents in which these innocent creatures were deprived of their rights, stipulated by the respective legal regime of Sri Lanka, somehow went down after time passed. The right to be free from cruelty should be identified as an animal right which is crucial in order to protect such animals and ensure the recognition of the welfare of animals in Sri Lanka.

"Sri Lanka has laws in place to prevent cruelty towards animals. Few people pay attention to this however, and animal cruelty continues."(Anver, 2011) It is evident, in reflecting on the recent incidents, that the law prevalent has failed to be implemented properly and effectively to govern the violations of animal rights or to protect the ill- treatment of animals in Sri Lanka, when compared with other jurisdictions over the world, although there have been several initiatives taken in the recent years to strengthen the existing legal regime in Sri Lanka for the protection of animals.

In discussing the above, this research shall be based on the issue of animal cruelty prevalent in Sri Lanka, specifically addressing the victimization of elephants and stray dogs due to cruel and inhumane treatment. This research intends to review, critically analyse the provisions contained in the Prevention of Cruelty to Animals Ordinance No 13 of 1907 to identify four main deficiencies in the Ordinance namely; the lack of, a sound definition for an "animal", stringent and updated penalties, the recognition of the concept of 'duty of care' and a proper authority to monitor animal welfare matters. It further aims to pin-point the legislation applicable to the above issue, its current implementation, evaluate whether the existing legislation is satisfactory



in addressing the issue at hand. In reviewing and critically analysing the provisions contained in the above Ordinance in order to discover the deficiencies in the law, this research ultimately aims to make recommendations to improve the existing legal system by adopting the animal welfare laws of India, Singapore and Malaysia to rectify the existing deficiencies in the Sri Lankan legal system for animal welfare. Further, the author intends to highlight the importance of expediting the enactment of the long over-due Animal Welfare Bill, identifying it as the key solution to overcome the aforementioned issues and “ensure effective and efficient laws on cruelty to animals in Sri Lanka.” (Jayasuriya, 2016)

## II. METHODOLOGY

The research methodology resorted in order to carry out this research, is the qualitative methodology where the data gathered using primary and secondary sources will be reviewed and critically analysed in order to fulfil the research objectives. Primary sources are; mainly the Prevention of Cruelty to Animals Ordinance No.13 of 1907, and other statutes enacted with regard to protection of animal rights in Sri Lanka as well as legal provisions on animal welfare in India, Singapore and Malaysia. Secondary sources are the newspaper articles and other articles published online related to animal welfare legislation in Sri Lanka and the issue subjected to this research. The legal provisions contained in the aforementioned Ordinance shall be thoroughly observed and critically analysed to discover deficiencies, and legal provisions of animal welfare laws of the countries mentioned above shall be examined in order to suggest amendments to the Sri Lankan law by adopting such animal welfare laws of those countries. The author shall also review and take in to consideration the recommendations and comments made by different authors of published articles on this matter, to address the issue at hand.

## III. DISCUSSION

### ***A. Victimization of Elephants and Stray Dogs due to Cruel and Inhumane Treatment***

During the past few years, many incidents took place, which later posed the question as to whether the animals in Sri Lanka are protected from being victims of cruel and inhumane treatment.

The elephants in Sri Lanka, who are considered as an exotic feature of the eco system in Sri Lanka, were placed

in a devastating position, being subjected to inhumane and cruel treatment. One such incident that took the attention of the public as well as international organizations is cruelty towards domesticated elephants in Sri Lanka. Elephants are kept in religious premises in order to be used for processions and cultural parades, chained in the zoo to woo the spectators and are used to provide elephant rides to tourists.(Mushtaq, 2016)

Many cases were reported (Mushtaq, 2016) and were highlighted through media where elephants are subjected to unnecessary burden and labour as well as where famous personalities such as politicians and well known priests have been condemned and arrested for possessing baby elephants illegally without a permit as well as involving in elephant trafficking which clearly violated the existing legal provisions that protect the elephants in Sri Lanka under the Fauna and Flora Protection Ordinance, where under Section 22A of this Ordinance it is stipulated that, “no person shall own, have in his custody or make use of an elephant unless it is registered and unless a license in respect of the elephant has been obtained in accordance with the provisions of this section”.

There were records of approximately 60 baby elephants who have been found to be stolen from jungles of Habarana, Udawale and are kept under the possession of many influential people such as politicians and priests over the past years. (Mushtaq, 2016)

Discussing about elephants fitted with metal frames being used to provide rides to tourists, “Deepani Jayantha, Veterinarian, Country Coordinator of Eemotion Foundation and a member of Animal Welfare Coalition commented on the crude nature in which these frames are fitted, and the pain and suffering that the elephants endure due to these practices; ‘Elephants that are used for elephant rides are fitted with a crude metal cage that resembles a bed frame which could weigh more than 50 kgs. And in order to keep the structure securely fitted, the cage is fitted using ropes tightly tied around the elephant’s spine’”(Wijenayake, 2016) and “In order to make elephants submit to elephant rides and other human interactions they are taken from their mothers when babies and forced through a horrific training process known as ‘the crush’. This involves physical restraints, inflicting severe pain and withholding food and water. By the time tourist come to ride an elephant, they may look at peace, but this is because their spirit has been broken. The bull hook used permanently reminds the animal of human dominance.” (Mushtaq, 2016) Metal cages that are

fitted onto the elephants used for rides are too heavy that elephant dorsum is not anatomically capable to hold such structure thus could damage the elephant's dorsum and the pelvic area. In controlling captive elephants, traditional restraining methods are used and in extreme situations they are hit in their head where cases have reported that has caused eye injuries (Wijenayake, 2016).

Another notable incident which grasped the attention of the public and animal activists is the extermination of stray cats and dogs within the premises of the University of Jayewardenepura and Moratuwa. It was reported that respective authorities of the University of Jayewardenepura and a private contracted company named "Ultrakill" were responsible in sedating and dumping stray dogs, while the Moratuwa University, in order to curb the stray dogs and cats in the university premises, carried out the same action by hiring a private contractor to chase away the strays. Unfortunately dogs were sedated using 'ketamine' and two dogs died of drug overdose. The strays that were removed from the premises were subsequently found dumped in a land. The issue that ought to be identified in this set of

circumstances is that, the authorities did not resort to the legally prescribed method of seizure and detention of stray dogs who are suspected to be diseased or known clearly to be diseased and whether to destroy or dispose of them, according to the provisions of Registration of Dogs Ordinance and Rabies Ordinance of Sri Lanka. Thus, as a consequence, the animals became victims of inhumane and cruel treatment subjected to unnecessary and superfluous injury.

It is clear that these two practical scenarios reflect the issue pertaining to inhumane and cruel treatment to animals in Sri Lanka.

## ***B. Existing Legislation and its Applicability***

Legislation in Sri Lanka that provide for the protection of animal rights in Sri Lanka can be listed down as follows.

- Prevention of Cruelty to Animals Ordinance No. 13 of 1907 as amended in 1912, 1917, 1919, 1921, 1927, 1930, 1945
- Registration of Dogs Ordinance No 25 of 1901 as amended by No 20 of 1915, 03 of 1920, 21 of 1921, 26 of 1938, 61 of 1939, 12 of 1945, 23 of 1946, 19 of 1947 and 60 of 1961.

- Animals Act No. 29 of 1958 as amended in 1968, 1988, 2009 and Regulations framed in Gazettes 1962, 1965, 2000, and 2009.
- Fauna and Flora Protection Ordinance No.2 of 1937 as amended in 1942, 1944, 1945, 1948, 1964, 1970, 1993 and 2009.

## **1) Prevention of Cruelty to Animals Ordinance No. 13 of 1907:**

The foremost law that ought to be analysed; which is the main piece of legislation dealing with protection of animals from cruelty in Sri Lanka, is the "Cruelty to Animals Ordinance No.13 of 1907" which is more appropriately titled as the "Prevention of Cruelty to Animals Ordinance No. 13 of 1907" (Hereinafter referred to as "PCAO"). This Ordinance has undergone subsequent amendments in 1912, 1917, 1919, 1921, 1927, 1930, 1945 and the latest amendment being No. 22 of 1955. While other statutes collectively deal with animal rights, the PCAO is specifically enacted to deal with the issue of cruelty to animals. The key provisions of this Ordinance shall be analysed as follows.

The preamble to this Ordinance states that, "it is an Ordinance to make better provisions for prevention of cruelty to animals."

Section 2 of the Ordinance defines the "offence of cruelty" by stating that

"Any person who shall,

- a. cruelly beat, ill-treat, and over-drive, or cause or procure to be cruelly beaten, ill-treated, over-driven, over-ridden, abused or torture any animal;
- b. cause unnecessary pain or suffering to any animal by an act or omission,
- c. convey or carry or cause them in vehicles, basket, box, or cage or otherwise, any animal or position animals so as to subject them to unnecessary pain or suffering", will be committing the offence of cruelty.

The term "animal" ought to be interpreted according to the Interpretation section where it states that, "animal means any domestic or captured animal and includes any bird, fish or reptile in captivity", and the penalty for the offence of cruelty shall be a fine which may extend to one

hundred rupees or may extend to imprisonment of either description for a term which may extend to three months or with both.

Similarly under Section 3 “if an animal is found in any place suffering pain by reason of starvation, mutilation or other ill-treatment, the owner of such animal shall be guilty of an offence and shall be liable for a fine which may extend to one hundred rupees and in the case for a second or subsequent offence, with a fine which may extend to two hundred rupees or with imprisonment of either description for a term which may extend to three months or with both”

Consequently, the penalties for killing animals with unnecessary cruelty and using animals for unfit labour

- Rabies Ordinance No 7 of 1893- amendment No.23 of 1956. latest
- Butchers Ordinance No 9 of 1893 as amended in 1976, 1981, 2008 and Regulations framed under the Local Authorities (Standard by-laws)

Out of the above, this research paper will only discuss the following legislation that are directly applicable to the issue which is the subject of this research; victimization of elephants and stray dogs due to inhumane and cruel treatment.

- Prevention of Cruelty to Animals Ordinance No. 13 of 1907
- Fauna and Flora Protection Ordinance No.2 of 1937
- Registration of Dogs Ordinance No 25 of 1901
- Rabies Ordinance No 7 of 1893

under this Ordinance, are stated to be punished by a fine which may extend to one hundred rupees or may extend to imprisonment of either description for a term which may extend to three months or with both.

Under Section 7 of this Ordinance which imposes a penalty of “a fine which may extend to one hundred rupees or may extend to imprisonment of either description for a term which may extend to three months or with both, for any person without reasonable excuse permits any diseased or disabled animal of which he is the owner die in any street.” Offences under this Ordinance shall be considered as cognizable offences within the meaning of Code of Criminal Procedure Act as per Section 12, thus

manifesting the severity of the offences that are defined under this Ordinance.

## 2) Fauna and Flora Protection Ordinance No.2 of 1937:

Although the Fauna Flora Protection Ordinance Section 22 (as discussed earlier) enumerates the necessity for a valid registration and license to keep an elephant in custody, the Ordinance does not directly provide for laws against cruelty exercised over such elephants.

## 3) Registration of Dogs Ordinance No 25 of 1901 and Rabies Ordinance No 7 of 1893:

The Registration of Dogs Ordinance provides for the “proper authority” that ought to take the decision as regards to the ‘seizure and detention’ of dogs, and Rabies Ordinance lays down the proper law as to how the seized stray dogs who are suspected to be diseased or known clearly to be diseased ought to be detained and how the local authority is vested in the power to make the decision “whether to destroy or dispose the dogs in such manner that the local authority deem expedient.” (Avirippola, 2017) Although this Ordinance applies to the situation of victimized stray dogs discussed above, this too does not directly deal with laws against the cruelty that these dogs might face.

### C. Adequacy of the Existing Legislation

It is clear that these two practical scenarios reflect the violations of the existing legal regime that specifically address the legal issue pertaining to victimization of domesticated elephants and stray dogs due to cruel and inhumane treatment. PCAO being the only existing legislation that lays down laws against animal cruelty, attention should be paid to identify if this piece of legislation is adequate in addressing the two major issues related to animal cruelty that took place and are still taking place in Sri Lanka.

The incidents highlighted above reflect immense cruelty caused to the animals which ought to be addressed specifically by the PCAO analysed above. Although the Ordinance manifests the acts amounting to an offence of cruelty to be severe, the law in relation to it is rarely implemented in order to bring justice to the ill-treated animals.

Captured stray dogs and domesticated elephants undergo immense cruelty due to ill-treatment and unnecessary suffering without anyone's knowledge, thus violating Section 2 and 3. As per statement given to the media, elephants are kept under physical restraints, inflicting severe pain and withholding food and water in order to submit them to tourist rides as well as in keeping them under control at temples, and zoos. This is a clear violation of Section 3 of the PCAO. Stray dogs in captivity are put through unnecessary suffering by being sedated and overdosed with 'ketamine' which is not the recommended method of disposing stray dogs as per law.

The PCAO came into force in 1907 and was last amended in 1955. Thus, many deficiencies can be distinguished in this Ordinance.

Firstly, the definition of "animal" interpreted in the Ordinance includes only 'captured or domestic animal' including birds, reptiles or fish in captivity. Unless the law is interpreted in a broad sense this definition does not suffice as it does not include many other categories of animals that are facing discomforts due to cruelty in the present context. This definition is evidently too narrow and limited to be applicable for the present issues pertaining to animal cruelty. The definition of "animal" under The Prevention of Cruelty to Animals Act, 1960 of India states that "an animal" means any living creature other than a human being." Such definition is wider in scope to bring justice to any animal undergoing unnecessary pain and suffering under the Indian law.

Secondly, the penalties that are imposed under the PCAO are outdated. They do not suffice as a penalty in the modern day nor does it suit to serve for the severity of the offence. Being liable to pay a minimum amount equivalent to hundred rupees or for an imprisonment extended unto three months will not penalize the perpetrators sufficiently. (Under provisions of PCAO analysed above). In Singapore, the new law on animal welfare has toughened the penalties against those convicted of animal cruelty by imposing 2-3 year jail terms, unlike in Sri Lanka.

Thirdly, the duty of care that the person in charge of an animal ought to be exercised to ensure the well-being of such animals, is not included in the PCAO. The proviso to section 3 stipulates that "it shall be a good defence to any such charge if the owner can prove to the satisfaction of the court that such condition of the animal was not due to act, omission, neglect or default on his part." This proviso reduces the stringency of Section 3, enabling the

perpetrators to show satisfactory excuse as to the condition of the animal who is being ill-treated and thus be free from liability proving that such condition was not due to their act, omission, neglect or default. If one tries to interpret this proviso it is doubtful as to how an animal, living with an owner, could put itself in a condition of starvation, mutilation or specially ill-treatment with no involvement of its owner's act, omission, neglect or default at all. The law should be able to completely vest the responsibility of taking care of the animals that are owned by a person and require to be held liable despite the presence of a direct causal link between the owner's act and the unfavourable condition that the animal is going through. Animals and Birds (Amendment) Act of Singapore provides for the practice of "positive duty of care" towards the animals by the owners and caretakers as according to the Codes of Animal Welfare unlike the Sri Lankan law.

Furthermore, the PCAO does not establish a specific authority that is vested with the power to look into Animal Welfare matters. It merely authorizes the Minister with power to appoint infirmaries to treat and care for animals that are the victims of offenses committed under the Ordinance, make rules for treatment of animals and other such related matters.

In addition to these main concerns the PCAO clearly lacks provisions to address issues relating to animals in pet shops, animal experimenting, animal performance, live transport of animals, and use of elephants for rides and processions, which are the most demanding concerns of the present day in Sri Lanka.

It is therefore clear from the above, there are many deficiencies in the current PCAO which renders Sri Lanka far behind from the rest of the world with regard to animal welfare legislation.

## IV. RECOMMENDATIONS

In order to over-come the above deficiencies and improve the existing legal system to address animal cruelty issues emanating from the present day context, several notable initiatives have been taken by the legislature and animal activists of Sri Lanka.

One such major step is the drafting of the "Animal Welfare Bill" which was approved by the cabinet in 2016, although it is yet to be enacted as law in Sri Lanka. However, many novel provisions are introduced by this Bill to improve the existing animal welfare law in Sri Lanka. It consists

of fifteen parts that comprehensively lay down the law on animal welfare that overcomes the deficiencies in the current Ordinance in a satisfactory manner.

Section 80 provides definitions for 'animal', 'animal in captivity' which has widened the existing definition of 'animal' in the Ordinance to mean 'any living creature other than a human being'. Section 3 expressly recognizes the concept of 'duty of care'. Under Part VII, VIII and IX the Bill establishes "Offences Relating to Cruelty to Animals", "Prohibited Conduct" and "Penalty" respectively by comprehensively defining the different offences and prohibited conduct that are punishable under the Bill while Part XII provides for "Investigation and Prosecution" procedure for offences committed. Furthermore, perpetrators can be convicted under the jurisdiction of the Magistrate Court and also be made liable for more stringent penalties. Most importantly the Bill proposes for the establishment of a 'National Animal Welfare Authority' under Section 5.

It is also favourable to recommend to include laws that will monitor the extermination of stray dogs in order to put an end to the unnecessary suffering and pain that stray dogs are put through in order to make Sri Lanka Rabies free. "The solution is not destruction, but dog population control through CNVR (Catch, Neuter, Vaccinate and Release), the humane, sustainable method recommended by the World Health Organization (WHO) and the World Organization for Animal Health (OIE) which Sri Lanka is obliged to follow, being a member of both organizations." (Perera, 2017) There ought to be provisions against cruelty in order to punish perpetrators who do not utilize the CNVR method and resort to inhumane practices. The law should establish authorities or government funded organizations to improve living conditions of community dogs by establishing veterinary and feeding centres and fenced zones that they could roam around freely.

Countries such as India, Singapore, and Malaysia have established fine animal welfare legislation. Indian Constitution under Article 51A (g) stipulates that "It is the fundamental duty of every citizen of India to have compassion for all living creatures", giving express recognition to animal welfare. In the Sri Lankan Constitution there is no explicit recognition of animal rights or welfare. When looking at the current context it is more suitable if the supreme law of the country expressly provides for the animal rights and welfare. New Malaysian law (since 2013) on Animal Welfare specifically provides

for a "new licensing system for animal related businesses and new responsibilities for pet owners and license holders" which is also recommended under the Animal Welfare Bill in Sri Lanka.

## V. CONCLUSION

In conclusion, it should be reiterated that it is time to enact the long-overdue Animal Welfare Bill in order to overcome the four main deficiencies in the Ordinance namely; the lack of, a sound definition for an "animal", stringent and updated penalties, the recognition of the concept of 'duty of care' and a proper authority to monitor animal welfare matters and "ensure effective and efficient laws on cruelty to animals in Sri Lanka." (Jayasuriya, 2016), in order to reflect 'the greatness of this nation and its moral progress.' The manner in which fine animal welfare law in India, Singapore and Malaysia have introduced novel animal welfare standards, Sri Lanka too should proceed to implement such novel standards as recommended above to improve the existing legal regime on animal welfare. As said by Attorney-at- Law Vositha Wijenayake, Convenor of Animal Welfare Coalition of Sri Lanka, "The current law dates back to 1907 and lacks in deterrent effect which prevents the protection of animals against cruelty. It is time we changed these laws and made sure that the long overdue Animal Welfare Bill is passed for efficient action against cruelty to animals."

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# PURSUING A BETTER NATIONAL WATER POLICY ENDOWED WITH SUBSTANTIAL RIGHTS ON WATER: CASE STUDY OF SRI LANKA

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**Abstract** - Every state is bound to fulfil fundamental needs of each human being as a duty bearer and subsequently those needs secured more powerful status as human rights. Formerly the water was an unlimited resource and Justinian categorized water under “Res communes” or resource common to all. However for the time being water became a commodity and many restrictions have been implemented over water resources. Similarly it became a scarce resource for many areas. Accordingly water need to be regulated through integrated mechanism. Since the water scarcity became a universal challenge world community presented new strategies to counter upcoming menaces. Many treaties and action plans were introduced in order to ensure the sustainable use of water resources. Right to water confronted with water rights. Land owners were against to ensure right to water of others, violating their water rights. But the governing bodies were bound to protect both right to water while protecting water rights. This paper intends to investigate this conflicting issue and main objective of this paper is to introduce proper national water policy for Sri Lanka which could counter the water management issues. Further this paper looks into water protection strategies and prevailing laws and appropriate mechanisms towards sustainable water use. Furthermore this paper suggests to secure the current runoff and utilize it through proper mechanism. This research use qualitative research methodology and mostly the secondary data and analytical and interpretative approach of writing.

**Keywords** - Water rights, Right to water, water policy

## I. INTRODUCTION

“Water is critical for sustainable development, including environmental integrity and the alleviation of poverty and hunger, and is indispensable for human health and well-being.” (Onyango, 2009) It would be harmful for entire

future of any nation by running on such an immense resource with less or out of proper National contrivance. The United Nations have committed to focus on water for a decade (2018- 2028) having an impression to raise awareness, define a road map and advance the water agenda. (UN, 2018) International community struggling from considerable time period for a sustainable water usage against increasing water scarcity and to establish integrated water management system throughout the world. UN and their funding limbs, are being launched numerous projects throughout the world in order to accomplish an appropriate substantial water management strategy.

This paper intends to investigate a path way to introduce a substantial National water policy for Sri Lanka. Sri Lanka is a country having high water saturation. Sri Lanka's Per capita water resources availability is 2,400m<sup>3</sup>. Average annual rainfall is 2,000mm. This small island discharges nearly 65% of available water to the sea through 103 river basins. As per the recent calculations the Mahaweli River discharges about 4,009mcm and the Kaluganga discharges 4032 mcm. (Wijesuriya, 2005) Accordingly it is hard to presume an immediate water scarcity threat to Sri Lanka. However several provinces of dry zone in the country continuously facing for an arid climate and water scarcity for considerable period of every year. This water diversification sirens a massive challenge raised before Sri Lankan water authorities to establish a standard water policy which could ensure appropriate water capacity for all citizens throughout the year while protecting both water rights and right to water of them.

In order to vanquish this huge target, it is required to proliferate the consumption rate of flowing water enabling the surplus to fertilize the dry zone. Flowing water surplus of the country could be utilized through various equitable

and commercial means which would contribute to marginalize the global water scarcity. This multilateral global approach needs to be implemented through an integrated water management system enabling protection of both water rights and the right to water of entire mankind.

This paper intends to understand the pertinence of protecting water rights and achieving the right to water through the same national water policy which is equipped with appropriate water management strategy and water protection mechanisms enforced by substantial legal bodies to counter emerging threats to the water sector.

## II. SCIENTIFIC APPROACH OF THE STUDY

It is very inconvenient to theoretically analyse the water sector in Sri Lanka which is highly politicized and overruled by the bureaucracy. But it is obvious that precise national water policy should be comparable with both national and global requirements in the water sector rather than addressing internal complications. Water rights and the right to water should be implemented by national legislations through proper enabling bodies to overcome huge disparities in the natural water distribution system. The necessity of national intervention for this enormous task has been declared by Beccar L. as “authorized demands to use a flow of water, including certain privileges, restrictions, obligations and sanctions accompanying this authorization, among which a key element is the power to take part in collective decision making about system management and direction. The main element of this definition is authorization; one can talk of ‘rights’ only when water use is certified by an authority (individual or collective) with legitimacy and power of enforcement, and recognized by users and non-users alike” (Beccar L., 2002). Accordingly, the political authority or the decision-making body (power) is the most important element in the process of securing all the rights behind the water sector. Rights are in two folds. One is human right to water or assuring access to water or right-based approach of water. The other one is water rights or protecting ownership of water or land-based approach of water. Anyhow, mingling of these conflicting structures is the most challenging and cumbersome task in drafting an appropriate water policy for a particular state.

This research is mainly based on secondary data which is influenced by library resources. Further, some eminent professionals and scholars engaged in the field have contributed a lot to elucidate the practical aspect of the Sri Lankan water sector. It was followed by the qualitative

research methodology and analytical and interpretative approach throughout the research. The main focus of this study aims to the international contrivance of drafting appropriate national water policy for Sri Lanka and to assess the causes for its recession.

Research problem of this study is “How to preserve the right to water while assuring the water rights through national water policy in Sri Lanka?” The author endeavoured to resolve this problem via four research questions as follows. What are the national and international attempts to draft an appropriate water policy for Sri Lanka? What are the fundamentals behind the prevailing water management system in Sri Lanka? What are the possibilities to implement equal access to water in Sri Lanka? Whether the contiguous relationship between land and water should be strengthened or discarded?

## III. SRI LANKAN WATER MANAGEMENT SYSTEM

### A. Introduction

South African poet Mazisi Kunene stresses the reality behind water which is invisible for most of the countries saturated with water. He says that, “The dictionary describes water as colourless, tasteless and odourless - its most important property being its ability to dissolve other substances. We in South Africa do not see water that way. For us water is a basic human right, water is the origin of all things - the giver of life.” (Withanage, 2015) Still Sri Lankan authorities behind water have not understood this immutable and idealistic truth which any water policy should be based on. Constitution of Sri Lanka does not recognize the right to water. Majority of the Sri Lankan water authorities do not address the maximum utility of water resources. Political authorities are blind to water pollution and over-extraction. Riparian rights have not been regularized. Ground water resources are in danger due to wage statutory implications. Hence it is clear that the Sri Lankan water sector is subject to particular internal anarchism even though it has been covered by many black-leg laws and snobbish authorities.

Being an island situated in the Indian Ocean covering a land area of 65,610 km<sup>2</sup> out of which 2,905 km<sup>2</sup> correspond to large inland waters, yet water has become a high-demanding commodity in Sri Lanka. (Dahanayake and Perera, 1998) More than 160 bottled drinking water companies are facilitated by the Sri Lankan government

under the Food Act No. 26 of 1980 to utilize various water resources (mainly water springs and groundwater) without considering the concealed risk of exploitation of ground water against the correlative rights of the neighbouring land holders. Though the Sri Lankan National water Policy anticipates to provide 100% water supply for both rural and urban areas of the country by 2025, it do not afford applicable measures to accomplish the target rather than uncertain means such as rainwater harvesting. (Wicramage, 2002) Accordingly it is clear that still Sri Lankan water policy is exercising in aimless and noxious manner.

**B. Long term prospect for a substantial water policy**

Inconsolable requirement of a national water policy was dragging throughout decades with the expectation of reducing the seasonal water scarcity in the dry zone. Ancient hydraulics piloted for the development of infrastructure such as large scale storage tanks and trans-basin diversions. International community committed to focus 1990 decade for widespread water sector reform in order to provide a better service to water users in south Asian region, especially the poor. (Saleth, 2004) With this awakening of international movements World Bank, International Monetary Fund (IMF), United States Agency for International Development (USAID) and Asian Development Bank (ADB) urged to implement several water development projects based on Sri Lanka in order to develop infrastructure facilities of farmers in water management and to launch multipurpose development projects.<sup>1</sup>

Further USAID specially strived to introduce a new water policy upholding international agenda on water resources during year 2000. It was consist of 7 comprehensive titles such as the foundation of the water policy, water rights and allocation, information management, institutional structure for water resources management, demand management and ground water management. However it was failed due to internal resistance of public and political disagreements. Further it did not address the actual problems grounded in the soil such as growing demand of water, sedimentation of reservoirs, saving rainfall water harvest, water pollution and groundwater depletion and

over extraction which are earnest requirements of the Sri Lankan soil. It restricted free use of water for general public, arrogating sole authority of handling and controlling water resources and intended to implement tax for water users.<sup>2</sup> Major directive of this policy was “The right to water will be granted through Water Entitlement”. However it exempted small scale users and individual water users supplied through group schemes. Another dangerous feature of the policy was this so called entitlement was transferable and required to be renewed time to time. Further it guides to extend the policy over small water users by encouraging local authorities to implement registration process for the purpose of groundwater management. Final objective of this policy was to shifting the character of water into a commodity which enabled the private sector to deal with as a business. This annoying and unbecoming policies which inappropriate with the requirements of the soil deteriorated the system and destroyed the public faith towards the government.

Thereafter Sri Lankan waters were not undergo any major regulating projects with appropriate conditions which suit with the genuine demands of the nation instead of implications with destructive appearances.

**C. Prevailing legal background behind Sri Lankan water sector**

Vast range of governing laws (nearly 50 statutes) and coordinating bodies (nearly 40 institutions) have been established in order to manage water resources in Sri Lanka. Each and every laws and institutions are having individual agendas and they attempt to carry out allotted quantum of duties within the spectrum of law. This less collaboration leads to minimize the productivity of the system and to raise unnecessary conflicts among higher authorities. Certain virtuous suggestions of the proposed policy were implemented through new amendments for the prevailing legislations such as National Water supply and drainage board<sup>3</sup> (Amendment) Act No.13 of 1992 and Water Resources Board<sup>4</sup> (Amendment) Act No. 42 of 1999. Even though most of the implications were not

<sup>2</sup>Regulation 3 (1) states “An application for water entitlement shall be submitted to the Authority in triplicate, and shall: -

(e) Be accompanied by the fee specified in schedule II hereto.”  
Schedule II gives the necessary application fees i.e.

(a) Registration of existing use Rs. 500  
(b) Application for water entitlement Rs. 1000  
(c) Renewal of water entitlement Rs. 500  
(d) Declaration or transfer of water entitlement Rs. 250  
(e) Application for transfer of water entitlement Rs. 1000

<sup>3</sup>National water supply and drainage Board Act No. 2 of 1974

<sup>4</sup>Water Resource Board Act No. 29 of 1964

<sup>1</sup>Gal Oya Left Bank Canal from 1979 – 1986, Mahaweli multipurpose development project in 2004, Asian Development Bank (ADB) funded for Comprehensive Water Resources Management Project (CWRM) in 1992, Water Resources Management Project (WRMP) was launched in 2001, World Bank and USAID initiated policy development program to enhance the productivity of irrigated agriculture in 1970 to 1980, Irrigation Management Policy Support Activity was initiated with support from USAID in 1990.

triggered out Water Resources Board Act of 1964 includes so many commendable qualities such as formulation of policy and planning for the water sector, conservation, utilization, prevention of pollution, integrated planning and coordination of activities on water resources and acting in an advisory capacity to the minister in charge. Hence it is clear that uncertainty of the Sri Lankan water is not a result of inadequacy of laws or defects of prevailing procedures. Since those laws were not aligned with tangible solutions for national demands in water sector and out of appropriate action plan, most of the laws were ill-famed.

## IV. TRANSITIONAL STATUS OF WATER

### A. Introduction

Water was considered as *res communes* or common entity for all under the Justinian's classification of property. However at the present context competition for water was rapidly increased before growing population and urbanization and it was intensified by the lowered water tables, reduced natural flows and complex water pollutions, resulting in defining it as a commodity to fill the lack of access to safe drinking water. This transition of status of water conducted to develop it as a human right under right based approach along with a crucial influence for the property holders who were bearing ownership of water sources.

### B. Right based approach

Though the South African Constitution has recognized the right to water as "Everyone has the right to have access to sufficient water" Sri Lankan Constitution is still silent on water resources. It only substantiate the public trust doctrine by article 27(14) and 28(f) which express the idea that the present generation holds the natural resources in trust for future generations. (Justice Shirani Thilakewardena, Justice Nissanka Udalgama, Justice N E Dissanayake, Justice L K Wimalachandra, 2009) South African Water Policy strongly declared that "All water, wherever it occurs in the water cycle, is a resource common to all, the use of which shall be subject to national control. All water shall have a consistent status in law, irrespective of where it occurs." It further establish the right based approach against the property ownership by stating that "There shall be no ownership of water but only a right (for environmental and basic human needs) or an authorization for its use. Any authorization to use water in terms of the water law shall not be in perpetuity."

Emerging trend to expand the Right to Life within the scope of Customary International Law has accommodated the Right to Water by establishing state obligations all over the world. Accordingly states are bound to provide continuous water supply and to facilitate various other integrated water resource management systems. Though the Sri Lankan water policy do not admit the enlargement of water rights, generally we are bound by international influence of strengthening human rights and most of the concepts will gradually creep into our social practices and legal system.

Right to water and sanitation has been recognized by more than 25 international instruments in various instances including the ICESCR, Convention on the elimination of discrimination against women (1979), the Convention on the rights of the child (1989), the UN General Assembly Resolution on 'The right to development' (1999) etc.

Especially the right to access to sanitation and safe drinking water was recognized by the 3rd South Asian Conference on sanitation which was held in India on November 2008 as the first regional attempt to promote human right to water. At the 4th South Asian Conference on sanitation held in Sri Lanka on April 2011 all the participants unanimously agreed to recognize the right to water and sanitation by all means including legislation and to make budget allocations for sanitation and hygiene programs. Even though most of the states in the Region were not eager to implement these directions, it conducted to promote it as a directive principle throughout all the national efforts in this regard. Accordingly Sri Lanka is also inspired to implement right to water through the national water policy rather than promoting entitlement.

### C. Property based approach

Even the right to water is hardly claimed, water rights are frequently discussed among legislative authorities. Water rights were interconnected with land ownership and land holders were entitled to use water as a conjunctive right. Among various other explanations water rights have defined in satisfactory manner by the Food and Agriculture Organization (FAO) as follows; "Water right is a legal right: to abstract or divert and use a specified amount of water from a natural source; to impound or store a specified quantity of water in a natural source behind a dam or other hydraulic structure; or to use water in a natural source" (Singh, 1991) It has further elaborated by certain authors and interpreted with substantial modifications. "In general, local water rights are based on a combination of historical rights, claims emerging from

labour (or capital) input in (re)constructing irrigation or drinking water systems, territorial rights or individual rights linked to land ownership. Often, these complex combinations do not correspond to what is defined as 'water rights' in official legislation" (Vos, 2006)

Mar del Plata Action Plan was initiated by the international community in year 1977 in order to establish the public ownership of water for the first time in history. It states that "Legislation should define the rules of public ownership of water projects, as well as the rights, obligations, and responsibilities, and should emphasize the role of public bodies at the proper administrative level in controlling both the quantity and quality of water. It should also spell out, either in the primary or subordinate legislation, administrative procedures necessary for the coordinated, equitable, and efficient control and administration of all aspects of water resources and land use problems, as well as the conflicts that may arise from them". (Bradlow, n.d.) Previously suggested water policy for Sri Lanka with the assistance of USAID recommend to establish the property rights of water in order to increase the productivity and it initiated the transformation of the status of water from common property to commodity. The suggested policy (March 2000) stated that all water including surface and groundwater will be owned by the state and managed by the government in partnership with users on behalf of all Sri Lankans; which was severely contested as being contrary to Common Law principles the government could transfer ownership to anybody, making water a market commodity. (C.Gopalakrishnan, 2002) However this maleficent suggestions were not established which would nullify the inherent property ownership and drastically violate the water rights of the citizens.

Water policies proposed with the same features were rejected by most of the countries throughout the world. The US farmers in Florida rejected a similar water policy. Thousands of Bolivians took to the streets in protest against such a bad policy. The people in Bolivia made it very clear that they do not want water companies entering into the public water systems. As same as British water investors strived to enter into the Sri Lankan water market during year 2000 with new water proposals.

Ultimate goal of the ADB water policy was providing investment opportunities for the private sector rather than incorporating sustainable water management system

or safeguarding water resources. Mr. John R. Cooney the Residents Representative of ADB has professed that free water is a thing of the past; for anybody it costs money to do it, costs money to generate it, costs money to dispose of it; somebody must pay some money along the chain. He further said that a "free resource is a wasted resource". In his opinion, therefore, pricing of water is good. (Cooney, 2000) Accordingly it is clear that ADB water policy was not genuine and it was a collusion against water resources of the country to convert it into a commodity.

## V. CONCLUSION AND RECOMMENDATIONS

In the event of Pursuing a better National Water Policy standing for general public and concurring with global agenda, as a partially saturated country general public of Sri Lanka is liable to preserve available water resources and ensure water rights of them. It is clear that Sri Lanka has agreed with international community to preserve right to water while ensuring the property based ownerships as the government assigned by the people. According to the constitution of the country government would act only as a guardian over the natural resources. However government is bound to preserve the human rights of the public and spontaneously it would lead to protect the right to water. At the same time government cannot acquire or violate the associated rights linked with any private property. Hence the water rights or property based ownership would be protected by the constitution thus the government adopt any human right which was not so far identified by the constitution.

Eventually glob would confront with huge water scarcity which should be investigated a prompt common solution as early as possible. Invariably dry zone of the country is also in danger of for considerable period of every year due to poor rains and depletion of water table. Everyone is unanimously liable to find solutions for this viable problem of water scarcity. Sometimes certain predictions may come true regarding climax of water scarcity that it would lead to a future world war. Many International movements have been declared several successful dimensions towards the sustainability of the globe in terms of preserving and promptly managing available water resources. At the movement it is impossible to survive without entering into the global thinking process, especially regarding the common natural resources.



Sustainable water use could be ensured only through proper water management process. Any water management criteria should be based on the stages of water circle and apt with human consumption patterns. Further it should be concentrated on the possibility of consuming running off stuff. Further the national water policy should be able to regulate all the differed authorities and absent from political interferences. Finally the national water policy should be ensured both right to water and water rights of the general public simultaneously by using applicable propaganda to promote both rights and sustainable means.

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# APPLICABILITY OF THE DEFENCE OF ACT OF GOD IN ENVIRONMENTAL DAMAGE : A CRITICAL APPRAISAL

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**Abstract** - Occurrences over which man has no control are referred to as 'Acts of God.' Some natural events that we experience today are very serious and recurrent. Flood or drought happens each year causing severe damage to the environment. Modern climatic patterns and the way that it brings loss and damage to people and the environment is not per se unforeseeable. However, not only individuals but also authorities ignore liability using the title as a defence, under the civil liability regime that governs recovery of damages for environmental damage.

In this backdrop, this study examines whether the defendants who are handling environmental aspects within their purview, could ignore their legal duty simply because they shift the responsibility by labelling it as Acts of God. It is observed that modern jurisdictions have a limited approach towards this defence and apply strict liability against the defendants for environmental damage, if it is a non-delegable duty and a foreseeable damage. This is a qualitative study which is designed to compare selected jurisdictions with Sri Lankan law in the area of research. The study is based on the primary and secondary data, for its comparative analysis.

**Key words:** natural events, acts of god, strict liability

## I. INTRODUCTION

An environment that is generally compassionate to its animations is called 'Mother Nature' in so far as it provides beings with air, shelter and food. The responsibility of mankind is to secure the basics that mother nature provides for their survival, and as such, gives an undertaking in return. The undertaking is in legal regimes that operate worldwide, regionally and domestically. The occurrences of natural events and the effect of it on the world could be

seen as ubiquitous. It is questioned whether the underlying cause for this effect is solely the behaviour of the people or other factors. It is uncontested that some natural events injure people and damage property. The reason is that such occurrences are uncontrollable. The controllability of the effect of natural occurrences would be a criterion for environmental liability, even though occurrences cannot be prevented, if they can be targeted to specific actions of humans.

In this background, it is imperative to examine the environmental hazards which are locally and annually experienced. Environmental damage occurs owing to severe rain and droughts inter alia. The climatic pattern of Sri Lanka is predictable, it is well known in which period heavy showers and droughts occur. The areas which are affected by extreme weather conditions are also identified and marked in maps. Further, the consequences of environmental hazards are not unknown as deaths of people and animals, personal injuries, loss of property of individuals and State, plus environmental displacement are reported every year.

Several statutory bodies have been established to administer to matters pertaining to disaster situations in Sri Lanka. They are statutorily obligatory to planning, managing, rebuilding and post-monitoring environmental damage. Also, they are liable for their own torts and torts of their employees as undermentioned duties are non-delegable.

As found in the Constitution of Sri Lanka of 1978, environmental protection is a shared responsibility of all. It is true that the authorities should not be blamed all the time for mismanaging the situation, but the citizens also have a responsibility to work towards environmental protection. By understanding and acknowledging the threat humans

face, communities should get together and march forward to protect the environment by themselves on a small scale and to get the duties of the public authorities done if they are inefficient and ignore their legal duty.

This study examines the possibility of applying the defence of "Acts of god" to exclude liability for environmental damage by the authorities and the rationale behind the defence.

## II. ENVIRONMENTAL DAMAGE

Environmental damage is very special. Environmental damage may affect the right to life and other rights relating to peaceful living on the earth. Diverse types of definitions for 'environmental damage' can be found in different jurisdictions. Sands explains that 'environmental damage' only includes fauna, flora and related factors, material assets like cultural heritage, the landscape and environmental amenity and interrelationship between them, other than the people and their property. It specifically focuses on the damage to bio-diversity. One recent example from the European Community Directive on Environmental Liability 2004 can be brought under this category. Therein, the damage to bio-diversity and damages in the form of contamination of sites are brought into one as 'environmental damage', but, this has been clearly distinguished from 'traditional damage'. Nonetheless, the Directive covers traditional damage by itself when the damage occurs by a dangerous or hazardous activity even though it is not considered under the definition of 'environmental damage'. In this context, the European Union regime avoids including 'persons and property damage' into the definition of 'environmental damage'. This approach, however, signals uncertainty in the application of international law since a narrow definition would exclude some aspects of environmental damage for instance, traditional damage, which is the damage to persons and property. 'Environmental damage' is broadly defined in relation to Antarctic environment in a 1988 Convention on the Regulation of Antarctic Mineral Resource Activities. It is stated that,

Any impact on the living or non- living components of that environment or those eco system, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to (the) Convention.

This definition has taken living and non-living things into consideration for environmental purposes which

include the damage to persons and property. Principle 7 of the Stockholm Declaration also provides for personal damages in view of human health. This is known as the 'Declaration of the United Nations Conference on the Human Environment and it proclaims that,

Man is both creature and moulder of his environment... Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself.

Further, in the light of the competing interests of human beings and nature, principle 13 of the Rio Declaration in 1992 states,

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.

Pollution victims are included in the regime, but it is not certain whether it comes under the meaning of 'environmental damage'. However, both are within the scope of the liability regime. Thus, the modern environmental regimes include both bio-diversity and persons and property damage in the definition of environmental damage.

It is also important to analyze the modern tendency of the invocation of human rights to seek redress for environmental harms in international law. Dr. Atapattu has stated that there is a call for a distinct right to a healthy environment and the invocation of human rights machinery to seek redress for environmental harms. She further noted the absence of a specific international machinery to redress environmental harms has led to this development. The civil and political rights such as the right to life, the right to privacy and the right to equality make precedence in developing the application of this right.

According to this study, it can be argued that the modern tendency is to define the term, 'damage' in order to gain maximum implementation and benefit for the victims of environmental damage.

## III. ENVIRONMENTAL LIABILITY

Environmental liability could be observed in two ways. Firstly, in view of State responsibility and secondly, the responsibility of the non -state actors. In the former, State's responsibility for environmental protection arises when

the States are in breach of any international law. However, State's liability for environmental damage is concerned with variation to State's responsibility in the modern world. This approach concerns environmental damage apart from law breaking since the result is reciprocal in the sense that the action affects human and natural environment. Environmental liability can be imposed through common practice. It is stated that,

Living law which is daily observed by members of the community, and compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous test and standard of reduction to writing. Writing is of course useful for establishing certainty, but when a duty such as to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question...

State's liability is conceptually much deeper and stronger than the concept of State's responsibility in the context of environmental damage in international law. Apart from the responsibility of the State to abide by the international law it has a duty to make laws in par with international law in each scenario. For the execution of such duties the State has empowered its branches of administration. Apart from any ministry or governmental body it may include any statutory body and or local authority. The liability of the latter (non-State actors) is very much interested to consider as no specific rule is applied. This includes private parties and individuals.

### **A, Basis of Liability:**

Modern international environmental law bases its environmental liability on the gravity of the harm and the nature of the activity. Generally, non-dangerous and non-prohibited activities which damage any environmental element are fault based while dangerous and hazardous activities that are prohibited by law are non-fault based. The activities that are dangerous and hazardous but neither prohibited nor permitted expressly by law are either fault or non-fault based. Activities that are dangerous and hazardous, though the law permits them, are non-fault based. The activities that are ultra-hazardous in nature where the liability is non-fault based represent absolute liability.

In the local jurisdictions, environmental liability is founded on different principles. The principles of liability which had been derived through English common law has become the common law of many of the Common Wealth

countries. For single occurrences which bring hazardous results entail strict liability under Rylands v Fletcher rule, while continuing acts are dealt with law of nuisance in the English law. Law of nuisance is also a part of strict liability. However, in considering the present applicability of the law of nuisance (this refers to the intervening acts that violate plaintiff's property rights) there are doubts as to whether the damage was foreseeable by the defendant. Therefore, it is not certain whether all the nuisances are subject to strict liability in the present context.

In fact, the modern environmental law principles of international law have also been derived through these common law principles. Therefore, it is worthy to study the rule of Rylands v Fletcher and the impact of it in protecting the environment.

### **B. The Rylands v Fletcher Rule**

In the Rylands v. Fletcher case, the defendants employed independent contractors to construct a reservoir in their land. This land was separated from the plaintiff's colliery by the intervening land. Beneath the site of the reservoir there were some disused shafts connecting their land with the plaintiff's mine across the intervening land. The independent contractors were negligent in failing to discover this. Water from the reservoir burst through the shafts and the plaintiff's mine was flooded. It was held that the defendants were liable, despite the absence of fault in themselves. Delivering his judgment in the Court of Exchequer Chamber, Blackburn J. has stated;

...We think that true rule is, that the person who, for his own purposes, brings on his land collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

In fact, the issue of this case was whether a property damage that is caused to the plaintiff's mine could be recovered from the defendants who were not the real wrongdoers. In the House of Lords, depending on the old laws on trespass, Lord Cranworth held that the defendants were strictly liable. Lord Cairns affirmed the judgment of the Court of Exchequer Chamber, by quoting the above passage and held that in this case, water that was accumulated in a large quantity, was a 'non -natural use' of the land. Analyzing the above decisions of the House of Lords, 'Waite' indicated that there are two approaches to the rule. Thus, he states;

... There is no single rule in *Rylands v Fletcher*, but rather two rules. The wide rule is that enunciated by Blackburn J and followed by Lord Cranworth in the House of Lords. The narrow rule, relied on by Lord Cairns LC, is a species of nuisance liability arising between neighbours for the escape of something not naturally on the defendant's land which adversely affects the claimant's enjoyment of his land.

Lord Cranworth had taken the broader view of the *Rylands* rule to apply strict liability on the defendants who had not done any wilful harm to the plaintiff on their part. This broader view follows the concern of the damage that can occur in the affairs of activities apart from the fault. On the other hand, Lord Cairns has taken the narrower view because he based himself on the fact that damage occurred due to the non-natural use of land. In fact, Lord Cairns does not bother about the intention of the defendant but, cares only about the nature of the activity that caused the damage. Therefore, the threshold for the liability was a non-natural use. In that sense Lord Cairns' view might be narrow as suggested by 'Waite'. Lord Cairns seems to have believed that his view is sufficient to decide the case but did not hesitate to accept that the same result could be arrived at on the original rule of Mr. J. Blackburn.

Nonetheless, the defendant is held fully accountable for all damages resulting from the escape of the substance even if he had taken due care to prevent its escape since the 'something is at his peril'. In this case, the standard of proof of the defendant's fault is less as the plaintiff has only to show that the defendant's action caused the damage. It is observed that the decision in this case paved the way to make different viewpoints on the accidents that result in damage from handling dangerous activities in the English common law. Despite the views, the decision in the *Rylands v. Fletcher* case, therefore has undoubtedly made an indelible impression in the English common law history because, it has set more a liability rule as against the law of negligence. This rule does not consider the fault or the blameworthiness of the doer. The standard of proof is less and it creates a victim oriented liability regime in tort law. This rule made the master liable for such occurrences even though the true doers are not his real employees. It ensures the financial assurance of a particular victim of a dangerous activity. Therefore, it shows justice and fair play of the common law. The negligence was found on the part of the independent contractors who had undertaken the contract for the building of the reservoir.

It covers single occasions, which are significant in the effect they have on the human and physical environment, for instance, bursting of reservoirs and the spread of fire. Some may argue that this case only deals with property damage and has no validity in environmental cases, however, if the House applied strict liability on this individual property damage depending on Blackburn J's rule, then the sanction would be confirmed if the environmental impacts of the building of a reservoir were concerned. Therefore, this rule can be used much more effectively for environmental cases in addition to individual property damage.

It has a few defences. Acts of god, statutory authority, act of a third party and statutory authority are considered against the application of the *Rylands* rule. These defences may limit the ambit of strict liability.

### C. 'Acts of God': the defence

An Act of God is applicable in a case in two ways. Firstly, in a case based on strict liability, an Act of God is applied as a defence, excluding liability. It is a ground of justification rather than a defence. However, the outcome is that the defendant is immune from liability. Secondly, a natural event is a *novus causa* which diminishes liability, disconnecting the chain of causation in negligence.

An Act of God is defined in common law, as an overwhelming event caused exclusively by natural forces whose effects could not possibly be prevented. It is also indicated that in modern jurisdictions, an Act of God is often broadened by statute to include all-natural phenomena whose effect could not be prevented by the exercise of reasonable care and foresight. Such an act cannot be avoided by having due care or diligence. There is observed a strict divide between humans and nature in this interpretation.

Force majeure is also used to mean the same however; the legal use of it differentiates from the meaning of an Act of God. Force majeure has a wider application as it not only includes natural forces but also includes other causes which may not be related to nature and can be connected to human agency directly and indirectly, but on whom the humans involved in the accident do not have any control or the incident that eventuated was inevitable and which cannot be controlled. It is understood that the scope of Force majeure is broader in application than an Act of God.

In *Aloysius Silva v Upali Silva* the Court of Appeal of Sri Lanka held that the appellant is liable for the consequences of his act in damming up and storing the dirty water on his land regardless of whether he is guilty of negligence or not. Interestingly, the defence taken by the appellant was that he constructed tanks and trenches on his land to prevent the escape of water but, owing to the heavy rainfall experienced in November 1973, the water overflowed causing the damage, which was not in his control. In other words, to raise the defence of an Act of God. However, the court correctly said that this argument is not valid as the water is dirty water accumulated by the appellant by artificial contrivances built by him on his land. It is not surface rain water flowing naturally from his land into the field below. It is dammed water allowed to overflow into the field and comes within the principle of *Rylands rule*. The approach taken by the court in this case is significant to the incidents where humans have intervened the natural causes of events. The court stated that the defence is not applied in a case like this.

In examining the applicability of the defence in strict liability cases, it is observed that the authorities as well as private individuals are trying to be immune from liability. Even though Sri Lankan case law authorities are not evident to prove the use of the law, English law has decided that an act of God is a valid defence to the rule in *Rylands v Fletcher*. In *Nichols v Marsland* the court stated that,

Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate.”

In this case, the defendant diverted a natural stream on his land to create ornamental lakes. Exceptionally heavy rain caused the artificial lakes and waterways to become flooded and damage adjoining land. The court decided not to impose liability under *Rylands v Fletcher* as the cause of the flood was an Act of God.

The traditional approach to the applicability of the defence shows us the strong delineation between human acts and nature. However, the court was of the view that depending on foreseeability there is a likelihood of making a defendant liable under the rule.

The traditional way of application of the defence has been criticised by the academia in the current context. In the absence of insurance for covering policies on floods and droughts this line of thinking is important. Fraley has suggested a shift of the legal doctrines across these areas considering that developments have taken place in disciplines such as the food and drug law, wilderness protection and patents. Seeing the corporeal as “imprinted by history”, the Author says that,

...These concepts connote passive and receptive forms of nature as a space for human action. Drawing on this traditional way of speaking even recent work in the field of geography describes events from “flood and forest fires to animal attacks and crop diseases” as “non-human interventions” despite the fact that there is scientific evidence that ties the frequency and origins of all of these events to human actions. Because we have not substantially developed a new understanding of “nature” and “human” as integrated, we easily fall back to the old dichotomy. Other fields such as law, which draw upon social science for their theoretical bearings, follow suit.

The argument has been a reality in the face of climatic transformation and occurrence of floods and droughts within the region. It is scientifically proven that human acts sufficiently link to severe floods in the cities in the rainy season. Thus, ‘severe rains beyond memory’ have become an annual occurrence.

Further, the emphasis made by the Indian Supreme Court with regard to the enterprise’s liability in the case of *M.C. Mehta v Union of India* is worthy to note in this connection. Stating the inappropriateness of the applicability of an outdated principle to a modern scenario the court emphasised that, they cannot allow their judicial thinking to be restrained by referring to the law as it prevails in England and they should be prepared to receive light from whatever source it comes but, the court has to build their own jurisprudence and they cannot countenance an argument that merely because the law of England does not recognise the rule or exceptions to the rule. Thus, the court held that the enterprises are strictly and absolutely liable for the damages caused by toxic escapes despite the fact that they are at fault or

not, therefore does not subject to any exception. Indian courts followed the newly established practise thereafter in several important environmental cases.

Consequently, a notable deviation from the applicability of Rylands v Fletcher rule which is prevailing in the English law is observed in the modern common law countries.

### III. CONCLUSION

This paper maintained the argument that environmental damage is special, therefore it warrants a strict legal approach, specially, when humans intervene artificially into natural causes. The authorities have a special obligation to be extra careful and implement a precautionary method to minimise the damage, if extreme weather conditions are recurrent and foreseeable; therefore, the effectiveness

of the rule of Rylands v Fletcher was examined. In this, it is observed that because of the wide application of the defence of Acts of God, the strictness of the rule has reduced. As a result, the competent authorities do not take their duties seriously. An Act of God is not a blanket immunity for the defendants who disregard environmental safety. A major reason for the wider application of the defence is the separation of human acts from nature. Nature is only a stage for performing human acts. This is correctly acknowledged by the courts in the cases of Silva v Silva and Mehta v Union of India. The approach taken by the courts must necessarily be the rule of thumb against environmental degradation. The world has experienced severe climatic change owing to human behaviour. In this sense, separating humans and nature is useless. Thus, it is timely to consider the applicability of the defence of Acts of God in the context of modern environmental deprivation.

PROOF



# AUSTRIAN MINDS: EXAMINING HOW VIENNA CIRCLE INFLUENCED ON HANS KELSEN'S NOTION OF "GRUNDNORM" AND 20TH CENTURY LEGAL POSITIVISM

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**Abstract** - This paper seeks to explain Kelsen's pure theory of law and his whole contribution to legal positivism was influenced and bolstered by his early stay in Vienna, even though the foundational stone laid by Kelsen on legal positivism is clearly distinguished from logical positivism propounded by the pioneers of Vienna circle, in this article I argue the intellectual uplifting Kelsen underwent during the youth he spent in Vienna had left a hallmark in his thoughts. Furthermore this article illustrates how both logical positivism and legal positivism grew parallel in a same time period during two great wars. Central argument I seek to explain in this article is to demonstrate Hans Kelsen as a legal modernist and how Vienna circle made impacts upon his thoughts.

**Keywords** - Vienna Circle, Legal Positivism, Pure Theory

## I. INTRODUCTION

Tracing a connectivity between logical positivism and legal positivism may seem to be a highly irrational or perhaps baseless endeavour as they are by nature constructed in completely different theoretical stances, but it would be an interesting observation to contrast how Hans Kelsen being the pioneer on legal positivism and his grand contribution to jurisprudence "pure theory of law", was influenced by the wave of modernist thoughts prevalent in Austria, mainly in Vienna Circle. After graduating from Vienna University from 1919 to 1930 Kelsen held an academic post there and it was in this epoch that Vienna circle began to grow as a new academic wing after the decline of Austrian empire. This circle was established by Moritz Schlick and Otto Neurath and Rudolph Carnap became the central intellectual figure in the circle. The developing

the ideas on logical positivism into the domain of science and philosophy were mainly done by Vienna circle in its heyday. It was absolutely in a swashbuckling process to assimilate the development of science into positivism and members of Vienna circle were particularly interested in the development of science and they saw the need of liberating 20th century philosophy from the dogmatic influence of Hegelian idealism. The phase positivism in philosophy of 20th century, while far from having a generally accepted meaning, appears to comprise at least three different trends: Empiricism, pragmatism and logical positivism. All these three aspects have enormously helped contributed to liberate philosophy from metaphysics. The intellectual grip of Vienna circle was akin to the given trends in positivism and moreover their ideas on language were crucially influenced by 20th century philosopher Wittgenstein. (Janik 1973)

In understanding how Vienna circle influenced upon the thoughts of Hans Kelsen, it is important to understand the significance of empiricism in law. The earliest understanding of Western jurists among the nature of law was primarily based on the natural laws which took more idealistic stance. The natural law discourse dominated among the Greeks and Romans as the fountain of law addressed those philosophical aspects but the empiricism became important to law, which extended the laws scope from nature, morality, religion, divinity and other external factors to the social order and how human acts involve in law. Freedman has aptly pointed out the importance of positivism in law as

"It is in modern legal theory that "positivism" has acquired major significance and come to symbolize the dominant

trends in contemporary legal thinking. Much its most important manifestation has been “analytical positivism”, scientifically established by Austin and his successors, modified in our time by Kelsen and the Vienna circle”. (Friedman 1967)

This paper will create a new discourse on how Kelsen’s approach to legal positivism or commonly called “Pure Theory “ was influenced by the contemporary intellectual transformation in the city of Vienna through the activities of Vienna Circle. Moreover this paper elucidates the slight similarities between logical positivism of 20th century analytical philosophy and legal positivism.

## II. KELSEN AND “GRUNDNORM”

The debate between ought and is has become a prevalent ideological encounter in law since the days of yore. The period where positivism grew was an era of many intellectual debates about these two elements. From one side the moralist argument on law ought to fulfil the moral order of the society was playing a pivotal role and other side Positivistic approach towards law freed it from the elements such as morality, the debate between good and bad etc. Instead of taking such idealistic standards the positivism in law focused on what the law is. English jurist John Austin was the first of entire positivist pantheon in 19th century many were yet to follow him. In examining the idea of Hans Kelsen’s “Pure theory of Law”, the influence he inculcated from Kant stands as a salient factor albeit he is regarded as a positivist in analytical jurisprudence. (Kelsen 1955) Kelsen regarded law as a hierarchy of normative relations, not a sequence of causes and effects, natural sciences. In fact this idea has gained its roots from Kantian notion of man as a fundamental part of universe subject to the law of causation. His sole objective is therefor to determine what can be theoretically known about law of any kind at any time and under any conditions. The essential foundations of Kelsen’s system may be enumerated as follows,

- (1) The aim of a theory of law, as of any science, is to reduce chaos and multiplicity to unity.
- (2) Legal theory is a science, not volition. It is knowledge of what the law is, not what the law ought to be.
- (3) The law is a normative not a natural science
- (4) Legal theory as a theory of norms is not concerned with the effectiveness of legal norms.

- (5) A theory of law is formal, a theory of the way of ordering, changing contents in a specific way.
- (6) The relation of legal theory to a particular system of positive law is that of possible of actual law.

Even though Kelsen’s idea was akin to John Austin externally, like Austin Kelsen never considered law command of the sovereign. As a matter of fact Kelesen’s understanding of law was rather systematic. He vividly described law as a chain of events followed by conditions and sequences, he believed in a hierarchy of norms should be constituted in any given legal system, each of norm should receive its authority form a superior source and the Kelesen called the fundamental norm as “Grundnorm”. In his analysis all the other norms in the hierarchy was subjected to the deduction except the “Grundnorm”. Kelsen states “The fundamental norm itself is not capable of deduction, it must be assumed as an “Initial Hypothesis “. (Kelsen1955) As an example in a sovereign state in parliament democracy, the parliament is the fundamental norm and if the legal system belongs to the country is governed by a dictator, his authority will be the highest norm.

## III. KELSEN’S ASSOCIATION WITH VIENNA CIRCLE

As an expert of constitutional law, Kelsen played a key role in drafting the constitution of Austria, which was a philosophical landmark in certain ways as the promulgation of new Austrian constitution marked the dawn of modernist legal thoughts in Europe. Having held a post in Austrian Constitutional Court, Kelsen left Austria for the U.S.A in 1930. However in understanding his intellectual contribution to the realm of jurisprudence throughout his career, it is evident that the days he spent in Vienna and his involvement in Viennese modernist movements crucially sharpened his legal acumen. In an academic paper named “Kelsen and his circle “; Clemens Jabloner has stated the following statement.

“Of Kelsen’s various connections, there are three which merit particular attention: Kelsen’s relations with the Austrian Social Democratic Party, to which he contributed notably on an intellectual level although he was not a member: the links between the pure theory of law and the logical empiricism of the Vienna circle and his contact with psychoanalysis and its founder Sigmund Freud. (Jabloner 1998)

In tracing Kelsen's links to Vienna Circle, it is an interesting factor to observe that Kelsen had never been a recognized member of the circle and ostensible Kelsonian standards were purely different from the scientific approach adopted by Vienna circle. In fact the difference between Vienna circle and Vienna school of jurisprudence of Hans Kelsen based on heavy philosophical distinctions. Mainly as stated above the phase "Positivism" was comprehended by two schools in different styles, but nevertheless the positivism in Vienna circle like legal positivism tends towards the empirification of their object of cognition. In his defence of not being a follower of Vienna circle Kelsen has stated "In response to your letter, I would like to inform you that I did not belong to the so called "Vienna Circle" in the strict sense of the word, I had personal contact with this circle through my acquaintance with Prof. Schilick, Dr. Otto Neurath. What connected me to this circle –without being influenced by it- was its antimetaphysical thrust. From the very begging I rejected the moral philosophy of this circle –as is formulated in Schlick's issues of ethics. However the writings by Phillip Frank and Hans Reichenbach on causality did influence my view of this issue. (Jablonek 1998)

Kelsen's own statement proves how he compelled himself to diverge from Vienna circle, even in understanding logical positivism from pure theory of law, it becomes certain Kelsen always saw law a normative science and under this condition there can be no doubt that legal norms which belong to the realm of 'ought' are not to be found in reality by empirical means. However, a mental operation, the assumption of the 'basic norm', makes it possible to describe legal norms as special kinds of 'realities'. In connection with law, 'positivism' implies a limitation to a regularly effective system of Orders created by humans. On the contrary the logical positivism applied in Vienna circle paid a much concern over observation of the experience and results of experiments.

Yet, there is a significant commonality between Vienna Circle and Hans's Kelsen despite having so many major firmly established differences around. Our main objective of this paper is to trace that commonality and to propose a hypothesis that Kelsen was sharply influenced by the intellectual changes occurred during the time period between end of First World War and beginning of Second World War in the city of Vienna. Firstly Hans Kelsen wanted to found a science of law which is kept free from all the elements foreign to the Specific methods of a science whose only purpose is the cognition of law. This contention upheld by Kelsen has made him anti metaphysical and

also his anti-metaphysical stances are one paramount factor which unites Vienna Circle and Kelsonian school of jurisprudence. Kelsen wanted to overcome the traditional half-measures employed by legal science, which tends towards 'pragmatic' or 'case-by-case' solutions as soon as a consistent application of a theoretical basis leads to ideologically undesirable consequences.

On the other hand we suggest the motives of both Kelsen and the pioneers of Vienna circle such as Carnap, Neurath and Schlick have rooted in modernism. Modernism was kind of a mantra absorbed by Vienna circle in the most active period of their scholarship. Throughout their active days, members of Vienna circle strived to refute the existed philosophical dogmas and 19th century philosopher Hegel happened to be their arch rival. Hegel took the whole human history as a process in which a "world spirit" gradually reached consciousness of itself. For Hegel, individuals are less important than the state as a whole especially the role of the state in the grand march of historical progress. These ideas were taken to support strong forms of nationalism. Hegel's was an "idealist" philosophy, since it held that reality is in some sense spiritual or mental. Hegelian ideas flourished in Europe and path created by Hegel aroused German nationalism which Vienna circle vehemently opposed. Apart from Hegel Vienna circle had rivalry with German philosopher Martin Heidegger too. Heidegger 's philosophical flare over metaphysical speculation was often criticized by Vienna circle and when Heidegger delivered his lecture after assuming Husserl's chair of philosophy at University of Freiburg in 1929, he delivered a lecture titled "What is Metaphysics ?" by this lecture he professed his famous declaration " The Nothing Itself Nihilates" ( Das Nichts selbst nichtet ).(Vrahimimis2012) However Heidegger's philosophical claim on nothingness was subjected to the harsh criticism by Rudolph Cranap of Vienna Circle. (Vrahimimis2012) In fact the Vienna circle appealed to modernism and their quest was essentially focused on liberating the European values from mysticism, romanticism and sheer boredom of nationalism. We argue the same modernist objective was imbued with Kelsen's approach to jurisprudence. Jurisprudence existed prior to Kelsen dwelled in much ideological whims and fancies. It is true that first positivist revolution in law was turned by English jurist John Austin; yet, the approach of Kelsen was sui generis in many ways. Mainly like Vienna circle Kelsen too anticipated to formulate his "Pure theory of law "under modernist shadows. Kelsen had explicitly mentioned that his norm theory is to clarify the relations between the fundamental and all lower norms but not to say whether

this fundamental norm itself is good or bad. That is simply the task of political science, or of ethics, or of religion.

In comparing and contrasting the points that how Kelsen's ideas can be par with Vienna Circle, his attempt to disrupt the authority of absolute idealism in law resembles how Vienna circle struggled to remove the Hegelian thoughts from philosophy. Having realized the impracticality of existence of such absolute values in law, Kelsen was audacious to reject the natural law theories propounded by all natural lawyers. This was the decisive factor which distinguished from traditional legal theorists. In an article written by a German scholar named Jorg Kammerhofer, author points out "Kelsen shows that such an absolute value cannot exist; that all attempts by the various natural law approaches to found such a value are bound to fail. While I cannot detail them all here, let me just mention Aristotle's 'entelechia' – the derivation of an absolute value standard from the alleged social nature of man. Kelsen proves that to derive a value from a series of facts – assuming that, empirically speaking, humans have unifiable characteristics – to seek to derive value from facts is a breach of the Is- Ought dichotomy, which dissolves the very possibility of the factual becoming a standard. (Kammerhofer 2009)

However the ambivalent position of Vienna circle in Kelsen's contribution to Western jurisprudence can be finally unveiled in one of his lesser known book called "Vergeltung und Kausalit". In this writing Kelsen has formulated following arguments.

- (1) People interpret 'nature' normatively according to the principle of imputation (thus as society) or scientifically according to the principle of causality (thus as nature).
- (2) In the development of human thinking the normative method appears before the causal one.
- (3) the idea of 'causality' only gradually becomes liberated from that of 'retribution
- (4) In the course of emancipation of the idea of causality from that of "retribution" through renunciation of absolute necessity –dualism could be overcome in favour of a unified science. (Klemenes 1998 ).

These claims have a slightest affinity with what logical positivists argued in their claims and this reiterates although Kelesen was not a part of Vienna circle, his work was availed by the contemporary changes occurred in Vienna. Above mentioned factors in this paper have clearly illustrated how two ideological bents in a same city grew up parallel to each other and given factors have discussed the extend that influenced Kelsonian thought in jurisprudence.

## IV. CONCLUSION

In this paper we have considerably attempted to show the connectivity between Vienna Circle and Hans Kelsen's pure theory of law as two different academic discourses grew in same time period between two world wars. In the end of the paper viewing Hans Kelsen and his legacy as the beginning of 20th century legal modernism would be one possible conclusion that we can reach after reading and analysing how Kelson attempted himself to understand legal positivism in a novel approach which completely diverged law's position from the conventional positivism existed before Kelsen, furthermore Kelsen's "Grundnorm" or "Pure Theory made a profound impact for modern legal positivists to develop law as a science. In the end we believe scientific approach followed by Kelsen was mainly arose from the parallel intellectual transformation he witnessed in Vienna circle.

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# THE SPACE BETWEEN PROMISES AND RESULTS: THOUGHTS ON REGULATING USE OF FORCE BY THE UN

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**Abstract** - United Nations forces are today deployed into settings that cover almost all the factual signposts on the spectrum between peace and conflict. In spite of the increased tensions they encounter and ever-expanding mission objectives, the fundamental purposes of UN deployment, namely maintaining international peace and security and advancing human rights, remain unchanged. This was underlined by the March 2018 UN Secretary-General's Report on Peace building and sustaining peace.<sup>1</sup> This paper assesses the importance played by the use of force by United Nations forces in achieving these objectives and argues that existing gaps between mission objectives and results can be reduced or closed by adopting a regulatory framework that is more sensitive to the nature, character and purposes of United Nations deployment. I submit in this regard that human rights law has a greater role to play in the realm of regulation than is acknowledged at present, suggest a conceptual criterion through which this could be achieved and in conclusion, assess the utility of such an approach with reference to practical examples.

## I. INTRODUCTION

Early international law thinking viewed the right to use force as a corollary of the state. War was thus an attribute of statehood and conquest conferred legitimate title to territory.<sup>2</sup> The questions of when and by whom force could legitimately be used would gain continued significance throughout the 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> centuries, culminating in the adoption of the Charter of the United Nations (the 'Charter')<sup>3</sup>. Its twin objectives of restricting the use of force except in self-defense and promoting international peace and security through collective self-defense confers

on the United Nations ('UN') a monopoly on the use of force<sup>4</sup>, in exchange for the promise of international peace and security. This paper deals with an integral aspect of the use of force by the UN; the legal standards applicable to its regulation. I venture to analyse why and how these standards could improve mission efficiency by eliminating or reducing, existing gaps between their desired and actual outputs.

Part II of this paper will analyse the purposes for which the UN is authorized to use force and trace its evolution with reference to specific mission mandates as well as the content of related principles such as Protection of Civilians (PoC) and Responsibility to Protect (R2P). Part III will consider the phenomenon of conflict of laws, assess its operational dynamics and how conflict of laws issues mediate between the two regulatory candidates, International Human Rights Law (IHRL) and International Humanitarian Law (IHL); in view of their concurrent applicability to armed conflict<sup>5</sup>. I submit in conclusion that any regulatory regime that seeks to regulate UN troop conduct must take cognisance of the peculiarities inherent in UN uses of force. It is only then that the reforms proposed in 2018 by the UN Secretary-General to restructure the peace and security pillar in line with the human rights and development pillar of the UN,<sup>6</sup> as well as the proposals contained in the Santa Cruz report on peacekeeper fatalities<sup>7</sup> will become a reality.

<sup>1</sup>ibid, Art.s2(4), 29 and 51.

<sup>2</sup>Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ Rep 226, para 25 and Case Concerning Armed Activities on the Territory of the Congo: Democratic Republic of the Congo v Uganda(2005) ICJ Rep, 178,179.

<sup>3</sup>Peace building report (n 1).

<sup>4</sup>General Santos de Cruz. Improving the Security of UN Peacekeepers (DeCruz Report), December 2017. Available at [https://peacekeeping.un.org/sites/default/files/improving\\_security\\_of\\_united\\_nations\\_peacekeepers\\_report.pdf](https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf) [https://peacekeeping.un.org/sites/default/files/improving\\_security\\_of\\_united\\_nations\\_peacekeepers\\_report.pdf](https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf)

<sup>1</sup> UN Secretary-General. Peacebuilding and sustaining peace. 2018. Available at <https://www.un.org/peacebuilding/>

<sup>2</sup>Ian Brownlie, 'International law and the use of force by states revisited' (2000) 21 Australian Yearbook of International Law 21, 22.

<sup>3</sup>Charter of the United Nations, signed 26 June 1945, I UNTS XVI (entered into force 24 October 1945).



## II. THE USE OF FORCE BY UN FORCES, A CONCEPT IN FLUX?

### A. *The UN Charter framework for the use of force*

Human history is often characterized by watershed moments. These watersheds take numerous shapes and forms, from the European colonization of Africa and Asia to the French revolution to the two World Wars; the last directly shaping the background relevant to the issues discussed here. The destruction and loss of life that resulted from the World Wars were unprecedented in history and shook the collective conscience of the international community to such an extent, that it was forced to call for and implement extraordinary measures. The First World War thus created the League of Nations<sup>8</sup> while the Second created the UN.<sup>9</sup>

Mindful of the events preceding it, the Charter of the UN adopts an extremely cautious approach to the use of force; the applicable framework comprising of Articles 2(4), 42 and 51. The context in which force is used by the UN is also informed by Article 1(1) of the Charter which provides that one of the purposes of the UN, is to 'maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace'. Humanitarian disasters and gross human rights violations within states have consistently been taken to represent such threats.<sup>10</sup> These collective provisions effectively proscribe the aggressive use of force and require member states to surrender to the Security Council ('UNSC') their right to use force except in situations covered by Article 51. Notwithstanding doubts that have been expressed regarding the current utility of the 'imminence' criteria<sup>11</sup>, the Right of collective or individual self-defense can only be exercised until the UNSC takes appropriate measures under the Charter. Thus when peaceful means of settlement fail, the UN is authorized to take measures such as 'demonstrations, blockade and other operations by air, sea or land forces of the members of the United Nations' as may be necessary to maintain or restore international peace and security.<sup>12</sup> UN operations operations, regardless of their characterization, are and

have been one of the principle mechanisms so used for the maintenance of international peace.

The centrality of the role played by 'peace' in the conceptual context within which UN operations are created and deployed is thus undeniable. As pointed out in the Agenda for Peace<sup>13</sup>, there is 'a need to address the deepest causes of conflict: economic despair, social injustice and political oppression'<sup>14</sup> and 'to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well - being among people.'<sup>15</sup> UN missions therefore pursue a broader concept of peace, which is sometimes also referred to as a 'liberal peace'.<sup>16</sup>

'Peace' also impacts and is impacted by, human rights. Mention of the close relationship that exists between these notions can be found for instance, in the Universal Declaration of *Human Rights* (UDHR) which provides in its preamble that the 'inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.<sup>17</sup> This is echoed in the Friendly Relations Declaration which emphasizes 'the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights...'<sup>18</sup> Similar references are made in the UN Charter<sup>19</sup> and the International Covenant for Civil and Political Rights (ICCPR)<sup>20</sup>. Peace and human rights thus exist in a symbiotic relationship, each respectively benefitting or suffering from, the presence or absence of the other.<sup>21</sup>

This paper will not venture on a detailed discussion regarding the classification of UN missions<sup>22</sup> because

<sup>8</sup>Covenant of the League of Nations, 28 April 1919, available at: <http://www.refworld.org/docid/3dd8b9854.html> (accessed 21 February 2018).

<sup>9</sup>The Charter (n.3).

<sup>10</sup>Refer for example UNSC Res. 1894, UN Doc. S/RES/1894 (11 November 2009), UNSC Res. 1911, UN Doc. S/RES/1911 (28 January 2010).

<sup>11</sup>John C. Yoo, 'Force rules: UN reform and intervention'(2006) 6 *Chicago Journal of International Law* 641. Refer also Tim Bakken, 'Nations' use of force outside self-defense'(2010) *Georgetown Journal of Law and Public Policy* 451.

<sup>12</sup>The Charter (n.3) Art.42.

<sup>13</sup>An Agenda for Peace: Preventive diplomacy and related matters, UN Doc A/ RES/47/120 (18 December 1992).

<sup>14</sup>*ibid*, para. 15.

<sup>15</sup>An Agenda for Peace (n.13) para 16.

<sup>16</sup>Refer for doubts expressed on the desirability of enforcing on societies, such foreign notions of peace; Alexander Bellamy and Paul Williams, 'Introduction: Thinking anew about peace operations' (2004)11 *International Peacekeeping* 1,2 and Michael Pugh, 'Peacekeeping and critical theory' (2004) 11 *International Peacekeeping* 39, 41.

<sup>17</sup>Universal Declaration of Human Rights, UNGA Res 217, UN Doc A/RES/217 (10 December 1948), Preamble.

<sup>18</sup>Declaration On Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, UNGA Res 2625, UN Doc. A/RES/25/2625 (24 October 1970).

<sup>19</sup>The Charter, n. 3.

<sup>20</sup>International Covenant on Civil and Political Rights, signed 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>21</sup>See further William A. Schabas, *Freedom from Fear and the Human Right to Peace, in The Challenge of Human Rights: Past, Present and Future* 36-51 (David Keane & Yvonne McDermott, eds., 2012).

<sup>22</sup>Refer United Nations Peace keeping Operations: Principles and Guidelines (UN Department of Peacekeeping Operations and Field Support 2008) 19 available at [www.effectivepeacekeeping.org/events/70th-un-gneeral-assembly-us-priorities-un-peacekeeping-summit](http://www.effectivepeacekeeping.org/events/70th-un-gneeral-assembly-us-priorities-un-peacekeeping-summit) and Ulrich Schneekener, 'Freiden Machen: Peacebuilding and peacebuilders' (2005) 80 *Die Friedenswarte* 17 for classification of UN missions.



its focus will be on the regulation of force used by them, regardless of the type of operation concerned. I am, however, mindful of the different levels of force that may be utilized by specific types of operations (and the divergence of objectives ascribed to them).<sup>23</sup> These differences are reflected in the wording adopted by enabling resolutions in addition to how force has in fact been used on the ground.<sup>24</sup>

The first recognized UN mission - the United Nations Emergency Force (UNEF) - for example, was only authorized to use force in self-defense and was prohibited from using initiative.<sup>25</sup> The United Nations Operation in Somalia II (UNOSOM II) on the other hand, was authorized 'to use all necessary means to establish a secure environment for the delivery of assistance'<sup>26</sup> thereby limiting its engagement (including the use of force) to the protection of humanitarian assistance missions.<sup>27</sup> Meanwhile in Sierra Leone, the United Nations Mission in Sierra Leone (UNAMSIL) was authorized to 'take necessary action to ensure safety of personnel, and within its capabilities, to afford protection to civilians under imminent threat of physical violence'<sup>28</sup>, thus enabling it to act in self-defense as well as defense of others. While in Cote d' Ivoire UN forces were authorised to use force 'in support of or in parallel with government actors'<sup>29</sup> in a 'preventative and pre-emptive posture',<sup>30</sup> in Darfur, they can use 'sufficient military powers to defeat spoilers'.<sup>31</sup> Compare these mandates with that of Mission De L' Organisation des Nation Unies Pour La Stabilization En Rd Congo (MONUSCO) and particularly of the Force Intervention Brigade (FIB) in the Democratic Republic of Congo. While MONUSCO was authorized to take all necessary measures for the protection of civilians<sup>32</sup>, the authorization for the FIB breaks new ground<sup>33</sup> by permitting it to support the FARDC in operations against the Lords Resistance Army (LRA) and more significantly, to carry out targeted offensive operations.<sup>35</sup>

<sup>23</sup>Ibid, United Nations Peace keeping Operations: Principles and Guidelines, 19.

<sup>24</sup>For a detailed discussion on the evolution of mission mandates refer Trevor Findlay, *The use of force in UN peace operations* (Oxford University Press 1996).

<sup>25</sup>Summary study of the experience derived from the establishment and operation of the force, Report of the Secretary General, UN Doc. A/3943 (09 October 1958) 139.

<sup>26</sup>UNSC Res 794, UN Doc. S/RES/794 (03 December 1992) para 10.

<sup>27</sup>Refer for a general analysis of UNOSOM Rules of Engagement F.M. Lorenz, 'Rules of Engagement in Somalia: were they effective?' (1995)42*Naval Law* 62, 65.

<sup>28</sup>UNSC Res 1270, UN Doc. S/RES/1270 (22 October 1999) para. 14.

<sup>29</sup>UNSC Res 2112, UN Doc. S/RES/2112 (30 July 2013) para. 6(a), UNSC Res 2216, UN Doc. S/RES/2216 (25 June 2015) paras 19 (a) and (c).

<sup>30</sup>UNSC Res 2162, UN Doc. S/RES/2162 (25 June 2014) para. 19(a).

<sup>31</sup>UNSC Res 1706, UN Doc. S/RES/1706 (31 August 2006) Preambular para. 11.

<sup>32</sup>UNSC Res 1856, UN Doc. S/RES/1856 (22 December 2008) para.s 3, 5.

<sup>33</sup>For an analysis of how, in view of its functions, the FIB should be classified for the purposes of IHL refer L. Muller, 'The Force Intervention Brigade - United Nations Forces Beyond the Fine Line Between Peacekeeping and Peace Enforcement' 2015 (20) 3 *Journal of conflict and Security Law* 359, 372.

<sup>34</sup>UNSC Res 1925, UN Doc. S/RES/1925 (28 May 2010) para. 12 H.

<sup>35</sup>UNSC Res 2098, UN Doc. S/RES/2098 (18 March 2013) para. 12 B.

The breadth of the foregoing mandates is put in context when one recalls the original peacekeeping principles of consent, impartiality and non-use of force except in self-defense and defense of mandate<sup>36</sup>. The fact that mission mandates were recognized as 'straining' these principles<sup>37</sup> as far back as 1999 should therefore not come as a surprise.<sup>38</sup> The use of force by UN forces is today recognised as a well - established exception to the aforementioned principles which, according to the Ramos - Horta report, 'should never be used as an excuse for failure to protect civilians'.<sup>39</sup> The resultant normative, qualitative and quantitative transformation has thus appropriately been coined a 'triple transformation' of peace operations.<sup>40</sup>

## B. Detailing the Charter framework

The evolution of mission mandates I describe above was radically affected by how the exigencies posed by conflicts outpaced the development of peacekeeping doctrine by the early 1990's, often at unacceptable cost. The events that unfolded in Rwanda from April to July 1994 and Srebrenica in July 1995 provide poignant and compelling examples. In the face of extensive criticism for inaction<sup>41</sup>, the need for a change was efficiently summarized by the Brahimi Report.<sup>42</sup> These developments contributed to increased weight being placed on two notions that are central to the contemporary understanding of UN deployment; Protection of Civilians (PoC) and the Responsibility to Protect (R2P).

PoC, in the context of UN missions, acknowledges that such missions are duty bound to provide a basic level of security to local civilians by virtue of the mere decision to intervene in a given situation.<sup>43</sup> Protection of civilians

<sup>36</sup>Refer R. Siekmann, *National Contingents in United Nations Peace Keeping Forces* (1991). Refer also Findlay (n 20) for a detailed analysis of the practical execution of UN mission mandates.

<sup>37</sup>Swedish Government, 'Comprehensive report on lessons-learned from United Nations Operation in Somalia April 1992- March 1995' (1995)24.

<sup>38</sup>Katherine Cox, 'Beyond self-defence: United Nations peacekeeping operations & (and) the use of force' (1999) 27 *Denver Journal of International Law and Policy* 239.

<sup>39</sup>Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Respects', UN Doc. A/70/95 - S/2015/446, Para. 122

<sup>40</sup>Alex Bellamy, Stuart Griffin and Paul Williams, *Understanding Peacekeeping* (Cambridge Polity 2004) 75.

<sup>41</sup>Report of the Secretary - General pursuant to General Assembly Resolution 53/55: 'The Fall of Srebrenica', UN Doc. 54/549 (15 November 1999), Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257 (15 December 1999).

<sup>42</sup>Report of the Panel on UN Peace Operations, UN Doc. A/44/305 - S/2000/809 (21 August 2000)11.

<sup>43</sup>Hugh Breakey, 'The protection of civilians in armed conflict: four concepts' in Angus Francis and others (eds), *Norms of Protection: Responsibility to Protect, Protection of Civilians and their interaction* (United Nations University Press 2012) 40.

under threat of physical violence is today, an established justification for the use of force by the UN.<sup>44</sup> PoC finds a convenient home in the Human Security Doctrine<sup>45</sup> and these levels of security are in turn informed by three considerations; the protective

body fulfilling its mission mandate, the natural expectations entertained by agents on what appropriate standards of protection are and the content of the applicable IHL and IHRL rules which establish the relevant legal standards.<sup>46</sup> This last consideration holds particular significance as the said standards also confer legal authority on the non - legal concept of PoC.

R2P on the other hand, consists of three pillars; the recognition that it is the responsibility of all states to protect individuals within their jurisdiction from the crimes of genocide, crimes against humanity, war crimes and ethnic cleansing ('R2P crimes'), the international community's commitment to assist states to fulfill this responsibility and the power of the UNSC to authorize the collective use of force in favour of those (at the risk of) being subjected to the said crimes.<sup>47</sup> Action under pillar 3 will however be taken only when peaceful means are inadequate and national authorities are manifestly failing to protect their populations from the four R2P crimes.<sup>48</sup>

But, by their very nature, crimes against humanity<sup>49</sup> and genocide<sup>50</sup> can be committed in the absence of a temporal or geographic nexus to armed conflict. So long as the applicability of R2P to the said crimes (when committed beyond the temporal and/or geographic scope of an armed conflict) is concerned, legal authority cannot thus emanate from IHL, but from IHRL. In the case of R2P

as applicable to war crimes (which by definition require a nexus to armed conflict)<sup>51</sup> the said authority emanates either from the standards prescribed by IHL per se, or in combination with those prescribed by IHRL. Moreover, both these concepts give prominence to the need to protect civilians from dangers emanating from third party conduct as well, thus resonating with the idea underlying the IHRL principle of due diligence<sup>52</sup>. A correlation to due diligence is not found in IHL<sup>53</sup> which with its focus on duties, is normatively ill-equipped to accommodate such a dimension.

It is also worth noting that, although these notions have not attained the status of jus cogens norms, they are relevant to UN missions in two very significant respects. First, they flesh out the content of mission mandates by adding detail into what is expected as well as required of a particular mission and second, they link the applicable legal structure with the content of the respective mandate, in effect connecting political statements with legal standards. The emphasis so placed by the conceptual framework underpinning UN missions on the protection of human rights and maintenance of international peace may be compared with the use of force by states or non-state actors, which is seldom defined by the preservation of peace or protection of human rights. For Kelsen, these latter forms of force constituted one method of international sanction, namely war (the other being reprisals), which was aimed at the opponent's 'complete submission or total annihilation'.<sup>54</sup> The armed conflict paradigm so represented is primarily characterised by the belligerents' ability to use offensive lethal force provided the standards set out by IHL are satisfied. The other end of this spectrum is occupied by what is referred to as the 'law enforcement' paradigm. Depending on the context and the amount of force used, UN missions therefore can fall anywhere between these two extremes. It must however be borne in mind that even in cases that involve elevated levels of force by the UN, the ultimate objective continues to be the maintenance of international peace and security (as informed by required emphasis on human rights), and is not the annihilation of those parties that are violating or have violated the said notions.<sup>55</sup>

<sup>44</sup>Consider mandates of UNAMSIL, MONUSCO, United Nations Operation in Cote d'Ivoire (UNOCI), United Nations Interim Force in Lebanon (UNIFIL), United Nations Interim Security Force for Abyei (UNISFA), United Nations Multi-dimensional Integration Stabilization Mission in Mali (MINUSMA), United Nations Mission in Liberia (UNMIL) and United Nations Operation in Burundi (ONUB).

<sup>45</sup>United Nations Development Programme, Human Development Report (OUP, 1994) 23,30.

<sup>46</sup>ibid, 48.

<sup>47</sup>Refer for the development of R2P doctrine, A more secure world: Our shared responsibility, Report of the High Level UN Panel on Threats, Challenges and Change, UN Doc. A/59/565 (December 2004), In larger freedom: Towards development, security and human rights for all, Report of the Secretary General, UN Doc. A/59/2005 (21 March 2005) and Protection of civilians in armed conflict, UNSC Res 1674, UN Doc S/RES/1674 (28 April 2006). Refer also Susan Harris - Rimmer, 'The Rwanda Paradigm: The Responsibility to Protect Displaced Persons' in Cecilia Jacob and Alistair D.B. Cook (eds) *Civilian Protection in the Twenty-First Century*, 79.

<sup>48</sup>Ibid, Breakey, 182.

<sup>49</sup>Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force on 01 July 2002), Arts 7(1) and (2). Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by UNSC Res 827, UN Doc S/RES/827 (25 May 1993) as amended by other Resolutions, Art. 5.

<sup>50</sup>Ibid, Rome Statute Art.6, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art.4.

<sup>51</sup>Rome Statute (n 49) Art.8, Statute of the International Criminal Tribunal for the Former Yugoslavia (n 49) Art.3.

<sup>52</sup>For a discussion of the concept refer Riccardo PisilloMazzeschi 'Due Diligence' E responsabilità internazionale degli Stati (Giuffrè 1989) 41-55.

<sup>53</sup>Durham and Wynn - Pope (n 28).

<sup>54</sup>Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens and Sons, 1950) 707.

<sup>55</sup>Consider Harry Aitken, 'The Security Council and International Law Enforcement: A Kelsenian Perspective on Civilian Protection Peacekeeping Mandates' 2017 (22) 3 *Journal of Conflict and Security Law* 396, 403 for an analysis of how enforcement action qualifies as a form of international law enforcement.

Any regulatory regime dealing with UN use of force must therefore be capable of taking cognisance of these distinctions and it is only then, that serious hopes of achieving consistency between what is promised and what in fact happens, could to be entertained. The succeeding portions of this paper will explain why such an extended role is not only desirable, but also, necessary. It will utilize as a general guideline in this regard, 'the efficiency criteria' which requires that the regulatory framework allow and compel, to the greatest extent possible, the realization of the objectives of deployment. Part III will lay the foundation for this analysis by assessing the difficulties that will be encountered in drawing up a regulatory scheme, focusing on the nature and content of the relevant conflict of laws issue comprised of the IHL – IHRL interplay, as applicable to the UN use of force. Part IV will analyze how this conflict could and should be resolved by reference to the *lex specialis* principle in view of the inherent peculiarities of UN use of force, while Part V will deal with the practical applications of the resultant normative basis to the case of use of force by UN missions.

### III. THE BASES OF A NORMATIVE FRAMEWORK FOR REGULATING UN USE OF FORCE

#### A. *The conflict difficulty*

Advancements made in various spheres create areas of functional specialization and the development of these areas create normative silos which shadow the relevant area of specialization. This 'siloing' creates distinct regulatory norms that take cognisance of and cater to the specific objectives and exigencies relevant to the particular silo and which then become crystallized into branches of law.<sup>56</sup> This phenomenon, ultimately results in what are termed 'self-contained regimes'.<sup>57</sup>

According to the International Law Commission report titled 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law'<sup>58</sup>, such regimes can take three principle forms i.e. a narrow form where the relevant regimes only contain secondary rules<sup>59</sup>, a broader form where

they contain primary as well as secondary rules<sup>60</sup> and a broadest form in which special rules of administration are also developed by the regime.<sup>61</sup> IHL and IHRL are classic examples of such regimes, with at least IHRL falling within the third category. These regimes are not however, completely self-contained. Even though they may well be capable of regulating issues falling within their purview on their own, they draw from and are impacted by, rules beyond them in their creation as well as failure<sup>62</sup>. They necessarily interact with the general law at some level<sup>63</sup> and 'self-contentedness' is therefore, nothing more than the specialty of the regime. Put simply then, conflict arises when different rules apply to the same subject matter, between the same parties leading to inconsistent results.<sup>64</sup>

Even though conflict may be summarized in the foregoing terms, to conclude that rules apply to the same 'subject matter' is somewhat inaccurate. This is because a given rule may only apply to certain aspects of the 'subject matter' and not to others. Lindroos exemplifies this by referring to the case of a vessel sailing into the Exclusive Economic Zone of a country, in which case rules pertaining to the freedom of navigation and to environmental protection regulate distinct components of the issue.<sup>65</sup> Another example (which is directly relevant to this paper) is provided by the use of force in armed conflict, which can be regulated by rules that prescribe behavioural standards as well as those that create Rights. *Prima facie*, IHL applies to the conduct regulation aspect of the situation with its duty - focus while IHRL applies to the rights - protection aspect (even though, the respective Rights and Duties these branches expressly confer create implied and correlative Rights and Duties).<sup>66</sup> The factual dynamic is further complicated, by the extensive but unclear relationship that exists between these aspects, each influencing and being influenced by the other. It is perhaps better in these circumstances, to understand conflict as emanating from the ability of these factual contact-points to attract particular branches, instead of particular branches applying to them.

How such conflicts are characterized also merits attention and informs the issues considered herein. Characterization can be carried out on a multiplicity of levels and bases,

<sup>56</sup>International Law Commission, Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, UN Doc. A/CN.4/L.682, para 15.

<sup>57</sup>Michael Bothe, 'The historical evolution of international humanitarian law', international human rights law, refugee law and international criminal law' in Fischer and others (eds), Crisis Management and Humanitarian Protection (2004)37.

<sup>58</sup>Fragmentation Report (n.56).

<sup>59</sup>Case Concerning the United States Diplomatic Consular Staff in Tehran (United States of America v Iran) I.C.J. Rep 1980, 41 [86].

<sup>60</sup>Exchange of Greek and Turkish Populations, P.C.I.J. Series B, No.10 (1925) [20].

<sup>61</sup>Fragmentation Report (n 56) para 172.

<sup>62</sup>Report of the International Law Commission, General Assembly Official Records, 59th session, Supp. No. 10 (A/59.10).

<sup>63</sup>Fragmentation Report (n.56) para 172.

<sup>64</sup>Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS 54/, WT/DS 55/R, WT/DS 59/R, WT/DS 64/R (2 July 1998) [4.20], Sir G. Fitzmaurice, 'The law and procedure of the International Court of Justice 1951 – 4: Treaty Interpretation and other Treaty Points', (1957) XXXIII British Yearbook of International Law, 236, 237.

<sup>65</sup>Anja Lindroos, 'Addressing norm conflicts in a fragmented legal system: The doctrine of *Lex Specialis*' (2005) 74 Nordic Journal of International Law 27, 48.

<sup>66</sup>The implied dimension of this issue will be discussed hereunder.

but the division between ‘apparent’ and ‘genuine’ conflicts<sup>67</sup> is most relevant for present purposes. Apparent conflicts arise when the content of one rule is prima facie inconsistent with that of a second, but in fact acts as an application of the latter. What this actually means is that the consequences that result from the application of the narrower rule, can be accommodated within the ambit of the consequences potentially returned by an application of the broader one. The former set of consequences is in effect, a sub category of the latter.<sup>68</sup>

These dynamics may be compared with that of ‘genuine’ conflicts in which one rule necessarily has to set aside another, as they return inconsistent results when applied individually. The respective consequences cannot be reconciled as the consequences returned by the application of one rule will be unacceptable under the other. A classic application of this phenomenon is found in the Nuclear Weapons Opinion.<sup>69</sup>

Thus, even though Art.51(2) of Additional Protocol I (AP I) proscribes the civilian population or individual civilians being made the objects of attack, IHL leaves room for ‘collateral damage’ by barring only attacks ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’<sup>70</sup>. By comparison, IHRL permits only the non - arbitrary use of lethal force i.e. ‘when there is an imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives...’<sup>71</sup> and imposes a duty not to use lethal force in other circumstances. The content of the consequential duty so imposed does not align with that of the corresponding IHL duty which makes a clear allowance for civilian casualties even when such civilians (for the purposes of this paper) do not pose an ‘imminent threat’. Civilian

casualties<sup>72</sup> satisfying the Art.51(2) threshold cannot by definition, also include individuals who would have posed a threat to the life of the person using force or to another, and would thus be classified as arbitrary deprivations by IHRL. The results so returned by the application of IHL and IHRL cannot therefore be reconciled, one set of results cannot fall within the remit of the other and necessarily falls beyond it. As noted by Milanovic,<sup>73</sup> what takes place in such situations is a partial displacement of one law by the other, a displacement sufficient to accommodate the application of that particular rule.

**B. Conflict between the candidate regimes:**

**IHL and IHRL**

I shall next consider the conflict issue as applicable to IHL and IHRL. How conflict is created between these two branches and how this manifests is central to understanding its normative character. Rules on the conduct of hostilities date almost as far back as hostilities themselves. They are found in varying forms and in numerous temporal and geographic contexts, ranging from the middle ages<sup>74</sup> to the ancient practices of the Pacific islands.<sup>75</sup> References to rules of war in codified form are also found in early treaties such as the Treaty of Amity and Commerce between the United States and Prussia of 1785.<sup>76</sup> Today’s IHL finds its roots in the Geneva Conventions of 1949 and their Additional Protocols and its content emanates from the principle of ‘inter arma caritas’ which is based on respect for opposing troops; reciprocity thus being central to its functioning.<sup>77</sup> IHL rules thus balance military necessity and humanity and are designed not to undermine an

<sup>67</sup>Fragmentation Report (n 56) para 88.

<sup>68</sup>Fragmentation Report (n 56) para 99.

<sup>69</sup>Nuclear Weapons (n.5) 240.

<sup>70</sup>Nuclear Weapons (n.5).

<sup>71</sup>Arts 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September 1990, Report prepared by the Secretariat (United Nations publication Sale no. E.91.IV.2), Chap.I, Sec.B.2.annex. Also, while the IHL Principle of Distinction is used in order to avoid killing civilians not participating in hostilities, the Right to Life has been interpreted with a view to avoiding the use of lethal force per se, refer *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) para. 202-213 (1995), *Jordan v. United Kingdom*, App. No. 24726/94 (ECtHR May 4, 2001), at paras. 103-104.

<sup>72</sup>Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the victims of international armed conflicts, Art. 50(1). The said Article defines civilians as persons not belonging to the categories referred to in Arts 4(A)1,2,3 and 6 of Geneva Convention III or Art.43 of Additional Protocol I which are, members of the armed forces of a party to the conflict and of militias or other volunteer corps forming part of such forces, members of other militias and volunteer corps (provided they satisfy certain attributes), members of regular armed forces who profess allegiance to an authority not recognized by the detaining power and inhabitants of a territory who spontaneously take up arms on the approach of the enemy (levee en masse).

<sup>73</sup>Marko Milanovic, ‘The lost origins of Ius specialis: rethinking the relationship between human rights and international humanitarian law’ in Ohlin, Jens David (ed), *Theoretical boundaries of armed conflict and human rights* (Cambridge University Press 2016) 78.

<sup>74</sup>M. Keen, *The Laws of War in the Late Middle Ages* (Routledge & Keagan Paul 1965).

<sup>75</sup>Helen Durham, ‘The Laws of War and Traditional Cultures: A Case Study of the Pacific Region’ (2008) 34(4) *Commonwealth Law Bulletin* 833. Compare with Marcus Cicero’s quote in his *Pro Milone*: ‘Silent enim legēs inter arma’ (‘for among [times of] arms, the laws fall mute’).

<sup>76</sup>A. Roberts and R. Guelff, *Documents on the Laws of War* (Oxford University Press 2005).

<sup>77</sup>Louise Doswald – Beck and Sylvain Vite, ‘International Humanitarian Law and Human Rights Law’ (1993) 293 *International Law Review of the Red Cross* 94.

army's ability to win the war.<sup>78</sup> It is primarily worded in the language of Duties, a feature that is explained by how and the conditions under which, it was created.

IHRL on the other hand, is based on the 'inherent dignity of the human person'<sup>79</sup>. It is the result of a long and sometimes uneasy relationship between the State and the individual and personifies a check on the powers of the State. IHRL is thus codified in terms of Rights which stem from the mere fact of being human while the corresponding responsibility to respect them emanates from the effective control of territory.<sup>80</sup> (Human rights originally being conceived of as a matter between the State and the individual; the ability of the State to interfere with Rights emanating from the exercise of effective control). They are therefore inalienable and capable of being enforced by the holder against whoever exercises effective control over the given territory, regardless of how such control came about.

The fact that IHRL continues to apply through armed conflict (the onset of which triggers the application of IHL) is no longer doubted.<sup>81</sup> According to the Wall Opinion, this application results from the nature of human rights;

'106. More generally, the Court considers that the protections offered by human rights conventions does not cease in the case of armed conflict save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.'<sup>82</sup>

While this undoubtedly justifies application from a rights perspective, it leaves two important issues unanswered. First, how does a regime that was designed to regulate relations between the individual and the state (which had as a *sine qua non*, the exercise of governmental authority resembled through effective control) apply to situations that may not possess such authority or control? Second, in

view of this concurrent application, how does *lexspecialis* identify the applicable normative standards between IHL and IHRL in the case of use of force by the UN (for the purposes of this paper)?

The first of the abovementioned issues can be resolved by reference to the nature of human rights which in their omnipresent nature, human rights survive through conflict and may thus be interfered with by actors who do not wield effective control through governmental authority. From this impact based perspective, regardless of the surrounding circumstances (and especially in conflict situations), any one that is capable of interfering with human rights exercises 'effective control' over the subject. This in turn, obliges them to respect the said Rights.<sup>83</sup>

It is against this backdrop that the second of the aforementioned issues i.e. how *lexspecialis* identifies the applicable normative standards between IHL and IHRL should be considered.

#### IV. CONCLUSION

Even though contemporary international life has been spared of large scale human-induced catastrophes such as World Wars, it is plagued and unsettled by a large number of regional as well as domestic conflicts that have more than enough potential to jeopardize international peace. UN missions, regardless of how they are characterized, play an integral role in the containment and elimination of such threats. It must not be forgotten however, that between the FIB (which to date enjoys the most aggressive mandate) and the most conventional, non-intrusive operation, force is used by UN forces at a number of levels. The objectives of the use of force by the UN are substantially different from those informing the use of force by states in traditional wars, such as winning the conflict and neutralizing enemies. Regulation of the conduct of UN forces has to be governed by a combination of IHL and IHRL whose content can only be identified by analyzing how conflict between these branches arises and can be resolved. It is imperative in this connection to note that each conflict is comprised of endemic factors that influence and are influenced by the factual dynamics of the situation. These dynamics play a crucial role in choosing the regime by which the relevant fact situation should primarily be regulated, that regime necessarily being

<sup>78</sup>Anthony E. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and the fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623.

<sup>79</sup>ICCPR (n 20) Preamble.

<sup>80</sup>Armed Activities (n 5). The principle has been applied by the European Court of Human Rights in *Loizidou v Turkey* (Merits) App no (ECtHR 18 December 1996) and *Cyprus v Turkey* App no 25781/94 (ECtHR 10 May 2001) and by the Inter-American Commission on Human Rights in *Coard et Al v United States*, Report No 109/99, Case 10.951(29 September 1999) and *Alejandro and Others v Cuba*, Report No 86/89, Case 11.589 (29 September 1999).

<sup>81</sup>Nuclear Weapons and Armed Activities (n 5).

<sup>82</sup>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (2004) ICJ Rep 136 [106]. Also refer J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press 2005) 299–305

<sup>83</sup>F.Mergret, F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', (2003) 25 *Human Rights Quarterly* 314, 323.



capable of allocating appropriate degrees of weight to the relative importance of these various factual components. This can be done by breaking the operational dynamics of *lexspecialis* down to a value based contact point theory which explains how particular laws are attracted by fact situations. In this backdrop, even though a detailed analysis of the relevant conflict resolution mechanism applicable to this case falls beyond this paper, both the objectives of deployment as well as the overall context within which the UN uses force, dictate that IHRL function as the

*lexspecialis* in the regulation of UN use of force. This is primarily driven by a recognition of unique objectives of UN deployment which are better accommodated by the overall protective accent of IHRL, which emphasizes a greater role for and survival of rights along with its unique tools such as due diligence, demands a greater role in the applicable regulatory framework. A framework so dictated by an IHRL influence promises improved levels of protection on a number of fronts ranging from targeting to preventing third party atrocities, in effect bringing results of deployment into greater harmony with its objectives.

PROOF



# ILO DECENT WORK AGENDA AND SRI LANKA: TEETH FOR TIGER

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**Abstract** - “Decent Work” is recognized as a normative foundation of the ‘Right to Work’ by the International Covenant on Economic, Social and Cultural Rights. International Labour Organization (ILO) identifies the agenda of decent work as a tool involving opportunities for work that are productive, deliver a fair income and other rights at work, and provides social protection and social dialogue with gender equality and the “Decent Work Agenda” can be designated as the sharp set of teeth of the tiger called “Decent Work. The Role of ILO and the standardization of national legal framework have a positive relationship in the arena of labour law. Thus Decent Work Agenda adopted by ILO remains as a standard accepted worldwide in this standardization process of decent work apart from other measures such as Conventions and Recommendations of ILO. As an instrument of good governance the decent work agenda fosters cooperation and economic performance while helping to create an enabling environment for the realization of the objective of Decent Work at the national level. Sri Lanka has reiterated its obligation towards decent work agenda during many international and regional meetings. Moreover the 1978 Second Republican Constitution of Sri Lanka by means of fundamental right to engage in any lawful occupation, profession, trade, business or enterprise and related Constitutional freedoms establishes the foundation to agenda of decent work. On the other hand labour legislation such as Shop and Office Employees Act, Wages Boards Ordinance, Industrial Dispute Act, Employees Provident Fund Act, Employment of Women, Young Persons and Children Act, Maternity Benefits Ordinance, Employment of Females in Mines Act that cover areas of decent work, namely; employment, rights at work, social protection and social dialogue, aspire ‘Decent Work’ within the domestic framework subject to legally prescribed restrains. Thereby the problem of this study was ‘to what extent Sri Lanka has incorporated international standards of decent work in

domestic labour law through substantive and procedural legal principles.’ Objectives of the research were to evaluate decent work agenda adopted by ILO with that of Sri Lankan legal framework and to suggest recommendations to improve the legal framework of Sri Lanka in line with international standards of the same. The research was carried out based on two methodological approaches; Black letter approach and International and Comparative research methodology. Two methodologies were carried out based on primary and secondary sources. Primary sources include the Constitution, related legislations, case laws and international standards and secondary sources include peer reviewed journal articles, conference proceedings, case commentaries and online articles. The study concluded with the connotation that teeth of tiger can be sharpen through suggestions made in the study which would shape the legal framework based on ‘decent work’ that ultimately avail the employees, employers and the government to maintain ‘decent work’ within Sri Lanka.

**Keywords** - Decent Work Agenda, National Policy, Standardization

## I. INTRODUCTION

International Labour Organization (ILO) is often referred itself as the custodian of workers’ rights. “Decent work” is one of the concepts that had been introduced in 1999 in the report to the Director-General to the International Labour Conference 87th meeting. Decent work is the converging focus of all its four strategic objectives: the promotion of rights at work; employment; social protection; and social dialogue (ILO, 1999). It must be noted that ILO as the main forum to maintain labour standards it provides directions through Conventions and Recommendations. Apart from Conventions and Recommendations, ‘Decent

Agenda' is a platform where working environment is concerned in terms of given criteria and assessed whether they are met. Substantial notion is that where more criteria are met there is decent work in that particular institution or country.

"...Decent work is one of the democratic demands of people everywhere. The Decent Work Agenda is an agenda for development that provides a sustainable route out of poverty..." (Sirleaf, 2006).

Relationship of ILO's framework for decent work and Sri Lanka was evident at the 13th Asian Regional Meeting of the ILO constituents in 2001 where the Government, workers' and employers' representatives in Sri Lanka made a commitment to develop a National Policy and a National Action Plan for Decent Work. The goal of decent work is to promote opportunities for women and men to obtain productive work in conditions of freedom, equity, security and human dignity (Steering Committee, 2006). In the process of implementation of the above plan it identifies weaknesses in the focus areas of decent work and sets out the policies designed to overcome them (Steering Committee, 2006). Problem under the discussion is whether ILO decent work agenda is compatible with Sri Lankan legal framework in order to protect the workers' rights. Main Objective of this paper is to evaluate decent work agenda adopted by ILO with that of Sri Lankan legal framework and to suggest recommendations to improve the legal framework of Sri Lanka.

Methodologies followed are black letter approach and comparative research methodology. Primary sources are the Constitution, related legislation, international standards and judicial decisions and secondary sources are books, theses, commentaries and journal articles that were utilized in this paper. It is noted that this research used the comparative research methodology at the stage of making recommendations in which lessons from other jurisdictions were addressed.

## II. ANALYSIS

"...Decent work is defined by the ILO and endorsed by the international community as productive work for women and men in conditions of freedom, equity, security and human dignity. Decent work involves opportunities for work that: is productive and delivers a fair income; provides security in the workplace and social protection for workers and their families; offers prospects for personal development and encourages social integration; gives

people the freedom to express their concerns, to organize and to participate in decisions that affect their lives; and guarantees equal opportunities and equal treatment for all..." (International Labour Organization, 2008)

Four criteria can be identified which is hereinafter mentioned as "Pillars of Decent Work". They are employment, rights at work, social protection and social dialogue.

Employment is the first pillar of decent work agenda and it can be stated that it is the main aspect which keeps other three pillars intact. Main idea under this head is to provide opportunities for employees which leads to enhancement of productivity and pro-poor economic growth. On one hand promoting employment for women and youth, facilitating economic development of employees and targeting towards declination of poverty, using knowledge management tools, promoting innovations and creativeness are other criteria which can be illuminated under the pillar of 'employment'. The situation of the "working poor" should be a matter of particular attention – especially in countries where the formal economy is small, many women and men are working, often arduously and for long hours, but are simply unable to earn enough to lift themselves and their families out of poverty (UN System Chief Executives Board for Coordination, 2008). In terms of the domestic legal framework it can be overviewed that legal platform had been set in Sri Lanka to fulfill the first pillar of decent work agenda. The Constitution of the Democratic Socialist Republic of Sri Lanka of 1978 in Chapter III under Fundamental Rights it is guaranteed to every citizen the freedom to engage in any lawful occupation, profession, trade business or enterprise by virtue of Article 14 (1) (g). It substantiates the first pillar at a certain rate. However the fundamental right violation being able to enforce at the Supreme Court in case of executive or administrative action is a bar in which most of the time people lose the way to enforce a fundamental right and judiciary also has not shown the willingness to go beyond it. *Samson vs. Sri Lanka Airlines Limited* is one such example where the Supreme Court of Sri Lanka rejected a fundamental rights application on the basis of non deprivation of violation from executive or administrative action but a private sector employer. Although possible legal bars can be identified recognition of right to work in the Constitution as a Fundamental Right needs to be apprehended.

Employment of Women Young Persons and Children Act No. 47 of 1956 is another legislation that can be pointed

out which this first preposition is embedded. It is a piece of legislation that was passed to empower women and young person at their employment. Leaving aside the gaps in the said law positive approach is evident by introducing such enactment which proves decent work criteria in Sri Lankan legal framework.

The gender distribution and its balance in employment is another factor that needs to be considered under the first pillar. In Sri Lanka the Constitution guarantees the equality principles as a fundamental right under Article 12 and based on it one can argue that equal distribution of employment between men and women is possible. However the labour market is not constructed upon such values. Knowledge, skills and attitudes (collectively called as competencies) are taken as criteria for employment and it is logical and justifiable. Legal framework can only facilitate at a limited range in such a context.

But the empowerment through legal framework can be possible provided that it is justifiable. Thus the legal framework should be carved to balance the sociological and cultural diversity between men and women in South Asia that would empower women for employment.

Second pillar is 'rights at work'. Emphasizing about the available rights based on the employment is the main idea of this phase. Individual as well as collective rights can be highlighted in this discussion. Working hours, salary/wage, leave, parental benefits are the main pointed to be evaluated under individual rights. Collective rights are the rights relating to freedom of association and collective bargaining.

In terms of the legal framework it is identified that enjoyment of above rights is different based on the sector of employment. Private sector and public sector employees are entitled to different versions of rights which are sometime discriminatory. Moreover the applicable legislation and regulations are different at the outset.

Leave entitlement in the private sector is a statutory right and within private sector two applicable statutes are there; The Shop and Office Employees Act No.15 Of 1954 and Wages Boards Ordinance No. 27 of 1941. On the other hand the Establishment Code stipulates that leave is a privilege not a right to public sector employees.

Parental benefits also have the same effect but rather discriminatory approach. Maternity benefits available to public sector employees are higher than private sector

and with private sector two different layers of leave are applied based on the nature of the employment which is discriminatory. Paternity leave is available to public sector employees (although it is not a reasonable entitlement) whereas private sector employees left nothing.

Fundamental workers' rights are part of the set of basic human rights and define a universal social basis of minimum standards in the world of work. The ILO Declaration on Fundamental Principles and Rights at Work covers the rights to freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation (UN System Chief Executives Board for Coordination, 2008).

Trade union rights are available to both private and public sector employees at different scales. However legal barriers like Essential Public Services Act No. 61 of 1979 and Public Security Ordinance No. 25 of 1947 hinder the rights of freedom of association. Collective bargaining tool also has the legal recognition in Sri Lanka which should be appreciated despite lacunas.

Adequate social protection is a viable need of the employee. "Social protection" as a wide concept covers not only social security but labour protection. Labour protection covers occupational safety and health and decent working conditions, and combines risk prevention strategies with the protection of rights and the integration of vulnerable groups, such as people living with HIV/AIDS (UN System Chief Executives Board for Coordination, 2008). Also it covers income security to people in the cases of emergency, unemployment, sickness, old ages etc.

Statutory entitlements of employees to Employees' Trust Fund (ETF) and Employees' Provident Fund (EPF) are the main legislative provisions under the pillar of 'social protection'. Employees' Trust Fund is a non-contributory benefit fund which is given by the employer as 3% of the total earnings of the employee. To the Employees' Provident Fund it will be mutually contributed by the employee and employer at 8% and 12% rates respectively. Moreover it is given the entitlement to gratuity payment to the employees who have worked over five years subject to certain conditions under Payment of Gratuity Act No. 12 of 1983. Ancient legislations need amendments to cater present demands of employees which is timely and worthy of highlighting. Increasing contribution rates, increasing

supervision over funds and focus on the main objectives of the funds are the areas to improve in terms of EPF, ETF and Gratuity entitlements.

Health and Safety component is another area which reveals social security. Workmen's Compensation Ordinance, Factories Ordinance and Shop and Office Employees Act provide legal stipulations to cover health and safety. However the formula followed in Workmen's Compensation Ordinance is not enough to cover up the damage inflicts on an employee. Compensation amounts needs to be increased. Compulsory insurance policy, availability of ambulance facility and proper inspection can be suggested to improve the decent work in Sri Lanka (this aspect is comprehensively discussed elsewhere in this paper)

Social dialogue refers to all types of negotiation, consultation and exchange of information between or among representatives of governments, employers and workers. Effective social dialogue depends on: respect for the fundamental rights of freedom of association and collective bargaining; strong, independent workers' and employers' organizations with the technical capacity and knowledge required to participate in social dialogue; political will and commitment to engage in social dialogue on the part of all parties; effective governance structures; and adequate access to relevant information and agreed processes for the prevention and resolution of disputes in the event that these should arise (UN System Chief Executives Board for Coordination, 2008).

Trade Unions Ordinance No. 14 of 1935 and Industrial Disputes Act No. 43 of 1950 are the main legislation to consider under this aspect. Provision of both legislation articulate many rights and at some point they hinder the same right too. For instance both private sector and public employees are given the right to form and join trade unions. When the right is violated by their employer, public sector employee receives the privilege to file a fundamental rights application under the 2nd Republican Constitution and the private sector employee can only complain to the Department of Labour which in turn can take necessary legal action against the employer. Applicable legal remedy is different in this context and it is discriminatory. Moreover the public sector employees are not allowed to establish federations and confederations. Also collective bargaining is not available as a statutory right to public sector.

### III. ISSUES

It was identified few key areas that have issues or legal gaps in the Sri Lankan framework. First issue is the unavailability of fundamental rights jurisdiction to private sector human rights violations by the employer or any other third party. Next it was identified the issues and disparities in terms of parental benefits. The empowerment of women and young person is not effectively catered through the Employment of Women Young Persons and Children Act No. 47 of 1956 although some aspects are covered. In terms of social protection pillar workmen's compensation needs to be readdressed and need serious improvements. Finally the pillar of social dialogue requires to be improved.

### IV. CONCLUSION

'Decent Work Agenda' is a programme where working environment is assessed and improved in terms of given criteria. Substantial notion is that where more criteria are met there is decent work in that particular institution or country. Decent work which includes all its four strategic objectives-the promotion of rights at work, employment, social protection, and social dialogue have been implemented in some situations in Sri Lanka, especially in public sector better than in private sector. But it should be implemented in public sector and private sector in equal manner. Moreover the areas such as social protection need improvement with new strategies to promote decent work. Commitment towards the decent work programme necessarily be mentioned herein.

"...Decent Work Country Programmes (DWCPs) have been established as the main vehicle for delivery of ILO support to countries. DWCPs have two basic objectives. They promote decent work as a key component of national development strategies. At the same time they organise ILO knowledge, instruments, advocacy and cooperation at the service of tripartite constituents in a results-based framework to advance the Decent Work Agenda within the fields of comparative advantage of the Organization. Tripartism and social dialogue are central to the planning and implementation of a coherent and integrated ILO programme of assistance to constituents in member States..." (International Labour Organization Official Web site, 2018)

It was reported four Decent Work Country Programmes in Sri Lanka after adoption of it. The most recent Decent Work Country Programme was launched in May 2018

which was named as “Decent Work Country Program’ (DWCP) 2018-2022”.

“...[The main areas of concern] are the creation of sustainable, inclusive and decent employment, better governance of the labour market, ensuring rights at work for all and greater data and knowledge generation. The four outcome areas are closely aligned with national policy frameworks and constituent priorities...” (The Employers’ Federation of Ceylon Official Web site, 2018)

However the recognizing and launching of programmes would not be effective unless the implementation part is completed via improving legal framework. Teeth for tiger must be provided via necessary and practical improvements in order to get the best out of “Decent work agenda”.

## V. RECOMMENDATIONS

Some recommendations can be made to enhance the decent work conditions in work places in Sri Lanka. To address the problem of fundamental rights actions against private institutions in Sri Lanka, in addition to its current application only to public sector, in line with the legal framework of the United Kingdom where its Human Rights Act of 1998 makes it possible for actions against private institutions, Sri Lanka also must develop the law to make the avenues possible for fundamental rights actions against private sector violations.

The other issue is about parental leave in the event of child birth. Sri Lankan public sector workers enjoy a meager maternity benefit than the private sector women workers. Further paternity benefit is not enjoyed by the private sector workers at all, while public sector male employee have 03 days leave in view of a birth of a baby according to the Chapter XII of the Establishments Code. While more maternity and paternity benefits should be allocated to all workers, Sri Lanka should introduce maternity and paternity leave in an equal manner to public and private sector as practiced in the United Kingdom and Sweden.

The other recommendations relate to the promotion of employment. The child labour is prohibited in Sri Lanka and it is prohibited to employ children under the age of 14. However in the year of 2016 it was increased the mandatory period of education from 14 years to 16 years by virtue of a Gazette Notification under the Education Ordinance No. 31 of 1939. Disparity between lawful age of education and lawful age of employment needs to

be eliminated in order to balance both rights of young persons. Thereby the definition of ‘young persons’ under Employment of Women Young Persons and Children Act No. 47 of 1956 needs to be amended.

Decent agenda includes the promotion of social protection category. Insurance must be compulsory for all the employees and employers as when damage is caused to employer or employee, there is no recovery or compensation process which gives more benefits to victims. Therefore there should be introduced mandatory insurance policy in public and private sector in Sri Lanka as provided by Hong Kong laws.

Further, every institution must take health and safety precautions such as providing equipments and guidance, and they must keep necessary ambulances, nurses and doctors in working hours. Pension scheme must be introduced to both public and private sector, as only some public sector intuitions have introduced this. This must expand to the other public sector institutors such as departments and authorities and private sector institutions.

Promotion of social dialog is the other component of decent agenda. To implement this agenda properly in Sri Lanka, the collective bargaining concept should be introduced in public sector

Teeth of tiger can be sharpen through such suggestions which will shape the legal framework based on ‘decent work’ and ultimately avail the employees, employers and the government to maintain ‘decent work’ with Sri Lanka.

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PROOF



# THE BITTER COOKIE: RIGHT TO CYBER PRIVACY IN SRI LANKA VS. THE MISAPPROPRIATION OF DATA GATHERED USING COOKIES

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**Abstract** - Success and progress in the technological age is dependent on the ability to collect, process and disseminate information at lightning speeds, with incredible efficiency. Ironically, the same technology which improves life in the 21st century is often responsible for its setbacks. The use of cookies is a prime example of how convenience has come at a steep price. Through a qualitative analysis of legislation, case law, and academic opinion, this paper focuses on how the use of cookies, if not properly regulated, can lead to violations of an individual's right to privacy, and how the Sri Lankan legal system is ill-equipped to counteract such violations. The study begins with the proposition that the right to cyber privacy exists as a positive legal right, despite its absence from the Sri Lankan Constitution. It then details the function of cookies, as well as their constructive and destructive potential. The crux of the paper highlights the inadequacies within the Sri Lankan legal system, focusing on the Computer Crimes Act No. 24 of 2007. Finally, it proposes certain amendments to the law with reference to international jurisprudence; specifically, the UK judgement in *Vidal-Hall v. Google* and the recent EU General Data Protection Regulation (GDPR).

**Keywords** - Cookies, Cyber Privacy, Computer Crimes Act No. 24 of 2007

## I. INTRODUCTION

As we entered the technological age, most aspects of our lives have been put 'online'. From everyday tasks such as researching for an assignment, shopping for groceries, paying utilities and interacting with friends and family, to more complicated activities like managing an entire business, getting a degree, or even seeking medical assistance, everything is being accomplished via computers, smartphones and other devices linked together by the World Wide Web (Internet). Such advancements

can be attributed to our significantly enhanced ability to collect, process and disseminate information at lightning speeds with incredible efficiency. Ironically, these same capabilities which allow anyone with a computer to perform all the above mentioned activities with a few clicks, can also enable another person with a computer to interfere with such activity. Therefore, increased convenience in this modern age has come at a steep price - from the risk of personal embarrassment to severe financial loss. This has given rise to a multitude of legal issues, where the violation of an individual's privacy stands out as a major concern. The use of cookies is a prime example of how advancements in Information Communication Technology can act as a double edged sword.

This paper focuses on how the use of cookies, if not properly regulated, can lead to violations of an individual's right to privacy and what solutions exist to mitigate such violations. The arguments presented in this paper are based on the premise that the right to privacy exists as an actual legal right. Therefore, the first part of this paper discusses (quite briefly) how such a right does exist within Sri Lankan law, despite it not being given express recognition as a Fundamental Right. The second part of the paper explains what Cookies are, their basic function and the positive aspects of their use. Next, attention will be focused on the different ways in which cookies pose a threat to individual privacy. (Here, special emphasis shall be given to the fact that most data collected using cookies are technically 'authorized' by the user, hence cannot be classified as unauthorized access. This paper argues that this can still amount to a violation of privacy, on several different levels, notwithstanding such data being obtained with consent.) The final part of this paper examines whether Sri Lanka's existing legal regime is adequate to prevent or punish such violations of privacy and compare it with certain alternative solutions proposed internationally.

## II. METHODOLOGY

This study adopts a doctrinal approach to research. The crux of the research is based on a qualitative analysis of the Sri Lankan law, with the Computer Crimes Act No. 24 of 2007 as the chief primary source. The study also relies on international judicial decisions and legislation to reflect the current status of the research problem, and to propose recommendations for the improvement of Sri Lankan Law. The general analysis and discussion is based on an analysis of academic opinion contained in secondary sources such as journal articles and relevant online sources.

## III. THE RIGHT TO PRIVACY HIDDEN WITHIN CHAPTER III

The extent to which the right to privacy exists within the Sri Lankan legal regime warrants separate research and analysis in itself, owing to the fact that it has not been expressly recognized under Chapter III of the Constitution and is thus up for debate. Moreover, the specific right to privacy in cyberspace has not been given express recognition by the Electronic Transactions Act No. 19 of 2006, nor the Computer Crimes Act No. 24 of 2007, which are the two main pieces of legislation within the sphere of Sri Lankan IT Law. Such a thorough analysis cannot be entertained within the confines of this paper, without diverting too much from the topic at hand. The most convincing argument made in support of the existence of the right to privacy as a Fundamental Right is that the freedom of speech and expression including publication guaranteed by Article 14 (1) (a) of the Constitution can be interpreted to also include the right NOT to express or to consider silence as a form of expression in itself. This would also mean that when a person communicates with a specific individual/s, he has the right to have that communication kept private from any third party. This argument has been propounded at length by Althaf Masoof (Masoof 2007). In the context of cyber privacy, it can be argued that provisions prohibiting unauthorized access (Computer Crimes Act 2007, s. 3), obtaining information without lawful authority (Computer Crimes Act 2007, s. 7), and illegal interception of data (Computer Crimes Act 2007, s. 8), implicitly recognize a right to privacy within Sri Lanka.

Moreover, the right to privacy in cyberspace has been expressly recognized internationally by instruments such as the UN Guidelines for Regulation of Computerized Personal Data Files of 1989 and the UN General Assembly

Resolution on Right to Privacy in the Digital Age 2013. In the UK, the Data Protection Act 1998 grants such express recognition. In light of all this, it is quite safe to argue that the right to privacy in cyberspace can and should be respected as a legal right.

## IV. WHO WANTS A COOKIE?

A cookie is a small piece of information written to the hard drive of an Internet user when he or she visits a website that offers cookies...Cookies can contain a variety of information, including the name of the website that issued them, where on the site the user visited, passwords, and even user names and credit card numbers that have been supplied via forms (Eichelberger 2017).

Cookies can either be temporary- where they last only until the end of a single web session or persistent- lasting across several browsing sessions until they are cleared by the user.

A detailed analysis of how data is gathered using cookies can be found in *Re Double Click* (S.D.N.Y. 2001) 154 F.Supp.2d 497; a class action law suit filed before a US Federal Court where the plaintiff class claimed that DoubleClick's cookie policy was in violation of several US federal laws pertaining to data protection. The legal implications of this case will be addressed towards the latter part of this essay, while for the time being, this would serve as adequate reference regarding the technological intricacies of cookie-use from a legal point of view.

In the context of this analysis, it is noteworthy to mention that all cookies are more or less stored on a user's hard drive, with his consent. Some newer web browsers come with cookies turned off by default and all browsers provide the option of clearing cookies or blocking them to varying extents. Most websites will also ask a user whether he wishes to accept or reject cookies. The latter part of this essay discusses how this can still amount to a violation of a user's right to cyber privacy.

## V. COOKIES ARE SUPPOSED TO BE SWEET

Despite the 'darker' side of this particular breed of technology which this essay focuses on; i.e. the threats it may pose on user privacy, it is important to note that cookies are predominantly beneficial, and have made internet browsing a lot more convenient.

Cookies are immensely helpful to repeat visitors on a particular website. The information it has stored from a previous visit will allow the user to avoid data traffic and thereby load the web page faster, or if the site requires you to login, such login information can also be stored on the cookie, making the entire process much more convenient. Once inside the website, the cookie may store certain user preferences such as auto-fill data (details previously entered into a form on the site such as name, address, telephone numbers etc.), search keywords, frequently visited parts of the site and advertisements viewed. All this information is used by the website to provide the user with a browsing experience customized to his needs and preferences, with an increased level of convenience. For example, one may notice that an online shopping website such as eBay displays advertisements of products similar to the ones viewed on a previous visit. Many people find such customization to be extremely useful in getting the best deals for whatever products they are looking for.

At the same time, the use of cookies can be immensely beneficial to the creators of the website as well. In addition to the abovementioned information, a cookie may also record how long a user remains on the site or which areas of a webpage he frequently clicks on. Such information is analyzed by certain websites in order to obtain valuable feedback regarding how popular the site is, how users locate the site, and which areas of the page are best suited to display advertisements. This information is then used by the site-owners to increase their reach, and improve on-page advertising.

Therefore, the use of Cookies, are for the most part, beneficial to both parties involved, and its proper use will make web browsing more convenient for the browser, while allowing the web designers to improve their sites.

## VI. WHEN THE COOKIE TURNS BITTER

As exhorted above, cookies are predominantly beneficial and are offered subject to the consent of the user. How then, does this simple piece of technology violate a person's right to cyber privacy?

'Third party cookies' and 'tracking or tracing cookies' pose the greatest risk to user privacy. A third party cookie is one which is not offered by the same website a user is currently viewing:

...users quite often find in their computer files, cookies from web sites that they have never visited. These cookies are usually set by companies that sell internet advertising on behalf of other web sites. Therefore it may be possible that users' information is passed to third party web sites without the users' knowledge or consent, such as information on surfing habits. This is the most common reason for people rejecting or fearing cookies. (Cookies: Frequently asked questions 2017)

A tracking cookie enables the creation of a user profile containing a web user's preferences and browsing habits: Tracking or tracing cookies are the most threatening to a user's privacy as they may be used to compile a profile of a user's Web surfing habits across multiple Web sites. Whereas a regular cookie enables a Web site operator to develop a profile about a user based upon his or her actions solely on a that operator's site, tracking or tracing cookies go a step further by tracking and reporting information about actions taken on several different Web sites. This enables the Web site operator to compile a much deeper profile of the user's behavior and interests (Cookies-Overview 2007).

An assessment of the capabilities of these two types of cookies illustrate the threat of user information being collected by third party websites, which in turn can be used to create user profiles containing a detailed account of his browsing habits, across several hundred websites. This is akin to a person borrowing books from several different libraries over the course of many years, while all that information regarding the books he borrowed and how long he spent reading each book is recorded on a single library card.

The main purpose for which such profiles are used is to produce 'targeted ads' which is often utilized by companies providing Online Behavioural Advertising (OBA) services to match the advertisements you see while browsing, with your interests (Privacy Fact Sheet 4: Online Behavioural Advertising; Know Your Options) While this alone can be understood to be a palpable threat to user privacy in and of itself, the possibility of this information being sold for monetary gain is a legitimate concern in today's commercially driven world.

There exist even greater threats to user privacy when such information is made available to non-advertising entities. Dyrli argues that users who look up information on topics such as abortion, capital punishment or gun control, stand a chance of being subjected to harassment by special

interest groups (Dyrli 1997). David Christle presents the hypothetical where a person who frequents sites promoting alcohol, has that information being made available to his insurance company, which in turn increases his premium (Christle 1996). White refers to arrests made by the FBI based on a person's activity on Pornographic websites (White 1995). If data collected using cookies is made available to law enforcement, it is not ludicrous to assume that it may lead to arrests being made on such grounds. Although most of these examples can be regarded as extreme, given the current politico-economic climate, one cannot make the argument that such fears are completely unfounded. In the technological age where information is freely available and easily traceable, it is important to acknowledge that cookie technology has opened the door to such potential violations of cyber privacy and that it is only a matter of time, before someone decides to step through it.

### VII. THE 'AUTHORIZED' PARADOX

As stated earlier in this essay, cookies are offered with the consent of the user in some form or the other. This section questions whether there is 'true consent' in all such instances. Before browsers such as Microsoft Explorer and Netscape came with cookies disabled by default, users had to change their settings in order to block all or specific types of cookies (Privacy Fact Sheet 4: Online Behavioural Advertising; Know Your Options). This remains true with regard to most popular browsers today. In such a case, can a web user (a vast majority) who isn't aware of what cookies do or how to disable them, be regarded as an individual who truly consented?

Most browsers that do not have cookies disabled by default, do contain that fact, buried deep within their terms and conditions, which is hardly ever read in practice. Moreover, some websites offer cookies by default, making it the user's duty to disable it on his browser. However, in recent times, most websites display a notice requesting permission to offer cookies on their page. Despite such safeguards to ensure active user consent, there are still two major issues that may arise: Firstly, in a crowded website with many banner advertisements, it may be difficult for a user to distinguish between cookies offered by the main site and those offered by external ones (first party cookies v. third party cookies). In such a case, does a user consenting to allow cookies on a particular site, also mean he consents to third party cookies? As explained earlier, it is these third party cookies that pose the greater threat. Secondly, some sites cannot be accessed at all unless the

user enables cookies. In such a context, it is debatable as to whether this amounts to voluntary consent.

### VIII. MAKING THE BITTER COOKIE, BETTER

Before proceeding with further analysis, it is pertinent to examine existing domestic legislation regarding the legal threshold necessary for criminalizing acts of the nature described in this essay. In Sri Lanka, the law is predominantly found within the provisions of the Computer Crimes Act No. 24 of 2007, which lists out 8 different computer related offences. The offence defined under Section 5; causing a computer to perform a function without lawful authority (commonly known as cracking) is irrelevant to this discussion since a cookie will merely collect data rather than perform a function. The Section 6 offence is one committed against national security, economy or public order and is therefore excluded. Section 8 makes it an offence to unlawfully intercept data and is also irrelevant to the discussion since cookies perform no interception. Section 9 relates to the use of illegal devices. Although a cookie can arguably fall within the definition of a 'device' under this provision, it will be impossible to establish '...intent that it be used by any person for the purpose of committing an offence under this Act'. Therefore, only the offences defined under Sections 3, 4, 7 and 10 are of even remote relevance to this discussion, warranting closer examination and analysis.

Sections 3 and 4 both require the element of 'unauthorized access' and constitute the offence commonly known as 'hacking'. Since the statute does not define 'access', it is difficult to make a convincing argument that placing a cookie on a user's hard drive would constitute access. Notwithstanding this difficulty, it is a near impossibility to argue that the placing of a cookie was 'unauthorized', since this term is also not defined by the statute, and as discussed previously, there is always some level of consent, rendering it 'authorized', within the ordinary grammatical meaning.

Section 7 would be the most appropriate provision for the purpose of criminalizing the misuse of cookies since it deals with the obtaining of data, which is the express function of a cookie. However, the provision as it stands, will be of no assistance since it also requires that the data be obtained 'unlawfully'. Hence, it will require the introduction of an interpretative clause, narrowly defining 'unauthorized' to mean 'without express consent', in order

for this provision to be effective in criminalizing the threats described above. However, the author believes that this will prove to be relatively ineffective and may lead to unnecessary complication of the law. Therefore, a more pragmatic solution is proposed in the following paragraph. Section 10 which deals with 'unauthorized disclosure of information enabling access to a service', does not afford a direct solution, since cookie data does not 'enable access.' However, a closer look at the language of Section 10 reveals the possibility of creating an offence, even when data has been lawfully obtained:

'Any person who, being entrusted with information (emphasis added)...provided by means of a computer, discloses such information without any express authority to do so or in breach of any contract expressed or implied, shall be guilty of an offence.'

The author therefore advocates for the introduction of a new offence, combining Sections 7 and 10, prohibiting the 'misappropriation of lawfully gathered data.' Here, 'misappropriation' would include 'buying, selling, receiving, retaining or in any manner dealing with such data, for a purpose that was not expressly authorized at the time at which such data was obtained.'

## IX. THE COOKIE PUT ON TRIAL

Attempts to penalize privacy violations caused by the use of cookies has encountered the same obstacle in other jurisdictions. In *Re Double Click* (S.D.N.Y. 2001) 154 F.Supp.2d 497 which was referred to previously, the plaintiff class based their claim on alleged breaches of the Electronic Communications Privacy Act (ECPA), the Federal Wiretap Act and the Computer Fraud and Abuse Act (CFAA). The action was dismissed on the grounds that the impugned acts fell within the consent exceptions of the first two statutes and did not reach the required 5000\$ threshold of statutory losses under the third statute. Two other class action suits based on the same three statutes were dismissed on similar grounds; *Re Intuit Privacy Litigation* (C.D. Cal 2001) 138 F. Supp. 2d 1272 which dealt with first party cookies and *Chance v. Avenue A, Inc.* (W.D. Wash. 2001) 165 F. Supp. 2d 1153 where the use of cookies to create targeted advertisements was challenged. A more severe blow was dealt to privacy advocates in *Re Pharmatrak, Inc. Privacy Legislation* (D. Mass 2002) 292 F. Supp. 2d 263, where the plaintiff class instigated action against a pharmaceutical company which had created detailed profiles of clients' medical conditions, occupations and insurance information in the manner

previously discussed in this essay. The plaintiff class moved the court to narrow the scope of permission given to Pharmatrak, so they could only collect 'anonymous, aggregate information' as opposed to 'personal, detailed information' but their motion was denied.

Despite such failure to successfully maintain an action in the USA, on the other side of the Atlantic, a recent case has broken new ground in the field of cyber privacy; *Vidal-Hall and others v Google Inc.* (2014) EWCA Civ 311. The claimants' action was based on the distress suffered from learning that their personal browsing habits collected by Google using cookies on the Safari browser, were used to create targeted advertisements. The claimants relied on the torts of misuse of private information and breach of confidence as well as provisions of the Data Protection Act of 1998. The High Court judgment, delivered in favour of the claimants, was subsequently upheld by the Court of Appeals. This judgement has laid down two important principles of law which will facilitate similar claims in the future: Firstly, it has cemented the misuse of private information as a tort and would apply to provisions of the Data Protection Act. Secondly, it allowed claims based on non-pecuniary loss which proved a major obstacle under the previously discussed US legal regime. Both of these principles could prove useful in the Sri Lankan context as grounds for pursuing litigation on common law bases, even in the absence of legislation. Although the Sri Lankan law of Delict is based on Roman Dutch Law, it has been heavily influenced by principles of English Tort Law. For example, the principle of strict liability, borrowed from the seminal English case of *Rylands v. Fletcher* (1868) LR 3 HL 330, is completely foreign to Roman Dutch Law, but was applied by a full bench of the Sri Lankan Supreme Court in *Elphinstone v. Bouste Ram* (1872-76) 26 which was later upheld in *Silva v. Silva* (1914) 17 NLR 2. However, the author presents judicial activism as a last resort, which is not likely to succeed on its own, since later judicial trends have shown a reluctance on the part of the courts to extend the judicial incorporation of English law (Cooray 1972). The author maintains that it is more pertinent to utilise the common law in order to persuade a change in legislation and then support legislation that introduces these principles.

## X. THE COOKIE ABROAD

The European Union (EU) has made great strides in terms of regulating the use of cookies through legislation passed by the European Parliament and the Council of the European Union. Therefore, a cursory examination of



these laws would provide a better understanding of how to legislate on this matter.

Under EU law, websites must comply with the commission's guidelines on privacy and data protection provided under Directive 2002/58/EC of 12 July 2002 on privacy and electronic communications. Article 5 (3) of the Directive specifically requires websites to obtain informed consent from web users by providing 'clear and comprehensive information in accordance with Directive 95/46/EC'. This Directive (95/46/EC) was recently repealed and replaced by the more stringent Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, commonly known as the General Data Protection Regulation (GDPR). This infamous regulation which came into force on the 25th of May 2018, caused a complete overhaul of the terms and conditions on most websites. The regulation identifies cookies under (30) where it provides that if a cookie can identify a user, it is considered personal data and subject to the provisions of the Regulation.

These Regulations and Directives can be used to identify the points of concern with regard to the use of cookies, pinpoint the aspects of cookie use which can be regulated by the law, and ultimately understand ways in which they can be regulated. This would prove invaluable in the formulation of domestic laws for regulating the use of cookies.

## XI. CONCLUSION

Over the past few decades, the humble cookie has developed into an integral part of the web browsing experience, making it faster and more convenient for the users, while helping designers improve their sites. However, the same technology that makes cookies such efficient collectors and trackers of information, is what makes them equally exploitable as instruments of privacy violations. An individual's right to privacy is an internationally recognized Human Right and the author argues that this right is also recognized implicitly under the Sri Lankan Constitution. However, this essay highlights the fact that Sri Lankan cyber law, as it stands today, is not even remotely tailored to address the threats posed by the abuse of cookies or similar technology. This is mainly due to the fact that under Sri Lankan law, data obtained with consent falls under the exception of being 'authorized' conduct and thus excluded from liability. Notwithstanding, this essay also recognizes several instances where even lawfully

obtained data can be later misused. Internationally, these threats to user privacy have been realized, and attempts have been made to pursue litigation in that regard. Despite its slow progress, with the reluctance of courts to penalize such infractions, there has been significant development in the area, especially since the Vidal-Hall judgment. The author advocates for similar development domestically, either through legislative amendments to the Computer Crimes Act or through judicial activism, borrowing from international jurisprudence. This would render even the bitter cookie, a lot more palatable.

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PROOF

# GOVERNANCE OF HIV IN THE AVIATION INDUSTRY: ANALYSIS OF MULTILATERAL LABOUR RIGHTS REGIMES

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**Abstract** - Denying employment to people based on their HIV status is a practice that is informed by social fears and norms, and employers have appropriated existing local and international laws to strengthen their position in refusing employment. There are discriminatory laws that inadvertently or by design deny or limit employment to people living with human immunodeficiency virus (HIV). This is especially true within the airline industry, given it is highly regulated by laws. About 50 countries have laws that regulate the entry and stay of people with HIV. The airline industry hesitates to accept people living with HIV as cabin crew citing safety regulations and international laws, and have refused work to or removed employees from positions within the company. In general, people with HIV face barriers to employment that far exceed those faced by others seeking employment. There is an exacerbated threat to people with HIV because airlines deal with multiple countries and are bound by many legal regulations that extend far beyond the legal system of any one country. The research analyses the regulations that govern the aviation industry within the context of employment. This qualitative research is aided by a constructivist approach, and exclusively uses secondary research. The cases under study in this paper are Sri Lanka in 2016 for a breach of employment law under the scope of ILO guidelines and national policies and South Africa in 2000 for breach of the South African Constitution and its Bill of Rights.

**Keywords** - Aviation Industry, Employment Regulations, Travel Bans for HIV

## I. INTRODUCTION

Social fears result in potential employers refusing to hire people with human immunodeficiency virus (HIV). Employers appropriate existing discriminatory local and international laws to strengthen their discriminatory position. This paper analyses employment practices in

the airline industry and examines the legal background they operate in. They are faced with many binding laws that limit their recruitment of people living with HIV (PLHIV), one of which is the international law imposed by 51 countries against PLHIV entering their countries.

HIV is merely a chronic disease, easily treatable and only requiring proper management (Deeks et al, 2013; WHO publications, 2017). If HIV is a chronic disease, similar to diabetes, governments and organizations must treat PLHIV in a manner similar to those with diabetes. However, PLHIV are not given the same opportunities as people with other illnesses, based on social stigma. With 2.1 million new infections each year and a total of 36.7 million living with HIV in the world (WHO, 2016), a large population of persons who should be in the labour force are HIV-positive. The economic impact of such a loss, if they are to refrain from working, would be catastrophic. This portion of people report that employment opportunities are not guaranteed and might not be sustainable when received (Ranmuthugala, 2014). They are frequently overlooked for promotions, demoted, and not offered positions (Larsson, 2017; Young, 2014). Such discrimination is arguably illegal, but pervasive.

The International Labour Organization (ILO) and the World Health Organization (WHO) along with the Joint United Nations Program on HIV/AIDS (UNAIDS) have proposed multiple international policies on employing PLHIV (ILO, 2006; UNAIDS, 2008) that guide countries and organizations on employment concerns.

However, in the airline and navigation industries, there are also other international laws and treaties that affect the decisions taken by the airlines. Loss of employment within the airline and aviation industry is higher as airlines deal with multiple countries and are bound by their legal regulations that extend beyond the legal system of a single country (POZ and Horn, 2010). The dichotomy

of whether the industry should be held accountable for the human rights of the employee or the passengers informs the current research, which analyses the regulations on employment governing the aviation industry.

The research identifies that laws governing employment and the regulations of individual companies restrict employment for PLHIV. The paper aims to determine the practical application of labour rights within the aviation industry through an examination of the barriers and the reasons behind these barriers that PLHIV face in employment within airlines. The paper asks the question of “What are the employment and labour rules that affect the governance of HIV in the aviation industry and how do they change the tapestry of employment for PLHIV?”

## II. METHODOLOGY

This qualitative research is aided by a constructivist approach, and exclusively uses secondary research. Secondary research plays a pivotal role in the analysis given the ethical considerations of speaking to PLHIV and the easy access to archival records from cases around the world. It is constructive because the researcher understands that knowledge is created within a person, and that all knowledge is subjective. It is the intention of this research to show both sides of the problem addressed, and to provide insight to both arguments. The research includes one case study of Sri Lankan Airlines (through the legal case at the Sri Lankan courts) and a seminal court case from South African Airlines. The research includes analysis of existing documents from sources such as the UN, courts from selected countries, legal cases, and other existing research on the area.

## III. RESULTS

### A. Sri Lankan Airlines

In October 2016, a person with HIV, hereinafter known as X (the name given at the courts), sued Sri Lankan Airlines for wrongful termination of employment, citing that his employment was terminated due to his HIV status (Dias, 2011; Sooriyagoda, 2017). The case file as submitted by Kamani Jinadasa provides the details of employment, screening, testing, and the subsequent rejection of X’s application. X filed a fundamental rights case with the Supreme Court asking to be reinstated with the airlines in the original position he applied for (cabin crew), and the Supreme Court granted this application leave to proceed (Sooriyagoda, 2017).

He had an illustrious 7-year history with Mihin Lanka (now-defunct carrier) before applying for the same position with Sri Lankan Airlines. His enrolment at Sri Lankan entailed a medical test and an HIV screening test, the results of which were made known to the Group Medical Officer of the Airlines, who then notified him that he had failed his medical test and asked him to return the staff identification material issued to him on being accepted.

He contested the decision to reject his application on three components: The decision to subject him to an HIV screening when it is not mandatory according to the “National Policy on HIV/AIDS in the world of work in Sri Lanka” (Ministry of Labour and Labour Relations, 2010), the withdrawal of the appointment, and the sharing of information such as termination and reason thereof with a third party (the medical officer of the airline). The case was won by Sri Lankan Airlines in January 2018.

The judgement against the petitioner was based on the argument that the petitioner had provided false information on the application regarding his sexually transmitted disease (Sooriyagoda, 2018). The three justices, Sisira de Abrew, Priyantha Jayawardena, and Nalin Perera, held that the employer was not at fault because of the original misinformation provided by the applicant, and that it was correct for the potential employer to withdraw the offer of employment on becoming aware that the applicant had produced misleading information. While the technicality is correct, the opposing argument then is that HIV status does not need to be made public or revealed to potential employers.

The respondent’s argument stated that he was aware that the “National Policy on HIV and AIDS in the World of Work in Sri Lanka contained policies which inter alia declared that HIV screening is not required for purposes of employment and confidentiality of his HIV status made it non-obligatory to disclose his HIV status in the said health form” (Sooriyagoda, 2018). He did not disclose to Mihin Airlines, his former employer, his HIV status in 2013 when he first became aware of it because the carrier did not ask for such information. However, he answered in the negative for the 2016 interview application for Sri Lankan Airlines. This was in keeping with the policy, but the Supreme Court held that the airline was not at fault because of the misinformation.

Herein lies the crux of the issue about disclosure and practicality: While the policy for HIV positive persons says

that they should not declare, the courts and companies work on the belief that the status must be declared. In such a situation, which law can the citizens follow? Also, after this possibly seminal case, corporate companies will have the legal backing to not only refuse employment, but to follow up on the confidential medical tests. This will result in a serious breach of privacy. This judgement is the opposite of the judgement in South Africa, as seen in the case study below.

### **B. South African Airlines**

In South Africa, a land of nearly 19% HIV cases, Jacques Hoffman, was refused employment by the South African Airways (SAA) because of a positive HIV test (South African Legal Information Institute, 2000). He applied for the post of cabin crew and was provisionally considered suitable for employment following a four-stage selection process comprising a pre-screening interview, psychometric tests, a formal interview and a final screening process involving role-play. The provision was that the selected persons should face an HIV test. On being found HIV-positive, the respondent's report was edited to unsuitable and he was informed he could not be employed.

In the first case submitted by the respondent to the High Court, the court agreed with the airlines, saying that the practice was "based on considerations of medical, safety and operational grounds ... aimed at achieving a worthy and important societal goal" (South African Legal Information Institute, 2000). They ruled that this did not exclude the respondent from all positions within the company, but only those of cabin crew positions, and that the airlines needed to consider the perceptions about its commercial operations: They said that if the "employment practices of SAA were not seen to promote the health and safety of its passengers and crew, its 'commercial operation, and therefore the public perception about it, will be seriously impaired" (South African Legal Information Institute, 2000). They said that if any discrimination existed in this practice, that the discrimination was justifiable under s36 of the constitution. However, in the appeal he submitted in August 2000, the Constitutional Court ruled that he should be employed by the airlines (South African Legal Information Institute, 2000).

1) Utopia or reality? Utopian laws exist in many countries because law is seen to be upholding humanity's best intentions. The creators of legal systems and laws wish to make these laws Utopian but that renders it

impractical because the system can be twisted to suit any need. The law is ambiguous in some instances and judges must constantly provide meaning for the words in the law. This leads to wilful as well as unintentional misinterpretations, based on the judge's subjective understanding of the law or moral code. Thus, it is imperative that we move beyond the Utopian to a more practical system of laws that will be non-discriminatory, non-marginalizing and inclusive. A closer reading of all laws is imperative, and the changes must reflect an inclusive and modern outlook to ensure justice and rights to all.

## IV. DISCUSSION AND CONCLUSION

This section attempts to analyse the two case studies through a better understanding of the religious and cultural backgrounds in each of the countries given that these socio-cultural backgrounds affect the way companies and individuals react to situations. The policies of each country are correlated with the specific case to understand the context and the discrimination.

### **C. Sri Lanka and Sri Lankan Airlines**

Sri Lanka is a majority Sinhala-Buddhist country, where Sinhala culture and Buddhist philosophy inform all actions. With the constitution providing a favoured position to the two (Parliament Secretariat, 2015), Sinhala Buddhist ideologies are important in any understanding of the country. This translates to communal feeling, age-based respect rather than meritocracy, many taboos concerning sex, and the interests of the many over the interests of the few. Religion and morality frequently impinge on secular aspects of life.

As a state-managed entity, Sri Lankan airlines is governed by the National Policy on HIV/AIDS in the world of work and the constitution of Sri Lanka. This means that they are entrusted with providing safe environments for and safeguarding the rights of their employees with HIV, including the right to employment. It is then problematic that the Supreme Court issued a judgment in contravention of this policy. The judges emphasized that the policy could not be used to protect this particular respondent because he had previously not disclosed his status, and thus the company was unaware of his status, and so, they were not at fault for asking him to be subject to a HIV test (Sunday Times, 2018). This is a tortuous argument that adversely impacts those who are to be protected by the policy. Such a judgment is untenable. Also, the other argument of the

judges was that the respondent was “blowing hot and cold” and that such a respondent was not entitled to benefit from the court, adding that the respondent had “breached the trust with the employer” (Sunday Times, 2018). This is employer-centric and such judgments can be harmful in the long term since this allows corporate entities to breach privacy laws relating to HIV. It is also important to move sex and sexually transmitted diseases from taboo topics to socially acceptable topics to counter the belief that a sexually transmitted disease is a precluding factor for employment.

#### ***D. South Africa and South African Airlines***

South Africa, by contrast to Sinhala Buddhist Sri Lanka, is a secular state where a Christian majority can be seen – especially Protestant Christianity – that encourages selfless work ethics. This is followed by Islam and Hinduism but in minority states. The urban South Africans speak English while the rural South Africans speak Afrikaans along with their native languages. The middle class is predominantly white so that there is also a racial breakdown that affects the way the society segregates.

The Constitution guarantees safety to people with HIV through a Bill of Rights (Gov.za, 2017): It says that “No employer can require that a job applicant have an HIV test before they are employed” and that “An employee cannot be fired, retrenched or refused a job simply because they are HIV positive” (KwaZulu-Natal Department of Health, 2001).

Having looked at the general background of the countries, let us now look at the specifics. What are the legal backgrounds that affect these countries’ decisions, especially in terms of employing people with HIV? There are many instances of employment issues around the world such as low hours of work; loss of employment; and discrimination at work based on gender, religion, caste, creed, and illness (Pebody, 2010; Personnel Today, 2004). But, how does the legal background specifically help or hinder those with HIV?

#### ***E. Legal background***

1) Sri Lanka: The Chapter on Fundamental Rights in the Constitution of Sri Lanka, being the main document for guarantee of rights of persons, guarantees that, “inter alia, all persons are equal before the law and are entitled to the equal protection of the law [as provided in Article 12(1) of the Constitution]”, and that “no

citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds [as provided in Article 12(2) of the Constitution]; no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment [as provided in Article 11 of the Constitution] and every citizen has the right to freedom to engage by himself in any lawful occupation, profession, trade, business or enterprise [as provided in Article 14(1)(g) of the Constitution]” (Parliament Secretariat, 2015).

The constitution is backed by and made more inclusive by the addition of the National Policy on HIV/AIDS (especially as dealing with voluntary and confidential testing), the National Policy on HIV/AIDS in the world of work in Sri Lanka (advocates for “no discrimination on real or perceived HIV status, testing should not be a requirement”) (Ministry of Labour and Labour Relations, 2010), and the International Labour Organization Convention No. 111 on Discrimination (Employment and Occupation) Convention 1958 (ILO, 1958).

A national policy means that the country is governed by it: It is a piece of de jure legislation. Thus, an employer cannot make an employee take a non-mandatory HIV test, and even if a test has been taken, its contents (test results) must be kept confidential. I believe that Sri Lankan Airlines was completely in the wrong because not only did it make X take a non-voluntary HIV test, it quizzed him about his HIV status and shared information about his HIV status with a third party (group medical officer). Thus, they are in clear violation of the National Policy on HIV and AIDS. In addition, the National Policy on HIV/AIDS in the world of work in Sri Lanka advocates for non-discrimination (Ministry of Labour and Labour Relations, 2010), another aspect the airlines are in violation of, given their retraction of the proffered employment contract based on the knowledge of HIV status.

Thus, the airlines have failed both policies set out to regulate companies and make the world of work more accessible and accommodating. This is because of the stigma attached to the illness that affects the attitudes of the employees within the company. Their behaviour is informed by the stigma and attitude they possess towards those with HIV, and thus, they are willing to contravene a national policy.

2) South Africa: The constitutional council upholds the word of the constitution of South Africa and its Bills of

Rights. The rights of PLHIV are protected by one such Bill of Rights (Gov.za, 2017) as mentioned previously, and this is what was upheld when the Constitutional Council decided in favour of the respondent in a case against an employee. The High Court in the first case sided with the employer citing social goals and communal security. This was a breach of the Bill of Rights that specifically sets out the rights of those with HIV as being able to hold employment free of discrimination (Gov.za, 2017). The high court argued on the medical considerations of the person: One of the arguments used frequently by employers is that those with HIV cannot carry out the same tasks as someone without HIV. Also, some argue that a yellow fever vaccination is fatal to people with HIV. However, people with HIV are able to carry out the same tasks as others because they are not physically unable to do so, and they are only at risk with the vaccine if they have reached the AIDS state. Thus, both arguments are invalid.

The High Court argued that the company must be seen to be concerned with the safety of the clientele, which is about national safety. They must balance safety with equality. This is what the Constitutional Council upheld through siding with the Bill of Rights. This allowed equality to take place while placing the onus on the company to ensure the safety of the employee and the clients. This is perfectly acceptable because the employee is able and willing to carry out his or her work and if provided a proper environment, will be able to do so. It is in the pressurizing and the criminalization that mistakes occur and illnesses increase. Thus, by ensuring that the workplace is safe and non-discriminatory, the employer ensures that the workforce and clientele are both safe.

However, is there an argument for the employer to justify his/her allegedly unfair treatment of the person with HIV? Is there a fair basis for why they behave the way they do? The following section addresses this question.

### ***F. Argument for the employer***

There are three main arguments for the reassigning of staff or rejection of employment for potential staff in the airline industry. The first is that HIV causes severe physical barriers that affect the capacity of the person to carry out their assigned tasks and this argument is used in all industries. The airline industry in particular has strict laws about physical capabilities, extending to height, weight, and appearance. Thus, the industry is able to refuse persons privileges because he or she does not meet the criteria set

out in the vacancy notices or the airlines' bylaws. These bylaws govern not only HIV, but other illnesses that may have debilitating repercussions such as asthma.

The second, and the argument with the most far-reaching results, is that an organization must ensure not only the employment of the employee but also the safety of its clients. The onus of protection and ensuring the correct conditions of work are provided to the employee lies with the employing organization. In the same vein, the protection of 3rd parties (clients) also lies with the organization. As with the case in China's budget airline (Business Insider, 2014), the organization must look into safeguarding its employee, its travellers with HIV, and travellers without HIV. Thus, the company must walk a tight rope. This leads to discriminatory practices because it is difficult to balance all three separate segments of people. One's rights might be perceived to impact another's and it is the responsibility of the airline to maintain all appearance of impartiality.

The third is that airlines are governed by international laws. With travel bans in place, some people may be refused entry because of their HIV status (HRW, 2017; HIV Travel, 2017). Also, if cabin crew includes a person with HIV, the airline can use that staff member only in certain areas that do not impose a travel ban (HIV Travel, 2017). There are some airlines that fly HIV-positive staff members within their own country or in countries with no travel ban, but this is a tax on their system because the airline must be mindful at all times not to employ him or her in any sector with travel bans in place. Thus, clearly, airlines refuse many potential employees on diverse but arguably compelling reasons such as the safety of passengers, safety of crew, physical ability of crew, and international regulations.

Having analysed both the effects of discrimination and the global instances of discrimination based on one's HIV status, known as serostatus, it is possible to arrive at some regulations that should be incorporated into government policies at the national level. There is a significant need for change in the ways laws are enforced. We cannot allow the law to be carried out to the letter rather than in the spirit it was meant. Understanding that the law is created with a Utopian mindset, hoping to guarantee basic rights to each person without discrimination, one must also understand that Utopian laws cannot be practically implemented. Also, with older laws, there is a very real possibility of the law being outdated. In addition, the law must be accommodating: The work of the law is to accommodate the population. It must be possible, not impossible to carry out.



Laws, by their mere existence, call for the breaking of laws, so it is important for the law to be easy to adhere to. They must be malleable and adaptive in changing situations, moving with the times. Thus, with each new situation (or illness), the law must adapt and change to encompass these changing situations. In addition, changing dynamics need changing strategies for enforcement of the law. However, many officials entrusted with the enforcement of the law at various levels seem to cling to older notions and are unwilling to change. This is true whether in the public sector or the private. While calling for a reduction of discrimination, especially through non-discriminatory laws, it is recommended that suggestions for redress must be shared and implemented. Those whose rights are violated must have the opportunity to have them redressed without facing backlash and further repression. Legal systems must allow and encourage the sharing of stories and must take the side of the oppressed rather than the oppressor.

However, it is also good to keep in mind that the discourse around anti-discrimination leads to a separation of PLHIV and people without HIV. Thus, PLHIV are segregated and marginalized, allowing a greater level of discrimination based on the separation. If they can be brought into the normal discourse by making HIV a normal phenomenon that does not inspire fear and is understood to be treatable (much like other chronic diseases such as diabetes or blood pressure), it is possible to make PLHIV part of the “normal,” or the heterogeneity of society. This would help make laws more inclusive and normative.

As has been shown in the two instances discussed in this paper, there is a certain imperialistic outlook and communal society feeling in these two countries that must be taken into consideration when drawing up laws. We cannot create laws for an individualistic society when these societies are communal. They will put their national safety first, attempting to safeguard the interests of the many over the interests of the one. Thus, it would be of no use to create laws that will only work within an individualistic society. These societies must investigate the social benefit aspects of any law if the law is to succeed. The need is to contextualize the laws: the laws must meet the needs of the community in which they are expected to exist. Thus, policy makers must create laws that are effective within the context of the country.

The most important question one must keep in mind is ‘how can a country protect its citizens while also prioritizing its national security?’ National security is usually paramount

in the interests of a country in modern times because of the possibility of global wars and global threats. A government is concerned with ensuring the safety of its citizens both physically and metaphysically. Thus, priority is given to national security before individual security. However, national policies are created to bridge this gap. Any national policy attempts to provide a country’s citizens with rights but also to promote the wellbeing of the entire country. Thus, policies are the bridge between national security and individual rights.

Thus, in conclusion, it is apparent that the practice of the airline industry looks at the greater good (that of the entire network – clients as well as employees and business), while the policies and constitutions address the rights of the individuals with HIV. Then, how can these two be brought together? By ensuring that the airlines follow closely the rules set out in the constitution or the national policy, and by being accommodating, the company can ensure that the spirit of the law is met rather than an unaccommodating letter of the law. It should be the airline’s intention to follow anti-discrimination laws and provide safe, secure work spaces for employees that do not jeopardize any customers or other employees. The onus rests with the employer to provide safe working conditions and non-discriminatory work spaces that allow all people the possibility to work well and to the best of their ability.

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# THE EFFECT OF STEM CELLS RESEARCH ON ONE'S RIGHT TO LIFE: ETHICAL AND LEGAL CONTROVERSIES IN THE DOMESTIC AND THE INTERNATIONAL ARENA.

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**Abstract** - Stem cell treatments have been a monumental discovery back in the 1800s. In the year 1968, two siblings were the first to be treated successfully with bone marrow transplant for a immunodeficiency. This influenced many countries globally including Sri-Lanka to perform stem cells research. These cells are extracted from a human embryo (Blastocyst) and then allowing it to grow in a laboratory environment to form healthy cells of any function. But unfortunately this extraction will destroy the Blastocyst. Thus today the concept is tainted with controversies as the Blastocyst itself has the Right to Life and that right is violated. Hence many countries have a tendency to vote against stem cells research while others have solid Acts and strong legal backgrounds to support such. The objectives are to uncover the reasons behind the ethical and legal controversies of Right to Life and to explore into the legal framework of other jurisdictions to understand their laws for stem cells research. This research will be carried out Based on a Doctrinal methodology inclusive of legal propositions and literature such as text books, case laws, online articles and journals. In conclusion this paper proposes the expansion of the legal system of Sri-Lanka and gives recommendations to build up the domestic laws by focusing on the international arena to strengthen the new technological advancements of biomedicine by overcoming the issues of human rights, as it will suit the medical needs of the society.

**Keyword** - right to life, stem cell research, Sri-Lanka

## I. INTRODUCTION

To explain the process of stem cells research scientifically, it includes the primary fusion of the egg cell with the sperm cell to form a fertilized egg. That is also known as a Zygote, which later on will multiply through a

process called Mitosis to form a group of cells named a Blastocyst. The Blastocyst consists of stem cells which will be extracted for the purpose of stem cells research. The importance of the above-mentioned cells is that they do not have a specific function. At the early stages of the stem cell, it can be clinically engineered to form a range of cell including but not limited to brain cells, muscle cells, tissues cells, etc. With time this will be examined and allowed to multiply in a Petri dish at a laboratory to form a "stem cell line". After its implantation on a damaged group of cell, the function of a stem cell would be to help in the regeneration and the re-growth of healthy cells. An example of a hypothetical situation being, if a person met with an accident and damaged the hand and the muscle movement was restricted by this accident, the damage area can be clinically implanted with stem cells to form new tissue so the patient can regain the access to movement. Stem cell treatments are very promising as it had so far helped many patients to recover from destructive diseases and many breakthroughs were possible including treatments to replace neurons damages, stroke, Alzheimer's disease, Parkinson's disease. Moreover, it is capable of repairing heart and brain cells as well as to produce insulin and many other powerful recoveries. Stem cells treatments are very much useful because at times transplants of organs may be rejected by the recipient's body. But there is a lesser chance of a clinically produced stem cell organ to be rejected in such a way (Guneratne ,2014). It is evident to have encouraging results obtained by experiments on animals to prove these claims and many such successful transplants worldwide were performed on humans as well. But in today's society a dilemma is spreading as, during the extraction of the stem cell from the embryo on the 5th day, it will cause the destruction of the embryo or the Blastocyst all together. People believe this to be similar to performing an early abortion. These scandalous

controversies are mainly because, many religions in Sri Lanka is against aborting on the fact of Right To Life and the ethical and moral dignity of a fetus. Due to this most of the stem cells were then to be extracted through a method named In-Vitro-Fertilization (IVF) in laboratories and clinics. This process also known as tube babies are for the couples who are not able to reproduce naturally. Therefore the doctors shall extracts the eggs and sperms into a Petri dish and let an embryo grow artificially for this process. Nearly a dozen eggs will be extracted from the ovaries and they will be left under the supervision to see if it fuses with sperm cells of the father to form a Blastocyst. Finally out of the dozen Blastocyst, four or less will be inserted back into the Mother's Womb for fertilization. While the remaining ones in the laboratory will be discharged as medical waste. This is where the stem cells will be extracted for research and treatments. But it's done under the approval of the donors. This process is carried out in a large number of countries which Sri Lanka is one of them.

## II. STEM CELL RESEARCH PROGRESS

Stem cells, which were found in the early 1800s was primarily a group of cell that has the capability to turn into any typed bodily cell. With time, in 1968, the first bone marrow transplant was performed to successfully treat two siblings with severe combined immunodeficiency (Murnaghan, 2018). With years of astonishing results from such treatments, many countries have now infused these miraculous treatments to its medical books. Dr. Geetha Shroff from New Delhi India, who was one of the first to develop human embryonic stem cell lines, was one of the few to help on curing many diseases. Over the past decade she has treated up to 10,000 patients suffering from diabetes, spinal cord injuries, cardiac conditions, Parkinson's diseases etc she has been able to isolate cultures and prepare them for a ready-to-use condition for a life span of 6 months. Speaking of her success she claims that there have been no side effects for the whole decade of her therapeutic usage of such cells to cure patients (Ali Ahlam, 2013).

Durdans hospital Colombo back in 2016 used bone marrow stem cells therapy to help heart disease patients whose arteries were blocked and this transplant was successful. This process has been recognized as a way forward in terms of regenerating (daily mirror, 2016). According to the Sri Lankan situation there have been certain backdrops against this technology. Such as the Civil War, the differences in the religions and the tradition of Buddhism, Catholicism, Hinduism and Islam that shifts

towards and neo-liberal mercerization and few other of such that had led to a drawback in the stem cells treatments in the country. Moreover, offering embryonic cancer treatments have been a widespread excitement throughout the world because it can cure a range of diseases that had been hard to cure so far and it has been evident that this process is safe and effective and of less side effects (Jayesh et al, 2007) Due to the inadequate funding done by the government these treatments may be of a high cost. But the effects are very promising.

## III. METHODOLOGY

For this particular research a doctrinal methodology is used. Mainly focusing on international legal treaties such as International Covenant on Civil and Political Rights, Universal Declaration of Human Rights and foreign case laws as well as domestic case laws. While mostly relying the arguments on secondary sources such as published research papers in Sri Lanka as well as of the International arena, a legal proposition to achieve the objectives of the paper will be reached. Text books and Online sources such as newspaper material and journal articles are used for further analyzing of facts to prove the hypothesis

## IV. THE QUESTION AT HAND

Stem cells research can affect the world at large by breaching few of the Human rights namely "freedom from torture, freedom for privacy as well as Right to Life". In the Sri Lankan context, freedom from torture is a crucial right that is expressly Stated in Article 11 of the constitution (the constitution of the democratic socialist republic of Sri-Lanka , 1978) that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...". Thus, the destroying of Blastocyst for stem cell treatments is considered as an issue of torture because this choice comes with a certain cost. Further Right to privacy under UDHR (UN General Assembly, 1948) Article 12 and ICCPR (International Convention on Civil and Political Rights, 1966) Article 17, subsequently states that no person shall be subjected to arbitrary or unlawful interference with his privacy. Therefore in the international Arena it can be seen through case laws such as Meyer v. Nebraska (1923) which explains why right to privacy should be extended to stem cells as well. Further it also states as to why the protection of personal autonomy even at the stage of an embryo is vital. Moreover the case of Union Pacific Railway Co. v. Botsford (1891) explained in its judgment that "no right is held more sacred, or is

more carefully guarded, than the right of every individual to the possession and control of his own person, free from all restraint or interference from others, unless by clear and unquestionable authority of law.” The right to privacy has a lesser application in Sri Lanka compared to the international arena.

Focusing the research mainly on Right to Life The concept of stem cells research and its adverse influences on the Right to Life are some of the utmost fundamental questions in today’s society. With this the question of when human life begins and what a person means may arise. Similarly, the question of whether human embryo is a person or not is one of the biggest debates of this decade. The destruction of an embryo can be a form of homicide for some. Critics have come up with two statements in the Western society. Where, an embryo is a person from conception therefore destroying it would be a homicide. On the other hand, if it’s not a person they will not be any protection required and destruction of such embryo is permissible. These questions can never be answered as there is no stringent law worldwide nor there are any international laws that gives a proper legal framework to be applied globally for stem cells research and regarding its effects. But this article shall propose the upbringing of stem cells research in Sri-Lanka as domestically Sri-Lanka already conducts such research and there has so far being no downside to it in Sri-Lanka or of International arena.

## V. ETHICAL AND LEGAL ISSUES INVOLVED WITH STEM CELL TREATMENTS

A new avenue into biotechnological advances has emerged through the development of Science and Technology human life is directly or indirectly affected through these developments. The final conclusions and answers may create controversial facts that might be unethical. Stem cell treatments and research had brought a curiosity among medical professions and the general public. The controversies for this process started as the removal of a stem cell from the Blastocyst had caused the damage or the death of the rest of the embryo (the Blastocyst). Thereby people who are against this process state that a human life starts at the point of the formation of a fertilized egg and they ethically claim this to be an unsound practice. Most of the arguments of stem cells are depending on the right and the wrong of destroying an embryo based on the moral status of it. The two ends of this is that stem cell treatments shall provide medical care to even diseases

that it scares of treatments. While on the other hand, the human life or the dignity of another who is yet to be born is diminished and destroyed.

Currently, the debate in Sri Lanka which opposes the human embryonic stem cell research is the dependency on human embryo for potential development of a therapeutic cure for other diseases. The notion among the society is that this process is similar to abortion as it destroys the embryo. Furthermore, it is accepted worldwide that there is two sides for this dilemma. That is, the right of the sick and the right of the Unborn. Thus bringing forward the argument of the moral status of the embryo there may be other issues such as embryo donation, medical risk that may happen during these processes of extraction and such, the commercialization of the stem cells, the clinical trials and its ethics.

Critics have pointed out the breach of the rights of a person to individuality, autonomy and selfhood by conducting these treatments and research. But leaving behind the issues it is also evident that good has come with such stem cell research as well. For example, the general liberty is justified, freedom to make personal reproductive choices, the freedom of scientific inquiry to achieving a sense of immortality, treatment for infertility and as a insurance at times of need. Eventually even as preventive measures of genetic diseases.

## VI. LEGAL FRAMEWORK IN SRI-LANKA FOR STEM CELL RESEARCH AND RIGHT TO LIFE

There are no expresses rights guaranteed in the 1978 Constitution of the Democratic Socialist Republic of Sri-Lanka for Right to Life, even though it is implicitly recognized as of chapter 3 under the fundamental rights. According to many commentators the crucial question arose regarding this right was at the incident of the murder of journalist Richard de Soyza in the year 2000 (nayana, 2003). Almost a decade after the previous incident, a fundamental rights application was filed on behalf of an army deserter who have been taken into custody and tortured to death by the offices of police station Payagala. This is the case of Kottabadu Durage Sriyani Silva V Chanaka Iddamaloda, Officer in Charge, Police Station Payagala and Six others((1991) 2 Sri LR 301), which recognized that right to life, is available in the Sri-Lankan Constitution with the emergence of a series of incidents through police brutality at its most disregarded form. In this case, it was said to be an infringement of Article



11, Article 13(2) and Article 17 which includes torture, unlawful detention and the right to apply the Supreme Court for relief. The court recognizes the deprivation of life could happen and this is ought to be permitted by law that has been justified in certain situations such as for self defense. There it was argued that life of a person can only be taken away in means and methods that are permitted by the law. But this was inconsistent with the notion of Right to Life. As of today the supreme court of Sri Lanka follows the foot prints of the International Human Rights Law to interpret fundamental rights on the basis of Sri Lanka's obligations.

In 2014, Sri Lanka had brought its innovations in the side of stem cells and regenerative medicine associated with the launch of the Sri Lanka national stem centre at the Institute of Biochemistry Molecular Biology and Biotechnology University of Colombo. Even though human cloning is banned, therapeutic cloning and gene cloning can be advantageous for the future generation under certain rules and regulations.

## VII. LEGAL FRAMEWORK OF OTHER JURISDICTIONS

The Universal Declaration of Human Rights (UDHR) Article 1 states that "All human beings are born free and equal in dignity and rights...." But in this the word "born" was to express the fact the fetus and embryo is not granted human rights. Further, down the lane an amendment was proposed but rejected which wanted to delete the word "born" by the UDHR, because it is important to protect the Right to Life from the moment of conception. Furthermore, the Convention on the Rights of the Child doesn't recognize the Right to Life until the child is born. The main protection for the child is given under the Covenant on Civil and Political Rights Article 6 which states that "every human being has the inherent right to life"(Patil, 2014). This article brought the debate of not even the In-Vitro-Fertilization methods or stem cell treatment but also of the infringement of the rights of the unborn. At the same time Article 6 was the basis for the legal issues for the legality of liberal abortion laws in the US Supreme Court. There have not been a constitutional statute or a ruling against a matter of Right To Life but a matter under the 14th amendment regarding fetus not being a person had come up to debate. This is presumably extended for embryos as well.

Moving to the American Convention on Human Rights, Article 4 on Right to Life expressively states that every person has the right to have his life respected. This right shall be protected by law and from the moment of conception. No one shall be arbitrary deprived of his life. Even though the information commission is responsible for the interpreting and the monitoring of these American conventions, it is stated that this right and this protection is not absolute. Further, the European Convention on Human Rights Article 2(1) provides that "Everyone's right to life shall be protected by law". This section was taken into consideration in the case of the Paton v United Kingdom European Commission of Human Rights (App. No. 8416/78, 3 Eur. H.R. Rep. 408 (1980)). It was stated that this aforementioned article does not include the right of an "unborn child" and the absolute right is always after the birth. Similarly, in the case of Vo. V France ([2004] ECHR 326 ) the European Court of human rights pointed out under this Article, the unborn child is not regarded as a person and even if the unborn child do have a right to life it is implicitly limited by mothers rights and interest such as her Right To Life, health and privacy.

In India, the Right To Life as a basic fundamental right is a guarantee and Article 21 of the Indian Constitution states that "no person shall be deprived of his life or personal liberty except according to procedure established by law." Similarly, this protection is provided under the Indian Penal Code no 45 of 1860, section 312 to 316 which deals with miscarriages. In the Federal Government of USA on March 9th 2009, the restrictions on funding stem cells Research which was the done by Governance of George Bush was removed. These restrictions were taken away by ex-president Barack Obama. This came as a blessing in disguise for more research to be conducted that are of stem cells. Furthermore, the supreme court of USA in January 7th 2013 rejected the hearing of a lawsuit regarding a blocking of the previously mentioned order no 13505. Thereby similarly promoting stem cell Research and having no say in it through the judiciary.

## VIII. RECOMMENDATIONS

When a new constitution comes along in Sri-Lanka as suggested in the year 2017, Right to Life is said to be added to the fundamental rights chapter by the National Action Plan for the Protection and Promotion of Human Rights. This will be formulated by reviewing the scope of Right to Life by the International Covenant on Civil And Political



Rights the European Convention on Human Rights have adapted along the years. Through the steering committee Reform the Parliament will look into this amendment (Harshana, 2017).

In the future developments in means to obtaining stem cells without harming the embryo will be infused to medical systems in countries globally. This shall decrease the controversial issues of Right To Life as the Blastocyst will not be destroyed. This involves the extraction of these cells specifically without harming the embryo. Thus, shall not change its chance of developing into a healthy individual. This is known as the “Blastocyst transfer method”. There have been evidence to state that this particular method have been used on cattle, horses monkeys etc and it has been successful (Matthew, 2005).

Countries must fund this sort of research because it is important for a nation to have a healthy future generation. People should have the right to choose if he or she is ready to die or not. If they are given with the option of using stem cells to cure themselves, they should have the right to choose if they would go along with these treatments or suffer for the rest of their life.

Further, Sri Lanka should have solid legal basis to fund the stem cell treatment and make it a government funding research by sending the word around the country to educate people. Even the legislation that is available does not resemble in a way to encourage these research to have a legal effect. Further, the penal provisions for violations of these rights are unclear. The absence of a strong backbone for the legislative system has been a reason for the rising of many more controversial issues over the year.

The country should establish clinics and a legal body to protect and promote these rights. This would help the development of this research. The work of them should be reviewed and address to beat controversies among the public and the society. Moreover, they have to be periodically supervised to ensure that a high standard of care and quality of these treatments and the facilities that are given for the patients. Additionally, the disposal and the preservation of embryos and stem cells need to be monitored as to whether they are done properly. While during this process it should also be noticed that to carry the research in the way the donors requested, the rights and the autonomy of the couples who are the donors of the stem cells for this research remains not violated and

their information which if they request to keep non-disclosed should be kept unrevealed. If the donors want to destroy the spare embryos after in-vitro-fertilization method, without breaching the rights the procedure must be followed as according to the wish of the donors. It can be suggested similar to United Kingdom, Sri Lanka can include a human fertilization and embryo Act to lessen the issues and the burden. As the treatments take a high cost it is unavailable to the poor. These challenges could be overcome if the government funds these researches and make it available for all the patients equally.

## IX. CONCLUSION

Stem cells research is one of the greatest advancements of biomedical technology as it has proven to cure patients who suffer from disruptive diseases such as neurons damages, strokes, Alzheimer’s disease, Parkinson’s disease and also it is capable of repairing heart and brain cells as well as to produce insulin and many other powerful recoveries. Even a cancer treatment can be the future of stem cells. Therefore, a solid basis for such research should be provided in any legal system. Every innovation and advancement of technology comes with its baggage of problems and controversies, to lessen these issues the research must continue to figure out solutions to work forward without breach of human rights and causing ethical issues. In the domestic legal framework, there is a need for a definitive legislation which follows IVF method. Sri Lanka has to bring forward solid laws for Right to Life rather than the judicial decisions. Further, research should be conducted to find out means and methods to extract stem cells without damaging the Blastocyst such as the method that is recently suggested by scientists called the “Blastocyst transfer method” by which human rights such as the Right to Life can be protected. If a country is serious and willing to make compromise solutions for therapeutic technological development such as stem cell therapy, which will help millions of people in the future, giving space for new inventions and further research to extract the stem cells without damaging the rest will be a better solution. Always ethical issues will remain at every innovation. Some pros and some cons will always come up when advances of technology hits the community. But if the legislative body is stringent and a separate legal framework is there to manage these, the benefits can over ride the harm and good will come out of it.

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- The 1978 constitution of the democratic socialist republic of Sri-lanka

# DILEMMA OF CREATING A CONSTRUCTIVE TRUST ON ILLEGAL PURPOSE

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**Abstract** - English law was received to Sri Lankan legal system in two ways mainly; by statutes and by judicial activism. In Sri Lanka present context, Law of trust is governed via substantive law and common law principles, mainly from the Trust Ordinance and by judiciary precedence. For decades the trust ordinance and case laws was consider as the supreme legal authority to adjudicate the legal issues relevant to the area of trust. According to the Trust Ordinance there are several types of trust can be established .Mainly express trust, implied trust (Constructive trust), resulting trust, and charitable trust .For the purpose of this paper, issues relating to the constructive trust is evaluated in detail. Comparing to the other types of trust constructive trust is much controversial. Hence it does not require verbal or documentary expressions to create a trust. In this backdrop doctoring of constructive trust is taken as offensive and defensive weapon by legal practitioners in the area that issues relating to the transactions of property. It should be the responsibility of judiciary to evaluate the cases in a wide spectrum. Since judiciary precedence is conceded as souses of law and it impact to the adjudicating process to establish the justice. Based on this backdrop it is clear that judgments should be competent and constant, if not it creates an ambiguity. This research paper is based to evaluate and indicate how creativity of judiciary impacts to establish the justice even it creates a dilemma: whether constructive trust can create on illegal purpose.

Key words - dilemma, Constructive trust, illegal purpose,

## I. INTRODUCTION

The history of equity and trusts concerns the development of the body of rules known as equity, English trust law and its spread into a modern body of trust law around Commonwealth and the USA .The law of trusts was constructed as part of “equity”, a body of principles made by the Courts of Chancery, which sought to correct the strictness of the common law. The trust was an addition to

the law of property, in the situation where one person held legal title to property, but the courts decided it was fair, just or “equitable” that this person be compelled to use it for the benefit of another. This recognized a split between legal and beneficial ownership: the legal owner was referred to as a “trustee” (because he was “entrusted” with property) and the beneficial owner was the “beneficiary”. Trust law is a statutory bias adjudicating system introduced to SL by British when Ceylon was colony. Basically trust issues were adjudicated by Trust Ordinance and it was gradually developed to the area of common law in SL legal regime. In present context trust law is govern by Statutory law (Trust Ordinance) and Common law (judiciary precedence). Judgments of courts should be compatible and rationale without any ambiguity, since such case laws are considered as sources of law. Based on above facts this research is narrow down to evaluate and indicate how creativity of judiciary impacts to establish justice by not restricting to substantive law.

## II OBJECTIVE OF THE PAPER

When adjudicating the property law issues connected to the constructive trust, normally courts consider the Trust Ordinance and past case laws to establish the justice. It is observed that in present context courts were taking creative steps to establish the justice when adjudicating issues relevant to Trust law. In this backdrop the objective of this paper is to: evaluate and indicate how creativity of judiciary impacts to establish the justice even it creates a dilemma: whether constructive trust can create on illegal purpose.

## III. METHODOLOGY

The study adopts qualitative approach, using comparative study design. The material used in the study including legislation, judicial decisions, books, electronic/internet sources, journal articles. The study is principally an

analysis and comparison of legal provisions (both statutory and common law).

## IV. DISCUSSION

### *A. What is meant by constructive trust*

In the area of trust law there are different kind of trust can be created .According to the trust ordinance there are four types of trust is identified .Manly express trust, constructive trust ,resulting trust and charitable trust. As for the purpose of the paper it is important to identify what is mean by constructive trust .According to the Trust Ordinance.

**Section 82:** An obligation in the nature of a Trust (herein after referred to as a “constructive Trust”) is created in the following cases.

**Section 83:** Where it does not appear that transferor intended to dispose of beneficial interest.

Where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

**Section 84:** Transfer to one for consideration paid by another.

Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

It is evident that by analyzing the above sections how the constructive trust is created. Constructive trust is formed not by the way that express trust is created. There is no visibility of verbal or written agreement; the obligation is formed due to the conducts of parties. Moreover according to the section 83 the word attendant circumstances specifically indicate that implied conditions having an impact to create a constructive trust. These attendant circumstances must be clearly proven in the courts to create a valid legal constructive trust. Section 84 specifically elaborates the impotence of intentions of the parties. If transfer to one for consideration paid by another and it appears that such other person who did

not intend to pay or provide the such consideration for the benefit of the transferee the property should hold by the transferee for the benefit of the person who provided the consideration. In such instances if intention is prove courts may declare the judgment on benefit of transferor based on constructive trust .This is the core area of the paper comparatively discussed in later .

### *B. Creation of legal trust*

Section 4 of the Trusts Ordinance is contained in Chapter II of the said Ordinance, which deals with the creation of Trusts. Section 4(1), which deals with lawful purpose are as follows:Trust may be created for any lawful purpose. The purpose of a trust is lawful, unless it is

- a. forbidden by law, or
- b. is of such a nature that, if permitted, it would defeat the provisions of any law, or
- c. is fraudulent, or
- d. involves or implies injury to the person or property of another or
- e. the Court regards it as immoral or opposed to public policy.”

Section 98: of the Trusts Ordinance refers to the saving rights of bona fide purchasers and reads as follows:

“Nothing contained in this Chapter shall impair the rights of transferees in good faith for valuable consideration, or create an obligation in evasion of any law for the time being in force.” Section 98 of the Trusts Ordinance, it is to be borne in mind, is contained in Chapter IX of the Trusts Ordinance, which deals with Constructive Trusts.

Section 4(1) of the Trusts Ordinance is specific with regard to the creation of Trusts, which could be for any lawful purpose. The said section has clearly defined the instances, where a trust could be regarded as unlawful

### *C. Constructive trust is established when Transfer to one for consideration paid by another.*

In some circumstances, people do not buy the properties using their names. They buy the properties using another person’s name and after some time the person who paid

consideration asked back the property. By rejecting to give back the property is the area issue aroused, whether the property is transfer based on constructive trust or not is the core area to adjudicate. It is clear that according to the Trust Ordinance, if the constructive trust is form by fluffing the fundamental elements of section 84 it can be applicable. Person who paid the consideration have the right to own the property and transferee must hold the property on benefit of transferor

**According to Dr. L.J.M. Cooray refers to the definition given by Keeton, which is as follows:**

“The relationship which arises wherever a person called the trustee is compelled in Equity to hold property, whether real or personal, and whether by legal or equitable title for the benefit on some persons (of whom he may be one and who are termed cestuis que trust) or for some object permitted by law, in such a way that the real benefit of the property accrues not to the trustee but to the beneficiaries or other objects of the trust”

But from the Muniyanidi Nachie v Kayambo (2 CALR56) case followed the same judgment in Saroja Nisansala v Aberfoyle (2011 BLR 379) court consider a same methodology even the scope is contradicted by comparing to other cases. It is impotent to analysis these two case laws in depth since the core area of this research paper is based on these two judgments. In Muniyanidi Nachie v Kayambo, the plaintiff was not a citizen in Sri Lanka, when he bought a property convincing the land to his sister’s name. The main intention to convincing the land to his sister is to avoid from tax that he obligate to pay according to the 1963 No 11 Finance Act. After some time P gains the citizenship in SL and asked his sister to re-convey the property to him, by rejecting the request P sue against her sister due to violating the elements of constructive trust. Defendant counselor argued that when Section 98, 4(1) and (2) read together plaintiff do not have valid grounds to establish a constructive trust. Because P has taken an approach to avoid paying tax according to the section 58 of the Finance Act. Due this augment prima Facie it is evident that P’s action is against the sections 4 of the Trust ordinance. Hence Plaintiffs agreement becoming null and void due fraud intention and deviating from revenue law. But adjudicating the issue, court considers that deviating from revenue law only do not make an invalid ground to established a constructive trust.. Parkidner J. pointed out that “according to the section 84 of the Trust ordinance Plaintiff has reasonable grounds to establish a constructive trust. Section 4 does not subject to the issues in revenue

law” judgments were delivered in favor to plaintiff.

In Saroja Nisanasala v Aberfoyle courts consider the same rational what was taken in the Muniyanidi Nachie’s case .At the stage of hearing both learned Counsel agreed that the apple could be argued on the basis of the following questions:

1. Could the plaintiff –respondent in the circumstances of the case, plead a constructive trust?
2. Is the trust alleged by the plaintiff-respondent contradicted with provisions in section 4(1) and 98 of the Trust Ordinance?

**Summary of the held is as follows**

- a. An act could not be treated as invalid constructive trust simply due to illegality
- b. Section 4 (1) of the TO as stated earlier clearly refers to the fact that a trust may be created for any lawful purpose, The unlawful purposes, which would forbid a Trust being created, are specifically referred to in section 4(1) .Learned Counsel for the appelland took up the position that the intention to avoid the payment of 100% as tax on the land transaction would clearly show the objective of the plaintiffs respondent’s action. However unlawful intention alone cannot make the contact illegal.
- c. Section 58(1) read with section 59 of the Finance Act had imposed a tax and empowered the Commissioner of Inland Revenue to recover the tax if in default due to the non-payment form the person whom it has become due.
- d. Section 59of the Finance Act, with the effect of the non-payment of the tax, clearly stated that the commissioner of IR, upon notification of such default by the registrar of land or lands or the company as the case may be, shall take step for the recovery of the tax deemed to be in default.

By analyzing the above two cases prima Facie evident that these two judgments arecontradicting with the Statutory provisions of Trust Ordinance. With this backdrop it create dilemma whether constructive trust is able to formulate on illegal purpose. But according to the judgment in Saroja Nisansala’s case mentioned that “unlawful intention and unlawful purpose alone cannot make the contact illegal” To justify these arguments counsels of plaintiff-respondent sited following source:

Dr. L.J.M. Cooray in his work on the subject of Trust has discussed the nature of an unlawful trust. According to Dr. Cooray, if sections 4 and 98 of the Trusts Ordinance had been omitted, the general law of the land would have prevented the operation of trusts for unlawful purposes. Referring to trusts for unlawful purposes, Dr. Cooray refers to Prof. Weeramantry's Treatise on the Law of Contracts. Prof. Weeramantry, referring to the breach of revenue regulations clearly states that the mere "breach of revenue regulations would not itself render illegal a contract in respect of which they are imposed". It could also be argued that what the plaintiff-respondent intended by purchasing the property in the name of the appellant was not to breach the revenue legislation, as in any event, at the stage of a re-transfer and at the stage of registration of the said land, the plaintiff-respondent would have to make the payment of tax in terms of the Finance Act.

Act could not be treated as invalid simply due to illegality. In *Fernando v Ramanathan* ((1913) 16 N.L.R. 337), a Full Bench at that time, had decided that a deed is not invalid on the ground of illegality because it is contrary to what may be termed the policy of an Ordinance. Considering the implied statutory prohibitions, Prof. Weeramantry has referred to the decision in *Mohideen v Saibo* ((1913) 17 N.L.R. 17), *Georgiades v Klompje* ((1943) T.P.D. 15) and "Pollock" and had stated that:

"Where a statute merely imposes a penalty on the performance of certain acts without declaring such acts to be illegal or void, the question arises whether such acts are void. In such cases we must look to the intention of the legislature to see whether the imposition of the penalty implies such a prohibition as to make the resulting contract void. The imposition by the legislature of a penalty on any specific act or omission is prima facie equivalent according to "Pollock" to an express prohibition. Such provision is however, only prima facie evidence and is not enough by itself to make a contract to do that act illegal or void."

Learned Counsel for the appellant contended that in terms of section 4(1) of the Trusts Ordinance there is no possibility of relying on a Trust, when the purpose is illegal:

Section 4(1) of the Trusts Ordinance as stated earlier clearly refers to the fact that a trust may be created for any lawful purpose. The unlawful purposes, which would forbid a Trust being created, are specifically referred to in section 4(1). Learned Counsel for the appellant took up the position that the intention to avoid the payment of

100% as tax on the land transaction would clearly show the objective of the plaintiff-respondent's action. However, unlawful intention alone cannot make the contract illegal. Referring to unlawful intentions, Prof. G.L. Peiris (Some Aspects of the Law of Unjust Enrichment in South Africa and Ceylon) states that,

"A significant development in the modern law is that an unlawful intention, bilaterally entertained, is no longer an absolute bar to restitution. This principle was recognized for South African law in 1939 in *Jajbhay v Cassim* where Stratford, C.J. declared that "the rule expressed in the maxim in *pari delicto potior est conditio defendentis* is not one that can or ought to be applied in all cases. It is subject to exceptions which, in each case, must be found to exist only by regard to the principle of public policy." Watermeyer, J.A. said: "the principle underlying the general rule is that the Courts will discourage illegal transactions, but the exceptions show that where it is necessary to prevent injustice or to promote public policy, they will not rightly enforce the rule." This view has been authoritatively accepted as applicable to the law of Ceylon."

## IV. CONCLUSION

It is evident that, no material had been adduced before the Court to show that the transaction in question had been for an unlawful purpose in terms of section 4(1) of the Trusts Ordinance. By analyzing above facts it indicts that justifications are made to prove that "unlawful intention and unlawful purpose alone cannot make the contact illegal". With this backdrop it creates a dilemma whether there is possibility to create a constructive trust on illegal purpose. It should be noted that law must establish the justice, if this case were interpreted as illegal transaction only by limiting to substantive law entire course will be null and void. It will be an injustice to the person who made the consideration. It is evident that rational behind this judgment was to establish the justice based on principles of equity and fairness. Also it is significant to emphasize the augment what was cited by plaintiff-respondent by justified the "unlawful intention and unlawful purpose alone cannot make the contact illegal". It clearly indicates that law should be necessary to prevent injustice. It is essential to appreciate to Dr. Shiranin A. Bandaranayake C J to her judgment by mentioning that "Considering the submissions made by both learned Counsel for the appellant as well as the plaintiff-respondent it is apparent that no arguments were put forward by the appellant that if it was allowed, the transaction which took place between the appellant and the plaintiff-respondent would defeat



the provisions of any law. Similarly no material was put forward to substantiate the fact that the said transaction is not one which is forbidden by law, fraudulent, involves or implies injury to the person or property of another and the Court regards it as immoral or opposed to public.” If above facts were put forwarded precisely the judgment may have taken a different conclusion. It is obvious that even dilemmas were created court were able to establish the justice by analyzing case in wider spectrum without restrictive to traditional methodology. Finally it should be noted that from above analysis following principles were derived and it makes an impact to the Sri Lanka legal regime.

1. Contract could not be treated as invalid simply due to illegality.
2. Unlawful intention, bilaterally entertained is no longer an absolute bar to restitution,
3. Unlawful intention cannot make the contract illegal.
4. Breach of revenue regulations would not itself render illegal a contract in respect of which they are imposed
5. Any transaction to be unlawful; material should adduced to the courts to prove unlawfulness.
6. If any transaction defeats the provisions of any law, forbidden by law, fraudulent involves implies injury to person or property and regards it as immoral or opposed to public policy such transactions will be null and void.

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# ANALYSIS OF INTERNATIONAL INSTRUMENTS IN RELATION TO VESSEL SOURCE MARINE POLLUTION WITH SPECIAL REFERENCE TO MARINE POLLUTION PREVENTION ACT OF SRI LANKA

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**Abstract** - This research is related to the Law of the Sea under the Public International Law concentrated to the Vessel source marine pollution. Although there are many types of marine pollution, this research is limited only to vessel source marine pollution by oil. Since marine pollution adversely affect to whole environment in terms of climate change, global warming and degradation of natural resources, it is expected to achieve the objectives through this research such as to identify the methods of vessel source marine pollution, to evaluate the effect to the environment, to determine the importance of prevention, to identify the stakeholders in prevention, to evaluate the existing laws, to identify the loopholes in the law and to recommend the steps to fill in the gaps in law.

Since the research is a doctrinal and library research, the methodology used here is Black letter methodology and as the research method, primary sources such as statutes like international treaties and conventions relating to law of the sea and marine pollution, Domestic acts relating to marine pollution including the constitution of Sri Lanka, Cases of International Court of Justice relating to vessel source marine pollution were used and also books by scholars in law of the sea, regulations and resolutions of International Maritime Organization (IMO), research articles, journal articles, web articles, blog articles, articles of international conferences relating to law of the sea were used as secondary sources.

This research recommends several recommendations such as to include provisions in the constitution of Sri Lanka for protection of marine environment even beyond the territorial waters, to revise the provisions of United Nations Convention of Law Of the Sea (UNCLOS) and The International Convention for the Prevention of Pollution of Ships (MARPOL) relating to innocent passage for

introduce new provisions without ambiguities, to establish a well-trained task force for encountering the emergencies relating to marine environment including oil spills and marine casualties, establish a special court or tribunal for matters relating to shipping, establish new ship yard facilities in Sri Lanka to repair ships which are found unseaworthy within maritime boundaries of Sri Lanka, claim the damages to marine environment from shipping agents and charterers when the ship owners refuses to pay.

**Keywords** - Marine Pollution, Shipping, State Controls  
Abbreviations

IMO – International Maritime Organization

UNCLOS – United Nations Convention on the Law of the Sea

MARPOL – International Convention for Prevention of Marine Pollution of Ships

MEPA – Marine Environment Protection Authority

CEA – Central Environmental Authority

## I. INTRODUCTION

This research is relating to Law of the Sea under the Public International Law and it is concentrated to the Vessel source marine pollution and narrowed down to an analysis of international instruments in relation to vessel source marine pollution by Oil with special reference to marine pollution prevention act of Sri Lanka.

Marine environment can be harmed by various types of pollution and however, the most common ways are from the land rather than ships. (Churchill RR, Lowe AV, 1983) The International Shipping industry is responsible for 90% of world trade and it provides the life blood to global economy. Since it is important and a vast growing

industry, the impact on the environment due to shipping should be evaluated. Types of pollution from ships include oil, chemicals, garbage sewage, air pollution, bunker fuel and the anti-fouling paint on a ship's hull and also old ships that are to be broken up or scrapped on beaches also can cause pollution unless great care is taken. Due to effective international regulations for preventing marine pollution by ships, those types of incidents are becoming much fewer than before. These regulations cover the ships' operations, designing and building with many safety requirements and a ship's captain and crew are required to have adequate training to prevent marine pollution from the vessel as well. . (Churchill RR, Lowe AV, 1983)

Marine pollution has not obtained a significant consideration by of public although it could adversely effects to whole environment in terms of Climate Change, global warming and degradation of natural resources. As an Island, Sri Lankan People used to consume fishery products obtained from the sea. But due to marine pollution those species become unconsumable as they consist of poisonous contents and heavy metals and this may cause for the cancers and some other serious illnesses & diseases after the consumption. (D Cormack, 1983) Thereby researcher conducted this research in vessel source marine pollution, evaluating the existing laws in Sri Lanka in order to prevent it while comparing the domestic law with the international laws in special reference to UNCLOS and MARPOL.

The research is limited only to vessel source marine pollution, limited only to release of oil by vessels, limited to United Nations Convention of Law of the Sea (UNCLOS) and International Convention for the Prevention of Pollution from Ships (MARPOL) in terms of International legal instruments, Limited to marine pollution prevention act of Sri Lanka in terms of domestic legal instruments and Limited only to the data obtained through books, journals, websites, paper articles and blogs.

It is expected to achieve the objectives such as; To identify the methods of vessel source marine pollution, To evaluate the effect to the environment, To determine the importance of prevention, To identify the stakeholders in prevention, To evaluate the existing laws and how the judicial decisions to prevent it, To identify the loop holes in the law and the areas which need to be developed and To recommend the steps to fill in the gaps in law including Marine Pollution Prevention Act.

## II. RESEARCH METHOD & METHODOLOGY

The Methodology which is used in this research is Black letter Methodology as this was a Doctrinal and Library Research. Researcher selected this methodology because, it looks into legal rules, doctrines, principles and concepts. Researcher decided that, it would be beneficial for him as statutory materials, reports of committees and case reports can be used as tools and due to advantages such as less time consuming, provide adequate opportunities for analysis, help to find quick answers for legal problems and its helpfulness for the continuity, consistency and certainty of law as well as it would help to understand the loopholes, gaps, ambiguities, and inconsistencies in the substantive law easily.

Researcher used primary sources such as Statutes like International Treaties and Conventions relating to Law of the Sea and Marine Pollution, Domestic Acts (Sri Lanka) relating to marine pollution, Cases of International Court of Justice and secondary sources researcher used Books by Scholars in Law of the Sea, International Maritime Organization Regulations and Resolutions, Research Articles of International Research Conferences, Journal Articles, Web articles and Blog Articles, International Conference Articles in Shipping Industry, Marine Pollution, Environmental Law, Law of the Sea and Marine Law.

## III. FINDINGS, ANALYSIS & DISCUSSION

### *A. International and Local Legal Mechanism to Prevent Vessel Source Marine Pollution*

In the context of vessel source marine pollution, it can be identified that there are many international legal instruments such as UNCLOS and MARPOL for preventing the vessel source marine pollution and set various legal enforcements to regulate the global shipping industry with this regard and also there are some local legislations such as Marine Pollution Prevention Act No. 35 of 2008 to ratify those international treaties and conventions in to Sri Lanka Law.

Marine pollution prevention Act No. 35 of 2008 is the currently existing law related to Marine pollution in Sri Lanka. Emerging of this Act resulted from signing

the United Nations Convention on the Law of the sea (UNCLOS) and International Convention on the prevention of pollution from ship 1973 modified by 1978 and 1997 protocols (MARPOL) by Sri Lankan government as a Sovereign state.

Under the part XII of UNCLOS, it emphasizes the obligations of states to protect and preservation of marine environment including the measures of preventing reducing and controlling the marine pollution, global and regional cooperation of states for prevention of marine pollution, technical assistance, monitoring and environmental assessment, international rules and national legislations, enforcements, safeguard, responsibility and liability, sovereign immunity, obligations under other conventions on the protection and preservation of the marine environment.

MARPOL being the major international convention and most important global treaty for the prevention of pollution from the operations of ship, it regulates the design and equipment of ships, ensure proper system of certification and inspecting, states obligation to prevent marine pollution and provide facilities for the disposal of oil waste and chemicals.

Hence, Marine Pollution Prevention Act (Hereinafter referred as act) sets the legal background to national Jurisdiction for enforcement of UNCLOS and MARPOL, the act mentions that it is for prevention, control and reduction of the pollution of marine environment of Sri Lanka and thereby it is clear that there is a legal mechanism in Sri Lanka to prevent the vessel source marine pollution emerged through various international and local legal instruments.

### ***B. State Responsibility and Obligation to Prevent Vessel Source Marine Pollution***

According to concerned international legal instruments, States are obliged to protect the marine environment a signatory parties to those conventions. Because according to article 192 and 194 of part XII of UNCLOS mentions that states have the obligation to protect and preserve the marine environment without excluding rights to exploit natural resources of marine environment and states shall take measures to prevent, reduce and control pollution of marine environment and these measures shall minimize Pollution from vessels, prevent accidents and also deal with emergencies to ensure the safety of operations at sea. Even article 235 of UNCLOS mentions that States are

responsible for protection and preservation of marine environment and they should be liable as well as should ensure the proper and effective legal mechanism to claim damages caused by marine pollution in compliance to the existing international law.

MARPOL article 1 clearly states that parties to the convention are bound to prevent the marine pollution and act according to the convention in the cases of vessel source marine pollution. Therefore, In Sri Lankan context, by respecting to those international regulations set by those international conventions, The Marine Environment Protection Authority (MEPA) has been established under the marine pollution prevention act as the operational body to implement the marine pollution preventive mechanism in Sri Lanka.

### ***C. Principle of State Control to Prevent Vessel Source Marine Pollution***

States are bound to take required procedures to avoid the marine pollution through its local legal enforcement mechanisms. In regard to Sri Lankan context it is better to examine whether it has been taken such measures to prevent marine pollution, compliance with the international law specially which the UNCLOS and MARPOL has stated as the measures to prevent vessel source marine pollution by a State.

Under section 05 of UNCLOS, it discusses the principles of Port State Control, Flag State Control and Coastal State Control and it is mentioned in the section II of UNCLOS that States shall establish international rules and standards to prevent, reduce and control the vessel source marine pollution as well as to minimize the threat of accidents which might causes damages to marine environment and also they should give due publicity for such requirements to foreign vessels and relevant international organizations. In implementing those international standards and rules for prevention of vessel source marine pollution in Sri Lanka, article 6 of the act states that MEPA shall implement the provisions of act in effective and efficient manner by formulating and executing a scheme of works for prevention, reduction, controlling and managing of marine pollution arising out of ship based activity, conducting researches for the preservation of marine pollution, take every measure to preserve the territorial waters or any other maritime zone of Sri Lanka, providing adequate and effecting reception facilities, recommend adherence of International treaties to prevent marine pollution, formulating and implementing the national

oil pollution contingency plan, overseeing, regulating, supervising exploration of natural resources and also to create awareness to preserve marine environment.

Therefore it can be concluded that Sri Lanka has taken necessary measures to prevent the vessel source marine pollution through the marine pollution prevention act even going beyond the international standards.

Enforcement of international standards are implemented upon three principles respecting to the state sovereignty of parties to those international conventions. Those three principles are called as Flag State Control, Port State Control and Coastal State Control. Flag State Control is the implementation and enforcement of international standards by the state which a ship is registered. Port State Control refers to the implementation and enforcement of international standards of prevention of vessel source marine pollution by the state which a ship enters to its port. Coastal control refers that when a ship is sailing in the maritime zone of another state for the purpose of innocent passage that state has the obligations to implement and enforce international standards to preserve marine environment.

This enforcement of international standards on those three principles; Flag State Control, Port State Control, Coastal State Control has been established by the section 6 of part XII of UNCLOS and it has empowered the States to enforce laws to prevent vessel source marine pollution within their legal jurisdictions.

In article 217 of UNCLOS it supplementary mentions that Flag States shall guarantee compliance to the international standards to prevent marine pollution by vessels flying their flag or of their registry. The requirement of the international standards covers the matters relating to design, building, equipment and staffing of vessels and other certificates required and flag states are obliged to conduct immediate investigations and institute proceedings if a vessel under their control commits a violation of rules irrespective of where the violation occurred or where the pollution caused.

In the principle of Port State Control, article 218 of UNCLOS mentions that when a vessel is willingly within a port of a state, that state may commence inquiries and where the evidence permits, institute proceedings in respect of any release from that vessel outside in violation of rules and regulations to prevent marine pollution.

However article 216.2 of UNCLOS mentions that No state shall be obliged to institute proceedings when another state has already instituted proceedings under Flag, Port or Coastal State Control.

By adopting these international standards into local laws, the marine pollution prevention act has taken various measures to ensure the implementation of those international standards in Sri Lanka. Since Sri Lanka being an Island and located in a very strategically important geographical location for global shipping industry it can be identified that marine pollution prevention act has more concentrated on the principles of port state control and coastal state control rather than flag state control as there are few number of vessels sail flying the Sri Lankan flag under Sri Lankan registration.

Act state that, Where the authority has reason to believe or is informed that there is a grave or substantial discharge, escape of dumping of oil into sea or is imminent, the authority may order the owner, operator, master or agent of any ship to report its position to authority and may instruct to take such steps as may be necessary to control or to take part in the cleaning up of pollutant. Even Section 10, 11 and 12 of the act further states that it shall be lawful for the Authority to order to take such steps to prevent, mitigate, control and clean up any pollution and also Section 11 states that any authorized officer may detain any ship, if he has reasonable cause to believe that any oil, or other pollutant has been discharged from the ship and the ship deposits sum of money with the Authority to meet the liability. Therefore it is clear that Sri Lanka's marine pollution prevention act has ensured the implementation and enforcement of international standards under state control principles.

***D. Status of Seaworthiness of the Ship to Prevent Vessel source marine pollution***

Seaworthiness of a ship is a very important aspect in respect of all the operations of a vessel. Because whether it is a container Ship or Tanker or Cruise Ship or Car Carrier, the protection of its cargo and ship crew is based on the seaworthiness of the ship along with it ensures the safety of oceanic environment which can be damaged due to marine casualty or oil leakages. Thereby international standards relating to seaworthiness of a vessel has been emphasized by UNCLOS and MARPOL and those international conventions have been ratified and adopted by Sri Lanka.

UNCLOS has introduced the international laws and regulations with regard to seaworthiness of a ship to be implemented through the state control mechanism and in article 219 mentions that, To ensure the seaworthiness of a ship to avoid pollution marine environment, states shall take administrative measures to prevent the vessels from sailing when a vessel within one of their ports and violates the applicable rules and standards relating to seaworthiness of vessel and thereby threatens damage to the marine environment. Positively even article 220 of UNCLOS empowers the Coastal States to control and prevention of marine pollution causing by vessel due to unseaworthiness.

Article 4.1 of regulation 6 of MARPOL, states that the state of the ship and its equipment shall be retained to ensure that the ship in all respects will remain fit to proceed to sea without presenting an irrational threat of harm to the marine environment. In the MARPOL Article I of Protocol 1 (Provisions concerning reports on incidents involving harmful substances) states that the master or other person having charge of any ship involved in an incident shall report the particulars of such incident without delay and article III states that reports shall in any case include individuality of ship, time, type and position of incident, quantity and type of harmful substance involved and assistance and rescue measures. The International Oil Pollution Prevention Certificate shall be issued by administration of flag state to any oil tanker or any other ship which are involved in cruises to ports under the jurisdiction of other Parties to the Convention and in any case, the issued administration shall be responsible for the license. However in Regulation 8.4 mentions that No International Oil Pollution Prevention License shall be allotted to a ship which is entitled to fly the flag of a State which is not a Party of MARPOL. Even when a ship in a port of another party to MARPOL convention and if it is found that master or crew are not familiar with essential shipboard procedures relation to the prevention of pollution by oil, port state shall ensure that ship shall not sail until the situation has been brought to order in accordance with the requirements of this convention.

According to regulation 6 of MARPOL requires to conduct surveys of ships by officers of Administration and such Surveyors can require repairs to a ship and if a survey is carried out by a nominated surveyor on a request of a port state and decides that the condition of the ship or its equipment does not correspond significantly with the facts of the certificate or that ship is fit enough to proceed to sea without presenting an unreasoning threat of harm to the environment they shall immediately ensure that

corrective action is taken and shall in due course notify the administration and also if such remedial action is not taken the license should be withdrawn until the necessary arrangements are taken.

Every ship required to hold a valid inspection by officers and if there are clear ground to believe that the condition of ship or its equipment does not correspond substantially with the particulars of the certificate the party carrying out the inspection shall take actions to ensure that the ship shall not sail until the doubts get cleared. However if a party rejects a foreign ship entry to the ports on the ground that the ship does not comply with regulations, it shall be immediately inform to the consul or diplomatic representative of the flag state. By doing so, even the flag state also become aware and able to institute proceedings against the ship for not complying with the international standards with the intention of ensure the prevention of marine environment pollution.

In context of Sri Lankan Law relating to seaworthiness of a ship and the certifications, all the international standards established by UNCLOS and MARPOL have been ratified and going further, it has enacted the laws related even to the record books of oil, harmful substances or any other pollutants which will effect to every ship that enters to any maritime zone of Sri Lanka and it requires that Captain or the person in charge of ship shall record in the oil record book regarding the activities relating to oil cargo, transferals of oil cargo, discharge of oil cargo, the ballasting or washing of oil fuel tanks, dumping of any other oily deposits and oil release operations etc. and also it is stated in the section 22 of the act that authority or any other authorized officer may inspect the oil record books or record books relating to harmful substances or pollutants and if any ship fails to carry these record books shall be guilty of an offence.

### ***E. Prevention of Marine Pollution in Maritime Casualties***

Maritime casualties are one of major sources of vessel source marine pollution. Maritime casualty refers to crash of ships, stranding or other incident of navigation or other occurrence on board a ship or external to it resulting in material harm or imminent threat to vessel or cargo.

According to article 12 of MARPOL it is a duty of every flag state to conduct investigations on any maritime casualty of its ships if such casualty has created a major damaging effect upon the marine environment and under this provision it ensures the passing of responsibility to



the flag states to take every measures to prevent maritime casualties by imposing manning, operational and navigational regulations to the ships flying their flag.

The Marine Pollution Prevention Act empowers the MEPA to take all the actions to prevent marine pollution caused due to any maritime casualty within any maritime zone of Sri Lanka and to direct the owner, master, charterer or any salvor to take such urgent and immediate measures in respect of the ship or cargo or any oil on board the ship for preventing, mitigating or eliminating pollution or the threat of pollution. Even the authority has the powers to sink or destruct a ship and undertake operations of loading, unloading or discharge of any oil to prevent a threat of marine pollution of any maritime zone in Sri Lanka. However the authority or any authorized person is excluded from liability for any act done or purported to be done in good faith.

Therefore it is obvious that marine pollution prevention act has empowered the MEPA in every aspect to prevent the marine environment pollution caused by maritime casualty within any maritime zone of Sri Lanka.

#### IV. RECOMMENDATIONS

In this study, researcher was able to understand many loopholes in the existing domestic legal framework relating to prevention of marine environment pollution from vessel sources in enforcement and implementation mechanisms. Thereby in this chapter researcher expects to elaborate those identified loopholes and recommend possible remedies to fill those gaps.

The first loophole was identified in constitution of Sri Lanka. There was no provisions with regard to defense of marine environment as it was limited only to territorial waters. Thereby researcher recommends to include provisions relating to the marine environment which is located even beyond territorial waters.

In UNCLOS and MARPOL, the provisions relating to innocent passage was not well dealt in the marine pollution prevention act and it mentions only that state should not make undue delays to ships. Thereby it is recommended to effective and comprehensive provisions without ambiguities.

Concerning the response to marine pollution due to casualties, it could be identified that act has not considered

to establish a special task force to act in emergency like oil spills under marine environment protection authority and currently such operations are done by Navy and NARA Institute under the guidance of authority. Thereby researcher recommends to include new provisions to present act or pass a new act for establishing such a brigade with trained personnel to respond those incidents quickly. Considering the enforcements of existing law, it could be identified that, though there are provisions to institute proceedings, there is a problem of lack of knowledgeable judges and lawyers in these shipping matters and marine law. Thereby researcher recommends to establish a special court or tribunal for such matters as currently implemented through high courts of articular areas.

According to existing law, when there is a problem in ship with its seaworthiness, it will not allowed to sail due to port state controls until it get repaired. But such repairing facilities are rare in Sri Lankan harbors and therefore researcher recommends to establish those ship yard facilities.

In a marine pollution incident, laws are permitting to detain a ship until the owner pays damages or compensations. But this practice is sometimes time consuming and not practicable as rich ship owners abandon such ships without paying and there by researcher recommend to make new laws to charge those fines from the Shipping agent in this country or Charterer of that ship who chartered that ship to this country. By doing this at least they tend to ensure sea worthiness, appropriateness and standard before they obtain the agency or charter from vessels.

#### V. CONCLUSSION

In this research, researcher could emphasize the importance and requirement of implementation of preventive measures to protect the marine environment from vessel sources marine pollution.

Through his research he has explained various methods of vessel source marine pollution, the effect to the environment from it, roles of various stake holders such as flag state, port state and coastal state and how they act to prevent this vessel source marine pollution, current legal framework and mechanism to protect marine environment and the loopholes of those existing laws. As well as he has been able to present practical remedial solutions for his identified issues as his recommendations to fill the gaps in current existing law.

# PROCEEDINGS

Thereby it is obvious and certain that he has clearly proved his research hypothesis that “International legal Instruments has not completely implemented in Sri Lanka in relation to the vessel source marine pollution”.

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PROOF

# POWER AND IDEOLOGY OF PROFESSIONS: A CRITICAL ANALYSIS OF THE ROLE OF JUDICIARY AND LAWS DELAYS IN SRI LANKA

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**Abstract** - Contrary to the orthodox traditional approaches, systematic study of underlie ideologies can be used as a powerful method of examination and understanding of individual as well as collective professional conduct and organizational behaviours as well as the reasons for their performance impediments. Purpose of this study is to examine how ideology of judges affects the functioning of Sri Lankan judiciary as a professional State institution. Study further focused on the most compelling and contentious pragmatic issue of laws delays in the Sri Lankan context through the theoretical lenses on ideology and power relationship of judges and litigants through critical analysis. Systematic ideological analysis warrant critical insights and understanding how modern professional structures such as judiciary were able to survive amid the dissatisfaction of the litigants and society. Moreover why litigants do not directly resist and voluntarily submitted themselves for such exploitation with passive reactions.

**Keywords** - ideology, judges, laws delays, judiciary

## I. INTRODUCTION

This study initiated from the confusion, inquiry and reflection of author's own thoughts which originated in the author's mind over the years of observing how Sri Lankan judiciary function and its overall performance including present laws delays of approximately 700,000 backlog of cases. As the actual performance of judiciary deviated from the expected performance, Author kept puzzling over the question of role of judiciary, more precisely; the performance gap between what is expected and actual when it comes to domestic laws delays. Hence fundamentally, this study is an attempt to understand and explore how power and ideology of professions can lead to individual, collective and organizational performance impediments' through the critical analysis of Sri Lankan judiciary and domestic laws delays .

While many stakeholders acknowledge the severity of the problem of domestic laws delays little has done to overcome it, especially in the domestic context. It is manifestly unfair for a litigant to wait for years for a decision. Intention of this study is to examine and understand whether ideology of judiciary acts as impediment for expeditious case disposal and if so how such a judicial ideology was formed and why such exploitation exists and why litigants submit themselves for such exploitation over commonly debated causes for such laws delays like poor judges litigants ratio, lack of infrastructure and resources, complexity of cases, vitality of delivering substantive justice etc. The laws delays and human dissatisfaction associated with it is evident world over in different magnitudes moving from a problem in to a crisis but the solution is still unidentified. Even though the issue of laws delays is old as the law itself, all modern judiciaries encounter this greatest challenge how to overcome these laws delays. This chronic issue already affected enormously to the present judicial systems and demands effective and speedy solutions to averse the collapse of entire judicial structure. (Kumar, 2012). Some laws delays are lawyers, some laws delays are judges and some are due to litigants. Hence in the centralized adversarial court hierarchy, as an expert of law as well as the head of case and court management, whole efficiency of the court system lies in the hands of a judge. Therefore judge can act as one of the prime cause or cure for such laws delays. Statistics revealed by the Ministry of Justice, Sri Lanka shows dramatic case backlogs over the past years. As at 31st December 2016 there were total of 725,944 court cases pending in Sri Lankan judicial system. Supreme Court had 3,566 pending cases while 4,837 cases were congested in the Court of Appeal according to the annual performance report of the Ministry of Justice. Also another 5,973 cases were backlogged in the Civil Appellate High Courts and 3,758 cases were pending in High Courts. District Courts had 142,749 cases while 535,644 cases were pending in Magistrate's Courts. Adding to the same, another 5,031 cases were stagnated in the Labour

Tribunals and 188 in the Board of Quazis. Quazi Courts had another 7,832 cases at the end of year 2016. According to the recordings, this total backlog of 725,944 cases was accumulated through 699,784 cases which were brought forward from the last year (Perera, 2017). This domestic issue gained international attention with the report of the Special Rapporteur on the Independence of Judges and Lawyers in Sri Lanka on Her Mission to Sri Lanka to UN General Assembly Human Rights Council. The said report informed the UN General Assembly Human Rights Council that judicial delays in Sri Lanka are 'nothing short of dramatic'. According to the submitted report even a politically neutral criminal case take ten to fifteen years for its proceedings. Similarly trail for a rape case taken fifteen years to conclude. Further there are civil cases pending before the courts for more than thirty years. Further it takes more than eight years for a divorce case to resolve. Special Rapporteur connoted such laws delays are evidently deprive the justice for the litigants especially victims and their families and further deny the liberty of those affected persons.

## II. METHODOLOGY

This is a qualitative research based on critical analysis. Ontology of the study considered that socially constructed entities were seen as the realities and those realities were also under continuous change. Accordingly epistemology is that, both reality as well as knowledge are socially constructed and subject to the power relations within society. Althusser Theory of Ideological State Apparatus was used as the theoretical lens for the study. Methodologies intend to adopt are Ideology Critique, Critical Analysis and Action Research. Methods to be employed are Ideological Review, Open-ended Interviews, Open - ended Observations and Narratives. Population for the study will be approximately 200 Magistrates and District Judges, 75 High Court judges, 12 Court of Appeal Judges and 11 Supreme Court Judges. Sample will be selected up to saturation level to cover standard 40% of the population.

## III. RESULTS

### Key Research question

What is the ideology of judges on the profession of judiciary in the modern Sri Lanka? And how does ideology of judges on the profession of judiciary affect the judicial performance including laws delays in modern Sri Lanka?

### Proposition 1

As per author's understanding Sri Lanka is a class based society especially on powers and privileges and there is a dominant class. Therefore author's first argument / hypothesis is that the judges are members of the dominant class in Sri Lanka. Only few got the membership by birth while the majority became members later in to that dominant class.

### Proposition 2

According to Marx, State is a committee of bourgeois class and judges as State officers and guardians of State become members of the State dominant ideology and acquire the role and power to execute law in the legal system. Ideological function of the law is a well researched area. (Twining & Uglow, 1981; Hunt, 1985) In a society legal system is not the sole basis of ideology. Moreover it might not be the most important. But what is important is that legal system does function as one of the major ideology to bestow legitimacy on present social and economic relations. Further it is vital to understand that modern legal systems perform more than an ideological purpose. Thus modern legal systems will advance the maintenance of the dominance of a particular class. (Martin, 1988). Further all judges being legal professionals they assume the ideology of the legal profession. Hence judges gains superior power due to this dual ideological sources comparative other professions. Also this ideological duality pave the way to legitimize their professional ideology as the State ideology or even likely to suppress the State ideology. Therefore it can be argue that judges of the Sri Lankan judiciary primarily contribute to the professional class dominance through their ideology. Therefore, author's second argument/hypothesis is that the Sri Lankan judges play a Professional Judicial ideology.

### Proposition 3

The law commonly defined and acknowledged as neutral and impartial, also symbolizes equality. Therefore law does not grant any preference or more importance for any individual or social class as well as should not have any special social interest. Thus it is obvious that the law should not subjective or objective in any sense. Therefore law should to be neutral and impartial to treat everyone and everything including different social classes. Consequently principles of neutrality and impartiality become mandatory bases for the administration of justice. Hence Judges should apply law, nothing but law. Law

demands judges to disregard their beliefs, ideas, interest etc and all together any ideology. Thus, author's third argument/hypothesis is that Judges mandate to adhere to legal ideology as per required by law.

#### Proposition 4

When examine the overall performance of Sri Lankan judiciary as a professional State institute over the years it is evident that there is a serious performance gap between expected and actual outcomes specially relates to laws delays. With that author would like to put forward the fourth argument/ hypothesis, the difference/gap between Ideal Legal Ideology and Actual Professional Judicial Ideology creates the individual and organizational performance deficiency including laws delays.

## IV.DISCUSSION

Power relationships in civil society featured in diverse shapes and forms in different eras such as feudalism, capitalism and in the modern society as professional colonization. In the contemporary society all professions commonly bears the power of knowledge which leads to individual discretion and particular professions such as doctors were able to gain power of collective will of their members which form dominant hegemonies even to an extend to threaten the ruling class. When refers to legal domain, even though Montesquieu states theoretical separation of power as legislature, executive and judiciary in reality formation and functioning of Sri Lankan judiciary system to date it was not able to get over its shackles from other two power sources and to fully functioned as an independent power source. Due to this unique nature, professionals attached to domestic judiciary system comparatively becomes more powerful than other professions who are purely depend on the power of knowledge. In lay sense there is a common misnomer that judiciary and law are the same. Based on the given false equation litigants and public anticipates pure justice and nothing but justice and due process of law without any exploitation or prejudice from the judiciary. Is Judiciary presents only law or is it fusion of power and law? According to Gramsci the term judiciary describes an arrangement and a representation of power rather than the law. Therefore it is questionable whether judicial power only presents the pure law. Law admit as a creation of the State on the assumption of democracy or will of majority. Therefore law is a representation of power of majority and ignorance of minority where absence of totality. When the law applied by individual judges it

does not operate in the same way and even in the same structures due to the different individual ideologies of judges which can clearly exemplify using dicta and obita dicta of a given case either to acquit or convict a litigant or reaching the same verdict based on differing grounds. Judges may have equal knowledge but different ideologies. Antoine Destutt de Tracy defined ideology in his writing *Mémoire sur la faculté de penser* (Vol. 1, 1796-1798) and *Éléments d'idéologie* (1801) 'as a system of ideas', which becomes the fundamental belief of a group and its members (Monika, 2012). Ideologies are defined as shared representation of social group and the group's image, their identity, their position in the society, aims, values, actions, norms, their relationships to other groups and resources. Ideologies are reproduces for its existence and survival in the society in material and immaterial forms using their group members. Commonly it is believed that main function of ideology is to legitimization of domination and exploitation by ruling class, institution or by an elite group. Ideological polarization between diverse groups is a unique characteristic of structure of ideology. Ideology since from its inception acquired multifarious definitions, interpretations and connotations swinging between the simply descriptive to paradoxical explanations. Marxists defined ideology as 'production of ideas, conceptions, consciousness (Marks and Engels 1970) within class struggle and domination. According to Marxist main function of ideology is to legitimize the social and economic order. This was further extended and branched in and out by different proponents with concepts of false consciousness (Engels 1893), ideological state apparatus (Althusser 1971), and the manufacture of consent and hegemony (Gramsci 1971) who envisaged ideology as a decisive factor within the society-power nexus, through the advancement of the ruling class. Habermas (1979 -1987), extended the concept of false consciousness through destruction of consciousness (1987),and formulate that it was a form of systematically distorted communication operating in line with the strategic interests of powerful communicators and constituting part of internal colonization (Habermas 1987). Ideology, in his view, was linked to mediatization, the circumstances where money and power decide the core processes of symbolic reproduction, viz. socialization, social integration and cultural transmission. (Monika, 2012). Even though for Marxists ideology was a negative false consciousness for Gramsci ideology was positive and it's with power. Gramscian hegemony means the ideological predominance of bourgeois values and norms over the subordinate classes which accept them as "normal". Althusser based ideology on social formations

and the dissemination of the particular bourgeois ideology on the Ideological State Apparatuses. He explained the “materialization” of ideology based on reproduction of ideological relationships. Foucault categorized relationships in three folds: struggle against exploitation, domination, and subjection. These three struggles can be observed in any professional relationship in modern society in ranging momentums either direct or subtle ways including judiciary.

Profession is defined as a paid occupation, especially one that involves prolonged training and a formal qualification (Oxford Dictionary, professional Standard Council). Basic traits of professionals are prestige, power and income (Goode, 1960). Professional gets unique powers due to the subject expertise. This is similar for legal profession. Judges were conferred with greater powers that affect the other people lives. A judge can cease a person’s liberty, property, family, or even, life in some jurisdictions. Thus judge is a person who can greatly and deeply affects a life of another individual. (Mautner, 2007). Talcott Parsons characterized professions as “collectively-oriented” and as having norms that are not based on the market and professions have become the most important single component in the structure of modern societies. Parsons also recognized that professions serve socially useful roles as well as sensitive and potentially threatening roles (Parson, 1954).

At the same time judge and litigant relationship is based on the fiduciary duty of a judge towards the litigants. In a fiduciary relationship the beneficiary is vulnerable to the fiduciary’s predatory or self-dealing actions yet must still repose her trust in the fiduciary. Three indicia mark the fiduciary relationship: discretion, vulnerability and trust. Discretion and vulnerability are, arguably, flip sides of the same coin. Discretionary power vested in the fiduciary means the beneficiary is always vulnerable to potential abuse through predation or self-dealing. Trust functions to economize on monitoring costs: fiduciary specialization makes it difficult and costly for beneficiaries to monitor their fiduciaries. And because the performance of a fiduciary’s responsibilities cannot always be measured objectively, beneficiaries might harm the relationship by constantly looking over the fiduciary’s shoulder.

For any profession there are ideologies formed and sustained over the period with respects to its own social

status, public and clients expectations from the profession. Similarly professionals themselves pursue and engaged in the give profession have their own expectations and ideologies. Therefore, when it comes to judiciary litigants and public developed their own social expectations and ideologies about what they expect from profession of judiciary and how profession should deliver it service. On the other hand, judiciary officers themselves have their own expectation and ideology about the profession of judiciary. When one of these two ideologies is dominant, one over the other, there will be suppression and exploitation of the weaker ideologies and stronger one will prevail. Ultimately, dominant group’s expectation will be delivered while suppressed group’s expectation may disregard.

## V.CONCLUSION

First, ideologies are socially and mentally shared belief of the group. Ideologies are social because they are functional and embedded to practices and ideological practices transformed in to social practices. Secondly structure of ideology will be reproduced in three forms by reproduction of the institution, individuals and relationships. Thirdly existence and survive of ideology takes place in the form of ideological polarization between groups: judiciary and litigants. This study attempted to study and understand some of the relations between ideologies and discourse with respects to Sri Lankan judiciary and litigants. Ideologies as the foundation of group beliefs, attitudes and actions it controls the physical and mental model of members of judiciary that underlie the ideological reproduction and discourse. Discourse plays a fundamental role for ideological material existence by daily expression and reproduction of ideologies. This study also tried to illustrate how ideology relates and interacts with knowledge and how collective groups or professionals can form as a critical dominator in the society with the power duality due to their ideology and knowledge. Hence ideological polarization between in-group and out-groups and its discourse is examined using judges and litigants. This analysis shows how ideologies are institutionally and individually reproduced using powerful institutions such as judiciary. Thus structural ideological discourse becomes collective group’s discourses and their ideological dominance, attitudes and interests will reflect in many indirect and subtle ways in consciously or unconsciously.



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# OFFENCE OF ENFORCED DISAPPEARANCE : ENHANCING THE PARAMETERS OF CRIMINAL LAW OF SRI LANKA

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**Abstract** - Enforced disappearances (ED) have been an outspoken and debatable dialogue at different spectrums across the globe during the last century due to complexity of the situation itself. Presently, ED is considered a gross violation of human rights at both international and regional levels. Further, this approach has influenced many jurisdictions to recognise the ED as an offence in the domestic levels with the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAED) (2010). Recently, the legislature of Sri Lanka passed the enabling statute for the previously mentioned ICPAED in order to guarantee the rights of the victims of the same and further to impose criminal penalties the wrongdoers. The study focuses on assessing and elaborating the new dimensions of recognising a novel penal offence of ED by the introduced domestic statute in expanding the constraints of the criminal law of Sri Lanka. The study is based on legal research methodology which is totally based on the assessment of the qualitative data as analysing the primary sources of domestic and international legal instruments, cases and the secondary sources of books and articles in relation to the area. The study specifies the legal validity of recognising ED as a penal offence at the domestic sphere in order to achieve justice for the harm suffered and finally, the study develops a legal argument in achieving the justice for the victims of ED in Sri Lanka from the treaty-based mechanisms.

**Keywords** - Enforced Disappearances, Criminal Law, Penal offence, Sri Lanka, Treaty-based mechanisms.

## I. INTRODUCTION

Enforced Disappearance (ED) is not a situation that can be defined in a single format due to the nature of its continuity and complexity. Similarly, the incidents of EDs

are not novel to the history of human rights violations at different levels. However, their systematic and repeated use—as a means of creating a general state of anguish, insecurity and fear—is a recent phenomenon (Velasquez-Rodríguez v. Honduras, 1988).

Particularly the incident of ED could be classified under the scope of many branches of laws, including International Human Rights Law, International Criminal Law and International Humanitarian Law Due to the nature of “multiple” human rights violations, ED most commonly represents a violation of the right to life (Mojica v. Dominican Republic, 1991); the prohibition on torture and cruel, inhuman or degrading treatment the right to liberty and security of the person (Velásquez-Rodríguez v. Honduras 1988); and the right to a fair and public trial (Rehman, 2010).

It is evident that, the highest numbers of EDs were reported as taking place in the countries like Latin America, Iraq, Sri Lanka and the former Yugoslavia (Nowak, 2009). Therefore, the level of intervention of the international community and/or the states are significant in order to combat the situations of EDs and ensure the rights of the justice in the societies.

The content of the paper is organized as follows. The second part of this study deals with the methodology used. The third and fourth parts discuss the international standards applicable for criminalizing ED and the allied international regimes connected to clarify the incident of ED and rights connected thereof. The fifth part of the study summarizes the substantive standards of recognizing the crime of ED in Sri Lanka. Finally, the study concludes with developing a legal argument on possible in achieving the justice for the victims of ED in Sri Lanka from the treaty-based mechanisms.

## II. METHODOLOGY

This study follows the black letter approach and the qualitative data was used in order to examine the subject matter. Statutes, judicial decisions and international conventions were used as primary qualitative data while legal text books, legal treatises and journal articles were used to gather relevant information as secondary qualitative data. The comparative analysis was built based on the International standards on the reason that, the new dimensions of recognizing a novel penal offence of ED by the introduced enabling statute (2018) to the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAED) (2010) does expand the constraints of the criminal law of Sri Lanka. The study does not focus on analyzing background, issues and concerns relating to the rules of extradition connected with the offence of ED.

## III. A BRIEF ON THE CORE STANDARDS APPLICABLE FOR CRIMINALISING EDs UNDER PUBLIC INTERNATIONAL LAW

There are few international/regional instruments which may qualify to address the issues of ED's in different perspectives; namely, Declaration on the Protection of all Persons from Enforced Disappearance (1992), the Inter-American Convention on Forced Disappearance of Persons (1994) (IACFDP), and the Rome Statute of the International Criminal Court (1998) and finally, the ICPAPED (2010).

The core international instrument, ICPAPED (2010) defines ED as;

arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law (ICPAPED, 2010, art.2)

Further, according to the ICPAPED (2010) the state responsibility towards the people in relation to ED is of two types. Firstly, the widespread or systematic practice

of ED constitutes a crime against humanity as defined in applicable international law and the states shall ensure the justice for the victims of ED thereof (ICPAPED, 2010, art.5). In particular, Rome Statute of the International Criminal Court (RSICC) (2002), recognized ED as a crime against humanity (RSICC,2002, art.7 i). Therefore, the state parties to the RSICC do bare the obligation to refer the issue into the consideration of the international criminal court established by RSCCC (RSICC,2002, art.5,13).

Secondly, the state shall take the necessary measures to ensure that ED constitutes an offence under its criminal law and to achieve justice for the victims suffered from ED (ICPAPED,2010, art.4). As IACFDP (1994) prescribes, the states should take the legislative measures that may be needed to define the forced disappearance of persons as an offence and to impose an appropriate punishment commensurate with its extreme gravity (IACFDP, 1994, art.3).

## IV. ALLIED INTERNATIONAL REGIMES CONNECTED TO THE INCIDENT OF ED AND RIGHTS CONNECTED THEREOF

An incident of ED may infringe the rights of both the victim and secondary victims, recognized by international, regional and domestic standards in different levels, due to the inherit, complex nature of the issue.

A situation of ED may directly affect, but not limited to the rights recognized by the Universal Declaration of Human Rights (UDHR) (1948) such as right to life, liberty and security of person (UDHR, 1948, art. 3), right not be subjected to torture or to cruel, inhuman or degrading treatment or punishment or arbitrary arrest, detention or exile (UDHR, 1948, art. 5, 9), non-discrimination (UDHR, 1948, art.7) and right to social security (UDHR, 1948, art.22).

The crime of ED is a complex offence under the Rome Statute (RSICC,2002, art.7) as the offence of torture. It has been called an "octopus crime" as well as a "permanent crime" since it leads to the crime against humanity. It is noteworthy that the United Nations Convention against Torture (CAT) (1987) has become a source of reference for the ICPAPED (2010) since torture is as an element of ED, and the obligation of the State Parties' to criminalize torture, as an offence under domestic criminal law (Kittichaisaree, 2001). The CAT (1987) describes rights to

reparation (CAT, 1987, art 7) right to fair and adequate compensation (CAT, 1987, art 14), the right to complain about the torture and the obligation to investigate towards the victims (Nowak, 2009).

As the International Covenant on Civil and Political Rights (ICCPR) (1966) recognizes, ED as a violation of right to liberty and security of person (ICCPR,1966, art. 9); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (ICCPR,1966, art. 7); the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (ICCPR,1966, art. 10) and right to life (ICCPR,1966, art. 6).

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) prescribes standards of the right to obtain reparation, as for of restitution, rehabilitation, satisfaction (including restoration of dignity and reputation) and guarantees of non-repetition which had been followed by the Article 24(5) of ICPAPED (2010).

### V. SUBSTANTIVE STANDARDS OF RECOGNIZING THE CRIME OF ED IN SRI LANKA

Neither Penal Code of Sri Lanka (1883) nor any other law does recognize ED as a criminal offence until the ratification of the ICPAPED (2010) with passing the municipal law, ICPPEDA No. 5 of 2018. With the operation of the statute, Sri Lanka has three principal obligations to be fulfilled: first, to criminalize ED under domestic law; second, to grant detainees and the relatives of detainees a number of rights and remedies for breach of those rights; and third, to cooperate with other Convention States in the investigations, prosecutions, and extraditions of perpetrators of enforced disappearances (South Asian Centre for Legal Studies,2015).

For that reason, the statute ICPPEDA (2018) categorizes the penal offence of ED as an autonomous crime, related crimes and liability of command responsibility. Moreover, the enacted legal regime guarantees the right to justice and reparation to victims of ED. Here the term 'a victim of ED' is referred to a disappeared person or any individual who has suffered harm as the direct result of an enforced disappearance (ICPPEDA ,2018 s 14, 25).

It is prescribed that, the commission of offence of ED may be by an individual or any person who, being a public officer or acting in an official capacity, or any person acting with the authorization, support or acquiescence of the State, and finally by a superior (ICPPEDA ,2018 s 3). The level of the actus reas and mens rea expected to commission the offence is different for the above mentioned three categories of persons.

The commission of the offence by any person who, being a public officer or acting in an official capacity, or any person acting with the authorization, support or acquiescence of the State, does bare a slight difference from the definition undermentioned, where the offence is committed by an individual.

It omits action of the arrests, detains to the first limb of the section 3 (1) (a), considering the nature liability of an ordinary persons.

ED is defined as the commission of offence of ED by an individual as follows;

3. (2) Any person who;
  - (a) wrongfully confines, abducts, kidnaps, or in any other form deprives any other person of such person's liberty; and
  - (b) (i) refuses to acknowledge such arrest, detention, wrongful confinement, abduction, kidnapping, or deprivation of liberty; or
  - (ii) conceals the fate of such other person; or
  - (iii) fails or refuses to disclose or is unable without valid excuse to disclose the subsequent or present whereabouts of such other person, shall be guilty of the offence of ED (ICPPEDA ,2018 s 3 ss2).

The level of criminal liability towards any superior for the commission of the offence of ED as specified below, derive the duties and responsibilities assigned to those of officials by the governing law and that of may be related to the first category (ICPPEDA ,2018 s 3 ss1) of a public officer or acting in an official capacity, or any person acting with the authorization, support or acquiescence of the State.

- 3.(3) A superior who –
  - (a) knows, or consciously disregards information which clearly indicated, that subordinates under the effective authority and control of such superior were committing or about to commit an offence under subsection (1);

(b) exercises effective responsibility for and control over activities which were concerned with the offence of enforced disappearance; and

(c) fails to take all necessary and reasonable measures within his power to prevent or repress the commission of an offence under sub section (1) or to submit the matter to a law enforcement authority for investigation and prosecution (ICPPEDA ,2018 s 3 ss 3).

Every offence under this Act shall be a cognizable offence and a non-bailable offence (ICPPEDA ,2018 s5). It is evident that the punishment imposed (for both absolute and related offences) and the non-bailable statute reflect the serious constraint of the state towards eliminating the ED even if the offence is committed by a non-citizen with/without the jurisdiction of Sri Lanka (ICPPEDA ,2018 s 6 ss 2). Moreover, the mental element of the state in eliminating and punishing the wrongdoers while the ensuring the rights of the victims could be visible from the extradition of suspects of ED respecting the principles of Public International Law (ICPPEDA ,2018 s10,11,12,13,25).

Further, either category of commission of offence and wrongdoer shall be guilty of the offence of ED and shall upon conviction after trial on indictment by the High Court (ICPPEDA ,2018, s 6) be punished with imprisonment for a term not exceeding twenty years, and also be liable to pay a fine not exceeding one million rupees and shall further be liable to pay compensation not less than five hundred thousand rupees to a victim (ICPPEDA ,2018 s3 ss1,2,3, s25).

Supplementary, the law recognizes the related crimes of ED as any person who aids or abets or conspires or attempts to commit any offence set out in section 3, shall be guilty of an offence and upon proof court shall impose the similar punishment as of commission an offence of ED (ICPPEDA ,2018 s4, s25).

The basic rights recognized by the statute (of both victim and relative of a victim) are right to know the truth, the progress and results of the investigation, the fate of the person disappeared, the right to form and freely participate in organizations and associations and right to assistance. Further, it is enacted the duty of the law enforcement authorities, where they shall undertake an investigation, even if there has been no formal complaint and appropriate measures to search for and locate the disappeared person (ICPPEDA ,2018 s 14).

## VI. AN ARGUMENT ON THE POTENTIALS OF ENSURING RIGHTS OF VICTIMS OF THE CRIME OF ED'S IN SRI LANKA THROUGH THE TREATY-BASED MECHANISMS

It is evident that the domestic legislation on criminalizing the offence ED provides a sound penal law regime in order to ensure the rights of the people in the country in par with the general structure of the ICPAPED (2010). Further, the jurisdiction of the matters connected hereto lies with the High Court of Sri Lanka hold in Colombo, or the High Court established under Article 154P of the Constitution (1978), for the Western Province hold in Colombo.

Nevertheless, ICPAPED (2010) establishes a Committee on Enforced Disappearances (CED) to carry out the functions provided for under the Convention itself (ICPPED,2010 art. 26) including the mandatory to consider the communications received (individual and state) in relation to issues of ED where all effective available domestic remedies have been exhausted (ICPPED ,2010, art. 31).

Vienna Convention on the Law of Treaties (VCLT) (1980) provides the legal regime on the operation of the treaty obligation by the states. Therefore, the communications relating to ED sent by Sri Lanka may be admissible at the CED, subject to the above- mentioned requirements, unless the state had proposed reservations for the Article 31of ICPAPED (2010) which had not been opposed by the state parties. Although, Sri Lanka has declared that, the state shall only recognize the competence of the CED to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under ICPPED (ICPPED ,2010, art. 32).

Consequently, there is no any possibility to victims of ED in Sri Lanka, by themselves, to reach the CED in order to obtain justice even after exhausted of the domestic law.

As discussed previously, ED has been described as a connected factor of the offences of torture and crime against humanity. With that, it generates a valid legal argument on the possibility of recognizing the victims of ED in Sri Lanka to approach the CAT Committee from or on behalf of individuals, subject to its jurisdiction as a violation of right to be free from torture.

Sri Lanka has ratified the CAT (1987) (with the enabling statute passed in 1994) and accepted the inquiry procedure for Sri Lanka under Article 20 of CAT (1987). In 14.08.2016, it recognized the competence of the CAT Committee to receive and consider communications from or on behalf of individual's subject to its jurisdiction who claim to be victims of a violation by Sri Lanka of the provisions of the CAT (CAT, 1987, art.22).

Yet, the issues of ED shall not be referred to the International Criminal Court as of violation crime against humanity since Sri Lanka is not a state party to the Rome Statute of International Criminal Court (1998).

Considering implementation of the suggested recommendations obtained from the treaty-based mechanisms in Sri Lanka has been a fact against the sovereignty of the state as interpreted by the judiciary in the *Nallarathnam Singharasa V Attorney General* (S.C. SpL(LA) No. 182/99, 2006) by Sarath N. Silva, Chief Justice in relation to the ICCPR (1966).

“Therefore, the accession to the Optional Protocol in 1997 by the then President and Declaration made wider Article 1 is inconsistent with the provisions of the Constitution specified above and is in excess of the power of the President as contained in Article 33(f) of the Constitution. The accession and declaration does not bind the Republic qua state and has no legal effect within the Republic.”

The Directive Principles of State Policy of the Constitution (1978) provides inter alia that, the state must “endeavour to foster respect for international law and treaty obligations in dealing among nations” (Constitution, 1978, art.27). That obligation is not justiciable (Constitution, 1978, art.29). However, there have been instances where the Supreme Court has relied on Directive Principles of State Policy in interpreting the obligations of the State (*Seneviratne v. UGC* (1978-79-80) 1 Sri L.R. 182, *Sugathpala Mendis & Others v C B Kumaratunge and Others* SC (FR) No 352/2007, Supreme Court Minutes 8th October 2008).

However, prior to *Nallarathnam* case (2006), there had been several instances where the Supreme Court has held the view that it could rely on treaties that have been ratified by Sri Lanka, even in situations where the legislature has not adopted an enabling legislation for the same.

In *Weerawansa v. Attorney General* (2000), Justice MDH Fernando, writing for the Court held that even in

situations where there was no express enabling legislation, the Supreme Court could enforce the obligations undertaken by Sri Lanka (*Samararatne*, 2010), under the ICCPR (1966), as stated;

“Sri Lanka is a party to the ICCPR (as well as the Optional Protocol)...Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to “endeavour to foster respect for international law and treaty obligations in dealing among nations.” That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes. In that background, it would be wrong to attribute to the Parliament an intention to disregard those safeguards” (SC (FR) 730/96, S.C. Minutes 3rd August 2000)

Therefore, it is evident that, except few instances, the judicial practice of the state, had not been developed as to the duty of judiciary to mandatorily consider the recommendations obtained from the treaty-based mechanisms in order to protect rights of the victim suffered in every aspect. In such a way, even if a victim of ED obtains a favorable recommendation from the CAT Committee in relation to his violation of rights, there is no obligation on the domestic judiciary to mandatorily follow such a recommendation.

## VII. CONCLUSION

Being a dualistic country, Sri Lanka practices the process of passing an enabling statute to incorporate the international law into the municipal law. Following the aforesaid rule, Sri Lanka introduced the enabling statute of ICPAPED (2010) in order to recognize the ED as a penal offence and to protect the rights of the victims/secondary victims of the same. It is evident that, the penal law of the country supplement with the operation of the ICPAPEDA (2018) in guarantying the rights of the people in the territory including, right to equality/equal protection of the law, right of non- discrimination, right to free from torture as specified by the constitution.

On the other hand, the power of the president in excessing the international law into the municipal law under the Article 33(f) of Constitution does restrict/limit the principle of *pacta sunt servanda* (“agreements are to be kept”).



Similarly, Sri Lanka is not a state party to VCLT (1980). Therefore, the accessibility to the treaty-based mechanisms and the enforceability of the recommendations for issue thereof have also been restricted for Sri Lankans due to the municipal legal practices/traditions/laws. However, rationally, those practices do violate respecting the treaty obligations of the state towards the both citizen of the state and the international community at large.

Anyway, it has been recognized ED as form of torture as well as a component of crime against humanity by the many domestic/regional/international dispute resolution mechanisms. Moreover, the ICPAPED (2010) specified as aforesaid fact as follows;

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law (ICPAPED, 2010, art.5).

Hence the crime against humanity has reached the status of jus cogens, it could be argued that ED as a pattern of crime against humanity too constitute a norm of jus cogens, which is the strongest possible rule under the customary international law (Brownie,2008).

Finally, it is the duty of the state, Sri Lanka, to bare the accountability of respecting the standards of the customary international law and treaty obligations while strengthening the municipal law in order to protect the rights of the people, specially the victims of ED.

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# ADMISSIBILITY OF COMPUTER EVIDENCE UNDER SRI LANKAN CRIMINAL PROCEEDINGS : A COMPARATIVE ANALYSIS

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**Abstract** - Sri Lanka has now stepped into a new global era having overcome the terrorism which resulted in a rapid technological advancement.. This study seeks to answer the problem present legal regime pertaining to computer evidence provide appropriate mechanisms to ensure the admissibility of computer evidence in Sri Lankan criminal courts and if the findings to that question is in the negative, what reforms should be brought upon to strengthen the law regime on this respect. The primary objective of the study is to examine the existing legal framework on computer evidence currently entertained in criminal proceedings in Sri Lanka with certain other jurisdictions. The secondary objective is to identify the loopholes of the present legal framework and to propose apt recommendations to reform the existing legal regime on the admissibility of computer evidence in Sri Lanka. The research was executed using two methodological approaches. The black letter approach was utilized for a profound analysis on the legal provisions pertaining computer evidence. Empirical research methodology was used to gather information on the current status of the computer evidence and its practical implication. Ultimately, this study raises certain pertinent questions in the legal framework on computer evidence still remain unanswered. The main focus of the study revolves around the significant provisions of the Evidence (Special Provisions) Act of 1995, the Evidence Ordinance of 1895(As amended by Act No 29 of 2005) and the Electronic Transactions Act of 2006.

**Keywords** - Admissibility, Computer Evidence, Criminal Proceedings, Sri Lanka

## I. INTRODUCTION

Evidence in the sphere of law, is said to be intrinsic in character: for it includes the material objects or statements which could be submitted to a competent court in

determining the accuracy of any claimed matter of fact under investigation. Hence, Law of Evidence is incidental to heterogeneous challenges with the global technological evolution, especially with the invention of computers. The main concern of this paper is on the current laws applicable in Sri Lanka regarding the admissibility of computer evidence under criminal proceedings along with its position with the cognitive laws of the US and England. The research problem seeks to answer whether existing provisions in the statutes relating to the computer evidence, safeguard mechanisms to ensure that electronic evidence will be admissible under criminal proceedings in Sri Lanka and what measures are necessary to be introduced, in order to ameliorate the admissibility in that regard.

## II. METHODOLOGY AND EXPERIMENTAL DESIGN

Primary data of this research were acquired through semi-structured interviews with stakeholders in the Information Technology and Criminal Law regime such as lawyers, judges and expertise in the respective fields .Secondary data was gathered via the content analysis method where the researcher deduced and analysed data from various materials such as books, journals, newspaper articles, websites which were related to the admissibility of computer evidence in Sri Lanka.

## III. APPLICABLE LAWS AND RESULTS

### 1. Evidence Ordinance of 1895

Section 3, the interpretation clause, of the Evidence Ordinance has curtailed the term "evidence" to include

oral and documentary evidence, hence it has been enabled by certain provisions of the Evidence Ordinance, to produce substantial objects as evidence when the circumstances require. Nevertheless our courts have admitted contemporaneous recordings of public speeches, telephone conversations through wire or tape recorders and photographs as evidence, despite of the exclusion of real evidence in Section 3 of the Ordinance. In the case of, *The King v Dharmasena* (1950) 51 NLR 481, Canakeratne, J. has expressing his views, on the value of photographic evidence stated that “may be the cameras do lie in terms of long focus lens and not holding at eye-level, hence one wouldn’t provide with all the witnesses since there are perjurers. If real evidence could be brought to the court and if a jury can view a scene, why not a photograph?”

## 2. Evidence Special Provisions Act of 1995 (ESPA 1995)

Courts were disinclined to admit documents generated by the computer as evidence, prior to the enactment of the ESPA 1995. This skeptical attitude of the courts can be observed in *Benwel v Republic of Sri Lanka* (1978-79) Sri. LR 194, where Colin Thorm J. declared that “Computer evidence is neither original nor derivative, it is in a unique category. In order to accept such documents, the court must satisfy that they have not been subjected to any alteration. None of the sections in the Sri Lankan Evidence Ordinance make reference to computer evidence...”. However, a hindsight was given in terms of computer evidence with the technological development occurred in computer transactions. ESPA 1995 was drafted as a consequence of this reconsideration.

It is noteworthy that under ESPA 1995 what is admissible is a “statement produced by a computer”. In the absence of the said phrase a question occurs as to the determination of the scope of admissibility. It is suggested that evidence are of two kinds; computer generated evidence and computer stored evidence. The amalgamation of the above two categories may also constitute evidence. However at present there are no judicial or scholarly regulations in Sri Lanka to provide guidance as to the exact scope of admissibility. Furthermore, in the UK, *R v Blackburn* (and *Wade*) [2005] All ER (D) 392 (May), addressing the issue of when is a document produced by a computer, the court was reluctant to accept a word processed document as a document produced by a computer.

Section 4 of the ESPA 1995 now enables a party to a dispute to confer any contemporaneous, electronically made,

audio or video recording or reproduction as evidence. Although the term “computer” has defined to include any device which stores and process information, ESPA 1995 does not define the term “electronic”. It is noteworthy that under this provision purely mechanical recordings can be produced as evidence. Only an electrical or mechanical recording or reproduction can be tendered as evidence under Section 4(1) (a), that is to say the recording must be supported by oral evidence in terms of relevancy. Such evidence may consist of a person who truly heard the conversation. Supreme Court observed in the case of *K.H.M.H. Karunaratne v. The Queen* (1966) 69 NLR 10 “the trial judge should have assessed the experts’ evidence before considering the tape record in proving the risk in attempting to identify the speakers by their voices in tape recorders the greater risk of such identification in tapped telephone conversation.

It is vital to note that the device used to make a recording or reproduction was functioning properly. In the UK case of *R v Spiby*[1991] Crim.LR 192, it was held that although computer-generated evidence does not contain human errors, but the real evidence does. This decision was overruled with the recognition of the computer error. Subsequently in *R v Cochrane*(C.S.) (CA) 15 June 1992, established for the first time that computer evidence should explain the nature and the function of the computer system, before ascertaining the application of Section 69(1) of the Police and Criminal Evidence Act of 1984. Non alteration of the recording or reproduction during or after making it, keeping it in custody is another requirement. Thus practical and theoretical issues have resulted due to the effortless alteration.

It is important to assess whether the provisions of ESPA 1995 is in conflict with the concept of hearsay rule; which generally means that evidence in all cases must be direct. The case of *Somasiri v. The Queen* (1969) 75 NLR 172, includes application of the hearsay rule. This was a murder case where the prosecution led testimony of two witnesses who claimed that the deceased, few days before her death informed his father about a warning on the accused visiting the house. The court held, referring to Section 60 that the testimony of the two witnesses are inadmissible by the reason of them being hearsay and not direct. The appropriate witness in such an event would be the father of the deceased. One has to determine whether the evidence is hearsay or not depending on the purpose it has been led. Consequently if a computer record is to be considered as evidence, the witness should be the person who entered the details to the system as he is the only one who aware on

the input. Moreover, hearsay rule could not be applied to all computer records such as automatic records which are kept without human intervention.

The principle of rule against hearsay is entitled to express statutory recognition in countries like the US and the UK although it is not firmly incorporated into Sri Lankan law. For an instance the Federal Rules of Evidence, in its US Rule 801(c) interprets hearsay as “a statement, excluding one formed by the declarant, while claiming at the trial, produced as testimony to prove the veracity of the matter asserted”. The hearsay rule was applied in the Iowa State, the US in *State v. Colwell* 715 N.W.2d 768 (Iowa Court of Appeals, 2006), which involved a cybercrime, where Colwell appealed against his two counts which amounted making of a false report under a statute of Iowa. The Iowa court established that “since the lacuna of a human declarant required by the rules of evidence, the computer generated records tracing calls between certain phone-numbers which this case include are not hearsay”.

The rationalization of the rule against hearsay to such electronic records retained by computers without any human intervention was brought forward by the Supreme Court of Louisiana in *The State v. Armstead* 432 So.2d 837 (Louisiana Supreme Court 1983). The court expressed its views stating that neither the printout itself nor the printout of the computer's integral operation results are hearsay evidence as it does not include the output of the statements put into the computer by court declarants. Such statements are generated without an oath so that their accuracy cannot be assessed by cross-examination. As per a machine, inaccurate data will only generate if such machine is not operating properly.

In the UK, Section 114 of the Criminal Justice Act 2003 defines hearsay as “a statement except an oral evidence given by a person in the proceedings, which is submitted as evidence on the stated matter”. By the reason of certain computer records produced before the court constituted hearsay, House of Lords had very reluctantly acquitted an accused in *Myres v. Director of Public Prosecutions* [1965] AC 1001 (HL). Although following this case a reconsideration of the law of hearsay evidence brought forward by strong judicial calls, no alterations were made until the Criminal Justice Act 1988, which enabled acceptable records made during business, an exemption to the rule of hearsay.

The position in both the US and the UK is that hearsay rule is not attracted by automatic recordings of information.

Thus in *R v. Dodson Williams* [1984] 1 WLR 971 (CA), a security camera which was in operation during a robbery was accepted as evidence and the reasoning was that no application could be made to the hearsay rule, regarding the evidence created by a machine which automatically recorded an event. A witness who had seen the CCTV footage of an event was allowed by the court to give evidence on what they saw before the CCTV footage was accidentally erased before the date of trial in *Taylor v Chief Constable of Cheshire* [1987] 1 All ER 225 case. Court held that their evidence was direct evidence as if they've observed the scene through binoculars.

Section 6 and 7 of the ESPA 1995 lay down the process to be followed in rendering the computer evidence. As per Section 6 a party setting forth evidence permissible under section 4 or 5 is required to submit an affidavit made by a person of a responsible position regarding the function of the relevant machine, so as the requirement under section 4 or 5 is satisfied. Section 7 declares that before forty days of the trial or inquiry the party tendering evidence under Section 4 or 5 shall submit a notice to the opposite party including a list of evidence along with a copy of such evidence, adequate to enable the party to understand the nature of such evidence. A party receiving such notice may within fifteen days from the receipt of such notice apply the party giving the notice to inspect the evidence ought to be provided, the device which produced the evidence, or any records on that regard. It is noteworthy that the procedure regarding electronic evidence under the ESPA 1995 is different that of in the Criminal Procedure Code of Sri Lanka.

### **3. Electronic Transactions Act of 2006 (ETA 2006)**

ETA 2006 was introduced to identify and expedite the establishment of contracts, the initiation and exchange of data messages, electronic documents, electronic records, and other electronically formed communications. ETA 2006 is to be applied not in conflict with the Evidence Ordinance or any other written law. If any information included in a data message, electronic document, electronic record or other communication made by a deceased or by reason of his physical or mental condition is unfit to attend as a witness or is outside Sri Lanka and where reasonable steps have been taken to find such person and he cannot be found or who fears to give oral evidence or who is prevented from so giving evidence, evidence regarding such information shall be accepted.



Certain presumptions are enacted by ETA 2006 by its Section 21(3). As regard the first presumption, it is of the candidness of the data message, electronic document or electronic record. This is a dramatic reversal of well-known hearsay rule. Emerging of any data message, electronic document or record from the person who claims to have made it would be the second presumption. Thirdly, the genuineness of any electronic signature will be presumed by the court. It is an obvious fact that these presumptions could be rebutted by proving the contrary. ESPA 1995 in contrary, confines its presumptions only to include the truthfulness of any contemporaneous recording or statement furnished by a device or a computer of common use. Nevertheless, it is proposed that such generalized devices may lead to unauthorized tampering which may cause uncertainty.

The Courts shall, unless proved in contrary, postulate the truth of information contained in a data message, electronic document, electronic record or other communication and in respect of a person who made any data message, electronic document, electronic record or other communication, that it was made by the person who is claimed to have made it and shall surmise the genuineness of any electronic signature or distinctive identification mark.<sup>45</sup> A delicate approach has been taken by the legislature to accept electronic evidence and the burden of proof of the genuineness of such document has been effectively moved from proposing party to the opposing party.

*Marine Star (Pvt.) Ltd v. Amanda Foods Lanka (Pvt.) Ltd* H.C. (181/2007(MR) decided on 31.07.2008, involved an issue regarding the admissibility of a text message (SMS) where Chithrasiri J. observed that SMS is a document that is to say as per the definition given for the term “document” in the Evidence Ordinance which includes data stored on hard disks or other form of permanent or temporary storage devices. In addition SMS is also acceptable under Section 21(2) of the ETA 2006 since it was sent during the course of business.

As per the UK, the Electronic Communications Act 2000 made the UK one of the first countries to effectively legalize e-signatures in the world. On the other hand, the Electronic Communications Privacy Act 1986 of the US has categorized levels of privacy protection, depending on how important or sensitive the information is.

#### 4. Payment Devices Frauds Act of 2006

Section 16 of the PDFFA 2006 is concerned with the matters regarding evidence under the same Act. Correspondently, a certified copy of an entry relating to a payment device inside or outside Sri Lanka, kept by an Issuer or acquirer in his ordinary course of business, whether in writing or way of by electronic, magnetic, optical or any other methods, in an information system, computer or payment device shall be accepted as evidence relation to a prosecution as for an misdemeanour under section 3 of the Act, and shall be prima facie evidence of the facts stated.

## IV. DISCUSSION AND CONCLUSION

The ESPA 1995 has facilitated the acceptance of computer evidence by removing obstacles such as the rule against hearsay, which previously prevented the admission of such evidence. Regarding to contemporaneous recordings created by electronic or mechanical methods by a machine or a properly operating device, the most critical issue is whether the recording was altered or modified so as to affect its authenticity and reliability. The evidence of forensic experts might become important in dealing with this issue. Relating to computer evidence, it is important to ascertain whether the information provided to the computer was accurate. Here again the evidence of data entry operators who put information into the computer becomes important characters. The ESPA 1995 focuses on the admissibility and not on discovery of computer evidence. As per criminal investigation, there does not appear to be any issue regarding the seizure, examination and production in court, of any device or computer used in any criminal offence. The field of forensically sound computer evidence has been evolved to receive and investigate information contained in computers and other devices, which has become vital evidence in a criminal matter. The enactment of legislation such as the ESPA 1995 may not by itself be adequate to deal with issues arising in technological development which constituted computer evidence. It is also essential to improve the required skills among investigators, computer forensic experts, lawyers and judges to tackle the issues arising from computer evidence and to provide the necessary equipment and infrastructure for the courts to confront with the challenges of this new field of evidence.

Issues arise in pragmatism where there are contradictions in the provisions of ESPA 1995 and ETA 2006. There is no applicability of the ESPA 1995 in relation to any data message, electronic document, electronic record or other

document to which the provisions of ETA 2006 applies. Another important issue need to be resolved is the express exemption of the applicability of the ESPA 1995 in Section 22 of the ETA 2006, rendering the change brought by the Evidence (Amendment) Act 2005 as nugatory.

To summarize, the law of evidence relating to computer records and statements in Sri Lanka has developed over the years. In terms of the economic development, it is necessary to embolden electronic transactions and remold Sri Lanka into a paperless environment. Computer forensic investigators must be aware of the legal environment in which they work, or they risk of having the evidence obtained being ruled as inadmissible. Nevertheless it is important for the public to have confidence in the legal system and its ability to incorporate types of electronic evidence in order to make use of the technological development and to ensure personal and commercial safety. Even though many positive changes has commenced in respect of the admissibility of computer evidence under criminal proceedings, in terms of the ESPA 1995 and the ETA 2006, the law is currently confronted by ambiguity which requires to be elucidated imperatively.

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PROOF

# A STUDY OF CRIMINAL RECIDIVISM IN SRI LANKA COMPARED TO NORWAY

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**Abstract** - The recidivism can be defined as the leaning of a convicted criminal to reoffend. Similarly, Black's Law Dictionary<sup>1</sup> is also defined recidivism as the tendency of a convicted criminal to relapse into a habit of criminal activity or behavior. In this context, there are many errors with regard to criminal recidivism in Sri Lanka with compared to Norway. The mean of the recidivism rate in Sri Lanka is 20.8 percent within the period of 2011 – 2015. In Norway the recidivism rate is 20 percent and Norway is the country which has the lowest recidivism rate in the world. It is evident that large number of people are reoffended in Sri Lanka when compared to Norway. There is a tendency to go back to the prison again and again in Sri Lanka because most of the prisoners are reoffended for crimes. But in Norway few citizen go to prison and those who go usually go only at once. Moreover, Norway depend on a concept called 'restorative justice' that aims to repair the harm caused by crime rather than penalize people.<sup>2</sup> Thus, this research study is focused to identify the causes of criminal recidivism in Sri Lanka with compared to Norway and to analyze the criminal recidivism rate in Sri Lanka with compared to Norway. The qualitative research method will be used for this study. Under the qualitative research method data will be collected through secondary sources. Secondary data will be collected from published books, journals, theses and online data from websites, e- databases. e-journals, e-theses and e-books. In this research study, it is expected to find out a concrete solution to prevent a person from reoffending for a crime and educate the public on such convictions.

**Keywords** – Recidivism, Sri Lanka, Norway

## I. INTRODUCTION

Recidivism is a broad term that includes re-arrest, reconviction and re-imprisonment. The term re-arrest can be defined as an act of arresting a person again,<sup>3</sup> reconviction as an act of being convicted again and re-imprisonment can be defined as, to put someone to prison again. In this manner, it is clear the term recidivism is used for a criminal activity that occur again and again. There is a significant number of causes that can be identified with regard to criminal recidivism in Sri Lanka with compared to Norway. The recidivism rate in Norway is 20 percent and it is the country which has the lowest recidivism rate. However, Sri Lanka's recidivism rate is fluctuating time to time. There are differences in recidivism rates in between countries and may be secondary to many factors. This should be the subject of investigation, particularly if more comparable recidivism data becomes available. Possible explanations include the level of post-release supervision, the beginning for imprisonment, the range and quality of intra-prison programs and investment into prison medical services, particularly those targeting drug and alcohol problems and other psychiatric disorders.<sup>4</sup> In this manner, it is clear that there are some specific factors affect for the tendency of recidivism. There is a need of recidivism for drug adductors in Sri Lanka as they are reoccurred the same offence time to time. In this context, it is clear that there pros and cons of criminal recidivism in Sri Lanka.

## II. SIGNIFICANCE OF THE STUDY

This research study is a significant one that makes comparison study on criminal recidivism in between

<sup>1</sup>Black, H. C., 1968. Black's Law Dictionary. [Online] Available at: <http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf> [Accessed 13 May 2018].

<sup>2</sup>Sterbenz, C., 2014. Why Norway's prison system is so successful. [Online] Available at: <http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12> [Accessed 12 05 2018].

<sup>3</sup>Butorac, K. G. D. S. N., 2017. The challenges in reducing criminal recidivism. Public Security and Public Order, Issue 18.

<sup>4</sup>McGuire, J., Bilby, C.A., Hatcher, R.M., Hollin, C.R., Hounsoms, J., & Palmer, E.J., 2008. Evaluation of structured cognitive-behavioural treatment programmes in reducing criminal recidivism. Journal of Experimental Criminology, 4(1), pp. 21-40

Sri Lanka and Norway. Sri Lanka's recidivism rate is fluctuating and Norway recidivism rate is considered as the lowest rate in the world. This research reveals the causes that influence the Sri Lanka's recidivism rate with compare to Norway and that will be a valuable research piece for the scholars and the public who make further research on recidivism.

### III. LIMITATIONS

This research is carried out in between Sri Lanka and Norway even though recidivism can be seen among many countries in the world.

### IV. PROBLEM STATEMENT

It is identified that large number of people are reoffended in Sri Lanka when compared to Norway. Moreover, there is a tendency to go back to the prison again and again in Sri Lanka because most of the prisoners are reoffended for crimes. But in Norway few citizen go to prison and those who go usually go only at once. Norway depend on a concept called restorative justice that aims to repair the harm caused by crime rather than penalize people. However, there is no restorative justice system in Sri Lanka and criminal recidivism has become a burning question to this small island.

### V. RESEARCH OBJECTIVES

01. To identify the causes of criminal recidivism in Sri Lanka with compared to Norway
02. To study the restorative justice concept of Norway and its applicability to Sri Lanka

### VI. RESEARCH QUESTIONS

01. What are the causes of criminal recidivism in Sri Lanka with compared to Norway?
02. Is restorative justice concept of Norway applicable to Sri Lanka?

### VII. LITERATURE REVIEW

Recidivism covers re-arrest, resistance to rehabilitation, repeat offending, re-conviction, re-offending, re-admission, re-incarceration, repetitious criminal tendency, among others. In broad terms, recidivism means a decline into crime and criminal lifestyle or activities by an offender who had once or more times been processed through the

penal system. Otherwise known as repeaters, incorrigible offenders and offenders beyond rehabilitation, recidivists are persons who repeatedly violate the law, get arrested and processed by the criminal justice administrators.<sup>5</sup>

According to the existing literature it is revealed that number of studies have tried to identify factors that impact recurrence of ending rates within and between countries<sup>6</sup> but these studies are delayed by problems with sample selection, definitions of what creates recidivism, and the length of follow-up.<sup>7</sup> Recidivism measures immensely helps to identify the relative threat to public safety posed by various types of offenders, and the success of public safety initiatives in (1) deterring crime and (2) rehabilitating or weakening offenders. Moreover, this has been used by many public safety agencies to measure performance and inform policy decisions and practices on issues such as pretrial detention, prisoner classification and programming, and offender supervision in the community. Recidivism is usually measured by criminal acts that caused in re-arrest, reconviction, and/or the re-incarceration of the offender over a specified period of time. Provided multiple measures of recidivism allow users to select the performance measure best suited to their outcome of interest.<sup>8</sup> In this context, numerous ways of recidivism measurements such as re-arrest, reconviction, and/or the re-incarceration facilitate the community to supervise the offenders. Re-arrest is a person who has released to the community for a short period on probation or after serving a term of imprisonment and again arrested for a different crime. In addition, it is an arrests for suspected violations of administered release, probation, or state parole. Reconviction means a person as a recidivist if capture lead to in a subsequent court conviction. Violations and cancellations of supervision are not included in reconvictions since no formal trial happened. Re-incarceration can be treated that a person as a recidivist if a conviction or revocation resulted in a prison or jail sentence as punishment.<sup>9</sup> Recidivism rate is differ from country to country. The gap of recidivism rate is noted in between Sri Lanka and Norway.

<sup>5</sup>Otu, M. Sorochi, n., n.d. Analysis of causes and effects of Recidivism in the Nigerian Prison System. [Online] Available at: <https://www.ajol.info/index.php/ijdmr/article/viewFile/120972/110401> [Accessed 10 July 2018].

<sup>6</sup>Fazel, S. & Y. R., 2011. Psychotic disorders and repeat offending: systematic review and meta-analysis. *Schizophrenia Bulletin*, 37(4), pp. 800-810.

<sup>7</sup>Butorac, K. G. D. S. N., 2017. The challenges in reducing criminal recidivism. *Public Security and Public Order*, Issue 18.

<sup>8</sup>Butorac, K. G. D. S. N., 2017. The challenges in reducing criminal recidivism. *Public Security and Public Order*, Issue 18.

<sup>9</sup>Butorac, K. G. D. S. N., 2017. The challenges in reducing criminal recidivism. *Public Security and Public Order*, Issue 18.

The rate of recidivism in Sri Lanka can be described as due to the level of post-release supervision, the threshold for incarceration, the series and quality of intra-prison programmes, and investment into prison medical facilities, mainly those aiming drug and alcohol issues and other mental disorders.<sup>10</sup>

VIII. METHODOLOGY

The qualitative research method has been used for this study. Under this method data has been collected through secondary sources such as published books, journals, theses and online data from websites, e- databases. E-journals, e-theses and e-books.

IX. DATA ANALYSIS

According to the statistics of Department of Prisons in Sri Lanka there was a reduction of recidivism from 21.7% in 2011 to 15.7% in 2015. However, in between 2011 – 2015 that there was a fluctuation of recidivism rate. The escalating rate of recidivism was in 2012 at 26.5% and 2013 at 23.1% with compare to other years (Table 1). But later on it has gradually reduced.

**Table 1. Recidivism Rate in Sri Lanka 2011 – 2015<sup>11</sup>**

Year	Recidivist	Percentage
2011	5868	21.7
2012	7512	26.5
2013	7110	23.1
2014	4731	17.1
2015	3793	15.7

There was a reduction of recidivism rate in Sri Lanka since 2013 (Table 1). However the Sri Lanka has a fluctuating recidivism rate though it indicates a decline from 2013 – 2015. When it comes to Norway there recidivism rate is always stable. Though the Sri Lankan recidivism is fluctuating it was a good sign that even it reduced to that rate from 2013 - 2015. Sri Lankan government has taken action to train the prisoners in the different fields such as carpentry, mason work, electrical/electronic work etc.

<sup>10</sup>McGuire, J. B. C. H. R. H. C. H. J. & P. E., 2008. Evaluation of structured cognitive-behavioural treatment programmes in reducing criminal recidivism.. *Journal of Experimental Criminology*, 4(1), pp. 21-40.

<sup>11</sup>Dept. of Prisons, 2016. Prisons Statistics of Sri Lanka. [Online] Available at: <http://www.prisons.gov.lk/Statistics/Statistics-2016.pdf> [Accessed 20 May 2018].

Once they leave the prison they can engage their own self-employment. This has become the reason for the decline of recidivism rate in Sri Lanka.

The causes for criminal recidivism in Sri Lanka are identified as that most of the prisoners in jail suffer psychological wounds from childhood relating to poverty, joblessness, family background, environments (especially in slums), community disrespect, a low educational level and other factors. It is evident that people in Sri Lanka used to condemn the released prisoners regardless of the nature of the crime committed and without understanding the reasons behind their committing such offences. In addition when the father or mother gets branded as a criminal, society judges these people's children the same way, ultimately letting those children be led into criminal circles.<sup>12</sup>

However, the lowest recidivism rate is recorded in Norway in the world. Most of the crimes are connected to robbery, and most vicious crime areas are with drug trafficking and gang problems that are reported to the police. In this context, it can be assumed that Norway's criminal justice system is working correct way. The significance is that the citizens who go to the prison, generally go only once.<sup>13</sup> Norway depended on a theory called "restorative justice," and its purpose is to repair the damage caused by crime rather than punish people. This system applies on rehabilitating prisoners.<sup>14</sup>

Restorative justice is a process through which regretful offenders accept responsibility for their bad behavior to those injured and to the public and that makes the sense to reintegrate the wrongdoer into the law abiding society. The importance of restoration can be described as in terms of offender's self-respect, the relationship in between offender and victims, as well as restoration of both offenders and victims within the community.<sup>15</sup>

According to the existing data it is clear that rate of recidivism in Sri Lanka is fluctuating. It was more than

<sup>12</sup>Weerakkody, C., 2015. Prevent recidivism with work chances, pleads prisons chief. [Online] Available at: <http://www.sundaytimes.lk/151227/news/prevent-recidivism-with-work-chances-pleads-prisons-chief-176568.html> [Accessed 13 May 2018].

<sup>13</sup>Sterbenz, C., 2014. Why Norway's prison system is so successful. [Online] Available at: <http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12> [Accessed 12 05 2018].

<sup>14</sup>Sterbenz, C., 2014. Why Norway's prison system is so successful. [Online] Available at: <http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12> [Accessed 12 05 2018].

<sup>15</sup>Haley, J. O., 2011. Introduction—Beyond Retribution: An Integrated Approach to Restorative Justice. [Online] Available at: [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1040&context=law\\_journal\\_law\\_policy](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1040&context=law_journal_law_policy) [Accessed 10 July 2018].



20% from 2011 -2013 and slight reduction can be seen in 2014-15. According to the present available statistics it is difficult to predict the future. It might go up or down.

## X. DISCUSSION AND CONCLUSION

Employment can be taken as one of the rehabilitation initiatives for the prisoners that just released or soon to be released from the prison as it facilitates the reduce recidivism rates.<sup>16</sup> According to the Norwegian perspectives prisoners should be treated as human beings not as animals. In Norway they pay attention to prisoners as human beings. The prison system should be a one that provide shelter for offenders and also in the same vein it should be a place that transform the wrongdoers to a law-abiding citizens, in that way assisting their easy reintegration and to protect from worsening.

There are three major elements of programmes that can successfully reduce recidivism such as treatment for substance abuse or psychological disorder can help remove barriers that prevent employment and integration; education provides the assistance essential for prisoners to obtain the type of jobs that lead to more successful outcomes; and meaningful employment provides released prisoners an income and supports reintegration by increasing stability and self-confidence.<sup>17</sup>

To guard against recidivism in the prison system in Sri Lanka, educational and vocational programmes should be made more accessible to prisoners by increasing the capacity and removing barriers, reserves and restrictions in enrollment as this will help immensely to reduce the recidivism rate in the society. Appropriate employment may reduce the economic incentive to commit crimes, and also may connect ex-detainees to more positive social networks and daily routines.<sup>18</sup>

Therefore, it is suggested to implement restorative justice in Sri Lanka to reduce the recidivism rate. And also to make an environment for prisoners and their kith and kins

to move ahead as an ordinary citizen in Sri Lanka without any harassment or obstacle.

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## PROCEEDINGS

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PROOF

# THE 19<sup>TH</sup> AMENDMENT TO THE 1978 CONSTITUTION OF SRI LANKA : IS IT A MOCKERY TO THE CONCEPT OF DEMOCRACY ?

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**Abstract** – Any country in formalizing their constitution which is the supreme law of the country, follows some fundamental legal doctrines like democracy, good governance, check and balance of powers as well the concept of separation of powers. The existing constitution of Sri Lanka is introduced in 1978 and even before it passes twenty years of its existence, it has been introduced 19 amendments to it. These amendments have made crucial changes to the structure of the constitution. The 19th amendment is composed with a wide discretionary power towards the prime minister's office in an implied manner. The 19th amendment states that the public has the right to access information but there was no transparency on the nominations of the constitutional council. If the 19th amendment was composed for the national interest then why does it need to undermine the rule of law? Is it a mockery to the concept of democracy? The latest amendment shows a clear difference between the powers of the president and a conquest of the powers of the judiciary and the legislature. The objective of this study is to identify whether the 19th amendment has truly limited the excessive powers granted to the executive president and how the amendment lays the fundamental grounds to ensure the concept of democracy and the concept of good governance. The selected methodology for the study is a library research where constitution and the 19th amendment are been used as the primary data and the existing literatures are been used as the secondary source. Nonetheless, it has been foreseen and understood that although there is a limitation to the powers of the executive presidency in Sri Lanka through the 19th amendment, it does not protect the fundamental democratic features and it does not ensure the separation of powers and good governance as promised by the present government. Therefore in order to ensure the transparency and the accountability within the government as well to the people, powers exercised by the executive president must

be reduced and further the judiciary and the legislature has to be endowed.

**Keywords** - 19th Amendment, Concept of Democracy, Constitution, Executive President, Good Governance, Separation of Powers

## I. INTRODUCTION

The constitution can be identified as the grundnorm of the law of any country and it provides the basic and the supreme law to the ruling party to govern its people. Although the constitution provides a constant law to the country, with the contemporary social changes the constitution needs some fundamental changes into it. That is where amendments become a significant feature to the constitution. Sri Lanka, is a country with a democratic background has made many amendments to the present constitution and the latest one is the 19th amendment. This very amendment has been introduced at least with the intention of reducing the powers of the executive presidency especially in clause 3, 4, 9 of the 19th amendment, Article 30(2) of the constitution where such power-cut could entrust and empower the democracy within the country. The ex-facie of this very amendment shows resembles of limitation of the powers of the president yet under the Article 30 (1) of the constitution, it still protects the executive powers of the president; he is the Head of State, Head of the executive, Head of the Cabinet, Commander in Chief, all of it. It is true that some of the powers granted through the 18th amendment has been dissolved by the 19th amendment yet none of this has not been able to limit the powers granted through the constitution itself to the president, where this nature of cover-up to the constitution challenges the democratic features of the country as well function as a key feature to mislead the general public by making a mockery out

of the democratic concept. On the other hand nature of bringing amendments by every executive president during their period also question the true identity behind these constant amendments to the constitution. It has become an open secret to the learned Sri Lankans that, these amendments have been composed due to the personal attachment of the leaders. Therefore the substance and the process of the 19th amendments are not much of a conspiracy but has bloated the country to a democratic uncertainty.

## II. METHODOLOGY

The research study has been conducted as a comprehensive library research with especial reference to the Sri Lankan constitution of 1978 and the 19th amendment of it. Further, the research has been identified the significance of both primary data and secondary data where the constitutional amendments; the 19th amendment and the primary constitutional theories as the primary data and relevant literatures and published research studies as the secondary data. In advance, this study can be identified as a pure qualitative research based on the concept of democracy and the contemporary legal aspect of the 19th amendment to the present constitution.

## III. DISCUSSION AND RESULTS

Montesquieu's formulation brings out the doctrine of separation of powers as an insurance against arbitrary rule for the different limbs of the governmental powers. Article 91(1) (d) of the 1978 constitution ensure that there is an organic separation between the judiciary on one hand and the legislature and executive on the other. The organic separation has weakened the doctrine since the cabinet of ministers are both members of the legislature and the executive. It is the government's duty to maintain a good governance. Separation of powers is a safety-net to exercise the people's sovereignty without abusing government powers.

An amendment is an improvement, a correction or a revision to the original framework of the 1978 constitution. These amendments are mainly adopted to change the limits of the government powers. The 19th amendment was the very recent amendment which was adopted to the 1978 constitution of Sri Lanka. The executive powers were vested to the president under the previous amendment. These powers are now being shifted to the prime minister,

who is a member of the legislature as stated in the 19th amendment. As a result the legislature has become monstrously powerful without any absolute checks either from the judiciary or the executive. It has created an imbalance between the governmental powers. In particular the 19th amendment has made changes to the executive power. The relevant changes are those proposed in articles 33A (2) and (3) of the amendment.

33A(2): The President shall always, except in the case of the appointment of the Prime Minister or as otherwise required by the Constitution, act on the advice of the Prime Minister or such Minister as has been authorized by the Prime Minister to advise the President with regard to any function assigned to that Minister.

33A(3): The President may require the Prime Minister or Minister giving advice to him or her under subsection (2) to reconsider such advice, but the President shall act on the advice given to him or her, after such reconsideration. It is clear that the 19th amendment has weighed the legislature's capacity to thwart the executive powers that were given more weightage by the 18th amendment. As per the article 33A (2) of the 19th amendment it has effectively transferred all executive powers to the prime minister. Yet there is a pin drop silence on how the prime minister can be removed, if such were to become necessary.

According to the article 43 of the 1978 constitution states that, the executive power is exercised by the president and by the cabinet of ministers including the public service. As per the situation in the 19th amendment the head of the government is the prime minister, the leader of the cabinet ministers is the prime minister. Therefore the prime minister holds the portfolio of the public services and the cabinet. And it further states that the president should seek for recommendations by the prime minister before any action being taken.

The 19th amendment has brought a hidden duality towards the prime minister. It can be seen that both executive and legislative powers are eliminated by the prime minister's office.

The concept of democracy could be practiced properly if the government powers are balanced. Article 4(a) and 4(b) read with Article 76(1) of the constitution states that there is a functional separation between the legislature and the executive. However the 19th amendment has almost malfunctioned the president's powers.

Article 136(1) of the constitution derogate the proposition that the legislature and the judiciary are exercised separately in regard to their respective functions. Article 4 (b) and 4 (c) recognize the conceptual powers between the executive and the judiciary. The 19th amendment was embodied in a concept paper that wasn't publicized. It was passed by an urgent bill and have included a provision to repeal the urgent bill which is under article 83 of the constitution. If the removal of urgent bill was included, how could the 19th amendment being passed through an urgent bill? It could be realized that the integrity and the independence of the judiciary has weakened.

According to the case law, Patrick Lowe and sons vs. Commercial bank of Ceylon ltd (2001) 1 S.L.R.280, if such act is not permitted by the statutes, it shall be taken as forbidden and the court should struck down as it is being excessive of authority. Thus permitting the prime minister to exercise wide discretionary powers as stated in the bill of 19th amendment clause 11 of article 42-44, the excessive powers should be stroked due to the violation of article 3. According to article 41A (1) of the amendment, covers the nomination of the constitutional council. The President's authority to nominate members has been downgraded. Out of a total of 10 members recommended to be appointed to the constitutional council the President who is elected by the direct vote of the people is authorized to nominate only one member. As per the theory of the articles he doesn't even have the power to raise an objection with regard to the suitability of any of the balance five non-ex-officio members proposed to be nominated as per Article 41 (6). On the other hand, the Prime Minister with the Leader of the Opposition together, can nominate five members in addition to both of them becoming ex-officio members in the constitutional council. That is between the Prime Minister and the Leader of the Opposition, they can hypothetically control 07 members of the Constitutional Council out of a total of 10 members. At every opportune stage, the draft 19th amendment seeks to constrain the power of the President, despite the fact that the President exercises the sovereignty of the people through direct franchise, in all of the nine Provinces in Sri Lanka.

According to the article 3 and 4 of the constitution the sovereignty is the root of the doctrine of separation of powers. The legislative power is exercised by the parliament, consisting of elected representatives of the people and by the people at a referendum. the executive power should be exercised by the president including the defence of srilanka. The judiciary is exercised by the parliamentary through courts, institutions. According to

the 19th amendment of article 35, the president may have powers to institute any offence, the institution carries out major limitations so that the president is limited to institute any civil or criminal proceeding. Article 4 states that the executive powers are vested under the president including the defence. Having compared with the 19th amendment to the constitution of article the prime minister advice is compulsory for the president to appoint offices. it could be seen that the 19h amendment has disrupt the concept of democracy.

The result is that the imbalance of the separation of powers would destabilize the concept of democracy of the state. In such a scenario the biggest concern is on national security, defiance and territorial integrity. For the defense of a country, executive decision-making must be untrammelled and rapid. Any dilly-dallying on the part of the executive, due to differences of opinion between the two 'created power centers' of the Prime Minister and the President, would be detrimental. In Sri Lanka, the concept of 'dual-executive power' is sought to be introduced, through the draft 19th amendment that has led towards a mockery to the concept of democracy.

#### IV. CONCLUSION

The introduction of the 19th amendment to Sri Lanka has been justified by many political entities as an attempt to clear the excessive influence of the executive presidency as dictator. In prima facie, it is true that the 19th amendment has cut off many powers vested on the executive president yet it has failed to reduce the powers president has been granted through the constitution itself.

The present constitution was consist with a little of the concept of separation of powers where the 19th amendment has uprooted that as well. A constitution lies on the foundation of the democracy has the two major elements; transparency and the accountability to its people and that has not ensured through this constitutional amendment. Article 35 (1) of the constitution has been amended by the 19th amendment by giving an opportunity to institute president for any offence, yet this opportunity has been limited by major protection to the president from been instituted through that article itself saying "While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity"; where it can be identified as a constitutional mockery.

The 19th amendment itself has placed the position of the judiciary in a very challenging position as it compromises with the integrity and the independency of the judiciary. The executive and the legislature grip over the judiciary will never guarantee the independency of the judiciary as remonstrated by Lord Denning as “corrupt elements of executive and judiciary want judges to remain impotent, incapable and sterile in the face of injustice”. The composition of the constitutional council is questionable where the majority of the appointments of the council is made by the president. Such actions does not hold the true purpose of constructing a constitutional council as keep the president away from the higher positions who safeguard the law and order of the country.

## V. RECOMMENDATIONS

- I. The clause 8 of the 19th amendment, Article 41I of the constitution says that the decisions finalized by the constitutional council cannot be challenged in the court of law unless it is regarding the fundamental right issue, yet it is also important to consider the issues arise in due to the public interest where many such recent situations occurred.
- II. The given position to the president as the Head of the cabinet under the Article 30 (1) is a visible barrier for the independence of the legislature as well it goes against the concept of separation of powers. It clearly does not limit the powers of the president. Therefore more than limiting the alternative powers such powers of the president has to be limited.
- III. Constitute the constitutional council as a complete independent authority since it offer appointments to many higher positions who safeguard the law and order of the country.
- IV. The 19th amendment does not address the critical issue of the removal of the Supreme Court judges where during the impeachment of Bandaranayaka J. has showed controversial the gravity of it. Therefore the amendment needs to include the procedure of the removal of Supreme Court judges.

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# TESTIMONY THROUGH SKYPE PROMOTES BEST INTEREST OF JUSTICE

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**Abstract** - Courts are gradually adopting new technologies to enhance and strengthen the administration of justice system. An emerging area with respect to promoting justice is the use of skype for the purpose of giving testimony in the event of security concerns on accused or witness and remoteness of their location. Initially, testimony through skype was only recognized by the judiciary. Recent development in law recognizes the testimony through skype, yet there are technical defects in its implementation. The main objective of this study is to identify, how testimony through skype promotes best interest of justice and to identify the technical deficiencies in implementation. Further, it is desired to suggest recommendations to overcome the defects. The black letter approach is utilized for this study. In this paper it objectifies to provide the importance of testimony through skype in court proceedings, to afford legal regulations, judicial recognition of using skype for court proceedings, to identify the loopholes in the existing legal framework and to give recommendations.

**Key Words:** testimony, skype, best interest of justice

## I. INTRODUCTION

The use of Skype technology offers a great advantage in recording statements of witnesses who cannot attend court due to security concerns and remoteness of their location. This paper focuses on how Skype could use in order to promote best interest of justice. Law has to be amended time to time in order to get the benefit of technological advancement. Initially, Sri Lankan courts did not recognize computer-based evidences for court proceedings. But with Evidence (Special Provision) Act No.04 of 1995 accepts computer evidence as an admissible evidence before court.<sup>1</sup>

Former secretary to the ministry of justice, Kamalini De Silva stated that ministry is willing to provide courts with any technical support needs to promote the best interest of justice.<sup>2</sup> As a result, Witness Protection Bill was presented to the parliament by Minister of Justice Rauff Hakeem. The bill was passed by the parliament and it came into operation in 13th of March 2015<sup>3</sup>. It provided the legal regulations for testimony through Skype who cannot attend to court due to security concerns and remoteness of their location.

A witness plays an imperative part in concluding the verdict of any case. Sometimes witnesses may face difficulty to attend to court to give evidence due to security concerns or remoteness of their location. In such instance, if their testimony or statement not produce before court that would negatively impact on court process of ascertainment of truth. This is not what law stands for. Therefore, measure has to be taken to promote best interest of justice by avoiding such difficulties. This paper focuses on whether testimony through Skype would promote best interest of justice by giving access to witnesses who have security concerns or remoteness of their location.

The first part of the paper discusses the importance of testimony through Skype in court proceedings, second part discusses the legal regulations in relation to use of Skype with special reference to Assistance to and Witness Protection Act, third part focuses on judicial recognition of using Skype for court proceedings, fourth part discusses the loopholes and technical issues on Sri Lankan law on testimony through Skype and the final part gives recommendations for effective use of Skype in recording evidence.

<sup>2</sup>Nadia Fazlulhaq, 'Skyped Evidence Set to Revolutionise Courts' Sundaytimes (01 December, 2013)

<sup>3</sup>Witness Protection Act 2015 s 2 (1)

<sup>1</sup>Evidence (Special Provision) Act, Section 5

## II. IMPORTANCE OF TESTIMONY THROUGH SKYPE IN COURT PROCEEDINGS

There are two issues which debilitate the best interest of justice. Namely, security concerns on accused or witness and remoteness of their location. When a matter is highly relied upon a witness testimony, there will be an immense threat on such person.

Hence, it's very important to ensure the safety of victim of the crime and witnesses and to give access to them connect with court. Samayan and six others were killed while they were carrying from Kalutara Prison to Kaduwela Magistrate courts.<sup>4</sup> With the killing of Samayan, valuable information with regard to the offences he committed and others who involved was also buried with him.

Also there are cases where foreigners have become witnesses in a crime, when they were in Sri Lanka and cases which they want to file in our courts. However, there is a long delay in our court proceedings and it takes years to conclude a case. Therefore, a foreigner may not be able to stay in the country for such a long period of time. Hence, most of them decide not to file an action and bear the unjust caused to them, due to the remoteness of their location which debilitates the best interest of justice. If Skype is used to record evidence they could give evidence from wherever they are.

## III. LEGAL REGULATIONS

Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 Act specified that,

“if it be in the best interest of justice and is found necessary: —

- (a) as a measure of protection to be afforded to a victim of crime or witness; or
- (b) on grounds of expediency,

Record any evidence or a statement of such victim of crime or witness, by securing such testimony or statement without his personal attendance before such Court, Commission or law enforcement authority through technical means by which contemporaneous or near contemporaneous audio-visual linkage between the Court, the Commission or the law enforcement authority, and any other location

<sup>4</sup>Thilanka Kanakarathna and S. Thantriarachchi, 'Prison bus shot at, Samayan and six others killed' Daily Mirror (27 February, 2017)

(hereinafter referred to as the “remote location”) within Sri Lanka, from where such person testifies or makes the statement, could be established.<sup>5</sup> In other words it stated Skype should be used to record evidence if it is necessary to promote the best interest of justice.

The Act allows testimony through Skype under two conditions. Firstly, the court has to satisfy audio-visual linkage is technically accurate and reliable.<sup>6</sup> Secondly, a judicial or public officer appointed by the court has to be in the presence of the remote location where the victim of crime or witness seeks to make the statement.<sup>7</sup> Evidence shall be recorded only if the above conditions are satisfied. Likewise, the Act specifies that the procedure for testimony through Skype.<sup>8</sup> Section 33(2) and (3) limits the application of this provision only in special occasions where it is essential for the best interest of justice.

## IV. JUDICIAL RECOGNITION

Testimony through Skype has been judicially recognized in countries such as, Sri Lanka, Fiji Island<sup>9</sup>, Australia<sup>10</sup>, UK<sup>11</sup>, USA<sup>12</sup>, India and Canada.

**KHURAM SHAIKH'S CASE:** In the famous Khuram Shaikh's case with the assistance of the Attorney General's department, the Colombo High Court decided to use Skype to record evidence from witnesses who were overseas.<sup>13</sup> Thereby, Christopher Stooksbury who saw the incident gave evidence via Skype from Canada.<sup>14</sup> With his valuable statement, the accused was convicted for the offence of murder.

**FRANCISCA DIEDA CASE:** In another case, Colombo Fort Magistrate Thilina Gamage has ordered to record evidence from the first witness of the case Francisca Dieda,<sup>15</sup> and the court ordered to record evidence under the supervision of an independent observer attached to the University of Colombo School of Computing.

<sup>5</sup>Ibid

<sup>6</sup>Witness Protection Act, Section 31 (2)

<sup>7</sup>Ibid

<sup>8</sup>Witness Protection Act, Section 33

<sup>9</sup>PeniLotawa vs. The State, Criminal Appeal No. AAU0091 of 2011

<sup>10</sup>People v. Novak, 41 Misc. 3d 733, 734 - 735, 971 N.Y.S.2d 197 (2013).

<sup>11</sup>Polanski v Conde Nast Publications Ltd [2005] UKHL 10 (HL)

<sup>12</sup>State of Florida v. George Zimmerman No. 5D13-1233

<sup>13</sup>Fazlulhaq N., 'Skyped Evidence Set to Revolutionise Courts' Sunday Times (<http://www.sundaytimes.lk>, 01 December 2013)

<sup>14</sup>Wilkinson D., 'Full horror of how Khuram Shaikh was murdered as he tried to help others' Manchester Evening News (<http://www.manchestereveningnews.co.uk/news>, 21 April 2017)

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## V. LOOPHOLES AND TECHNICAL ISSUES ON SRI LANKAN LAW ON TESTIMONY THROUGH SKYPE

The major issues of the testimony through Skype are the reliability and security concerns. Especially for countries which follow adversarial system, reliability of the witness is a major concern. Unlike in physical presence of the witness, it is difficult to assess whether witness telling the truth or not. Because the court can only observe the witness who is giving evidence inside the square of the camera focal point.<sup>17</sup>

In the Memogate Scandal, the Judicial Commission of Pakistan allow testimony through Skype. Justice Isa said, "It is the responsibility of the government to ensure a good link,"<sup>18</sup>

Mr. Abeyaratne further pointed out some issues related to use of Skype in court proceedings. One is the lack of technical knowledge by the lawyers. Not all the lawyers are familiar with IT and IT law. Therefore lawyers and even the judges would face difficulties in using Skype in the court proceedings. In most of the instances judges would reluctant to use Skype due to lack of knowledge over it.<sup>19</sup>

## VI. RECOMMENDATIONS

It is a must to have guidelines on preparing the Courtroom for Skype and Preparing the Witness to Testify through Skype.

Therefore, it is recommended to draft set of guidelines on preparing the courtroom for Skype. Further, it is important to have the surrounding with suitable network fundamentals. The most important aspect is the connection speed and it is important to set out minimum download and upload speed in the court room. Otherwise there will be lot of connection failures which ultimately question the authenticity of the evidence.

Moreover, it is recommended to promote IT law among the lawyers and judges and to make them more tech-savvy.<sup>20</sup>

<sup>17</sup>Fazlulhaq N, 'Skyped Evidence Set to Revolutionise Courts' Sunday Times (<http://www.sundaytimes.lk>, 01 December 2013)

<sup>18</sup>Hameed U, 'The Importance Of E-Court Protocols For Skype Testimony' (2016) <<http://courtingthelaw.com/2016/08/10/commentary/the-importance-of-e-court-protocols-for-skype-testimony/>> accessed 18 October 2017

<sup>19</sup>ibid

<sup>20</sup>Fazlulhaq N, 'Skyped Evidence Set to Revolutionise Courts' Sunday Times (<http://www.sundaytimes.lk>, 01 December 2013)

## VII. CONCLUSION

Although our courts initially reluctant to use technology in court proceedings, with the enactment of Evidence (Special Provisions) Act and Witness Protection Act, recognize the computer based evidence as admissible before courts. This is a big step taken towards promoting better interest of justice. Using Skype to record evidence was practicing in many developed countries in the world to enhance the justice. By following this technical advancement for better justice, our law also accepts testimony through Skype. Purpose of this legal recognition is clearly stated in the Witness Protection Act, to promote best interest of justice. Testimony through Skype is allowed on two specific occasions; for the protection of witness and remoteness of the location of the witness. Even before the Act passes, courts had used Skype to record evidence via Skype such as in famous Khuram Shaikh case. Although the law has been now strengthen with the legal recognition of Skype, it is important to note that mere recognition was not achieved the desired outcome of promoting best interest of justice. Our law has been not specific on the use of Skype for testimony as it creates many practical difficulties on its application. Therefore it is important to set out guidelines specifying the manner to use Skype. Apart from those technical difficulties in our law, there are some general issues of using Skype for testimony; reliability and security concerns. This issue has been pointed out in many cases and scholars with their arguments.

In conclusion researcher admits that the statement of "giving evidence by Skype is preferable to giving no evidence at all"<sup>21</sup>. Therefore, it is believed that testimony through Skype Promotes Best Interest of Justice. Further, it is recommended to enact guidelines to enhance the effective use of Skype for testimony.

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PROOF

# THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) AND THE RATIONAL OF THE COOPERATION AND COMMITMENTS : AN EMPIRICAL APPROACH

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**Abstract** - Regional trade agreements on services have become a global phenomenon. The General Agreement on Trade in Services(GATS) has driven the path to enhance the service sector of the country. This article explores the role of the GATS and the Impact on it in order to enforce Regional Trade Agreements. The research has followed the mixed method. That shows that the enforcing Regional Trade Agreements are not effective for the growth of the service trade. High Level of Human Capital and removal of restrictions for foreign suppliers affect trade in services than the GATS-type liberalization. Further this article will explore which region has the opportunity to get the advantage of committing more service agreements.

**Key words** - Regional trade agreements, Services trade, WTO, GATS.

## I. INTRODUCTION

Regional Trade agreements become much more popular in the global society today. Also, the mechanism of the General Agreement on Trade in Services (GATS) is not strong and substantial liberalization does not occur within trade agreements on services. Lack of real progress in the negotiations on access to the services market within the Doha Round was one of the main reason for this situation. Regional Trade Agreements are considered as means of trade liberalization on more flexible conditions. Also, trade liberalization in services is conducted in an autonomous way because of asymmetric distribution of benefits and losses from the reform of regulation, not all of the countries in a trade agreement can be interested in real liberalization in practice. Another reason was the, other mechanisms different from the GATS emerge in the Regional Trade Agreement system that can substantially influence the dynamics of mutual trade between participating countries.

## II. PAPER LAYOUT

This paper investigates what provisions stimulate the export of services to the greatest extent within the practice of existing preferential agreements. This article is based on the evolution of the Regional Trade Agreements from 1948 to 2017 and it will be focusing on the level of the countries which have committed agreements under the service sector. Also this research will be looking at the regional level enforced service trade agreements and the level of integration. It will empirically analyze what are the advantaged countries in the Service trade commitments.

## III. PURPOSE OF THE STUDY

Main purpose of this study is to look at the nature of trade policies and complexity of service trades agreements and how they affect the trade in service commitments. The study also tries to identify the factors which determine the integration of service trade in the world. Therefore, the analysis is done by looking at the dynamics of trading services to date through descriptive approaches. Furthermore, the determinants of integration of service trade are analyzed through the trade openness of each country as a basic component in the integration of service trade.

## IV. HYPOTHESIS

This article based on three Hypothesis.

- A) Regions better endowed with human capital involved in more services agreements
- B) Developed countries have more advantages in committing more service trade agreements
- C) Trade Openness tends to admit more service commitments

## V. LITERATURE REVIEW

The growth of preferential services trade in the framework of Regional Trade Agreements are likely to be higher when countries include TRIMS provisions, commitments on government procurement, and labour market regulation, and have common political positions on international relations. Implementation of GATS-type commitments in regional agreements does not lead to a significant growth of trade in services between participants. The results show that the negative effect on services trade dynamics in services RTAs occurs due to the inclusion of anti-corruption commitments, uniform standards for financial assistance to national companies, anti-money laundering provisions and TRIPS commitments. (Danil'tsev & Biryukova, 2015)

The results of this study indicate that the openness of service trade in Association of Southeast Asian Nations (ASEAN) is influenced by a set of limiting and facilitating policies. In addition, the complexity and depth of commitment play a role in influencing the openness of service trade. In the interim, variables of trade volume, population, real effective exchange rate, service trade facilities, and human capital contribute significantly to the openness of service trade in ASEAN. It can therefore be construed that the openness of service trade is determined by the policy instruments and commitments in the service trade agreements made. (A. Fadhil, 2017) Liberalization of trade in services is only useful when it goes hand in hand with the promotion of sound domestic regulation. It has revealed the clear limits of peripheral experimentation in key areas of rule-making (i.e. rules that are not directly related to market access or liberalization outcomes), with increasing deference of the periphery (i.e. PTAs covering services) towards the centre (i.e. the GATS) with regard to solutions to the bulk of the unfinished rule-making agenda in services trade. (Delimatsis, 2010) Liberalization of trade in services is only useful when it goes hand in hand with the promotion of sound domestic regulation. It has revealed the clear limits of peripheral experimentation in key areas of rule-making (i.e. rules that are not directly related to market access or liberalization outcomes), with increasing deference of the periphery (i.e. PTAs covering services) towards the centre (i.e. the GATS) with regard to solutions to the bulk of the unfinished rule-making agenda in services trade. GATS-minus commitments in PTAs could be deemed largely irrelevant. In particular, they are not applicable to trade with non-parties which, in turn, might relish any newly arising market opportunities.

Otherwise, if subjected to GATS-minus treatment as well, 'outsiders' are given a lever, potentially, to challenge the PTAs status under Article V of the GATS. (Adlung & Morrison, 2010) The progress is long overdue because commitments under the General Agreement on Trade in Services (GATS) have not kept pace with trade opening that has occurred around the world. Several delegations pointed to the large and long-standing gaps between members' commitments and the rules they apply, which are often more open. Some members considered that the focus should be on removing this "water" between formal commitments and current practices (WTO, 2017). Theoretical researches on trade in services are conducted in several directions. First, it should be mentioned that a single theory explaining specialization of countries in trade in services has not been developed yet. Services have been considered non-taxable for long, have not been counted in international trade statistics, and, accordingly, theories on trade in goods have not been paying much attention to services. (Hoekman & Meagher, 2014)

## VI. RESEARCH METHODOLOGY

### 1) Regional Trade Agreements Information System (RTA-IS)

The Regional Trade Agreement Information System (RTA-IS) is a comprehensive database of all RTAs notified to the GATT/WTO. The application allows to search and export available information on any notified RTA, as well as on the consideration process of a particular RTA. The RTA-IS contains information only on those agreements that have been notified, or for which an early announcement has been made, to the WTO. Information on the content of these agreements and the parties thereto reflects information provided by the parties to the WTO. RTA from the list of short RTA titles has been examined.

### 2) The Global Human Capital Report

The Global Human Capital Report 2017 presents information and data that were compiled and/or collected by the World Economic Forum. The Global Human Capital Index 2017 ranks 130 countries on how well they are developing their human capital on a scale from 0 (worst) to 100 (best) across four thematic dimensions—capacity, deployment, development and know-how—and five distinct age groups or generations—0–14 years; 15–24 years; 25–54 years; 55–64 years; and 65 years and over—to capture the full human capital potential profile of a country.



Four thematic dimensions form the sub-indexes of the Global Human Capital Index - Capacity, Deployment, Development and Know-how. The Index's Capacity subindex quantifies the existing stock of education across generations, the Deployment subindex covers active participation in the workforce across generations, the Development subindex reflects current efforts to educate, skill and upskill the student body and the working age population, and the Know-how subindex captures the growth or depreciation of working-age people's skillsets through opportunities for higher value-add work. It can be used as a tool to assess progress within countries and points to opportunities for cross-country learning and exchange. Therefore, the 2017 index has been reviewed in order to find out the correlation of trade development and the Human Capital.

**3) Data and Data Source**

The Data used in this study is secondary data or data that has taken from a third party publication. The Data employed comes from various sources of data and publications of International institutions.

**4) Service Trade Restriction Index**

The World Bank's Services Trade Restrictions Database aims to facilitate dialogue about, and analysis of, services trade policies. The database provides comparable information on services trade policy measures for 103 countries, five sectors (telecommunications, finance, transportation, retail and professional services) and key modes of delivery. Within each subsector-mode assess policy regimes in their entirety and map the bundle of applied policies into five broad categories (with associated scores): Completely open (0); Virtually open but with minor restrictions (25); Major restrictions (50); Virtually closed with limited opportunities to enter and operate (75); Completely closed (100).

All the countries data have been measured and it has been compared with all the regions.

**VII. KEY FEATURES OF SERVICES COMMITMENTS UNDER GATS MULTILATERAL AGREEMENT**

Modes of Supply Type Of Supply	Interpretation
Mode 01 Cross border supply	service provided directly by overseas service providers to domestic users; for instance, legal considerations given by overseas lawyers through telecommunications devices.
Mode 02 Consumption Aboard	service provided by an overseas service provider to domestic customers after the customers move physically to the service provider country; for example, Sri Lankan students studying in Japan or Indonesia..
Mode 03 Commercial Presence	service provided with the presence of a service provider from abroad to customers in the customers' country; for instance, the establishment of an private University belonging to a Japanese citizen in Sri Lanka
Mode 04 Movement of Natural Persons	provision of direct services in the form of foreign workers who have specific expertise to consumers in the consumers' countries; for example, medical doctors from Sri Lanka practicing in Japan.

The GATS is administered by the World Trade Organization (WTO). The WTO is the only worldwide international body that deals with the rules on commerce among nations. In it agreements are discussed, negotiated and signed by most of the nations involved in trade in the world and ratified by their respective parliaments. Until now there are 144 countries members of OMC. In that number are covered all Latin American countries, including Cuba. The GATS is one of the key agreements, which was negotiated in the Uruguay Round and implemented in 1995.(García-Guadilla, 2002).The entry into force of the GATS in 1995 constituted a major achievement because more than 120 GATT Parties agreed to establish a comprehensive set of rules on global trade in services. The Agreement's first novelty rests in its definition of "trade in services". The Agreement covers all measures affecting four modes of supplying services internationally. The modes cover not only trade in the traditional sense (mode 1: cross-border supply), but also involve movement of labour (mode 4), capital (mode 3) and consumers (mode 2):

According to the Article 01 of the GATS Agreement , trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; Page 286 (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.(GATS, 1995)

**Table 01 - Supply Mode of GATS**

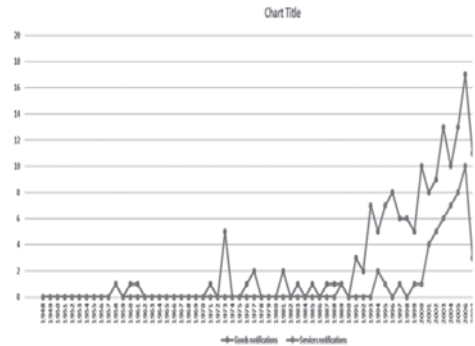
	North America	South America	Central America	Commonwealth of Independent States (CIS)	Africa	Middle East	West Asia	East Asia	Oceania	Europe	Caribbean
Total	31	44	34	11	02	05	07	72	18	38	04
Intra regional)	01	03	05	04	01	00	00	18	01	13	00
Extra regional	30	41	29	07	01	05	07	54	17	25	04

**VII. RESULTS AND DISCUSSION**

**1) Trade Agreements**

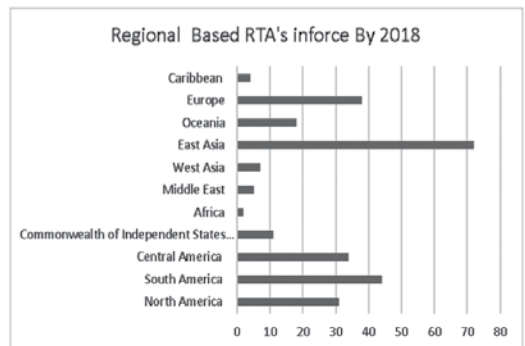
This Section has covered the mode of service supply under the RTA's from 148 to 2017. Also it will analyze the capacity of the enforcing trade agreements. This section will help to

understand to what type of countries have committed into the more agreements under GATS.



**Figure 01 - Evaluation of the regional Trade Agreements 1948- 2017(Data Source of - <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>)**

According to the figure 01 it is clear until 1990 there was no any significant growth of the service trade. But we can see that the Committing RTA's has significantly has gone up after 2000.GATS has formed in 1995.That means service sector trade commitments has gone up after enforcement of the GATS agreement. By 2014 Service trade commitment has tied up with the Trade in goods sector also. This clearly elaborates that Service sector commitment has become much more important after enforcing GATS agreement.



**Table 02- Enforced RTA on Service Trade by 2018- 152 (Based on the data source of <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>)**

Figure 02 Gives an insight on the regional basis regional Trade Agreements on Services. According to this graph East Asian countries has empowered more RTA's than the other regions. Europe and south America also has committed considerable amount of Agreements for this

time period. But West Asia has not that much considerably committed agreements in their region or with the other region.

Figure 02 - (Based on the data source of - <http://rtais.wto.org>)

It is observed that the regional based agreement on service trade has gone up significantly in the East Asia region. Specially ASEAN commitments is the reason for this commitments. But Africa, West Asia and Middle East countries enforcement is relatively low with compared to the other countries. Specially Europe and American countries has enforced considerable amount of RTS's.

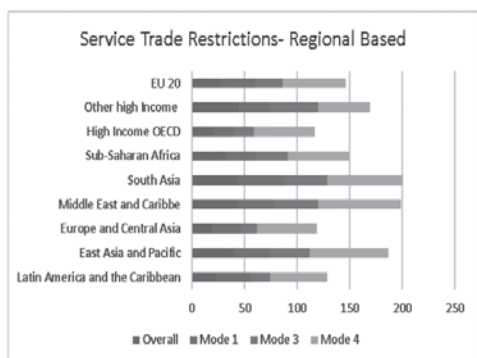


Figure 03 – STRI on the Basis of Region and Author’s Calculation

## 2) Service Trade Restriction Index

Figure 03 depicts the service trade restriction index for all the regions High Income countries full list of data – Appendix 01). As per the chart, it can be seen that , the overall value of service trade restrictions in all the regions and the Mode 01,Mode 03 and Mode 04 Service trade restrictions also. According to this chart Europe and central Asian countries service trade restrictions is somewhat low compared to other countries. Also the High Income OECD countries restriction level is below than the other regions. But South Asia, Middle East and Caribbean and East Asia and Pacific Countries Score levels are higher than the other regions. Specially, this chat indicates that the mode 04 restriction level is higher in all the regions.

## 3) The Global Human Capital Index

Figure 2: Gap in human capital development, by region, 2017



Source: Global Human Capital Index 2017.

Source: [http://www3.weforum.org/docs/WEF\\_Global\\_Human\\_Capital\\_Report\\_2017.pdf](http://www3.weforum.org/docs/WEF_Global_Human_Capital_Report_2017.pdf)

The Global Human Capital Index evaluates countries based on outcomes rather than inputs or means. The size of the current human capital, current investment in building future human capital and current outcomes in the labor market and it will tend to commit more Trade agreements. Between them, the 130 countries featured in this year’s edition of the Report make up 93% of the world’s population and contribute more than 95% of global gross domestic product (GDP).

Yet, like the wider geographic regions in which they are located, these countries exhibit a broad range of overall success in developing their human capital. On average, the world has developed only 62% of its human capital as measured by this Index. Or, conversely, nations are neglecting or wasting, on average, 38% of their talent (Figure 2). At a regional level, the human capital development gap is smallest in North America and Western Europe, and largest in South Asia and Sub-Saharan Africa. However, there are a wide variety of overall human capital outcomes within each region and across different aspects of human capital globally.

The Global Human Capital Index shows that all countries can do more to nurture and fully develop their human capital. Across the Index, there are only 25 nations that have tapped 70% of their people’s human capital or more. In addition to these 25 countries, 50 countries score between 60% and 70%. Further 41 countries score between 50% and 60%, while 14 countries remain below 50%, meaning these nations are currently leveraging less than half of their human capital.(World\_Economic\_Forum, 2017)

## VIII. CONCLUSION

Finally, it is clear that the commitment level cannot be measured by calculating number of Regional Trade Agreements. There are other extra factors also which are highly influencing to the success of trade. Specially countries which have high level of human capital and low level trade restrictions has grown up their trade in services in the world. It is not the number of agreements it is all about the way of the facilitating integration. Borderless investment will boost the facilitation of a country and it will cause to commit more service trade investment opportunities.

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# MARRIAGE CANNOT BE SLAVERY; AN ANALYSIS ON FORCED MARRIAGES AND GROUNDS FOR NULLITY IN SRI LANKAN CONTEXT

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**Abstract** - When considering the concepts such as divorce and nullity in the Sri Lankan context it is very apparent that the laws remain very rigid regarding them. As a grave loophole in law there are no direct provisions for the forced marriages as well. According to our law there are only three grounds to get a divorce in the General Law and as per the Section 19 (2) of the Marriage Registration Ordinance such as malicious dissertation, adultery and incurable impotence at the time of the marriage. In contrary, in England more flexible grounds for divorces can be observed as unreasonable behavior, adultery, desertion, two years separation with content and five years separation without consent which may lead to divorce and forced marriages can involve a range of criminal offences as well.

Therefore the research problem here is to determine whether the grounds for nullity of marriages, divorces in Sri Lanka are adequate and whether they provide necessary provisions covering all the aspects including the forced marriages as well. The main objective is to review the existing grounds for divorce and the nullity of Sri Lanka, locus standi of the parties and to propose the new grounds for a divorce and the nullity of a marriage along with the remedies for forced marriages.

In this research the doctrinal legal research methodology is used as this topic is based on the various legal propositions and legal principles regarding the nullity of marriage. The research is qualitative in nature where the researcher has used some conventional legal sources (text books, case laws), statutes and enactments and some commentaries to derive the research accuracy. The researcher has used one of the unique cases in Sri Lanka, Harin Hugh Dias v. Ambagahage Tekla Fernando (DDV 00889/15) as a primary legal source which provides inferences for nullity, forced marriages and locus standi where an old man has

been cheated by a young house maid and contracted two fraudulent marriages with the same person and the same year forcefully with the help of a Registrar of marriages where the his son's locus standi to declare that marriage null and void is in uncertainty. Apart from that researcher has used a theoretical framework consisted of various jurisprudence schools such as positivism, social contract theory, American realism etc. followed by a contextual analysis.

As per the research results the researcher could find that there is also another aspect which has limited the functionality of the divorces in Sri Lanka. It is Sri Lanka's deep rooted ethics, culture and social morals. It is governing the ordinary lives of people and most of the times the aggrieved parties are discouraged to file divorce no matter how much they are suffered from their forced marriage because of the fear to the society and due to the harm that causes to their dignity. And also more flexible grounds for marriage should be declared such as the mere mismatch of the couples and locus standi to declare the marriages null and void should be provided to the external parties other than the contracted parties to the marriage. As per the conclusion since there are no statutes or laws covering directly this area as per now, the act of forcing to marry must be criminalize and should be included into the Penal Code of Sri Lanka as a separate offence directly and the severe punishments too should be included. And it is high time that the attention of the relevant law making authorities turned towards this lacuna in the law.

**Keywords:** Nullity, Forced Marriages, Locus standi

## I. INTRODUCTION

When considering the concepts such as divorce and nullity in the Sri Lankan context it is very apparent that the laws remain very rigid regarding them. The divorce and nullity

procedures are very strict and they cannot be changed easily. Every procedure are included in written and if the laws are to be changed it should undergo a long procedure. As a grave loophole in law there are no direct provisions for the forced marriages as well. According to our law there are only three grounds to get a divorce in the General Law and as per the Section 19 (2) of the Marriage Registration Ordinance such as malicious dissertation, adultery and incurable impotence at the time of the marriage.

As per a research done by two students from the Edinburgh University they have found only 1.5% of marriages in Sri Lanka results in divorce compared to 42% in the United Kingdom. According to them there are many grounds for the divorce in England such as unreasonable behavior, adultery, desertion, two years separation with content and five years separation without consent. When compared to Sri Lanka we have limited grounds for a divorce which are very hard to prove.

As Hart is proposing in the “positivism” there is no necessary connection between law and morals or law as it is and ought to be. Like in the existing divorce procedures they will never allow to give the divorce to a party for the mere fact that they can't live together. So it is apparent that there is no connection between moral values and the law prevailing in Sri Lanka due to its rigidity.

However the Researcher will bring this issue to light with the help of a unique case decided in Sri Lanka, Harin Hugh Dias v. Ambagahage Tekla Eresha Fernando (DDV 00889/15), case which comes under civil law category.

This case has been filed on the 3rd of November 2015 in the Colombo District Court. In this case the plaintiff's father was an eighty six years old man and he has contracted a purported marriage in 2007 with the defendant who was the house maid of the home and who was fifty three years old by that time. The plaintiff is a dual citizen of Sri Lanka and the United Kingdom, but he is permanently living in the United Kingdom, but he has visited his father several times annually till he contracted this marriage with the defendant lady. After that marriage she has restricted the visits of the plaintiff to see his father and she also has cut off the communication with him. The plaintiff's father, Mr. Gamunu Pieris Dias (GPD) is having a property worth of 150 million in the Cameron Place of Colombo and they have been living there with the defendant since 1995.

Moreover, the plaintiff's father has died in 2012 and the marriage of them has created several suspicions to

the plaintiff. First of all, he was his only son and he was never informed by his father that he is going to contract a marriage between this lady, although he contacted him few days before the marriage. And none of the relations of him has been invited or informed about their marriage although some of his relatives who are residing in Sri Lanka used to visit him rarely, because the defendant lady has taken the physical custody of his father even restricting him to visit his ordinary family physician who has been treating him for almost 40 years. But the plaintiff was trying to get the legal custody of his father once he got to know that he died in late October in 2012.

So the plaintiff is challenging that the defendant lady has made fraudulent marriage certificate and has forced his father to sign the marriage certificates. Here in the marriage certificate his name appears abnormal, as there is a name which he has never used in his life time not in the previous generations only but also in the subsequent generations. And later the plaintiff's lawyers have discovered another marriage certificate between the same parties, with the same Registrar and with the same witnesses. When comparing the two marriage certificates there are lot of unusual occurrences as the unusual family name used as the plaintiff's father's name as, Ponnahannadige Gamunu Pieris Dias. The civil condition of the defendant in one marriage certificate is stated as a “widow” where in the other certificate it is known as the “divorcee of Reginold Alexander Gunawardane”. And most importantly the marriage certificate numbers are not in a sequential order. The marriage certificate which is dated on the 14th of February 2007 bears the number 6560 whereas the certificate in the June month in 2007 bears the number 6557 which is almost irregular. And one witness's name is Dilrukshi Winiprida Pieris (her real name) but in the latest marriage c certificate it is stated as Dilrukshi Winiprida Dias in order to give the sense that she is a relative of Mr. GPD to sign as a witness.

There are some complementary cases which is related to this case as he has filed a case regarding the suspicious death of his father under B1419/12 in the Magistrate Court of Colombo Fort against the defendant and the other case is the DLM 00102/15 a land matter where the defendant has forged the signs of a deed of gift of the above said property and transacted it to her name as proved by the Examiner of Questioned Documents (EQD). And also the defendant has contracted two known marriages before the plaintiff's father where she has been married to one of her father's best friends, and secondly to another old man the above mentioned Mr. Reginold. And the grounds for



this marriage were the adultery and malicious desertion of him by this defendant lady. These facts are apparently supportive when giving the judgment of this case due to her criminal behavior.

However the main issue regarding this case is that the defendant is challenging the plaintiff saying that he has no capacity or the locus standi to declare the nullity of this marriage as it can only be done by the parties to the marriage. She is also challenging him under the Sections 43, 44, 46 (2) of the Civil Procedure Code of Sri Lanka which will be discussed detailed throughout the course of this report. This will be a unique or a land mark case in the Sri Lankan Law history as the nullity is declared by the son of the parties to the marriage and if he will be able to win this case. Anyhow regarding the above said property if the marriage will not be declared as a nullity, the defendant lady will be entitled to the half of the property while the other half will be entitled by the plaintiff according to the laws of succession. Even if he loses this case he will be entitled to the full property through the DLM 102/15 case as the signs have been forged according to the EQD and therefore it is null and void. And although this is a civil case lot of criminal factors are involved such as forgery, common and dishonest intention, cheating etc. as per the Penal Code of Sri Lanka.

Therefore based on background, the research problem has been formulated to determine whether the grounds for nullity of marriages, divorces in Sri Lanka are adequate and whether they provide necessary provisions covering all the aspects including the forced marriages as well. The main objective is to review the existing grounds for divorce and the nullity of Sri Lanka, locus standi of the parties and to propose the new grounds for a divorce and the nullity of a marriage along with the remedies for forced marriages. Furthermore it will be reviewed whether there are adequate grounds for penalties are available for the above unique cases in Sri Lanka.

## II. METHODOLOGY/ RESEARCH DESIGN

In this research the legal research methodology is used which is consisted of legal sources and non-legal sources. Legal sources are basically the primary authority of law constituted by the Judiciary, Legislature and administrative agencies and the secondary authority of law is consisted of some commentary from non- governmental bodies such as Reports, Journals, Legal treaties etc. the researcher has also derived the information from non-legal sources such as life style of people, memories, experiences etc.

Moreover, doctrinal legal research methodology is used as this topic is based on the various legal propositions and legal principles regarding the nullity of marriage. The research is qualitative in nature where the researcher has used some conventional legal sources (text books, case laws), statutes and enactments and some commentaries to derive the research accuracy. The researcher has used one of the unique cases in Sri Lanka, Harin Hugh Dias v. Ambagahage Tekla Fernando (DDV 00889/15) as a primary legal source which provides inferences for nullity, forced marriages and locus standi where an old man has been cheated by a young house maid and contracted two fraudulent marriages with the same person and the same year forcefully with the help of a Registrar of marriages where the his son's locus standi to declare that marriage null and void is in uncertainty. Apart from that researcher has used a theoretical framework consisted of various jurisprudence schools such as positivism, social contract theory, American realism etc. followed by a contextual analysis and a comparative study will also be done regarding the legal system of Sri Lanka and United Kingdom regarding the same area.

## III. RESULTS AND DISCUSSION

As per the research results the researcher could find that there is also another aspect which has limited the functionality of the divorces in Sri Lanka. It is Sri Lanka's deep rooted ethics, culture and social morals. It is governing the ordinary lives of people and most of the times the aggrieved parties are discouraged to file divorce no matter how much they are suffered from their forced marriage because of the fear to the society and due to the harm that causes to their dignity. Especially the female spouse tries to endure every pain especially in rural societies by being backward. But it is bit different in the urban societies as most of the women are independent and they can make their living by their own. So they are not hesitating to go for a divorce.

Although the law remains as this or equal to everyone there are lot of issues faced by the people when getting a divorce or a nullity in Sri Lanka and the law is so much lagging behind in this field due to the unnecessary rigidity. But in the General Law procedure the divorce takes a long period where it will take minimum of three months to be summoned before the courts after filing an application. And when the parties are summoned they are still been produced before the mediation committee to get the consent from the both parties and if one spouse says he/she is not ready to give the divorce then it drags down for some years, for example when proving adultery in Sri

Lanka the name of the co- defendant should be included in the plaint which is apparent that Sri Lankan Law is rigid in this aspect.

According to our law there are only three grounds to get a divorce in the General Law and as per the Section 19 (2) of the Marriage Registration Ordinance such as malicious desertion, adultery and incurable impotence at the time of the marriage.

When considering the malicious desertion there are two grounds such as simple desertion where the deserting spouse leaves the matrimonial home and the constructive desertion where the innocent spouse has to leave the home. In *Silva v. Misinona* (1924) the court interpreted malicious desertion as permanently giving up the matrimonial responsibilities without the consent of the other spouse. Here the spouses have to prove both *animus* and *factum* where the intention to desert and the fact of separation should be proved. But unfortunately the cruelty of the parties had not been covered in this aspect. The innocent party or the deserting party will not have to leave or oust unless the cruelty factor is not involved which can also be included to the end of the malicious desertion, but which has been disregarded by the General Law of Sri Lanka.

The next one is adultery. It is apparent that there are lot of spouses who are committing adultery, but most of the times it is difficult to prove the adultery. Although it is considered as a civil offence the proof should be shown beyond the reasonable doubt like in criminal offences as per decided by *Jayasinghe v. Jayasinghe* (1954). This is very unreasonable by the aggrieved party as it is very difficult to prove the adultery as a ground for divorce in Sri Lanka which is an extra burden to them. Accordingly proving the matrimonial fault is very essential in the general law and the substantive law and procedural law is difficult to be altered. But in the Kandyan Law it is not necessary to show the matrimonial fault and the substantive law and the procedural law is not rigid as the general law. In the Section 32 of Kandyan Marriage and Divorce Act No. 44 of 1952 recognizes more practicable grounds for the divorce which includes inability to live happily together and the lack of the mutual consent of the parties including the other three grounds in the General Law. So the divorce is possible without proving the matrimonial guilt of the other party. And the procedural law includes that when the parties want to get the divorce they can file an application to the District Registrar which is more complementary and which will preserve the privacy of the parties as well.

But in the General Law procedure the divorce takes a long period where it will take minimum of three months to be summoned before the courts after filing an application. And when the parties are summoned they are still been produced before the mediation committee to get the consent from the both parties and if one spouse says he/she is not ready to give the divorce then it drags down for some years.

Next reason is that since the procedures are long it costs lot of money which is unbearable to the poor people. The lawyers charge lot of fees if the divorce is to be given soon. It is not accessible to everyone equally in the society due to the higher charges and fees which is very unfair by the innocent poor people. Even though they want to divorce and they understand that it is impossible to live together, but still they will not go for a divorce as the initial payment of Rs. 5000 is a big amount for the people.

## IV. CONCLUSION

So when considering the above facts it is apparent that there is an inadequacy with the procedure followed regarding this case due to the lack of statutes and necessary provisions followed in the procedural law. There was also evidence that the law is not accessible in this regard as the major issue of this case lies with the *locus standi* of the plaintiff. But this case can be regarded as a landmark case in Sri Lankan history if the plaintiff party will be able to win this case. If not, or if his request to be heard before the court is rejected it also can be decided that the law is discriminatory in a way and the rigidity of it forbid configuring the justice to the relevant parties. If the authorities can make the relevant laws covering the areas such as the forced marriages, widening the *locus standi* in the civil matters likewise in Fundamental Rights cases there will be better social implications to the society as they will not step backward and make their lives a living hell even without coming in front of the courts.

As per the conclusion since there are no statutes or laws covering directly this area as per now, the act of forcing to marry must be criminalize and should be included into the Penal Code of Sri Lanka as a separate offence directly and the severe punishments too should be included.

Therefore, the forced marriages should be cut off from its root without growing and the society should not tolerate the forced marriages under any circumstance. Every victim irrespective of the gender and the age should stand

against the forced marriages and they should not step backward when they are faced with such a situation. And they should not accept endangering their entire lives and should protest in the very first place. And it is high time that the attention of the relevant law making authorities turned towards this lacuna in our law.

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PROOF

# A CRITICAL ANALYSIS RELATING TO IMPLEMENTATION OF ENVIRONMENTAL LAW IN SRI LANKA: MARINE POLLUTION

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**Abstract** - The issue of marine pollution is a global menace of marine debris and toxic substances entering our oceans. These substances come from mainly land – based sources and sea based sources. In more general terms, oceans are used as dumping sites for various materials and substances that should not be there hence this is very dangerous to our eco systems. The Marine Pollution Prevention Act No. 35 of 2008 of Sri Lanka has attempted to address the areas with regard to marine pollution, yet the problem keeps recurring in spite of a number of regional and global conventions attempting to deal with this issue.

**Keywords** - Marine Pollution: Environment: Global menace: Authority Penalties

## I. INTRODUCTION

Sri Lanka has sovereignty over maritime zones due to the provisions of Maritime Zone Law No.22 of 1976<sup>1</sup> of Sri Lanka and Presidential Proclamation hereunder of 15th January 1977 and United Nations Convention of the Law of the Sea. Due to the reasons of rising population, agriculture activities, growth of industrial activities (mainly tourism), expansion of ports in Colombo and Hambantota, Sri Lanka is at greater risk of being subject to marine pollution.

According to the United Nation definition, “marine pollution refers to direct or indirect introduction by humans of substances or energy into the marine environment (including estuaries), resulting in harm to

living resources, hazards to human health, hindrances to marine activities including fishing, impairment of the quality of sea water and reduction of amenities.”<sup>2</sup>

Therefore, “it is inevitable that Sri Lanka is prone to pollution and is in need of effective protection of its marine environment”<sup>3</sup>. The Marine Pollution Prevention Act No.35 of 2008 can be pointed out as the main legislation dealing with this particular issue enacted for prevention, control and reduction of marine pollution in Sri Lanka by strengthening the legal powers vested in the Marine Environment Protection Authority for acting to prevent, mitigate and control marine pollution and for implementing international Conventions on marine pollution applicable to Sri Lanka.<sup>4</sup>

This study focuses on the salient features of the Marine Pollution Prevention Act, the challenges in implementing its provisions, critical analysis of its contribution to the phenomenon of environmental jurisprudence in Sri Lanka and recommendations for the purpose of ensuring the marine environment.

<sup>1</sup>Piyadasa, H. (2014). Marine environment protection from offshore oil and gas: activities in Sri Lanka. MASTER OF SCIENCE in MARITIME AFFAIRS (MARITIME SAFETY AND ENVIRONMENTAL ADMINISTRATION).

<sup>2</sup>Convention On The Law Of The Sea. Article 1 (4).

<sup>3</sup>Marine environment of Sri Lanka includes the territorial waters, maritime zone, coastal zone and fore-shore.

<sup>4</sup>Marine Pollution Prevention Act No.35 of 2008. (Current act repeals the Marine pollution prevention Act No 59 of 1981 which prevailed earlier with the object of establishing the Marine Environment Protection Authority as an effective and efficient body.)

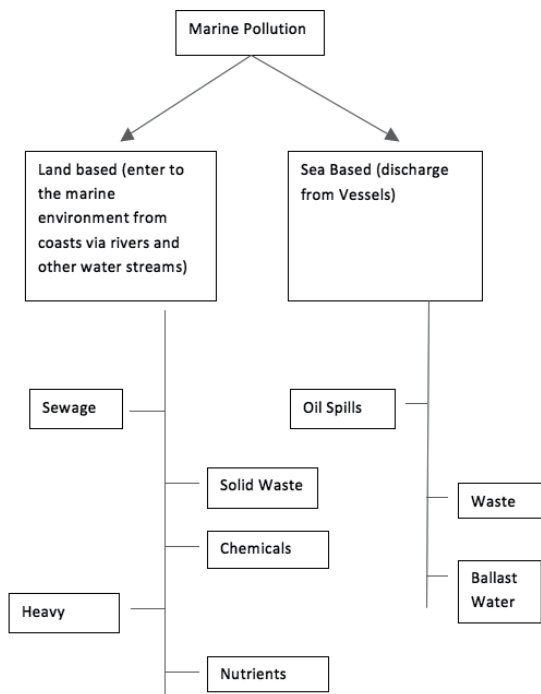


Figure 1. Factors Contributing To Marine Pollution

## II. SALIENT FEATURES OF THE MARINE POLLUTION PREVENTION ACT NO. 35 OF 2008

According to the Preamble the use of the words 'prevention' and 'control' signify that principles regarding the international environmental law<sup>3</sup> have been incorporated to the national domain. The Part I states the Establishment of the Marine Environment Pollution Authority and therefore The Minister of environment shall appoint the Board of Directors of this authority who will be made responsible for the implementation of the Act. Furthermore, the Authority has been vested with the power to take any effective action to achieve the purposes of this Act within Sri Lankan territorial jurisdiction.<sup>6</sup> According to Part II which includes the Functions of the Authority states that the Authority (under the Minister) has been given absolute discretion to enjoy and carry out the following powers and functions:

- Effectively & efficiently implement the provisions and regulations<sup>7</sup>
- Formulate & execute a scheme to prevent, reduce, control and manage pollution arising from both ship and shore based activities in territorial waters, maritime zone, fore shore and coastal zone.<sup>8</sup>
- Conduct research with both government and private agencies for the above purposes.<sup>9</sup>
- Manage, safeguard and preserve from pollution caused oil, harmful substance or any other pollutant.<sup>10</sup>
- Provide adequate and effective reception facilities for any oil or other harmful substance pollution.<sup>11</sup>
- Recommend adherence to international conventions and protocols which the government may ratify, accept, accede or approve.<sup>12</sup>
- Formulate and implement the National Oil Pollution Contingency Plan.<sup>13</sup>
- Regulate the conduct of contractors and sub-contractors conducting explorations of natural resources, including petroleum/ related activities.<sup>14</sup>
- Create awareness about marine environment preservation.<sup>15</sup>
- Do other acts which are necessary to carry out the above functions.<sup>16</sup>
- Conduct investigations to institute legal action on relevant matters.<sup>17</sup>
- Oversee sea transport of oil and bunkering.<sup>18</sup>
- Acquire, hold, take, give on lease, hire, mortgage, pledge, sell, dispose any movable or immovable property.<sup>19</sup>
- Inspect and survey any land or premises or ship<sup>20</sup> order to take necessary preventive steps<sup>21</sup> power to detain any ship<sup>22</sup> and arrest any person who violates the rules and regulations.<sup>23</sup>

According to the Part III, it establishes the Marine Environmental Council. Thus a Council is established to

<sup>7</sup> Section 6(a)

<sup>8</sup> Section 6(b)

<sup>9</sup> Section 6(c)

<sup>10</sup> Section 6(d)

<sup>11</sup> Section 6(e)

<sup>12</sup> Section 6(f)

<sup>13</sup> Section 6(g)

<sup>14</sup> Section 6(h)

<sup>15</sup> Section 6(i)

<sup>16</sup> Section 6(j)

<sup>17</sup> Section 7(b)

<sup>18</sup> Section 7(c)

<sup>19</sup> Section 7(d)

<sup>20</sup> Section 9

<sup>21</sup> Section 10

<sup>22</sup> Section 11

<sup>23</sup> Section 12

<sup>3</sup>Marine Pollution Prevention Act No.35 of 2008: The principles of 'precautionary and sustainable development Section 9

advise the authority on matters connected to the exercise, performance and discharge of powers and duties<sup>24</sup> and on any matter referred to it by the Authority.<sup>25</sup> Furthermore the Part V relates to Finance and thus the authority is required to maintain a fund to purchase equipment's to provide necessary facilities and other related activities.<sup>26</sup> Moreover the Part VI is regarding the Reception facilities and prevention measures against pollution. As precautions, the Act itself has adopted the following requirements to safeguard the marine environment and its surroundings:

- Establishment of a waste management scheme.<sup>27</sup>
- Maintenance of a record books relating to oils and pollutants.<sup>28</sup>
- Possession of equipment to prevent pollution.<sup>29</sup>

Furthermore the Part VII relates to Maritime Casualties and therefore where the pollution is caused or when there is an imminent threat of pollution, the Authority has the power to take necessary preventive measures with regard to all ships which enter the marine environment of Sri Lanka and take actions against any failure.<sup>30</sup> The Part VIII and IX include the provisions with regard to the Prevention of Pollution – Civil & Criminal Liability/ granting permits. The Act have recognized reactive methods to prevent marine pollution by imposing criminal on sea based and land based pollutants.<sup>31</sup> To comply with sustainable development and precautionary principles, authority shall grant permits for dump any oil, harmful substances or other pollutants to the marine environment of Sri Lanka.<sup>32</sup> The Part XI deals with the Miscellaneous Provisions. The Minister may make regulations for matters required by this Act without prejudice to the generality of the powers conferred to him.<sup>33</sup>

### III. CHALLENGES IN IMPLEMENTATION

#### Lack of central co-ordination

As there are several Acts and regulations relating to marine environment, there is no central data and information and

coordination system with regard to prevention of marine pollution in Sri Lanka.

#### Over-lapping mandates

Land-based sources are handled by a variety of agencies that include the CEA<sup>34</sup>, CCD<sup>35</sup> and municipal authorities. Land based activities do not fall under the purview of this act and as a consequence the MEPA does not have the legal capacity to control such activities. Sri Lanka's efforts to manage land-based pollution can hardly be considered as a success story and hence the landward side of the problem is not under proper control which can be considered as a challenge encountered in the implementation of the Marine Pollution Protection Act. Moreover, ships belonging to the Sri Lankan Navy, the Sri Lanka Army, or the Sri Lanka Air Force has been excluded from the scope of this Act and are covered by the Army Act, Navy Act and the Air Force Act respectively.<sup>36</sup>

#### No adequate human resource

"Sri Lanka experiences marine pollution originating from a variety of sources. Heavy metal pollution can be seen in certain areas, which could be due to land-based activities. Some studies also have reported heavy metal accumulation in edible species in coastal water bodies. This has been reported from the Negombo lagoon, Bolgoda Lake and in sediments of Galle harbor. Among the types of heavy metal reported were Ferrous (Fe), Zinc (Zn), Cadmium (Cd), Copper (Cu) and Lead (Pb). These pollutants have been reported in concentrations higher than permissible levels of coastal waters. Apparently, industrial (e.g. Katunayake and Ekala industrial zones) and municipal sources in surrounding areas are responsible for this situation."<sup>37</sup>

Lack of policies, resources and proper procedures

"Another problem is the invasive alien species (IAS) brought in with ballast water which is the water studies have reported 26 previously unrecorded species from the inner harbor area of Colombo, some of which are found in the ballast water of ships."<sup>38</sup> The IMO<sup>39</sup> ballast

<sup>24</sup>Section 14(3)(a)

<sup>25</sup>Section 14(3)(b)

<sup>26</sup>Section 18

<sup>27</sup>Section 21

<sup>28</sup>Section 22

<sup>29</sup>Section 23

<sup>30</sup>Section 25(2) - The penalty would be a fine not less than rupees fifteen million and not exceeding rupees thirty five million section

<sup>31</sup>Part VIII

<sup>32</sup>Sections 26,27 and 28

<sup>33</sup>Section 51

<sup>34</sup> Central Environmental Authority

<sup>35</sup> Coast Conservation Department

<sup>36</sup> Section 47

<sup>37</sup> The Island (2015). Overcoming challenges of marine pollution for healthy oceans. [online] Available at: [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=126133](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=126133) [Accessed 17 Mar. 2018].

<sup>38</sup> ibid

<sup>39</sup> International maritime organization



water management (BWM) Convention contains an environmentally protective numeric standard for the treatment of ship's ballast water before it is discharged. The BWM Convention also contains an implementation schedule for the installation of IMO member. The BWM Convention entered into force on September 8, 2017.<sup>40</sup> Until then ballast water was released without any treatments and imposing restrictions through local environmental legislation will hamper the cooperative nature of international trade activities.

Furthermore, Sri Lanka has just begun oil explorations in off-shore areas that can also create marine pollution, especially in the Mannar basin. Sri Lanka is a developing country which is on a journey to achieve many goals with respect to economy. In this regard construction of ports and the movement of ships for commercial purposes and mining of natural resources are of immense importance, even though imposing penalties and introducing regulations are necessary considering the protection of the coastal and marine areas of the country, a balance should be struck between such concerns and economic goals.

Moreover, large scale poaching in Sri Lankan waters by Indian fishermen has become a daily occurrence, where the fishermen use harmful bottom trawling methods banned in Sri Lanka, causing severe damages to the marine environment. However, like many environmental problems, marine pollution also cannot be solved by efforts taken by a single line, single agency or a ministry.<sup>41</sup>

#### IV. CRITICAL ANALYSIS ON CONTRIBUTION TO THE ENVIRONMENTAL JURISPRUDENCE IN SRI LANKA

The Sri Lankan Act of Marine pollution prevention is based on the precious International environmental principles such as precautionary principle and sustainable development. Since this is the new act enacted in the year 2008 after repealing the marine pollution prevention act of 1981, it strives to ensure the quality of environment while

focusing on economic and social development goals in more effective way.

Marine pollution occurs in two ways; land based and marine base. The main contributors to prevent, control and reduce marine pollution in both ways. Furthermore entrusting power to authority to make schemes and plans to achieve the objectives of the Act resulted in many effective schemes and plans such as National oil Spill contingency plan<sup>42</sup> contributed to strengthen the legal framework of Sri Lanka. However, due to the overlapping mandates among different authorities<sup>43</sup> has made it difficult to take straight actions regarding prevention of marine pollution. Therefore it may take considerable time and cost in implementing powers and functions vested to authority.

It is not a possible to eradicate marine pollution completely. But to mitigate the pollution, Authority is granting permits to dump any oil harmful substances or other pollutant in to the territorial waters of Sri Lanka with conditions.<sup>44</sup> In this way they attempt to ensure the protection of marine environment in an effective way for the future generation of Sri Lanka. This can be seen as a commendable contribution towards the Sri Lankan environmental jurisprudence by neutralizing it with international environmental principles such as sustainable development, precautionary principle, intergenerational equity and intra generational equity.

According to the Act Minister of Environment has discretionary powers to implement rules and regulations to prevent marine pollution, but it doesn't guarantee that person is of the Knowledge and capacity in the relevant subject. So it may result in lack of proper rules and regulations regarding the subject in parallel to the contemporary technologies.<sup>45</sup> This can be seen as a barrier for the development of environment law jurisprudence in Sri Lanka.

Making people aware about the value of marine environment, its pollution and steps to prevent, control

<sup>40</sup> Worldshipping.org. (2018). Ballast Water | World Shipping Council. [online] Available at: <http://www.worldshipping.org/industry-issues/environment/vessel-discharges/ballast-water> [Accessed 12 Mar. 2018].

<sup>41</sup> The Island (2015). Overcoming challenges of marine pollution for healthy oceans. [online] Available at: [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=126133](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=126133) [Accessed 17 Mar. 2018].

<sup>42</sup> The Island (2015). Overcoming challenges of marine pollution for healthy oceans. [online] Available at: [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=126133](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=126133) [Accessed 17 Mar. 2018].

<sup>43</sup> Such as (1)The Coast Conservation and Coastal Resources Management Department(2) Sri Lanka Coast Guard (3)The Department of Wildlife Conservation (4)The Department of Fisheries and Aquatic Resources (5)The Forest Department <sup>44</sup>Section 24

<sup>45</sup> Piyadasa, H. (2014). Marine environment protection from offshore oil and gas: activities in Sri Lanka. MASTER OF SCIENCE in MARITIME AFFAIRS (MARITIME SAFETY AND ENVIRONMENTAL ADMINISTRATION) :Currently Sri Lanka is lacking of an effective institution to monitor activities in marine environment of Sri Lanka - HTNI Piyadasa

and reduce the pollution, is one of the main contribution undertaken by this Act to maintain the certainty and quality of environmental law.

## V. RECOMMENDATIONS

### ‘The solution to pollution is dilution’

It is evident that there is no single obvious solution to eliminate pollution completely and at the same time comply with the country's economic goals and thus, a balance should be drawn between these conflicting interests. We suggest the following recommendations to enhance the effectiveness and efficiency of the current legal framework on prevention of marine pollution in Sri Lanka.

- There should be a co-ordination in between the powers, functions and regulations regarding the prevention of the marine pollution. It will be helpful to reduce the overlapping between the institutions.
- As the marine protection authority, it is the primary institution that is responsible for achieving objectives under the act; there should be established criteria for appointing persons who have knowledge on the relevant subjects and capacity to exercise powers under the act as board of directors.
- Minimizing the discretionary power given to the authority under s.7 when exercising its functions which may lead to abuse of power, by establishing criteria<sup>46</sup> under which circumstances such powers can be exercised.
- 
- Establishing a prompt mechanism to report, incidents of oil spills and other marine pollution activities will be a rapid, clear and correct way to take preventive action to the success of protecting marine environment.

## VI. CONCLUSION

The pollution of the waters in the seas directly affects the lives of the sea species as well as lives of the human health and resources indirectly. By glancing through the facts above it can be seen that the government of Sri Lanka has involved reducing the menace by implementing

Marine Pollution Act No.35 of 2008 together with Marine Environment Protection Authority, ratifying international conventions as MARPOL etc. Nonetheless evidence shows that these methods have failed in addressing the issue, the law with regard to this hypothesis should be broadened while giving practical problems a reliable solution.

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<sup>46</sup>Marine Pollution Act No.14 of 1971 of New Zealand.6,7,8.

# RIGHTS AND DUTIES OF STATE PARTIES TO UNCLOS III REGARDING MARINE POLLUTION PREVENTION: A GLOBAL LEGAL PERSPECTIVE WITH REGARDS TO VESSEL BASED POLLUTION AND OCEAN DUMPING

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**Abstract** - This paper reviews the global governance framework of marine pollution specially by vessels and dumping under the United Nations Convention on the Law of the Sea (UNCLOS) 1982, which is considered as the most comprehensive unified international regime that addresses the nations' rights towards the better governance of the world ocean. Part XII of UNCLOS is devoted for the "protection and preservation of the marine environment", where section V addresses the international rules and national legislations and section VI addresses enforcement of rules and regulations by States, with respect to pollution prevention and control. UNCLOS recognizes six categories of marine pollution, of which pollution by vessels and by dumping have been specially focused in this paper. Ocean going vessels may deliberately or accidentally discharge pollutants in to the sea and to address the issue, Generally Accepted International Rules and Standards (GAIRS) have been set up by the International Maritime Organization and UNCLOS have provided Flag, Coastal and Port States' jurisdiction in terms of rights and duties. UNCLOS defines "Dumping" as the deliberate disposals of wastes from manmade structures at sea and there are provisions for States parties in order to prevent, reduce and control pollution of the marine environment by dumping. For both sources, enforcement powers have been provided for Flag, Coastal, Port or any other State that has connection to the pollution activity.

**Keywords** - Marine Pollution, UNCLOS, Vessels, Dumping

## I. INTRODUCTION

Being born from customary law and treaties, international environmental law has been given life by many

conferences and events. Even though there are many other elements derived at such conferences, the 1982 UNCLOS is considered as the most comprehensive unified international regime, which addresses the nations' rights towards the better governance of the world ocean (Hollis & Rosen, 2010).

UNCLOS defines marine pollution as the anthropogenic introduction of hazardous wastes to the marine environment, causing harmful impacts on marine and human life, hindrance to marine activities and deterioration of water quality (UNCLOS-Article 1(1)(4)). Part XII is devoted for the "protection and preservation of the marine environment", where section V addresses the international rules and national legislations and section VI addresses States enforcements, with respect to pollution activities (UNCLOS-Part XII). Section V categorizes marine pollution sources in to six groups, namely land based sources, seabed activities, activities in the Area, dumping, from vessels and atmosphere (Article 207 to 212 respectively). To limit the scope of this article, only two sources of marine pollution; vessel based and dumping, have been taken in to consideration (Article 211 and Article 210 respectively). Article 194 describes general obligations of all States, which requires individual or joint measures, prevention of pollution of other States, avoiding unjustifiable interferences and preservation of fragile ecosystems. Article 216 provides the enforcement authority in terms of ocean dumping to be born by Flag States with regards to vessels flying its flag, Coastal States with regards to dumping within its maritime zones and any other State with regards to loading waste within its territory or offshore terminals. Article 217, Article 218 and Article 220 provides authority to Flag States, Port States and Coastal States to enforce rules and regulations to control vessel based marine pollution.

## II. OBJECTIVES

The main objective of this paper is to provide the reader a comprehensive understanding of the international legal order to prevent, reduce and control marine environmental pollution from vessels and ocean dumping.

## III. METHODOLOGY

1982 United Nations Convention on the Law of the Sea (UNCLOS) has been mainly referred in this qualitative study. Relevant Parts, Sections and Provisions have been extracted from the convention and elaborated to justify the argument that UNCLOS stipulates orders for States parties to individually and collaboratively act in order to protect the marine environment from pollution. Some other published materials have been referred to extract secondary information that supports these justifications.

## IV. RESULTS

### A. *Pollution from vessels:*

Ocean going vessels may deliberately or accidentally discharge pollutants in to the sea (Jin-Tan, 2006) and there are two ways to address the issue under international law (Bodansky, 1991).

- Establishing Generally Accepted International Rules and Standards (GAIRS) by IMO including,
- Discharge standards
- Construction, Design, Equipment and Manning standards (CDEM)
- Navigational standards
- Governing Flag, Coastal and Port States' jurisdiction (prescriptive, enforce, adjudicate).

The first way of addressing the issue of marine pollution from vessels is the duty of the States. According to the Article 94 of UNCLOS III, Flag States shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. The existing Flag States obligations are reaffirmed and tightened by UNCLOS III, while new improved roles have been assigned for Port States and Coastal States (Jin-Tan, 1997). However, there is a perennial conflict between the strict Coastal States regulations to protect their marine environment and other States, who find Coastal States regulations a threat for freedom of navigation (Jin-Tan, 1997).

### 1) **Duties and rights of Flag States:**

- Flag States have the right for innocent passage in the Territorial Sea (TS) of other States (UNCLOS-Article 17), freedom of navigation and other lawful activities in other States' EEZ with due regards (UNCLOS-Article 58) and freedom of the high seas (UNCLOS-Article 87).
- Flag States bear the duty to prevent, reduce and control pollution from vessels flying their flag or of their registry.
- Flag States shall ensure the safety of their ships at sea by Seaworthy construction, Internationally approved crew training standards and Measures to prevent collisions (UNCLOS-Article 94(3)(a),(b),(c)),
- Flag States are obliged to;
- Adopt national laws and regulations, which at least have the same effect as GAIRS (UNCLOS-Article 211(2)).
- Enforce regulations to ensure compliance (UNCLOS-Article 217(1)) and make vessels prohibited from sailing if the compliance is unsatisfactory (UNCLOS-Article 217(2))
- Inspection and verification of onboard certificates (UNCLOS-Article 217(3))
- Investigation of regulation violations (UNCLOS-Article 217(4))
- Request assistance of other States for cooperation in investigations (UNCLOS-Article 217(5))
- Institute legal proceedings against the vessels committed the violation, if sufficient evidences are available (UNCLOS-Article 217(6)) and make those information available for all States (UNCLOS-Article 210(7))
- Provide adequate penalties to discourage violations (UNCLOS-Article 217(8))

### 2) **Duties and rights of Coastal States:**

Coastal States, as the direct victims, have the greatest interest in pollution prevention (Bodansky, 1991), and claim the right to exploit the natural resources within their environmental policies (UNCLOS-Article 193), (UNCLOS-Article 56(1)(a),(b)(iii)). Coastal State's jurisdictions differ according to the maritime zones.

#### **Territorial sea**

Sovereignty rights allow, rules to be legislated and enforced to prevent, reduce and control of pollution from foreign vessels but that should not violate their right of innocent passage (UNCLOS-Article 211(4))

**EEZ**

- Regulations may be enforced in accordance with GAIRS (UNCLOS-Article 211(5)).
- Under special circumstances, special mandatory measures may be adopted for pollution prevention of clearly defined areas of the EEZ (UNCLOS-Article 211(6))
- However, those rules must balance both Coastal and FlagStates’ interests. Coastal States interest over environment protection weakens with the distance from the shore while Flag State’s interest in freedom of navigation increases(Bernhardt, 1980).
- With regards to marine pollution prevention, Coastal States may:
- Institute proceedings against vessels for regulation violations at the TS and the EEZ (UNCLOS-Article 220(1)).
- Require information from vessels, if there is clear belief of violation of rules while navigating in the TS or EEZ (UNCLOS-Article 220(3)).
- Physically inspect vessels that are suspected to violate international rules while navigating in the TS and the EEZ (UNCLOS-Article 220(2),(5))
- Detain vessels with clear evidences of regulation violations at TS or EEZ, (UNCLOS-Article 220(6)),
- Release those vessels with appropriate procedures (UNCLOS-Article 220(7)).

**3) Duties and rights of PortStates:**

A significant feature of the UNCLOS III is the expansion of Port State jurisdictions(Churchill & Lowe, 1988).

- Port States have the right to undertake investigations of vessels and institute proceedings for discharge violations outside of its TS, EEZ and high seas or investigate for violations at another State only at request (UNCLOS-Article 218(1),(2)) and may take administrative measures against violations of GAIRS (UNCLOS-Article 219).
- Investigation records should be transmitted on request and on Coastal State’s request, the proceedings may be suspended and evidence and bonds shall be transmitted (UNCLOS-Article 218(4)).

**B)Ocean Dumping**

UNCLOS defines “Dumping” as the deliberate disposals of wastes from manmade structures at sea including themselves (UNCLOS-Article 1(5)). In order to prevent,

reduce and control pollution of the marine environment by dumping, States shall, (UNCLOS-Article 210)

- Adopt national laws and measures not less effective than existing regional and global regulations.
- Establish permission criteria for dumping in to the TS, EEZ and the continental shelf (CS)
- Re examine the global and regional regulations and standards time to time
- Adopted laws and regulations shall be enforced by the Flag States with regard to vessels flying their Flag or by Coastal States with regard to dumping at its TS, EEZ or the CS (UNCLOS-Article 216). Coastal States have the right to permit dumping after due considerations of impacts (UNCLOS-Article 210(5)). Any other States may enforce jurisdictions, if wastes are loaded from there.

**V. DISCUSSION AND CONCLUSION**

UNCLOS offers different legal provisions for vessel source pollution and dumping. Basically, the definition of “Dumping”, which is voluntary, doesn’t include any operationally generated wastes (UNCLOS-Article 5(b)), thereby refers to only deliberate disposals. Therefore, Dumping is controllable by setting up of permissible standards.

For vessel source pollution, Coastal States have no obligation to implement international rules and standards in their national legislations if they are not party to the respective treaties and Flag States have the primary prescriptive and enforcement powers over their vessels(Marsden & Varner, 2012). Coastal States cannot set rules for discharge standards for vessels in accordance with GAIRS. Due to the international nature of shipping business, Flag States argued that more uniform international standards are required rather than “patchwork quilt” type potentially conflicting national regulations(Bodansky, 1991). However, vessels registered in convenience registries with high freedom from Flag States control are accountable for the highest rate of discharge violations (Jin-Tan, 1997). . Regarding dumping, Coastal States bear the duty of regulations including permission criteria for dumping at their TS, EEZ and CS. Other than this, GAIRS are different for the two regimes, where for vessel source pollution, the paramount legal instrument is MARPOL 73/78 and for dumping, it is the 1972, London convention(Nordquist, et al., 2012).

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# CHILD SEXUAL EXPLOITATION AND CHILD PROSTITUTION IN SRI LANKA: A LEGAL PERSPECTIVE.

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**Abstract** - Child sexual exploitation and child prostitution are some of the major challenges which Sri Lanka is facing as a developing tourist destination. Poverty, lack of education and inequality are some of the main causes for these kinds of issues. Sri Lanka is sometimes known as the heaven for sexual relationships among tourists due to the commonly found child prostitution services. This issue arises mostly in South Asian countries such as Sri Lanka, India, Nepal, Cambodia, Thailand and Philippine. Sri Lanka has a beautiful coastline around the country as it is an island with an attractive tourist destination which brought the country a huge benefit for the country's economy but on the other hand it exploits the countries future generation by giving a new face to these kinds of issues. This research will be focused on commercial sexual exploitation of children and child prostitution in Sri Lanka, how it is addressed in the legal framework and how the law has tried to prevent them and protect the children. Further, it discusses the legislative provisions of some selected jurisdictions such as North Ireland, England and Wales. Finally, this normative research which is based on a literature review focuses on the pros and cons of the Sri Lankan legislative provisions and proposes some recommendations.

**Keywords** - sex tourism, sexuality, child prostitutes, beach boys, childhood

## I. INTRODUCTION

As stated in Article 1 of the United Nations Convention on the Rights of the Child 1989, "A child means every human being below the age of 18 years, unless under the national law applicable to the child. Majority is attained earlier." In Sri Lanka the age of majority is established as 18.

Children are the most vulnerable group in the growing society. Though there are so many child rights available in the present society still children are faced to various

kinds of child rights violating acts such as sexual abuse, sexual harassment, abduction, statutory rape, commercial sexual exploitation, incest, neglect, child marriages, trafficking and international adoption trade are some of them.

This can be shown very clearly by the national child protection authority statistical data reports<sup>1</sup> on the number of cases which has been reported to them. In 2010 the report states there were 3892 cases reported to the authority and 2017 report states this number as 9014 Therefore, it is amply clear that in present we have so many rights to protect the child. However, the main controversial question is whether the children enjoy them. Furthermore, the report indicates it's not the overall Sri Lankan child abused data it only shows the statistics on the complaints which the authority had received. This statement asserts that the number will be larger if they had covered the entire island through proper investigations and research.

This research focus on child sexual exploitation and child prostitution and the main objective of this research is to analyse whether the existing Sri Lankan Penal Code and Children and Young Person's Ordinance which is related to commercial sexual exploitation of children are adequate to protect the children. Furthermore, it aims to make suggestions on how to protect and prevent this issue.

## II. METHODOLOGY

This study is a normative research and thus based on a literature review. Moreover, primary and secondary sources are used. Statutes, international treaties, conventions and case law have been used as primary resources in order

<sup>1</sup>[www.Childprotection.gov.lk](http://www.Childprotection.gov.lk) (n.d.). National Child Protection Authority statistical data. [Online] Available at: <http://www.Childprotection.gov.lk/?id=2211> [ Accessed 14 Jul.2018].

to carry out the research. Nonetheless, research articles, newspapers and reports prepared by National Child Protection Authority and UNICEF have been used as secondary sources in this research. A comparative legal research and analysis have also been used with regard to selected jurisdictions.

## III. DISCUSSION

Among the major problems that today's world is facing, sexual exploitation of children is among the most crucial. United Nations International Children's Emergency Fund (UNICEF) conducted researches on commercial sexual exploitation of children (CSEC) which found challenging statistics on CSEC from around the world. For example, it states that India has 270,000 to 400,000 child sex workers<sup>2</sup> and Cambodia has a 31 per cent of minor sex workers. Even in Europe for example in Lithuania 20 per cent of prostitutes are children<sup>3</sup>. Mostly this can be seen in tourist destinations especially in developing countries in South – East Asia such as Thailand, Cambodia, Sri Lanka, Philippines, Nepal, India and other tourist destinations in Europe, Africa and America.

Tourism is not the one and only cause of child sexual exploitation. Social inequality, gender discrimination, cheap labour practices, corruption and poor educational opportunities can be identified as some of the basic causes of this issue. These conditions make children prematurely involve in livelihood activities, sex is the most in demand and gives a great profit without any investment so they choose it as the best option to solve their problems.

Mainly child Sexual exploitation occurs through child prostitution. This is much invisible in Sri Lanka, but as the tourism industry developed and foreigners start to travel to Sri Lanka this problem got a new face because some of the foreigners were seeking sexual relations with young boys. (Kalutara case, Baumann case, Lomond case.)<sup>4</sup>

When compared to the other South Asian countries, boys are more vulnerable than girls in Sri Lanka. (A boy

victim, the story of Kamal, Children in a coop, A Bevy of Boys Abused, some female Abusers)<sup>5</sup> According to the UNICEF estimate, Sri Lanka has 15,000 male children who are involved in prostitution<sup>6</sup>. In Sri Lanka two types of child prostitution can be found. One is mostly known as “Beach Boys”, who are often imposed to work by the property owners along the coastline and most of them are school dropouts within the age range between 8-15 years. These prostitutes are mostly work alone or sometimes in gangs and could be found in beach resorts along the west and south-west coasts.

The other is “Bonded Children”; they are the children who are five years of age. They are mostly used for pornography and sexual activities as prostitution by internationally controlled rings. These children come from poor families around tourist coastal areas. Most of them were trafficked by an agent or pimp and put into prostitution. Often these children are injected with drugs or hormones and at last they get addicted to them. If these children are not removed from this in their early age it is difficult to effectively rehabilitate them. Prostitution of boys is unrecognised and prohibited subjects in many South Asian countries, as a result of this, cases which are involving the prostitution of boys are often unreported and covered in silence. Usually the perpetrators who are involved in these kinds of crimes are Swiss, German, Dutch and French paedophile.<sup>7</sup>

Hence, this research analyses the existing protection and trends in the application of Sri Lankan law in relation to protect the children from sexual exploitation and prostitution.

### ***A. Commercial sexual exploitation of children and child prostitution defined.***

As stated in the Stockholm Declaration and agenda for action<sup>8</sup> of the world Congress against commercial sexual exploitation of children, commercial sexual exploitation is “A fundamental violation of children's rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or the third person or persons. The child

<sup>2</sup>Commercial sexual exploitation and sexual abuse of children in South Asia. (2001). [e-book] Kathmandu: UNICEF. Available at: <https://riselearningnetwork.org/wp-content/uploads/2015/09/CSEC-in-SA-UNICEF-Yokohama-Report.pdf> [Accessed 21 Apr. 2018].

<sup>3</sup>Fact sheet: Commercial Sexual Exploitation. (n.d.). [online] UNICEF. Available at: [https://www.unicef.org/spanish/media/files/sexploitation\\_fact.doc](https://www.unicef.org/spanish/media/files/sexploitation_fact.doc) [Accessed 18 Jun. 2018].

<sup>4</sup>Samarasinghe, M. 1997. Ipsnewsnet. [Online]. [1 September 2018]. Available from: <http://www.ipsnewsnet.com/1997/02/sri-lanka-children-cracking-down-on-foreign-paedophiles/>

<sup>5</sup>Seneviratne, M (not dated). Wednesday's Children Some Case Studies of Sexually Exploited Children. Sri Lanka: A Publication of the PEACE Campaign.

<sup>6</sup>Lankanewspapers.com. (2006). Sri Lanka News/ Sri Lanka has 40,000 child prostitutes. [Online] Available at: <http://www.lankanewspapers.com/news/2006/6/7287.html>

<sup>7</sup>wijeratne, s. (2006). The sexual exploitation of children. The Sunday Leader. [online] Available at: <http://www.thesundayleader.lk/archive/20060430/focus.htm> [Accessed 6 Jun. 2018].

<sup>8</sup>The Stockholm Declaration and Agenda for Action. (n.d.). [e-book] Available at: [https://www.dji.de/fileadmin/user\\_upload/izkk/StockholmAgenda1996.pdf](https://www.dji.de/fileadmin/user_upload/izkk/StockholmAgenda1996.pdf) [Accessed 20 Oct. 2018].

is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and amounts to forced labour and a contemporary form of slavery.”

To understand the issue well first it's very important to get to know the difference between Child Sexual Abuse (CSA) and Commercial Sexual Exploitation (CSEC). The term, “CSEC implies sexual abuse while sexual abuse can be done within the home, but it never implies necessarily the child should be further exploited to the benefit of the abuser or others.

The optional protocol to the convention on the right of the child 2000 on the sale of children, child prostitution and child pornography an international instrument focusing on all three aspects states child prostitution as, a minor used for sexual activities for any form of reward or payment.

***B. Legal mechanism for the protection of children from commercial sexual exploitation and child prostitution.***

International law, human rights and child rights instrument provides sufficient protection for CSEC. United Nations convention on the rights of child (UNCRC), 1989 prohibits the involvement of minors in the sexual industry. Children are recognized as a group requiring “safeguard and care, including appropriate legal protection” in order for them to “fully assume (their) responsibilities within the community”, says the preamble of the UNCRC.

Sri Lanka adopted the UNCRC in July 1991 and became a signatory to the global plan of action for children also in 1991. The UNCRC makes compulsory for all the state parties who have become members, to take necessary actions and measures to prevent all forms of sexual abuse and exploitation to protect children by article 34 of the convention.

Article 25 and 39 of UNCRC stimulates the State parties to recover the victimized child from psychological, physical and social integrity. Article 36 also mandates that protection should be afforded to the child against all form of exploitation detrimental any aspect of their welfare.

**1) Sri Lankan law:**

As Sri Lanka is a dualism country it has to implement an enabling legislation at national level to make these international conventions operative within the country. Sri Lanka took certain steps to give effect to

these conventions at the national level by enacting certain domestic legislations. Such as the Penal Code of Sri Lanka the Ordinance No.2 of 1883 and subsequent amendments and the Children and Young Person's Ordinance No.48 of 1939 are the main statutes which provide most legislative provisions on children based sexual activities, the Brothels Ordinance, the Vagrant's Ordinance 1941 also address child sexual abuse and CSEC in Sri Lanka.

Article 27 (13) of the Second Republic Constitution of Sri Lanka 1978 states that “the state shall promote with special care and interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination” and this is mostly enforced through article 12(4) of the constitution. But there wasn't any legislative provision of criminalizing a sexual abuse or exploitation of children until the penal code as amended in 1995, 1998 and 2006.

In 1995 sexual exploitation of children was introduced as a crime under the Sri Lankan penal code by section 360B. It criminalises a person who permits a child to be on any premises for the purpose of engaging the child in any kind of sexual activity or pornography will be considered as an offender and shall be convicted and punished with an imprisonment for a period of more than 5 years and less than 20years. It was the first statutory provision which made sexual exploitation of children a criminal offence and tried to reduce the crime by the stated penalties.

Penal Code defines rape under section 363 as a coercion penetrative sexual intercourse done by a male perpetrator with a female victim. Furthermore, section 364 (e) mentions about rape of a female child under 18 years and the later part of the section state about males on female statutory rape. Both the sections needed an element of penetration to prove the intercourse. But it is not explicitly recognized as child sexual exploitation or abuse in Sri Lanka.

A rapist shall be punished with imprisonment for a time period of not less than 10years and not more than 20years. Even if it's done by a young person under the age of 18 with a 16-year-old female even though the parties involved on their consent it shall be punished with imprisonment for ten years of time.

Though, an intercourse with a male child victim under the age of 16 or 18 by a female perpetrator is not recognized under rape or statutory rape, it can be sued under unnatural offences or under the offence of gross indecency between people. Even the statute covers homosexual relations and prohibits them, and the offenders shall be punished with imprisonment for ten years and if the victim is under 16 years and the offender is over 18 years of age then the penalty could be increased till 20 years by section 365 and 365(A) respectively. But these sections lack to protect male children and even the female children age between 16 to 18. Sometime section 365 and 365(A) can be used as convicting children as co-Perpetrators rather than victims. These sections of the Penal Code should be abolished then it will prevent children from being treated as offenders instead of victims in these kinds of exploitative situations. Or else the phrase which gives such idea should be repealed. Even section 364 of the Penal Code should be amended and include the offence of statutory rape for boys.

The Children and Young Person's Ordinance no.48 of 1939(CYPO) has provisions on child prostitution and child brothel. Section 72(1) on chapter 5 of the CYPO states about engaging a female victim under the age of 16 in prostitution is a crime. This offence has a maximum imprisonment of two years as the penalty which states in section 72(2) of CYPO. When reading this section, it is very clear that CYPO has legal provisions to criminalize and punish such offenders but the question is do it really protect the entire children, clearly the answer is no because these sections have only focused on female children so it is proven that this section is not gender-neutral

But however, section 73 of CYPO doesn't mention about a gender as in section 72. It generally says if any person lets a child or a young person to attain in sexual activity or brothels will be considered as an offender and shall be convicted by a summary trial before a magistrate and will be liable either to a fine not exceeding two hundred and fifty rupees, or imprisonment for a term of six months or both.

This section is the only statutory provision which can be found gender-neutral. Most of the perpetrators are funded by foreigners and even this kind of brothel customers are foreigners due to this reason a fine of rupees two hundred and fifty is not enough and even

the period of imprisonment of six months is not severe enough to stop these perpetrators. Always the punishments should be severe then the perpetrators and paedophiles will think twice before they commit these offences.

Though it is proven that the mechanisms surrounding child prostitution, child exploitation including allowing a child to be on premises for such activities are prohibited by Sri Lankan law but the penalty is not enough to stop these crimes and even some provisions should be interpreted more widely so it would be much easier to punish the offenders.

## 2) Comparison with some selected jurisdictional laws:

When analysing some foreign legal provisions, we can identify an advanced legal regime which regulates child sexual exploitation and child prostitution. The penal code of Sri Lanka says penetration is enough to prove rape and statutory rape but the Dutch law states to constitute a rape it should not only be sexual penetration, receiving fellatio, giving cunnilingus and even active French kissing also constitute a rape.<sup>9</sup> When protecting children this kind of interpretation will be more effective to protect them against child prostitution and sexual exploitation.

Sexual Offences Act 2003 of England and Wales section 5 states that a penetration in vagina, mouth or anus is enough to constitute it as a sexual activity with a child if the child is under 13 it constitutes as rape and the penalties are severe sometime it could be life imprisonment. This shows very clear that the England law is gender-neutral so, it protects both the male as well as female children. When comparing Sri Lankan law with England and Wales, Sri Lanka protect children under the age of 16, so Sri Lanka is much forward than England when considering the age limit of the children but when comparing the penalties and the interpretation of the crime England stands much forward than Sri Lanka. These kinds of interpretation and penalties should be implemented in Sri Lanka to adequately protect both male and female children.

North Ireland too has a similar legal framework as England and Wales, the difference is their Sexual

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<sup>9</sup>Wikipedia.org. 2018. Wikipedia.org. [Online]. [25 July 2018]. Available from: [https://en.wikipedia.org/wiki/Statutory\\_rape](https://en.wikipedia.org/wiki/Statutory_rape)

Offences Order of 2008 in section 15 they interpret the crime clearer as penetration not only with penis, it states with any body part or even with anything else constitutes the offence of rape and if the victimized child is under the age of 13 the sentencing will be life imprisonment. Comparing with these legislative provisions Sri Lanka should also amend the interpretation of statutory rape and the penalties and increase them till life imprisonment.

### C. Conclusion and recommendation

As the above discussion reveals, it is apparent that Sri Lankan law relating to child sexual exploitation and child prostitution has its own weaknesses when it comes to interpreting the offence, sentencing and in enforcement. When deeply going through the comparison with the law enforced in England, Wales and north Ireland it is clear that Sri Lanka is lagging far behind in regulating child sexual exploitation and child prostitution. The Penal Code as a whole address all forms of sexual abuse but it doesn't properly protect children between ages 16 to 18 and it is not gender-neutral because it mostly protects the female child with most of its provisions. Even the Children and Young Person's Ordinance focus mostly on female victims. It can be pointed out as a weakness of the legislative provisions. It is clear though the legislations are successful it has still some gaps in it, one is its inability to address the issue of child prostitution because CYPO has provisions mostly about girls but it is not enough to protect the entire children. Especially boys who are sexually exploited mostly by tourists, they need more protection, so the provisions should be gender-neutral as it is in England, Wales and North Ireland laws. Another weakness on the legislation is it doesn't directly criminalise a foreign paedophile. Therefore, it is worthwhile to consider the prospects of re-enslaving the existing law with the examples drawn from England, Wales and north Ireland context.

Therefore, it is suggested to increase the penalty as life imprisonment for statutory rape, unnatural offences, act of gross indecency between persons and grave sexual abuse when the victim is a child and protection of both male and female children between the ages of 16 to 18 should be included in the above crimes; sexual exploitation of children should be introduced as a non-bailable offence; section 72 of CYPO should be amended by including male child victims to it to successfully protect the entire children who are the future of the country.

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# THE IMPACT OF UMA OYA MULTIFUNCTIONAL PROJECT ON HUMAN RIGHTS

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Abstract - Implement of development projects are frequent in Sri Lanka at present. Uma Oya can be identified as a heavily attracted project by many. General public of Badulla district has faced a troublesome situation due to this. The problem of the study is how the people's lives and Human rights were influenced by the project. Primary data as well as secondary data were utilized in order to study the above problem. Primary data were collected through questionnaires from randomly selected 100 families in the areas of Weheragalatenna, Makul Ella and Egodagama. Secondary data were collected through internet, reports and newspaper reports published related to this development project. Primary data were analyzed through quantitative analysis and qualitative data were analyzed through qualitative analysis. It was able to explore that the Uma Oya development project has created serious and adverse effects on Human rights.

Keywords— Uma Oya / development projects / human rights

## I. INTRODUCTION

Uma Oya multifunctional development project was initiated as an outcome of the bilateral agreement (donation of 450 billion US dollars debt) between former president Mahinda Rajapakse and Iranian government in 2008. The principle objectives were,

- I. To generate 231 mega wt electricity
- II. To expand cultivable fields up to 4500Ht
- III. To fill 14 Reservoirs

The possibility of violating Human rights has grown as a result of the above project which initiated in order to fulfill above objectives. A group of people has displaced due to this. Many water wells in the areas of Badulla and Bandarawela has completely dried up. Fulfilling the necessity of drinking water as well as supply of water for cultivates has adversely impacted by this. Therefore it is

important to study the public attitudes, opinions of those aggrieved people under such a situation. As well as it is important to study the influence diverted on public and Human rights of theirs.

## II. RESEARCH PROBLEM

The research problem of the study is how the influence of Uma Oya project effected on lives and Human rights of people.

## III. RESEARCH OBJECTIVES

The objective of the research is to study the human rights violations related to Uma Oya multi-functional development project.

## IV. RESEARCH METHOD

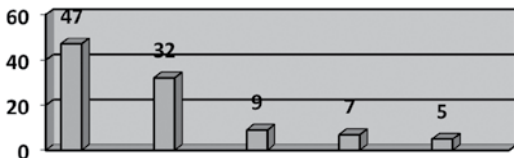
Primary and secondary data were used for the study and primary data were collected through a questionnaire from randomly selected 100 families in the areas of Weheragalatenna, Makul Ella and Egodagama. Secondary data were collected through internet, reports and newspaper reports published related to above project. Primary data were subjected to quantitative analysis and qualitative data were subjected to qualitative analysis within the data analysis process.

### *A. The Influence employed on respondent's occupation*

It can be recognized that livelihood of most has been the agriculture during investigate of the influence by Uma Oya project on the rights of people. The research proves that an adverse effect by the project has been employed on the rights of people who were engaged in occupations associated to agriculture. The attitudes of the respondents on the impact on their occupations can show as follows.



**Graph no 1: The attitudes of respondents on their occupation**



Source: - Field research, 2017.

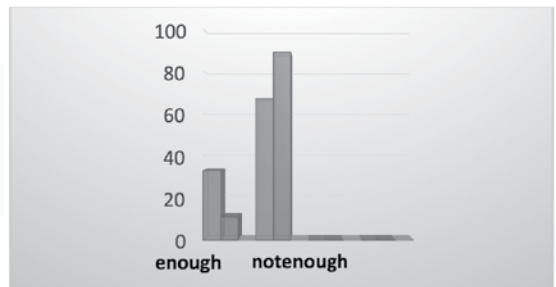
47% has stated that a very potent influence has employed on their occupations when examining manner of expressed attitudes of the respondents on the influence on their occupation. 32% has stated that a serious influence has employed on their occupations. Their livelihood has disintegrated due to loss of their fields and properties. When inquiring the influence employed on occupations, one of a respondent stated that, “we lived close to the river. We cultivated Kankun beside the river as a secondary income. Below the home. We earned about 18000 thousands rupees per a month. We almost lost all those livelihoods. We had to be debtors. Never wanted to borrow afore. So, none of good has received from the project except displacements. Many people had to face difficulties Like this as they disintegrated their livelihood due to loss of their cultivate lands. Most of the respondents have lost their occupations at present. The major reasons for this has been that they have not received cultivate lands hitherto even the government has promised to confer new properties. 5 respondents have stated that none of an influence as on cultivations. 9% has stated that only a medium influence has employed. 7% has responded that none of a serious impact has employed. Business people have well enough impacted.

Additionally, some people has joined with driving jobs at present but, they are not well enough for their prevalence as they expressed. The major reason for that is they are having subjective job only twice for a week. it seems to be that Their rights have violated Though there is an established right to do a legal profession, employment, enterprise or an industry alone or with another. People’s income has affected with the change of their existed occupations.

**B. The Influence employed on infra-structure facilities by Uma Oya development project**

Infra-structure facilities can be identified as an organ which has subjected to both adverse and favourable affects. The effects employed on respondent” water, Health, transport and electricity facilities can be analysed as follows.

**Graph No 2:- influence on respondents water facilities**

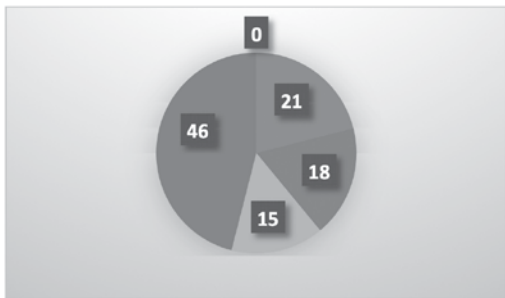


Source: - field research, 2017

no 02 shows that the situation respondents have faced on water supply. 33% has indicated that water supply is enough and 67% has indicated that water supply is not enough. Most has indicated that water supply is not enough for their cultivation activities and percentage of it is 89%. The opinion of the people who has indicated that the water supply is enough was, “we just grow around the home and use tube well water.” Drinking water was well enough” was the response when the respondents were questioned on water facilities that they had in their inceptive residence. Their criticism on the present situation was, We have to buy water now. We never bought water before. Water was taken from wells and springs. The problem is that those people had to supply drinking water from tubes within a background of well enough water they supplied from streams and channels. During dry seasons government has supplied water from bowsers. Study find outs that a water crisis has occurred compare to their inceptive occupations.

**C. Influence employed on respondent's education facilities**

**Graph No 03: Influence employed on respondent's education facilities**

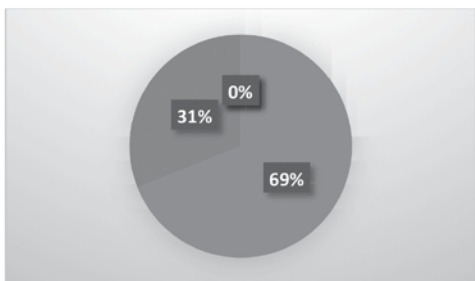


Source: - field research, 2017

Less has expressed that a huge influence has employed on education facilities. 21% has indicated that a huge influence has employed on education facilities. The distance for the schools that children have to travel in those families have changed due to resettlements. Most in Moragahawatta have affected by this issue. Most students are educating from Welimada national school and those children's travelling distance has changed due to this. One mother expressed that her child traveled alone to school earlier and now she has to take her child to school and take back. Some children have to travel by school service vehicles. But most expressed that they are difficult to spend. This proves that their right to education has impacted by this.

**D. Influence employed on respondent's electricity facilities**

**Graph No 04: Influence employed on respondent's electricity facilities**



Source: - field research, 2017

Study proves that it has not been a problem for the supply of electricity. 69% has indicated that they did not face any problem related to supply of electricity. Simply, none of influence has impacted on electricity facility.

any influence has not impacted on transport. The reason was that the resettlements were done close to the road. One of an officer mentioned that there are more facilities in new villages related to roads. Furthermore they said that Census were done walking on muddy roads and Compare to those periods that road are in a developed status. Both adverse and favourable effects has occurred due to UmaOya development project According to people's opinion.

**V. CONCLUSION**

It was able to explore that Uma Oya development project had heavily and adversely impacted on Human Rights.

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