KDUIRC
INTERNATIONAL RESEARCH CONFERENCE

13TH INTERNATIONAL RESEARCH CONFERENCE

HOLISTIC APPROACH TO NATIONAL GROWTH AND SECURITY

15TH - 16TH OCTOBER 2020

Law

PROCEEDINGS

General Sir John Kotelawala Defence University

KDUiRC
INTERNATIONAL RESEARCH CONFERENCE
2020

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LAW

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Table of Contents

Welcome Address

Major General Milinda Peiris RWP RSP USP ndc psc

Vice Chancellor, General Sir John Kotelawala Defence University

Honurable Minister of Education, Professor G L Peiris, the Chief Guest , Keynote Speaker, Secretary to the Ministry of Education, Professor Kpila Perera, Secretary to the Ministry of Foreign Affairs, Admiral Prof. Jayanath Colombage, Deputy Vice Chancellor (Def & Admin) Brig. Nanda Hathurusinghe, Deputy Vice Chancellor (Academic) Prof. Jayantha Ariyarathne, Deans of the respective Faculties, Directors of Centres, Academics, Senior Military Officers, Administrative Staff, Students and all distinguished guests who are connected with us in the cyber space.

First and foremost, let me very warmly welcome our chief guest, Hon Professor GL Peiris, Minister of Education for very kindly accepting our invitation and for gracing this occasion as the chief guest of this inaugural session of our international research conference 2020.

Sir, we consider your presence here this morning, as one of the most renowned scholars the country has ever produced in the field of Law, as a great honour to KDU. Let me also warmly welcome our keynote speaker, Prof Kapila Perera, Secretary to the Ministry of Education, who is having a very close affinity with KDU as an illustrious member of our alumni association.

Then I also welcome Admiral Professor Jayanath Colombage, Secretary to the Ministry of Foreign Affairs, and other distinguished guests and invitees participating on line as well. KDU, from its inception, was instrumental in handing down the core values of security to the development paradigm in Sri Lanka.

This year's theme 'Holistic Approach to National Growth and Security" highlights the importance of maintaining a harmonious blend in security and development in all national projects. As you are aware, this year's conference is taking place amidst very challenging circumstances, so much so that, it becomes a landmark event of KDU in terms of its resolution to ensure the continuity of events at KDU even under the most trying circumstances. And this conference is also significant because the year 2020 marks 40 years of existence of KDU since its inception in 1980.

KDU, initially established as a tri-service academy known then as KDA or Kotelawala Defence Academy, marked a significant diversion in 2008 with its renaming as General Sir John Kotelawala Defence University. Since then, with the guidance and vision of His Excellency the President Gotabaya Rajapakse, as the then Secretary to the Ministry of Defence and the Chairman of our Board of Management, KDU kept a giant leap forward to become a fully-fledged university with nine academic faculties and a University Hospital with state-of-the-art facilities. With this phenomenal change, KDU began expanding its horizon to provide its high-quality higher educational opportunities to civilian students, thereby reducing the burden on other state universities of the country in supplying for the higher educational demand in the country. Today, the University is ready to march forward steadfastly contributing to the national needs combining the national security domain with higher educational needs of the country.

Ladies and gentlemen, KDU international research conference has been attracting local and foreign presenters, participants and more importantly renowned scholars and professionals of the highest caliber both locally and internationally. However, in this year, the global pandemic situation has restricted having them physically present at KDU. But many of our invitees will join us on line to enrich the deliberations through this novel experience of having the conference on a virtual platform.

I reckon that this is a blessing in disguise for us to travel on untrodden paths for new discoveries. KDU IRC has been instrumental in establishing and strengthening the much needed research culture not only at KDU but also in the whole country.

We have been attracting papers from almost all universities, from many research institutions and other organizations representing even Batticaloa and Jaffna, which I reckon is a very encouraging sign. And the impact of the growing research culture was evident during the first breakout of Covid 19 earlier this year, where our staff and students were researching day and night for creating various products and inventions of our own to help the fight against Corona. So, it is heartening to note that in this year's conference, there are many research papers reaching the conference secretariat, which involve the student community of our nine faculties.

Therefore, we are proud that we have created a platform for emerging researchers and scientists for showcasing their research outcomes at KDU research conference. And it is our fervent belief that inculcating and fostering the research culture and enhancing the quality and quantity of research in various disciplines in the country can raise the resilience levels of society and the nation as a whole.

This year's conference has attracted six hundred and fifty plus paper submissions, which I believe is a very clear indication of the right enthusiasm growing in the country towards research, particularly in development and security domains. So we are proud as a university to be able to stand up resolutely to fulfill the needs of the nation, especially at a time when such efforts are very much needed. I believe the efforts of security-based education aiming at strengthening national development should be more cooperative in the future and KDU has always facilitated any research efforts that strengthens the national security of our nation. We urge the academic community of Sri Lanka to join hands with us in all our future endeavours to support the nation especially through productive research in diverse disciplines.

The organizers of the KDU international research conference intend to set the tone to initiate more collaborative research at national and global levels. This research conference is an ideal platform to make connections. I hope that authors of KDU and various other local and international universities will take the opportunity to interact and develop friendly relationships, establish networks and to explore win-win situations.

I wish all the very best for the presenters and hope you will enjoy every moment of this academic fusion taking place on two whole days.

Finally, let me once again welcome our chief guest and the keynote speaker on behalf of all KDU staff. I wish that presenters and participants would have all the courage to continue their pursuits with determination to link up with the international community and work towards national growth and development through their research.

Thank you.

Chief GUEST'S SPEECH

Prof. GL Peiris

Honourable Minister of Education, Government of Sri Lanka

Major General Milinda Peiris, Vice Chanceller of the Sir John Kotelawala Defence University of Sri Lanka, Admiral Professor Jayanath Colombage, Secretary to the Ministry of Foreign Affairs, Professor Kapila Perera, Secretary to the Ministry of Education, Deputy Vice Chancellors, Deans of Faculties, Heads of Department, members of the staff and students of this university, friends well wishers, ladies and gentlemen. I am delighted to be present with you on this occasion for the 13th International Research Conference. I am no stranger to these surroundings. I have been consistently associated with your work during the progress of your university until you have reached the stature that we all are proud of at this time. There is no doubt that with the nine fully-fledged faculties that you already have and your plans further to expand this university particularly bearing in mind the priorities of this country at this moment. I am particularly happy about your plans for the establishment of a Faculty of Criminal Justice. I think that is certainly an area that is worthy of focus and attention. So you have always assessed, evaluated very accurately the needs and priorities of our country in the field of Higher Education. And you have been very quick to respond to those needs. That innovative approach is much to be admired. And these are among the reasons why I have particular pleasure in joining you in these deliberations. There is one another matter that I would like to mention. It is this that you are having this conference for the 13th consecutive time. It is our experience in this country that many good things are planned and inaugurated. It is much more difficult to follow through. So the fact that you have been able to do this without interruptions for 13 years adding to your expertise as you go alone improving and expanding towards what you are attempting. It is greatly to be admired the sense of perseverance and determination that is greatly required in this country at this moment and your performance is an inspiring example of what we all need to carry the country forward to even greater heights.

Now the theme that you have chosen for this 13th International Conference is extremely appropriate from many points of view. You have heard representation from many countries as Major General Milinda Peiris, Vice Chancellor explained a moment ago. You are holding this conference in exceedingly challenging circumstances. Again you have been to adapt to difficult circumstances.You are resorting to modern technology to include and involve foreign participants in these deliberations even though they are unable to present with us physically on this occasion. The topic that you have chosen is the holistic approach to national growth and security. I think that is extremely relevant to present day needs in Sri Lanka today.

The first point I would like to make is that there is an intimate connection between national growth and security. It is fanciful to talk of any kind of national growth without the assurance of security. Security is a necessary and indispensable foundation. Without security it is impossible to achieve growth in any sector of the economy. The celebrated Political Scientist the late Professor Harold Laski of the London School of Economics said that the basic duty of a state is to provide security for its people.

That is the ultimate reason for the existence of the nation state. The theory of the Social Contract which has been developed by writers like Lock and Rousseau emphasizes the fact that the public have given the authority to state principally for the reason to create conditions in which life can go on in an orderly and frank manner so that the citizens of that state can realize their fullest potential as human beings, develop themselves and develop the community in which they live. In order to do this the essential condition is security. Without it nothing at all can be accomplished. Now we have seen empirical evidence of this in the recent past of our country through the 30-year conflict with the Liberation Tigers of Tamil Eelam. It was impossible to attract substantial investment into this country. Every facet of Sri Lanka's economy suffered grievously during that period. How can you attract investors into a country which has been thrown asunder by a ferocious war? Investment, international trade all this was affected by the ongoing conflict. I would also like to make a reference to the concept of reconciliation which became very relevant and important after the end of the war in 2009. There was then naturally the feeling that we have to leave the pain and anguish of the war behind us. We have to emphasize unity and the solidarity and bring together all the people of our cherished land irrespective of caste, creed, ethnic or religious identity to emphasize the oneness of the nation. That was the pith and substance of the concept of reconciliation. But it all went wrong during the *Yahapalana* administration of 2015 to 2019. And it is worth examining in an objective spirit the reasons why that endeavour failed so miserably. I think the basic reason is that the authorities at that time forgot the sentiments, the feelings and aspirations of the majority community. Reconciliation of course bases emphasis on minority aspirations to make them comfortable, to convey to them in definite terms the impression, the conviction that they are very much part of the country. They belong, the sense of belonging so that confidence should be imparted to minorities, and at the same time, it is absolutely necessary to carry the majority community with you. If you lead them behind if you engender in the lines of the majority community that they are not important, they can be sidelined, they do not matter, such an exercise in reconciliation is doomed to failure as empirical experience in those 4 years convincingly demonstrated. What happened during that period? I think the most alarming spectacle that we are seeing in this country today is evidence that is transpiring in daily basis before the Presidential Commission that is going into the catastrophic phenomenon of the Easter Sunday Attack. Evidence has been given by one witness after another, the Inspector General of Police, the Secretary to President, the Secretary of Defence, all these people. Their evidence emphasizes the total breakdown of this security apparatus in the country. It is not mere debilitation or weakening of security apparatus it was total collapse of it. There was no security apparatus functioning in this country at all in any realistic sense. So it led to the loss of 265 valuable lives of this country and crippling of many other citizens of our land. Why did this happen?

When the present President, His Excellency Gotabaya Rajapaksa was Secretary to the Ministry of Defense, there was a very close collaboration between the intelligence arm and immigration. Whenever an application was made by a foreign preacher somebody who wants to come and teach in this country, when visa was requested a very thorough background check was done. As Admiral Professor Jayanath Colombage would bear witness the antecedent of the person applying for the visa was thoroughly examined. And if there was anything

unsavory in the past of that person, if he has been involved in any activity which led to disharmony among communities, then the immigration authority in close consultation with the intelligence arm would turn down such a request for visa in this country. That whole apparatus was consciously and deliberately dismantled. It did not happen unwittingly or inadvertently. It was deliberate government policy. So intelligence personnel were made to feel that they were in embarrassment. The less that heard from them, the less they were seen the better. That was the environment which prevailed at that time.

Surely, if you are talking of national growth and security, the first thing to ensure is that funds that are coming from abroad had to be brought into the country through proper channels. We have in this country such an established conduit. The conduit is the External Resources Department of the Central Bank of Sri Lanka. Of course resources are welcome. But they must come through the External Resources Department. We must know the source, the origin of these fundsand where are these funds coming from? We must know the purpose for which these resources are going to be applied, who is going to manage these resources? There must be an auditor accounts. All of these were dispensed. You had a situation where a university was built. What is the purpose for a university to come up in Kattankudy. The facilities, the buildings that are constructed, they are better than the buildings that you have here at the Kotelawala Defence University. They are superior to the quality of the infrastructure in the universities of Colombo and Peradeniya. If you go to Kattankudy blindfolded if the blindfold is taken off when you get there, you will feel that you were in the Middle East. The Palmyra trees, the architecture the overall environment. The sums of money involved are colossal. There is no exposure, visibility or accountability. It is that brought about a situation that culminated in the total collapse of this security establishment. Madrasas can be all over the country. There are no Sunday Schools. They are providing many of them on daily basis. Nobody examines the curricula. There is no regulatory mechanism at all. So the seeds of racial hatred are sown by those institutions. Of course there must be freedom with regard to imparting instruction. But clearly there must be some supervision, some control, some regulation. That was totally lacking. So the country then paid the supreme price for the neglect of security in pursuit of narrow and particent and political objectives to placate aggressive minorities, not law abiding members of minority communities, but people who were intent on the destruction of the very social fabric of the country. So that was our sad experience.

This is true not only within the country, but also in the conduct of our foreign relations. What happened there? Sri Lanka is unique among the nations of this world in committing to a resolution in 2015 in the UN Human Rights Council. Sri Lanka became a co-sponsor of a resolution in condemning its own armed forces accusing its armed forces of the gravest crimes under international law and under the international humanitarian law because the preamble to resolution 13/1 of the 1st of September 2015 acknowledged with appreciation the report of the High Commissioner for Human Rights. And the High Commissioner's report makes the most damaging allegations against the armed forces of this country. And the government of Sri Lanka endorsed all of them and called for a thorough investigation at the international level. The resolution gave responsibility to the Human Rights Council and to the Commissioner for Human Rights to keep Sri Lanka under constant review. So here was a government

which consciously, voluntarily, deliberately submitted the country to adjudication and assessment in respect of its armed forces to international tribunals where justice considered the inanity of what happened. There were pledges given. In resolution 13/1 and 34/1 which are clearly contrary to the highest law of this country, the constitution of Sri Lanka operating para 6 of the first resolution 13/1 recommended that foreign judges of Commonwealth and other foreign judges should be entrusted with the task of judging our armed forces and of course, members of the civilian population. This is not possible under Sri Lanka's constitution because foreigners cannot exercise judicial power in respect of our citizens. And then the High Commissioner for Human Rights, Prince Hussein publicly conceded that in respect no other country has a Human Rights Council based in Geneva adopted so intrusive approach – so intrusive, interfering directly with domestic policy in that country. To what extent did this go? The resolutions involved matters which are clearly within the domain of the Sri Lanka's parliament not the business of foreigners. It called for constitutional reform. It called for devolution of greater powers to provincial councils. It called for thorough overhaul of Sri Lanka's armed forces and the police. It called for the repeal of the prevention of terrorism Act and its replacement by alternative legislation. Members of the Sri Lankan armed forces and the Sri Lankan police force were to be subjected to special criteria when they applied to join UN Peacekeeping forces abroad and even to enroll for programmes of training. So this is the extent to which national dignity and pride was compromised in order to placate foreign interests whose aims and objectives were incompatible with the well-being of this nation.

So this attitude which destroyed the very foundations of our national security manifested itself both in respect to domestic policy and the conduct of country's foreign relations during that period 2015 to 2019. In such a situation you cannot possibly have national growth. You cannot have economic advancement because security has broken down entirely.

Just one another point I want to make before I conclude, and that is the reference to militarization in the current political discourse. Non-governmental organizations and elements of the opposition as well as some prejudiced and biased foreign commentators are finding fault with the role of the military in the conduct of national affairs in Sri Lanka at this time. But no objective observer of the Sri Lankan scene can doubt the fact. When it came to the control of COVID-19, this country could not possibly have achieved what it did without the vigorous involvement and cooperation of the armed forces, particularly the intelligence arm. We were able to control the pandemic because the armed forces were able to identify those who have been infected, first the immediate circle and then the outer periphery. That is still being done, yesterday today it is being done. And the role of the armed forces is indispensable. Without them the situation would be far worse than it is. Why is there this kind of hostile attitude towards armed forces? I think people who subscribe to that point of view failed to distinguish between the culture of east and west in this regard. Cultural attitudes, assumptions and values are in critical significance in this area. The attitude in this country, the attitude of the public, of ordinary people, to the armed forces is not what prevails in some western countries. The armed forces are not looked upon with fear. They are not regarded as instruments of oppression. On the contrary, after the war ended in 2009, it is in effect

the armed forces, they got involved very intimately, very vigorously in uplifting the social conditions in the people affected in areas. They built houses. They made water available. They played a role in restoration of agriculture. And I know personally because I have seen in my own eyes that armed forces of this country even helped in the constructions of latrines, of toilets in that part of the country. These are not regular functions of the armed forces. But because of the culture of our country the social morals the value system based upon empathy and compassion which is the hallmark of Sri Lanka's culture. That was the nature of the role that was performed by the Sri Lankan military. It is this fundamental fact that is not taken into account. In critiques of the present scene who find fault with the armed forces forget their involvement in national activity on broader scale.

So these are some of the remarks that I would like to make to you on this occasion. I am very happy that you are having this 13th International Research Conference. I am very happy that you have chosen a topic that is extremely appropriate. You have chosen a more relevant topic for this time. As the Minister of Education also with the responsibility for higher education in this country, I am very proud of the achievements of your institution, what you have been able to accomplish within so brief a time span. The needs of higher education in this country are very urgent when more people are clammaering for access to higher education, in our ministry, with the active system of Professor Kapila Perera who is rendering a yeoman service in that regard, we are trying to bridge the gap between education and employment opportunity. We are talking to the major Chambers of Commerce they provide the jobs in the private sector to ascertain from them the employment opportunities that will be available in their institutions during next three or four years, what are the skills which we are looking for? Because they are telling me it is not that we do not have jobs to offer. We have jobs. But when we interview people we find that they don't have the skills which we want in our institutions. So we don't want to enhance a reservoir of angry and frustrated young people. We want to ensure that there is a co-relation between the education that is imparted in our institutions and the skills for which there is an identifiable demand in the market place. So these are some of the adventures that we have embarked upon. We are also looking critically at our curricula which are obsolete and anachronistic. They have not been revisited for a very long period. There must be in line with the needs of our society methods of teaching. There is far too much emphasis on rote learning in memory that students have required to commit their notes to memory, retain in the memory and reproduce it at the examination that is antithetic of the education. Education comes from Latin words '*educate*' which is draw out not to force in vast volume of actual material into mind of the students. So purpose of the education is to develop the analytical and the critical faculty of the student to encourage him or her to think for himself or herself and apply that volume of knowledge to face the challenges of life. So in the midst of all of this, in confronting the formidable challenges, I am very confident that your institution, Sir John Kotelawala Defence University will render an invaluable service. So I congratulate to you on your achievements of the past and I wish you well for the future. I know that you will continue to do your country proud. And I thank you sincerely for the honour that you have bestowed upon me by inviting me as the Chief Guest for these deliberations.

Thank you

Keynote Speech

Prof. Kapila Perera

Secretary, Ministry of Education, Government of Sri Lanka

Ayubowan! Wanakkam! Assalamu Alaikum! The Vice Chancellor of General Sir John Kotelawala Defence University, Major General Milinda Peiris, the Chief Guest today my honorable Minister, Ministry of Education, honorable Professor G.L. Peiris, Deputy Vice Chancellors, Deans of the Faculties, Heads of the departments, the Secretary to the Ministry of Foreign Affairs, Professor Admiral Jayanath Colombage, all the foreign participants who are joining this 13th International Research Conference at KDU, all the presenters, moderators, session chairs and all the distinguished invitees. Thank you very much for inviting me to deliver the Keynote Speech under the theme 'Holistic Approach to National Growth and Security.' I am indeed honored and privileged to be here having witnessed the very first one 13 years ago, and it happened to be General Milinda Peiris who was the Vice Chancellor then as Major General and we witnessed the presence of the Chief Guest as the Ministry of Higher Education, Ministry of Research and Technology.

I would like to start with this quote from the Chief Guest, "We do not want to have a reservoir of angry uncontented people." I was one who had gone through in 1971, of course not in the country in 1988 -1989 and then in then 1983 as a university student, and many times during my academic career where there were disruptions to education, holding back the desire to fulfill or acquire knowledge with my colleagues, peers and the rest of the people due to the lack of security. I know how I felt then as a student. I think I was in grade 4 in 1971, and then in 1983 in my second year at this very same premises, the education of ours were disrupted. And the feeling of those delays due to the lack of security, and the Cheif Guest elaborated in deep sense of comprehension how security is important for the national growth. If I look at what is this traditional approach that is often based on defensive security policies as we had during my time at different ages. We had always defensive security policies. However, the persistence of strong security measures generates inecure feelings. I hope you agree with me. If there are strong security measures that generate insecure feeling as it reveals the presence of threats. So these are some of the things that people quote. Then again the democracy, well-being and freedom are some of the elements that we feel that we reduce this feeling of insecurity by reducing both threats and activities that we feel. Even if you take a house if you feel this insecureness due to lack of security this might not allow you to think, generate analytical skills. You are always worried about the security. How to provide security to your children and for yourself? And then it hinders and it slows down entire process of nurturing, acquiring knowledge. And then that it is halting the growth. so you start from the small households or individuals then if you take as a whole family, a village, a township and then provinces as a country, it basically retards the national growth. So, therefore, we need to have this thinking of holistic approach to national growth and as you and I understand there are necessary and essential conditions when we learn mathematics for certain things. The Cheif Guest emphasized repeatedly the essential elements and in our academic mathematics there are sufficient and necessary conditions or essential conditions for

forming mathematical theories there are certain things. Likewise, it is essential to have security for national growth.

When it comes to economics, always and even for decades, the GDP strongly criticizes the measure of development. Still the role of economic systems neglecting the goal of global capabilities and expansion holds this economic growth or national growth. But the concession of development based on the glorification of individual success and the pushed capital accumulation hardly allows reducing insecurity and increasing freedom. So security becomes an individual good and relies upon ineffective defensive policies that we have practiced in the past unlike in the present. So development, well-being, security and freedom are strictly interrelated. Individual capabilities imply collective capabilities. Even in free market economies often human needs such as food, housing, employment, health care, family policies, fresh water, security and safety can be put in a market under regulation or collective governance, and those things even the Chief Guest highlighted. The need for water, need for food, how the security-- food security and water security ensure the getting this national security when you combine all these types of security the national growth under war conditions. So these goods are often under political debate as they are critical for development and social cohesion. The more they are shared among the large part of the population the less we experience social conflict and political instability. Security hardly is achievable individually. It is the result of more holistic thinking. Individual security and freedom implies the security and freedom of all. As I mentioned before these are interrelated. And if you look at or if you study research and in future research all these studies can help in understanding human capabilities and pathways towards collective security and enhance development. So instances of participation in definition of security needs would make citizens able to feel at the center of development goals. So therefore, unlike in the past where we did not think holistically and the interrelations between the security and the national growth. Then we will fail. Even the theories in the literature highlights this one.

As far as Sri Lanka is concerned the contemporary security concerns that we face as an Indian Ocean country are broader and more complex, that need not be elaborated, than any state in our history. This will continue to exist. We can't say that this will stop today, tomorrow, next year or in ten years' time because the geopolitics and the race for the arms business and economic development, all these things will continue to grow, sometimes exponentialy. So therefore, national security cannot be neglected and cannot be just let it go as the Cheif Guest mentioned, even in a fraction of a second, it is very important. Otherwise there won't be any growth. As the Secretary to the Education, in the present context the role played by ensuring a secure environment for the student to go and sit the examination. They are not in a position to concentrate on answering the questions if the place is not secure. So if we are not able to hold the exams and continue to postpone, then we cannot achieve and we cannot predict national growth. So in this context the role played by the national security is to be commended as the Ministry of Education. I know personally the quick response to ensure secure examination centers for all of us for the future of Sri Lanka. Under these conditions even the identification of COVID origin in the recent past, you have to have peace of mind to concentrate on everything. That is basically if you only think of one place, one center out of 2,646 examination centers, then there will be lack of security in different centers. So therefore, you have to

think holistically. Only the one aspect of securing one place will not enable for us to continue this one and therefore the results will come in future in terms of national growth. So the range that concerns arise from threats to system that allows society to control intergroup and interpersonal conflict to more recently reorganized concerns associated with threats to social and economic systems. Once these events start to influence the policy and the economy of a country with a national resilience, that country will perish. One way of addressing this emerging situation is by promoting more and more research and development.

KDU, boasting with diverse nine faculties and through two new faculties to come, the Faculty of Criminal Law and the Faculty of Technology, is going to expand and provide opportunities and platforms for you to think, ponder in a military environment and inviting day-scholars giving the signal that is very important for you to mix each other understand the role of the military or security for the civilians, 22 million people in this country, how important the national security and the training in a military set up to achieve the common goal of national growth. So the KDU is at the forefront of researching the development and security related problems holistically. A holistic approach is needed to understand contemporary complex situations and circumstances. University education could inculcate co-values of security and development such as human dignity, integrity, democratic participation, sustainable development, economic equity, mutual understanding and respect and equality of opportunity. The three flags that are behind bring all three forces together, thanks to the KDA then, and how important this mutual understanding in the war was understood and it helped to coordinate things in a better manner. You trained officer cadets together and they understand the security roles in the air, at sea, on land. I am sure that it could have been the catalyst then. Now you bring the third aspect the day-scholars. So this is holistic thinking. Like I started at the beginning it was not there then. We had three academies that did not know each other, but how had it come during the time when the national security was at risk. So ultimately the beneficiary is national growth. The honorable Minister, the Cheif Guest mentioned how difficult it was for Sri Lanka to attract foreign direct investments. As I think Minister of Enterprise Development, Foreign Minister, Foreign Secretary. If you don't have security and thrust, nobody would come. But when you train together military and civilians with hand and hand, it would provide an ideal platform. The importance of civil-military relations and how KDU is instrumental in developing the above mentioned areas is to be commended. By promoting civil-military relations through education, a country could raise the resilience levels, like I mentioned, of communities. Honorable Minister spoke at length and elaborated that you have to have a strong commitment and the political will to ensure the security of this country. If these elements, instruments fail, the first thing that is going to effect is the education of the future generations. Even for me, the Oxford graduate, Rohdes scholar, I am a pupil. And this has provided opportunities and the responsibility to the government to ensure the security. So all spheres of activity will simultaneously grow ultimately culminating in national growth.

These are the few thoughts that I have to share with you. I would like to extend my gratitude on behalf of the Ministry of Education for having me and inviting me to deliver the Keynote address and set the platform for the next two day deliberations. And I wish all the success in the

deliberations and creating more networks and have future directions for years to come in this context of national security that you have chosen today. Whatever that you are going to do, base national security at the forefront. So divided we lose together we win. And I wish all the very best and thank you very much for all the participants and the people who have submitted papers, presenters, moderators, and session chairs. You are plying a very important role in this context of national security and the national growth.

Thank you very much!

Vote of Thanks

Dr. L Pradeep Kalansooriya

Conference Chair, 13th International Research Conference,
General Sir John Kotelawala Defence University

It is with deep appreciation and gratitude that I present this vote of thanks on behalf of the organizing committee of the 13th International Research Conference of the General Sir John Kotelawala Defence University.

First of all, I convey my heartiest thanks to Professor G.L. Peiris the Minister of Education, a distinguished academic who spared his valuable time with us on this occasion. Sir, your gracious presence amidst busy schedules is truly an encouragement and it certainly added the glamour and value to this important event.

Professor Kapila Perera, the Secretary to the ministry of Education, also a distinguishable academic and a senior military officer is a proud product from our own institute. Sir, I greatly appreciate your willingness without any hesitation to be our Keynote speaker today.

I would also like to take this opportunity to extend my appreciation and gratitude to the Vice Chancellor, Maj. General Milinda Peiris for all his guidance and assistance provided throughout the event and this event wouldn't have been a reality and a great success without your courageous leadership under the current challenging situation today.

I would be falling my duties if I don't mention the exceptional support and assistance provided by the two Deputy Vice Chancellors who were there behind the team guiding us through a difficult time. I also would like to thank the Deans of all the faculties who shared the responsibilities and guided their staff amidst their very busy schedules.

This year's conference has attracted six hundred and fifty plus paper submissions, which is a very clear indication of the right enthusiasm growing in the country towards research, particularly in development and security domains. I take this opportunity to thanks all authors share their studies on National Growth and Security in our conference. I also greatly appreciate our panel of reviewers on the valuable time spent to review this large number of papers. I'm sure that your valuable resnses would tremendeously supports to authors on enhancing their research studies.

Ladies and Gentlemen, as you witnessed, this was a new experience in the new normal, after the present pandemic, and therefore it was huge challenge to organize, coordinate and conduct research conference of this magnitude on virtual platform enabling a wider participation of both local and foreign participants. I thank all our participants attending the conference online despite numerous difficulties encountered due to the present situation.

Further, it is with great pleasure that I acknowledge the tremendous support and assistance provided by academic staff of all the faculties with all the Heads of Departments going beyond their regular duties to make this event a success. Similarly, I take this opportunity to appreciate the contribution of the administrative and non-academic staff

whose commitment was essentially required in achieving the overall success.

Our sponsors, the financial support given by our Platinum Sponsors, People's Bank and Bank of Ceylon and Co-sponsor, Abans Private Limited is highly appreciated.

Last but not least the officer cadets and day scholars who formed a very virtual component of the organizing teams in every sphere and I believe that it was a great learning experience and exposure which would help them tremendously in similar undertakings in the future.

Finally, I have no doubt that all of those attending the two days seminar will make the best use of the opportunity to enhance their horizons and establish new bonds and networking while sharing their own knowledge and experience in a friendly learning environment.

In conclusion, let me take this opportunity to profusely thank my co secretaries, who stood alongside me throughout extending unexplainable support and assistance with exceptional commitment.

Thank you so much. I wish you good luck and all the best.

Plenary Session

The Role of Law in National Growth and Security

Session Summary

Session Chair: **His Lordship Jayantha Jayasooriya PC,** Chief Justice of Sri Lanka

Rapporteur: Mr Managala Wijesinghe, Dean, Faculty of Law, General Sir John Kotelawala Defence Universiy

Chair of the Plenary Session in Law was His Lordship Jayantha Jayasooriya PC**,** Chief Justice of the Supreme Court of Sri Lanka.

The first speaker, His Lordship Yasantha Kodagoda PC currently serves as a Judge of the Supreme Court of Sri Lanka. He served as a Deputy Solicitor General from 2005 to 2015 and as an Additional Solicitor General from 2015 to 2019 at the Attorney General's Department. He was the President of the Court of Appeal of Sri Lanka from 2019 to 2020 until he was appointed to the Supreme Court of Sri Lanka. Formerly, he was a Public Prosecutor, and a Criminal Appeals Counsel who served as a Law Officer cum Legal Advisor to the Government of Sri Lanka for about 3 decades. He served as the second in command of the Criminal Division of the Attorney General's Department, and also as the Secretary cum Chief Executive Officer of the Presidential Task Force for the Recovery of State Assets (Proceeds of Crime) located overseas. Additionally, he had functioned as the Director of the Institute of Advanced Legal Studies of the Incorporated Council of Legal Education.

The second speaker Justice Mohan Peiris, PC was called to the Bar in 1975 and joined the Attorney General's Department in 1981 as a State Counsel, later serving as a Senior State Counsel for over 15 years. During this time, he received training at the National Institute of Trial Advocacy at Harvard Law School, the Centre for Police and Criminal Justice Studies at Jesus College, Cambridge and at George Washington University. After leaving the Attorney-General's Department he started practicing in the Unofficial Bar. He appeared both in original and appellate courts mainly in the areas of Public Law, Commercial Law, Land Law, Industrial Law and Criminal Law. He was an Examiner at the Sri Lanka Law College, a visiting lecturer in the Faculty of Law of University of Colombo, Deputy President of the Sri Lanka Bar Association (BASL) and a member of the Sri Lankan Delegation to the Universal Periodic Review at the 8th Session of the Human Rights Council of the United Nations. He served as the Attorney General of Sri Lanka from 2008 to 2011 and as the Chief Justice of the Supreme Court of Sri Lanka from 2013 to 2015.

The third speaker Dr. Charika Marasinghe holds a Bachelor of Laws (LL.B.) Honours degree from the University of Colombo, Sri Lanka, and is an Attorney-at-Law of the Supreme Court of Sri Lanka and a Solicitor of the United Kingdom. As a Commonwealth Scholar, she obtained a Master of Letters degree (M.Litt.) and a Doctor of Philosophy degree (D.Phil) in International Law from the University of Oxford, specializing in International Human Rights and Child Rights Law. In a career spanning over 35 years, she has served as a Senior Lecturer in the Faculty of Law of the University of Colombo, as Deputy Chairperson and a member of the National Child Protection Authority, and a trainer and a resource person in the field of human rights, child rights and women's rights at diverse conferences and institutions, both local and international. She was the co-recipient of the *'Women and Engaged Buddhism Award'* (2008) of the Buddhist Council of Midwest, USA, for conceiving a counselling programme for Tsunami survivors, and the recipient of *'An*

Outstanding Woman in Buddhism Award' (2009) from Thailand, for exceptional development of wisdom and compassion in the protection of child rights. At the invitation of the Sri Lanka-India Friendship Society, Dr Marasinghe delivered the 2014 Mahatma Gandhi Memorial Oration based on her personal experiences as a human rights and child rights lawyer who had travelled extensively in the former war affected areas of Sri Lanka.

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

Transcribed speeches of the plenary speakers are continued in the following pages.

Sri Lanka, Its National Security and the Law

His Lordship Yasantha Kodagoda PC

Justice of the Supreme Court

My Lord the Honourable Chief Justice, the Former Chief Justice Honourable Mohan Pieris, Dr. Charika Marasinghe, President's Counsel Mr. Shavendra Fernando, the Vice Chancellor of General Sir John Kotelawala Defence University, Major General Milinda Pieris, the Dean of the Faculty of Law, distinguished participants, ladies and gentlemen.

National Security of a country means the security of the country itself and that includes the security of the State, the security of the people of the country and its property. The protection of National Security is critical for the survival of the people and the State. Maintaining national security is the foremost duty of the State. During the pre-independence era of Sri Lanka, the threats to the nation and the people, came from invading powers and colonial powers. Unlike the pre-independence era, attacks of evil forces came from within the country during the post-independence era. One such key force tried to fragment the country with the view of creating a separate sovereign state in one part of the island, and another sought to destabilize the State with the view of causing governmental and governance related structural changes while intimidating democratically elected governments through violent means. They did so, through ultra-constitutional means and in direct violation of the criminal laws of the country. These forces have unleashed violence of unimaginable magnitude and severe loss of life and damage to property were also inflicted.

Apart from the unsuccessful coup in 1967, in that overthrowing two democratically elected governments, the more serious threats and attacks on national security took place in 1971, 1988-1990 and from the mid 1970's to 2009. During nearly thirty years of armed conflict and terrorism, at times, the intensity of the attacks was such, that territorial integrity and sovereignty of the country were seriously affected. Lawful governments were prevented from executing the writ of governments. As a direct result of the termination of the armed conflict and the perpetration of terrorism by the elimination of the organized presence of the Liberation Tigers of Tamil Eelam in the Northern and Eastern provinces, since 2009, Sri Lankans witnessed a decade of peace, ending that peace, it was most unfortunate that, on the morning of Easter Sunday of 2019, the people of Sri Lanka came under a serious terrorist attack. Unlike, previous threats and attacks on national security, which had a political undertone, this terrorist attack brought in a new dimension to the root causes of terrorism in Sri Lanka namely, religious fundamentalism coupled with lunacy like radicalism and extremism. That terrorist attack, if at all signalled to one pointer namely, that Sri Lanka needs to remain vigilant all the time, as attacks on national security can be unleashed at any point of time and can be due to multiple reasons and root causes. They can also take multiple manifestations.

It is unfortunate ladies and gentlemen, that during the post-independence era of Sri Lanka, successive governments leading the state of Sri Lanka, had to necessarily give priority attention to the protection of

national security thereby, retarding national, social and economic development and growth. Sri Lanka has remained a middle-income developing country for too longer a period. This has been mainly due to the considerable resources and time that had to be spent on the protection of national security. It was also associated with the devastation caused due to attacks on national security. Ladies and gentleman, the State has multiple instruments in its arsenal to respond to attacks on national security based on the nature of the attack, its intensity, its source, cause, methodology, previous experience and of course prudence. The State can selectfrom multiple responses that are available. They are, the military, policy, legal, law enforcement, criminal justice, social and political responses. While some of these measures are aimed at the protection of national security through the prevention of such attacks, others are aimed at responding to attacks on national security and mitigating harm. Some mechanisms maybe used to achieve both these objectives. Social and political responses are primarily aimed at addressing the root causes and thereby, preventing the emergence and the escalation of situations that may explode into attacks on national security.

The focus this afternoon, ladies and gentlemen, of this paper, is on the law as a response to threats and attacks on national security. As you could appreciate the law, law enforcement and criminal justice are key elements of any legal system. The law itself and the processes of law enforcement and criminal justice, are founded upon a key concept namely, the Rule of Law. That is a forfeiture of our Constitution. To enforce a law enforcement and criminal justice response to threats and attacks on national security, a prerequisite would be the prevalence of appropriate national security legislation, such legislation would have components of both substantive and procedural criminal law. When national security legislation should seek to provide it's a matter that is dependent upon the threat and the nature of attacks on national security. National security legislation, ladies and gentlemen, generally contains the following key features:

- They create offences that contain prohibitions of certain harmful conduct amounting to attacks on national security.
- They also impose legal requirements that compel persons to act in certain stipulated affirmative manners with the view to protecting national security.
- Such legislations also stipulates punishments for violation of these prohibitions including affirmative duties.
- National security laws, ladies and gentlemen, also provide a legislative framework and thereby, facilitate the conduct of investigations intoconspiracies, preparation, attempts, abetment and attacks on national security.
- They also provide for the arrest and detention of persons believed to have been involved in the committing of attacks on national security.
- These laws also provide for the institution of criminal proceedings, prosecution and trial of offenders and the management of judicially imposed penal sanctions.

Among the multiple national security legislations Sri Lanka has, are the Constitution and the particular article 157, Chapter 6 of the Penal Code, the

Prevention of Terrorism Act, the Public Security Ordinance, the Convention on the Suppression of Terrorist Financing Act, the Suppression of Terrorist Bombings Act, the Prevention of Hostage Taking Act, Offences Against Aircraft Act, Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Suppression of Unlawful Acts against the Safety of Maritime Navigation Act and the Prevention and the Suppression of Crimes against Internationally Protected Persons Act. The last six of these items of laws that I read out, relate to Sri Lanka giving effect to its obligations under counter terrorism international conventions. It is pertinent to note, ladies and gentlemen, that though not typically classified as national security legislation, the Police Ordinance and the Army, Navy and Airforce Acts can also be applied to mobilize responses to protect national security. Though not typically classified as national security legislation, the Computer Crimes Act and the Financial Transactions Reporting Act can also be helpful in mounting judicial responses to attacks on national security. Of course, ladies and gentlemen, the Code of Criminal Procedure Act provides a legislative framework upon which criminal investigations into attacks on national security could be launched, criminal proceedings may be initiated and instituted and persons responsible for such attacks prosecuted. This list of laws, ladies and gentlemen, is not complete if I don't mention that in the by gone era, emergency regulations promulged from time to time in terms of the Public Security Ordinance, the Proscription of the Liberation Tigers of Tamil Eelam Act of 1978, the Criminal Law (Special Provisions) Act of 1962, the Criminal Law Act of 1962 and the Criminal Justice Commissions Act of 1972 have also been used to respond in multiple ways to attacks on national security. These laws are no longer in force.

National security legislation, ladies and gentlemen, deviates in multiple ways from the routine laws in this country. Therefore, some argue that they are stringent laws in comparison with the routine laws of the country and are draconian in nature. I do not necessarily subscribe to that view. Due to some of the deviations found in national security legislation it is necessary to very carefully look at the manner in which national security legislation should be enforced as well as applied and interpreted. While some of the criticisms against national security legislation may be unfounded, it is to be noted that the very nature of certain pieces of national security legislation may lend itself to be abused and misused for collateral purposes. Furthermore, it is most unfortunate that the very nature of certain features of national security legislation and the manner in which they are at times sought to be enforced facilitates illegal activities such as the perpetration of torture and other extra judicial criminal activities which necessarily infringe fundamental human rights. Unfortunately, in this country there is ample evidence in support of that contention.Therefore, in my view, ladies and gentlemen, the development of national security legislation must, on the one hand, take into account cotemporary forms and manifestations on threat and attacks on the national security of Sri Lanka and also the global theatre relating to terrorism. On the other hand, I need to underscore the fundamental importance of national security legislation being unconditionally, and I repeat unconditionally, compliant with our own Constitution and the doctrine of the Rule of Law. Restrictions, if any, on the enjoyment of fundamental rights, should necessarily conform to the

restrictions that may be imposed in terms of Article 15 of the Constitution. They should also be proportionate to the existing or imminently likely threats.

Having said so, ladies and gentlemen, I must finally emphasise that it is of paramount importance that Sri Lanka develops efficacious legislations to replace the outdated and much maligned Public Security Ordinance and the Prevention of Terrorism Act. Doing so would be necessary to efficaciously protect Sri Lanka's national security by enhancing the potency of the state to prevent attacks and also to respond to attacks through efficacious criminal justice processes. It is also necessary to ensure that such laws that would be developed in the future is compliant with Sri Lankas obligations under International Human Rights Law and Humanitarian Law and of course, fully compliant with the Constitution of Sri Lanka.

In that regard, ladies and gentlemen, I wish to recommend to you, for your consideration, the Counter Terrorism Bill of 2018 which was developed necessarily by a team of Sri Lankan legal, Military, Law Enforcement, Intelligence and Security Professionals and also vetted by the Supreme Court for its compliance with the Constitution.

I thank you ladies and gentlemen for your patient hearing.

The Rule of Law in the Globalized Society

Mohan Peiris PC

Former Chief Justice

Your Lordship the Chief Justice, His Lordship Yasantha Kodagoda, the Vice Chancellor, Major General Milinda Pieris, Dr. Charika Marasinghe, Shavindra Fernando President's Counsel, Members of the Faculty, members of the academia and finally, perhaps, the most important of the stakeholders, the officer cadets and the students.

My dear students, I'm pleased that his Lordship Justice Kodagoda did mention the parameters within which the whole concept of national development and national security must be structured upon. And I think, I was equally pleased, when his Lordship the chief justice was pleased to observe that there must be the contours to national development and national security. In other words, we have to have parameters. And it is within that context, that I propose to place before you for your discussion certain matters which I thought you might find interesting to listen to. My dear students, you will appreciate that sustainable growth, I am really coining this term 'sustainable growth' from the expression sustainable development, sustainable growth and security must take cognizance as his Lordship was pleased to observe, must take cognizance of and strike an appropriate balance with the Rule of Law and be equipped to protect against potential dangers in these very difficult contemporary times. There is, therefore, my dear students, an urgent need to take a holistic view of national security and national development. By adopting such an approach, a full spectrum of security issues is assessed, ranging from people's security, which is the ultimate concern, political security, which is of overarching importance, and economic security, which underpins all other considerations, to military, cultural and social perspectives, which reinforce efforts in other areas, and the promotion of international security, which provides support for measures taken in a national context.

My dear students, a holistic approach of this nature requires a focus on both internal and external security. Internally, it is essential to promote development, continue reform, maintain stability, and create a safe environment. Externally, we should promote international peace, seek cooperation and mutual benefit, and strive to bring harmony to the world. The nation's security in the context of terrorism; hSomeland security and the security of our citizens are both of paramount importance. All initiatives taken in this respect must be people-centered, and implemented for the people, on the basis of the people's needs, and with the support of the people. Security issues, both traditional and non-traditional, must be taken into account. The national security system we envisage will integrate not only political security and homeland security, but also security-related military, economic, cultural, and social concerns, science and technology, information, and ecological resources.

National Security doesn't mean posting security personnel all over the country. That's not what it is. Issues pertaining to development must be considered as an indispensable adjunct to security issues. Development provides a basis for security, whereas security constitutes a necessary

condition for development. Our national security must also be viewed in the context of international security. For the sake of our global community with a shared future, we should all work toward our goal of satisfying the world's security needs in a way that is beneficial to all. We will continue to improve our national security system, strengthen our national security capacity, and defend our sovereignty, security and national interest as it concerns our development needs. That is something we must understand.

Two decades into the new millennium, the components of national security itself needs to be redefined. The traditional view that national security is related only to security of territory from external aggression needs to be changed. Internal stability and order and comprehensive national strength of the country are equally important factors in protecting and maintaining the security of the nation state.

We have been through a long-drawn conflict in our country which led to bloodshed and disorder and posed a serious threat to national security. You will agree that the path towards minimizing social conflict depends on what measures are taken nationally in improving individual security. The essential components of such security are in the realms of food, health, education etc. Security threats can also arise out of environmental degradation. It has been our experience that where there is a multitude of problems relating to personal, economic, political or environmental security, there is a risk of breakdown of national security. Policymakers will tell us that selected indicators of human security provide us with early warning on whether a country is heading towards social disintegration and possible national breakdown. That's a warning we should take seriously.

A growing phenomenon that we see is rapid urbanization. It is undoubtedly one of the key megatrends driving change in society across the world. The frequency, direction and speed of urbanisation means that it must be at the forefront of the strategic agenda for any country, but particularly in emerging economies such as ours. But this isn't the only megatrend that impacts on the agenda of today's town planner. Another is demographic change, where certain areas of our country are ageing while birth rates in other parts of the country are making the average population younger. The socioeconomic characteristics of the influx of people into expanding cities raises important policy issues. Who is coming, and what do they bring with them in terms of both tangible and intangible assets, particularly the skills to make them employable? This leads to another of our identified megatrends – technological breakthroughs – which (if managed well) holds the promise to provide parts of the solution for the future sustainable management of the country. As HE the president observes, smart solutions to urban problems need technology as an enabler and he keeps reminding of that need consistently.

A question that I would wish to pose is as to what opportunities a sustainable approach to development offer to communities in developed and emerging economies alike? Urbanization is not so much of a threat to sustainability as many people think. The quality of growth that countries can achieve is strongly linked to their power to address social, environmental and economic issues in a cohesive and proactive manner, while making the most of future opportunities. This is what we call the "new capitalism" – managing and developing all capitals

holistically for the development of a sustainable local economy. It is in this context that I will focus on the imperatives of the Rule of Law in our pursuit to a rapid movement of development and the growing need for national security. In the case of this modern approach to governance, you might ask yourself the question whether there is room for the Rule of Law? Is the rule of law simply rhetoric, or a universal principle? No doubt the Rule of law has gone through turbulent times in contrast to the other concepts, and has been subject to the severest of critique. Today Dicey's theory of rule of law cannot be accepted in its totality. The modern concept of the rule of law is fairly wide and therefore sets up an ideal for any government to achieve. This concept was developed by the International Commission of Jurists. It is known as Delhi Declaration of 1959 which was later on confirmed at Logos in 1961.

According to this formulation.

"The rule of law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil or political rights but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality".

According to Davis, there are seven principal meanings of the term ‘‘Rule of law: (1) law and order; (2) fixed rules; (3) elimination of discretion; (4) due process of law or fairness; (5) natural law or observance of the principles of natural justice; (6) preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and (7) Judicial review of administrative actions. So finally, it may correctly be said that rule of law does not mean and cannot mean any government under any law. It means the rule by a democratic law-a law which is passed in a democratically elected parliament after adequate debate and discussion. Likewise, Sir Ivor Jennings says-

"In proper sense rule of law implies a democratic system, a constitutional government where criticism of the government is not only permissible but also a positive merit and where parties based on competing politics or interests are not only allowed but encouraged. Where this exist the other consequences of rule of law must follow".

I ask the question - Is the Rule of Law simply rhetoric or a universal principle? You will recall that at one time of our jurisprudential history, it was thought that any form of discretionary power was incompatible with the Rule of Law, as it was thought to be the sure way to arbitrariness. You will appreciate that today that would perhaps be an overstatement of the principle, and a product of academic overreach. Today exercise of discretion is an indispensable element in any modern administrative structure. Discretionary power therefore must be exercised in good faith and in consonance with the Rule of law. In other words, we can never have unbridled discretionary power. This must be borne in mind in deciding the parameters of national growth and national security. We have to remember the decision-making process must be within the confines of legality; procedural propriety; rationality or reasonableness and as the Europeans would say – within the confines of the doctrine of proportionality. It might be well to remember that this supplies to our Courts themselves, who are trustees of the Rule of Law.

The topic is presented by relating to a real-life story which brings out a well-known

generalization by the executive to this much misunderstood principle. A Greek Professor of International Law was asked by the United Nations to assist a country in North Africa to fall in line with the international standards followed in the treatment of political prisoners. The Greek Professor, having spent quite some time in that country, had one day, to present his report to the Ruler of that country. Having done so, the Ruler observed that the important part of that report required the Government to conduct itself in consonance with the established standards of democracy. The Ruler had point blank rejected such a proposition. The Ruler had said "you Greeks, you think you invented democracy, that has no meaning". A few days later they re-presented the report with amendments. The amended report required the Government to act in accordance with human rights. The Ruler was extremely displeased and went on to express his reservations by saying "I fear, the bodies such as Amnesty International or Human Rights Watch have influenced you unduly". The meeting ended there. The Good Greek Professor returned with his team and after much deliberation, re-presented the report to the Ruler with a new formula. They presented the report the third time, and this time, they required the Government "to act in accordance with the standards of the Rule of Law". To their utter surprise, the Ruler was pleased, and he said "fine, that's perfect, nobody will know what that term means". How true this is, for we see today, globally, the words 'Rule of Law' are generously spoken of notwithstanding the naked violation of the basic rules of equity and fairness. I would not be wrong to say that this is a term to which lip service is paid in generous doses without stopping to think of what these simple, but cogent, words really mean.

My dear students, as academics say, few political concepts have globally accepted meanings. As you heard in what the North African Ruler said of the concept of democracy, this approach also applies to the concept of rights, liberty, justice and freedom and to law itself.

Amidst all the discussion of the national security and development, and the enthusiastic discussion of the rule of law, we observe naked violations of the rules of equity and fairness. I would probably venture the observation that the term Rule of Law is one to which lip service is paid without pausing to think as to what these simple but cogent words really means in designing a holistic approach to national security and development.

We are reminded of Sir Ivor Jennings who describe the Rule of Law as something which threatens the fair distribution of wealth and power. We have Prof. Titmuss who says the Rule of Law is one which would introduce a pathology of legalism into relations between the subject and State. Prof. Morton Horowitz of the Harvard Law School says the Rule of Law enables the shrewd, calculating and wealthy to manipulate its form to their advantage.

Look around us, from East to West, from North to South, we see strife, turmoil, aggression, death, devastation of life and property, amidst our drive for growth and national security. With all the mayhem around us, academics seem to suggest that the Rule of Law is a force entirely for the good, and which advances democracy. It is commonly said and heard that for rapid development and the need for achieving effective national security requires the exercise of discretionary power. But this is not exactly true. We have seen the Rule of Law gaining tremendous popularity, notwithstanding its turbulent history. Its survival, it is said, has been attributed to

the fact that it is entrenched in the legal and political cultures in the civilized world. How then could discretion be exercised, having regard to the overarching need to preserve the Rule of Law? How can we embark on rapid development and preserve national security by the exercise of discretionary power for the public good?

It might be interesting to note that Parliament and the Executive are also subject to the Rule of Law. We see this in civilized jurisdictions all over the world. I ask the question – is the system of justice in a globalizing world under strain in finding accommodation for the Rule of Law? It must be borne in mind that the development process and concerns for national security must be within the confines of the law. Public officials are not expected to exceed their power and are expected to apply the law equally. National growth, national development or national security cannot be at any cost.

To be able to sustain this balance, it is necessary that we ensure access to justice. Prof. Jeffrey Jowell, an eminent jurist, says that the Rule of Law does not rule only by law. It is a much richer concept that must be appreciated. The development process and the national security framework must be conducted within the structure of recognized rules and principles which restricts discretionary power.

Another question I have for you is whether national growth and national security be achieved side by side? How do we manage these competing factors? The key to the answer is the principle of 'sustainable development'. The problem appears to be the equitable application of the principle in the different circumstances we apply it to. As Justice Weeramantry puts it, the difficulty is steering a course between the need for development and the need for environmental protection which is part of national security. In the context of globalization and continuous economic integration that we have seen in recent times, the relationship between the economy and national security has become increasingly interlinked. It is these connections that represent both opportunities and potential threats to the country's national security. The open and interconnected nature of our economy leads to vulnerabilities from both internal and external threats. Having recognized this, economic security has emerged as an important strategic priority for governments.

Given these growing international interdependencies within our national security as well as recent concerns of the environment there is a recognized need for assessments of the potential risk that may emerge as a result of such economic activity.

Some of the questions that emerge are; firstly, how can national security be defined? Secondly, as to what can be learned from academia about the relation between the economy of a county and the various aspects of national security? Understanding national security has evolved over time. It has been shaped and influenced by historical events. In broad terms, stability, safety, protection and freedom from fear, threat or conflict are considered some of the core themes of national security. It can also be defined in terms of the values that people hold, such as physical safety, economic welfare, autonomy and psychological wellbeing.

National security today has become associated with preventing disruptive effects on society, economic performance or critical processes such as democratic decision making. The interconnection between national security and economic growth has grown, as globalization and

economic integration have increased over the last few years.

With the experience of successive wars and conflicts, and the proliferation of the Nation State throughout the 19th and 20th centuries, realist explanation of behavior among States dominated the discussion, highlighting the importance of national preservation. In terms of the realist thinking, certain common themes appear in relation to national security, inter-state aggression, the fear and threat of violence from hostile States, and a focus on the military and the ability to respond in order to preserve itself and its security – in other words its territory.

With the establishment of the League of Nations, there was a liberal school of thought inspired by writings by Emmanuel Kant. National growth within a critical political economy is the mutual constitution of the economic and political sphere and the security threats posed by the unequal divisions of power and welfare. Academics supporting this theory are reluctant to treat the economy and national security as separate fields. If one was to look at it through the lens of the theory of critical political economy, the security of the State may be threatened by the unequal divisions of power and welfare, and by transnational corporations that are able to influence these conditions.

There is an overall consensus that poor governance and corruption plaguing many developing nations are the principal obstacles to progress. These obstacles invariably lead to the feelings of desperation, apathy and determinism. It is therefore necessary that we seek the protection of the Rule of Law as a guiding concept in our quest for national growth and security. Members of the public are expected to comply with the law. Public officials are not expected to exceed their power and are expected to apply the law equally. The application of the law must be fair and impartial. It is therefore imperative that in arriving at decisions with regard to national growth and national security, that the law must be accessible. What I mean by that is that the law that has been applied, must be easily understood. It must be clear. It must be predictable. Secondly, the legal principles that apply to national growth and the maintenance of security must be applied having regard to law, and not discretion. Any decision making process must be exercised lawfully, fairly and reasonably. There must be equality before the law. National growth and national security must take cognizance of human rights; any disputes with arising out of or concerning national growth and national security must be resolved without delay or undue expense. Any inquiry or legal procedure pertaining to, arising out of or concerning national growth or security – must be fair, and must be compliant with the obligations in international as well as national laws.

I might wind up by reminding you of what Plato famously said; “if the law is the master of government, and government is its slave, then the situation is full of promise; and may enjoy all the blessings and all what the Gods shower on the State.” The Rule of Law, ladies and gentlemen, does not rule only by law – as I said before it is a much richer concept. It is again said by Prof. Jowell, that the Rule of Law in democratic governance is not a theory of State but a simple practical guide to the bare essentials of how power has to be exercised, even in the cause of national growth and national security. That it is not a monopoly of the developed world, but a fundamental need to recognize the dignity of humankind. That it must be recognized against other values such as the right to life, to right to secure existence. And for

that reason, could not be compromised arbitrarily.

You will finally appreciate that to callously and recklessly disregard the Rule of Law in achieving national growth and national security, can lead to national chaos. I want you to appreciate that it is a worthy objective to be upheld and an inexplicably indispensable principle of good governance and to establishing a world order where all humankind can live in peace and in dignity.

Thank You.

Holistic Approach to National Growth and Security: A Global and Local Perspective

Dr Charika Marasinghe

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Your Lordships, distinguished speakers, the Vice Chancellor, faculty members and students, I thank the Vice Chancellor of General Sir John Kotelawala Defence University, Major General Milinda Peiris, and the Dean of the Faculty of Law, for honouring me with this invitation to deliver a talk on the timely topic, "Holistic Approach to National Growth and Security A Global and Local Perspective".

At the outset, I would like to say that I'm sharing my views today with you, not as an academic, but as a human rights and child rights practitioner, who has followed a non-adversarial approach, in making various interventions in the human rights and child rights field. It is significant that the topic I have chosen for my talk, highlights two important issues namely, national growth and security from a holistic perspective. I would like to begin my talk by examining the word 'Holistic', because it is only when we possess a clear understanding of this word that we will be in a position to do justice to the topic of this conference.

The term 'Holistic' is derived from the Greek word 'Holos', meaning 'whole'. Holism expresses the idea that everything is part of the whole, as all parts are indissolubly interconnected. Nothing can exist independently of the whole or can be understood without reference to the whole. If I may explain further by referring to medicine, in medicine holism means that the whole of a sick person;their mind and the way of life, and not just their body and the symptoms of the disease should be considered when treating them. We are deliberating on the theme entitled holistic approach to national growth and security at a critical turning point in the history of humanity. We are experiencing at first hand, the ramifications of our ignorance of the interdependence and interconnectedness of all phenomena. The COVIDpandemic is challenging our existence as human beings on this planet earth.

The COVID pandemic is challenging and also questioning the way we humans have interacted with nature in all its integral aspects. It is equally making us question the way we have, all over the world, governed our countries for decades in thoughtless ways and exploited the natural resources of the planet for the sole purpose of human flourishing and human growth. We have not considered the long-term effects of this on the natural world of which we are an intrinsic part and on which we depend all our physical, even for that matter, spiritual needs. In other words, COVID-19 is putting a question mark over our very existence as humans on this planet. Humanity has more or less vested with the belief that it can conquer any enemy by the use of mighty forces, and the most sophisticated weaponry. With this belief, many wars had been waged, won or lost, across centuries by humans against fellow humans. But, the war we are waging at this hour, globally, is a war against a tiny virus, not visible to our naked eye.

A billion-dollar armoury of sophisticated weaponry or a fearless armed force cannot fight on our behalf and rescue us from the crisis that we are faced with today. The shere magnitude of the COVID-19 virus is demonstrated by the fact that, COVID-19 related deaths in the US have surpassed American lives lost in World War-I. According to Geopolitical and Geoeconomics analysts, the world is experiencing very serious COVID-19 related economic crises such as, mass unemployment, increased economic inequality and community desruption. We are witnessing just the tip of the ice burg and deeper challengers are yet to be witnessed or experienced.

Who can predict with certainty that the COVID-19 will be the last of its kind to attack humanity. In this context, I believe, it is very opportune to approach the subject of national growth and security from a holistic perspective and comprehend where we have gone wrong as human species, then perhaps we can transcend this crisis with insightful strategies strongly grounded in our Asian philosophical traditions and values which recognise, that we are part of a process that intrinsically connects and sustaining us all in intricate patterns of mutual causality.

Applying this eastern concept of interdependence and interconnectedness of all phenomena, let us now turn to the two subjects of national growth and security. For decades we have understood these terms in the narrow sense of the words, for an example, national growth is understood in terms of economic growth. We have measured it with the yardsticks of Gross National Product (GNP) or Gross Domestic Product (GDP). However, the appropriateness of GDP as an indicator to measure the economic well-being of a nation is being questioned, due to its inability to measure the real state and quality of all aspects of life of the people and of the nation.

Lately, we have seen some more holistic approaches to this being applied by certain countries. Bhutan for example, employees an indicator called gross national happiness (GNH), to measure their economic condition and well-being. It places a great importance on preserving the nation's ecological heritage. Some discussions are also underway in India, to develop and ease of living in debts, which is aimed at measuring the quality of life and sustainability, as well as economic health. Thus, it measures the all aspects of lives that people truly value.

If we approach national growth from a holistic perspective, I emphasise that it should encompass the sum total of human growth of our country. I would like to quote Article 27(1) of the United Nations Convention on the Rights of the Child to substantiate my point. It states that, "States parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." This provision truly embodies the concept of holism. In this holistic sense, I believe that national growth should represent, reflect and epitomise the total human personality development of its citizenry in five domains; physical, mental, spiritual, moral, and social. The dangers of placing sole or excessive emphasis on physical development and ignoring the mental, spiritual, moral and social dimensions will in the long run cause serious harm to national growth and society as a whole. It will also post unprecedented challenges to the security of a nation. While fostering national growth based on interconnectedness and interdependence of all aspects of national life, we must remember that this must include the most

vulnerable, the marginalised and the impoverished. The national growth of a country has no meaning if it fails to fulfil the basic needs of the poor and the marginalised. In other words, holistic approach to national growth must not leave anyone behind and should not be driven by the exclusive needs of the most powerful and wealthy in our nation.

The holistic approach to national growth also means caring for the earth. It means preserving and fostering our biodiversity; the seeds, soil, water resources, the fauna and flora, and clean air. It means above all that we should not engage in selfish exploitation of nature's wealth. This will simply endanger our existence and the existence of all the other species. The holistic approach to national growth also demands that we put an end to corruptions, wastage and the misuse of the nation's resources and worth, and instead ensure their more equal distribution for the well-being of all Sri Lankans.

Turning to the term 'security' in a simplified way, it can be defined as activities involved in protecting a country, building or a person against attacks, danger, threats, etc. In the common parlous, we anticipate a threat, a danger or an attack from an enemy within or outside the territorial boundaries of a country. In the presentday context, is it appropriate to confine the definition of security to this narrow domain? Specially, considering the security, the so-called security challengers caused by the fourth industrial revolution, namely the 'internet revolution' and also the new normal precipitated by COVID-19 pandemic. When approached from a holistic perspective, security cannot be taken in isolation and in a fragmented sense. On the premise that all phenomena are interdependent and interconnected, security too is very much intertwined with national growth and cannot be separated.

For a nation to thrive security approach from a holistic perspective should embrace physical security, psychosocial security, digital security and I would also add ecological security, specially in the COVID-19 pandemic context. I might add that all nations are now completely interlinked and national security cannot be considered without considering international and global security. Does not holism take us in this direction?

I would like to recall that we are a nation that has lived with a 33 year long war and two insurrections in the south. Although we have overcome three major violent encounters, the war that we had been waging against each other, decade after decade, generation after generation, continues in our hearts and minds. I would say the Sri Lankan psyche, we are entangled in memories, stories, opinions and views about what happened in the past. We are engaged in an unending ongoing dialogue with ourselves and others, justifying our hostile reactions and unable to comprehend the way to transcend our collective suffering and look beyond.

We have failed to understand that our hatred, anger, fear and ill will against each other have contributed to our collective suffering. As a nation, we need to investigate our collective suffering; the Sri Lankan wounded consciousness, hateful consciousness, egoistic consciousness, and dominant consciousness without blaming and accusing each other. This collective, wounded, hateful, egoistic and dominant consciousness has unfortunately set into every aspect of our life be it public or private. This I consider as the biggest security challenge that we are facing at this critical hourand also, the biggest stumbling rock in achieving the vision of the present government, "Vistas of prosperity and splendour". From a holistic

approach, if security is to be a progressive contributor to individual and national growth, while upholding the rule of law, equal application and equal protection of the law, the entire security apparatus should contribute towards physiological and psychosocial security of our people and eradicate fear, anxiety, freight, alarm, panic from the hearts and minds of our Sri Lankan consciousness.

When talking about the holistic approach to national growth and security, I would like to refer to Singapore, which became a first world nation from a third world nation within just one generation. Singapore has come a long way since independence, and throughout its economic progress, the governments of the date reiterated their commitment to promote a gracious society. Addressing the 1996 national day rally, then Prime Minister Goh Chok Tong emphasised that Singapore should develop its economy, but that economic growth should be complimented with personal development and embrace social graces. The Prime Minister further stated that, we need to go beyond economic and material needs and reorient society to meet the intellectual, emotional, spiritual, cultural and social needs of their people. On the eve of the national day of Singapore in 2012, Prime Minister Lee Hsien Loong emphasised that, improving hardware like new housing, flats and more metro train lines is just one aspect. He said, strengthening our heartware traits such as mutual respect, care and compassion meritocracy and integrity is more important.

Mr. Lee highlighted that Singapore's aim is not about being a wealthy and modern society. He said just as important is nurturing a society that is caring. The reflections of the prime ministers of Singapore amply demonstrate that hardware; economic growth and infrastructural development should go hand in hand with heartware; growth in personal development and social values. As we celebrated the 150th anniversary of Mahatma Gandhi this month, I would like to end my speech with three quotes by Mahatma Gandhi. The first quote by Mahatma Gandhi beautifully captures the importance of individual growth vis-à-vis material growth. "Historically we are a country that has proudly spoken of a cultural heritage that had struck a balance between material growth and individual growth from a holistic perspective. The concept of 'Dhanyagara'; land of plenty, 'Dharmadhweepa'; land of righteousness amply speaks of this cultural heritage. Mahatma Gandhi believed "real wealth is in people, not in gold or silver and the true veins of wealth are in flesh". He said that the final consummation of all wealth is in producing as many as possible the most number of full breathed, bright eyed, and happy hearted human beings". The COVID pandemic has taken us back from the globalization drive that we embarked upon in 1977. I think it is putting us on a new dual carriage way called 'Glocalization' which reminds us to value more what is local and more sustainable, both in terms of people and land. In this connection I would like to share the second quote by Gandhi. He said, "I do not want my house to be walled in all sides and my windows to be stuffed. I want the cultures of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any". Finally, I would like to share this quote that has some bearing on the security that we are talking about. Mahatma Gandhi said, "I have three enemies. My favourite enemy, the one most easily influenced for the better, is the British Empire. My second enemy, the Indian people, is far more difficult. But my most formidable opponent is a man named Mohandas

Karamchand Gandhi. With him I seem to have very little influence."

Thank you very much for your beautiful presence at this conference.

Thank you.

The Need to Strengthen the Legal Framework to Ensure Security Concerns

Rear Admiral (Retd.) Shavindra Fernando PC

Deputy President, Bar Association of Sri Lanka; Former Additional Solicitor General; Former Judge Advocate General, Sri Lanka Navy

Your Lordship the Chief Justice, Justice Kodagoda, Mohan Peiris, President's Counsel, former Chief Justice, Dr. Charika Marasinghe, ladies and gentlemen.

It is not a very envious task to come as the fourth speaker after three eminent and eloquent speakers have come and delivered very interesting speeches before me. However, I will try to live up to expectations. First of all, I must say I'm privileged to associate myself with the International Research Conference of General Sir John Kotelawala Defense University under the theme 'Holistic Approach to National Growth and Security'. I'm thankful to the Vice Chancellor, Major General Milinda Peiris and the organizing committee for inviting me to be a speaker of the plenary session in law to be held under the theme the Role of Law in National Growth and Security. I have decided to speak on the topic 'the Need to Strengthen the Legal Framework to address Security Concerns'. Sri Lanka as you know is a developing country with a population of approximately 21.8 million, bearing a gross domestic product or GDP per capita of 3852 USD in 2019.

After the conclusion of the war which plagued the country for 30 years, Sri Lanka experiences an economic growth at an average of 5.3% from the period of 2010 to 2019. Although national growth has slowed down in the previous years, Sri Lanka repurposed its peace dividend after the end of this war towards reconstruction and further growth. In the five-year period from 2009 to 2013, which was the period immediately after the end of the 30-year-old war, the economy grew at an annual average rate of 6.5%. It was particularly impressive in the three years after the end of the war recording a GDP growth of 8% to 9.1% showing continued high growth trajectory. However, this momentum broke with growth declining substantially to 3.4% in 2013. During the five-year period from 2014 to 2018 the average annual growth increased to 4.2%. Moreover, growth had continued to moderate since 2015 ending with 3.2 growth in 2018, the lowest in 16 years. Due to the economic impact of the Easter Sunday attacks in April 2019 growth was expected to be 3% or less in 2019. However, Sri Lanka managed to return to a sense of normalcy by stagnating at 3.7%. After an average growth of 2.3% in 2019, economy contracted down to -1.6% in the first quarter of 2020. This decline, a first in 19 years, was driven by weak performances of construction, textile, mining and tea industries. This is due to the COVID-19 health crisis which impacted economy's activity severely since the first quarter of the year. High frequency indicators suggest the growth has faltered in the second quarter, as curfews island wide impeded in economic activity and global demand remain weak. Moreover, the closure of airports to tourists between April and September brought tourism activity to a standstill. Why I went through these statistics was to show that a security situation or a national disaster could have severe consequences to the national economy or to national growth.

Ladies and gentlemen, the security of a state is one of the prime responsibilities of a government towards its people. It is in this context that under our Constitution, the President of the Republic is the Commander in Chief of all Armed Forces. He has unfettered discretion and power of appointing the commanders of the armed forces. Under article 33 (2) (g) of the Constitution President has power to declare war and peace. Under article 33 (a) the president shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law including the law for the time being relating to public security. In a Supreme Court Determination SC Reference 2 of 2003 five judges of the Supreme Court including Chief Justice Sarath N Silva, held inter alia "we have to express our opinion accordance with the Constitutional determination made by bench of seven judges of this court that executive power being a component of the sovereignty of the people including the defence of Sri Lanka is reposed and exercised by the President and any transfer, relinquishment or removal of such power from the President will be an alienation of sovereignty which is inconsistent with Article 3 read with Article 4 being entrenched provisions of the Constitutions".

In the same determination it was further held, and I quote, "those powers including the checks and balances have to be exercised by the respective organs of the government in trust for the people for the good governance of Sri Lanka and the establishment of a just and free society as laid in the Directive Principles of State Policy contained in Article 27 (1) of the Constitution. It is in this background that we state the opinion of this court in terms of Article 129 (1) of the Constitution in respect of the first question in the reference, that in terms of the several articles of the Constitution analyzed in this opinion and upon interpreting its content in the context of the Constitution taken as a whole, the plenary executive power including the defence of Sri Lanka is vested and reposed in the President of the Republic of Sri Lanka. The minister appointed in respect of the subject of defense has to function within the purview of that plenary power thus vested and reposed in the president.

So, the Constitution gives that power to the Head of State, the President of the Republic, because of the importance of security of the state. National economy and national growth are largely dependent on the security and stability of a nation. In Sri Lanka, our economy is dependent largely on tourism and foreign investment. Those are not the only factors but those are two key factors. Before a person could decide to make Sri Lanka his or her tourist destination or where a foreign investor is considering investing in Sri Lanka, one of the primary concerns would be the security and political stability of the country. In the event that either a prospective tourist of foreign investor is not satisfied with the security and the political stability of Sri Lanka it can be rest assured that he would rather choose another destination for his travel or investment. Therefore, the security of the state has a huge impact on the economy of a country and thereby the national growth of the country. It is pertinent at this stage to consider if there are adequate laws to ensure that there is security, and law and order in Sri Lanka. While in a general context, the existing laws are considered sufficient to meet ordinary law and order situations, what needs to be examined is whether existing laws are sufficient with regarding to dealing with a situation of terrorist attacks or economic attacks which maybe aimed at high political targets or economic targets. In both these

instances in the event of such an attack it could have severe consequences to the economy and national growth of the country. I will not endeavour to examine the normal penal laws that exist in our country which could cater to a normal law and order situation. During the last five decades Sri Lanka faced the following emergency situations.

The 71 insurrection, communal violence in 1978 and 1983, the insurgency during 1987 to 1990, over three decades of terrorism up to 2009 and the Easter Sunday terrorist attacks of 2019. In all five situations mentioned above it was clearly established that the normal penal laws were grossly insufficient to control the law and order of Sri Lanka and the security of our country. The Public Security Ordinance which has been in existence since 1947 is one of the special laws that can be used during an emergency situation. Under the Public Security Ordinance, the President is empowered to declare a state of emergency and has the power to make regulations to ensure that the national security is not compromised. Such regulations can derogate from normal laws. Such regulations, although named regulations, constitutionally has the force of law. However, in the event the President declares an emergency he has to go before Parliament and the continuance of emergency would depend on the approval of it by Parliament. In addition, under section 12 of the Public Security Ordinance it empowers the President to call out the forces in any area where he feels there is a threat to public security in order to assist the police. With that the forces get police powers. The Prevention of Terrorism Act or the PTA which came as a temporary provision act in 1979 is now part of the permanent laws of Sri Lanka. The PTA is the only law available at all times, including during periods where emergency is not in force that could be used to deal with acts of extremism and/or terrorism or to prevent a threat of such acts. As such it is imperative to examine if the PTA is sufficiently stringent to cater to situations that could pose a threat to the national security of a country. One of the main drawbacks of the PTA is that offences as described in section 2 of the Act mainly deal with hostile acts against specified persons. 'Specified persons' is interpreted in section 31 of the Act and does not include ordinary civilians. In a present day context, where countries have to deal with international terrorist organizations that select civilian targets to achieve its purposes it is my opinion that the PTA is grossly insufficient to control a situation where a nation comes under a terrorist attack or to subsequently convict and punish its offenders. During the period from 2015 to 2019, the then regime did not consider the security of the country as a priority. In facts steps were taken to repeal the PTA and draft a Bill named Counter Terrorism Bill which was a diluted version of the existing PTA. This subsequently came into public domain.

It is now public knowledge that the Easter bombings of April 2019 was made possible largely due to the then regime's lack of preparedness to deal with such a situation in which hundreds of lives were lost. It is pertinent to note that one of the reasons why the terrorists carried out such attacks was to get international publicity and finding Sri Lanka an easy target due to security not being given a high priority at the time. In this context, it is my view that strengthening the PTA or bringing new laws to strengthen the security of the country is of a paramount importance. For this purpose, after the Easter bombings, the Sri Lanka Bar Association set up a committee to study the existing PTA, the proposed Bill; Counter Terrorism Bill and to examine a fresh and recommend new amendments to

either to improve and strengthen the Prevention of Terrorism Act or to recommend new laws to curb terrorist acts. In addition, recently the Justice Ministry has appointed committees to look into amendments required to the existing civil, criminal and commercial laws. Therefore, it is my view that it is imperative that reforms to the existing PTA should be prioritized. In conclusion, I am of the view that if we are to look forward to a growth in our national economy and national growth it is imperative to strengthen our legal framework to ensure not only the security concerns but also to ensure that foreign investors or tourists as the case maybe feel that Sri Lanka offers a safe and secure climate, a safe environment for them to confidently choose Sri Lanka as one of their destinations for investment or tourism.

Thank you ladies and gentlemen.

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Technical Sessions

Technical Session 1: Session Summary
Session Theme: Expanding the Horizons of Commercial Law for National Prosperity

Session Chair: Dr. Chathura Warnasooriya

Technical Session I on Law was held on the sub theme of 'Expanding the Horizons of Commercial Law for National Prosperity' and the session was chaired by Dr. Chathura Warnasooriya. Dr. Warnasuriya holds a Ph.D in Law from Brunel University London and an LL.M in International Trade Law from the University of Wales Cardiff's Institution. Whilst practicing in all areas of general commercial litigation, Dr. Warnasuriya has worked as an Associate at Global Solicitors, Wembley in the United Kingdom. He possesses experience in international business and commercial negotiations in countries across the Europe. His expertise is broadly in the areas of Corporate and Commercial laws, with particular emphasis on International trade finance. He is also an Attorney-at-Law of the Supreme Court of Sri Lanka with over 18 years' experience as a legal Counsel. He holds and has held a number of visiting academic appointments and has authored several works on Commercial and International Law. He is intensively involved in International fora and has given presentations and reports on contemporary legal issues at law symposiums held in many countries.

The first presentation was a co authored research papaer titled "Intellect Eclipsed": An Analysis of the Unconscious Bias and its Impact on the Development of Intellectual Property Law by Hasini Rathnamalala and Padmaja Wijesooriya. Their main objective of the research is to analyze the historical development of intellectual property law and its contemporary challenges in light of the feminist jurisprudential interpretations.

Second presentation was on Contracts Formed During Frustrations and Force Majeure: An Anti-Crisis Shield for Consumer Protection against Boilerplate and Limited Liability Clauses by SM Anuruddika G Senevirathne. Her main finding was the legal error in application of force majeure and frustration principles on contracts formed during impediments

RMRKK Rathnayake presented her research on The Effectiveness of the Piercing of Corporate Veil under Sri Lankan Law: A Comparative Analysis with UK. Her research was an evaluation of the adequacy of Sri Lankan statutory provisions and case laws regarding the corporate veil piercing doctrine compared to the UK jurisdiction

Co authored research paper was presented by YP Wijerathna and BKM Jayasekera titled Legal Implications of COVID-19: Force Majeure and Contractual Obligations in International Sale of Goods. Main concern of their research was the unprecedented circumstances led by this pandemic pertinent to the liability for failure to fulfil contractual obligations in international commercial contracts.

Research presentation on 'Copyright Protection of Application Programme Interfaces: An Analysis of the Sri Lankan Position' was the final presentation of the technical session I. She discussed about the necessity of legislative intervention to address the IP issues on software industry and other businesses reliant on APIs.

Paper ID: 418

"Intellect Eclipsed": An Analysis of the Unconscious Bias and its Impact on the Development of Intellectual Property Law.

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Abstract: The main objective of the research is to analyze the historical development of intellectual property law and its contemporary challenges in light of the feminist jurisprudential interpretations. The secondary objective is to examine the probable links between the areas in intellectual property law such as copyrights law, patent law and application of the relevant theoretical paradigms of feminist legal theory. The research methodology is based on the exploratory research design, adhering into the legal research methodology, which is mainly on library-based secondary data review. The outcome of this inter-disciplinary research is a policy paper to recognize the dynamics of historical discrimination in order to overcome the contemporary challenges in gendered areas of intellectual property law.

Keywords: Intellectual Property Law, Copyrights Law, Feminist Legal Theory

I. INTRODUCTION

Intellectual property law(Herein after referred to as IPL) is recognized as creating exclusive rights in a wide and diverse range of things from novels, computer programmes, paintings, films, television broadcast, and performances, through to dress designs, pharmaceuticals, and genetically modifies animal and plant organisms. Intellectual property law also creates rights in the various insignia that are applied to various goods and services, from 'FUJITSU' for computers and to 'I CAN'T BELIEVE IT'S NOT BUTTER' for margarine. We are surrounded by and we constantly interact with the subject matter of intellectual property law. For example, you are reading a copyright work bearing the Oxford University Press trademark. You are sitting on a chair protected by design rights and marking the book with a pen the mechanism for which has, at some stage, been patented. Alternatively, you may be typing notes into a computer, which no doubt has parts (such as the mouse) that are protected by patents and design rights. (Bently and Sherman, 2014)

On the other hand, feminist legal theory (hereinafter referred to as FLT) could be recognized as one of the main jurisprudential schools of thoughts in legal philosophy. As Minow and Verchik points out it is not as easy task; precisely to point out the exact starting point of FLT from world history. (Minow and Verchik, 2016) Feminist legal theories emphasize the role of law in describing society and in prescribing change, while other types of feminist theory might de-emphasize or even question the role of law in these areas (Minow and Verchik, 2016). Feminism has been described as a house with many rooms; theorists have offered various ways to analyse these chambers or schools of feminist theory. As they describe the world has been shaped by men (who possesses larger shares of power and privileges) women and men should have political, social and economic equality.

This research focuses on the link between IPL and FLT. While IPL providing legal protection aesthetic and scientific works by authors, FLT focuses on guaranteeing equality between men and women in areas such as

employment, family relation, right to participation in public life and political participation. Historically women did not enjoy right to participation in the democratic process or economic and social life and it indicates in the concept of women in IPL, in areas such as copyrights law, Patents and Trademark laws.

Considering the above, the authors willing to discuss on the IPL and its relationship with FLT.

II. GENERAL INTERPRETATIONS BETWEEN INTELLECTUAL PROPERTY LAW AND FEMINIST LEGAL THEORY

Intellectual property scholarship and feminist epistemologies have proceeded upon parallel but unconnected tracks. (Halbert, 2006) Feminist scholars rarely, if ever, mention the words copyright, patent, or intellectual property; intellectual property scholars rarely, if ever, appeal to feminist interpretations to better understand the law. (Halbert, 2006) As indicated above, it should be noted that IPL's basis is "new knowledge" and FLT is based on the concept of equality between genders. In this research, the authors focus on the analysis of the foundation of theories in IP law and its impact on each other. For example, there is a link between equality and social construction on genders as accepted in FLT. On the other hand, IPL's basis, "new knowledge" It should be analysed in the gendered assumptions of FLTs in light of new knowledge and ownership-based creations of literature, science and aesthetic areas.

The construction of culture, knowledge, science, politics, and public life as masculine is premised upon the public/ private distinction significant in understanding the traditional place of women in the world. (Halbert, 2006) It is one of the prominent underlined theories in FLT. Further, FLT within the discourse of jurisprudential theory argues that substantive equality could not persist as long as the society applies women the male standards and concludes it is equality. Feminist historical analysis suggests that women were systematically excluded from sites of production, and, as assorted crafts became masculine territory, women were not given the opportunity to develop knowledge in those fields. (Halbert, 2006) This could be understood in light of certain FLT arguments and gendered assumptions on woman's role in the society. For example, in the peak of the industrial revolutionary years, women's role mostly limited as 'home-makers' or 'primary caregivers' while men were the 'bread winners'. (Cook and Cusack, 2011) In the above scenario, even the concept of Aristotelian Sameness theory could be prevailed to some extent, as Halbert correctly points out above, women were not in a position to contribute freely and openly in male constructed social and cultural arena. Women historically have been shut out of the industrial system of knowledge production, a system that takes place in factories, laboratories, and research institutes. (Halbert, 2006)

III. COPYRIGHTS LAW AND APPLICABLE PRINCIPLES OF FEMINIST LEGAL THEORY

Copyrights law is one of the major areas in IPL. Copyright is the term that used to describe the area of intellectual property law that regulates the creation and use made of a range of cultural goods such as books, songs, films and computer programmes. (Bently and Sherman, 2014) Copyrights law could be defined as The rights specified under the statute include the exclusive right of reproduction, the "copy" right, as well as exclusive rights to distribute, publicly perform, publicly display, and adapt protected works. (17 U.S.C. § 106, 2005).

Over the past century it has been the focal point of anxieties over law's ability to adapt to new technologies. Copyright law determines the number of literary and artistic

copies that created by the author. Our post-industrial era is marked by rapid technological changes in which our ability to reproduce and receive information grows exponentially. (Joyce, 2013) Many of our grandparents witnessed the development of the television as a novel feature and communication through cables and satellite would belong to a hazy future. Despite the cable and satellite communication, today, we are linked to digital era where experiencing the physical distance to carry texts, images, and sounds with startling ease and rapidity. (Joyce, 2013)

As elaborated by feminist legal theorists, women were perceived as homemakers. Hence knitting and cookery were considered as essential elements in their stereotypical gendered roles until recent. Therefore, traditionally, cooking recipes and the knitting patterns, quilts designs were shared from generations to generation or from county to country without any copyrights protection. However, in the commercial world, knitting and cookery as a trade lead significantly by men as major income generating sources. Cookery books and knitting books are currently copyrights protected and considerably expensive. It is a noteworthy example on male construction in the area of copyrights. Especially it is a generalization of women's contribution as recognized by societal norms such as caring and nurturing nature goes without monetary value.

Halbert is one of the prominent authors in the area of gendered aspects in American copyrights law and she argues this issue in several important ways. Firstly she connects the social construction of gender to copyrights law. Theoretically speaking, women stand outside, or on the periphery of, masculine creation. If creative work, either scientific or artistic, is to be protected legally, it will on balance be the work of men. (Halbert, 2006) If the very construction of knowledge that is the basis for claims to copyright and patent protection is gendered, then what is protected is the outgrowth of a gendered system rendered invisible until a feminist lens sheds light on the politics of this otherwise "neutral" construction. First, a feminist epistemology can be grounded in an examination of craft labor done by women. (Halbert, 2006) Craft labor focuses on labor performed by women involving "caring" -- the labor of the hand, brain, and heart. (Halbert, 2006) Masculine knowledge exists within a capitalist mode of production, dividing subject from object and knower from the known. What men do for recognition, women do for love. (Halbert, 2006) A masculine social construction of knowledge means that women and men primarily participate in an already determined system framed by masculinity. (Halbert, 2006).

Secondly, the author focuses on the historical developments in gendered aspects in printing phases of creations/authorships under copyrights protection. As the legal history and philosophy indicates, women's abilities in tradable areas were not recognized similarly to those of men. This was a famous realism in the male-dominated printing presses during the pre-world war II era that female authors were ousted. To remedy this, feminists started the printing presses on their own. The aforesaid phase in the world history is indicated by Halbert as the publishing industry has traditionally been male dominated and has led many feminists to seek alternatives to the mainstream publishing system. The most popular of these early feminist presses, The Woman's Press, was forced to create new distribution channels after being vilified by the mainstream male-dominated publishing industry. Feminists wishing to publish in the late 1960s and early 1970s met similar resistance to those writing in the early twentieth century. (Halbert, 2016)

Not only the area of printing but also the whole concept of authorship was gendered in

certain areas, for instance, the author of the famous "Mill on the Floss" Mary Ann Evans used the pen name George Eliot to write her novels in a time when female novelists were seen as only romantic authors. Mary Ann wanted to be taken seriously therefore appeared as a male-author to overcome the societal norms on then-female authors (Hughes, nd).

IV. PATENTS LAW AND FEMINIST LEGAL THOERY

Patents could be defined as a limited monopoly that is granted in return for the disclosure of technical information (Bently and Sherman, 2014). It is our primary policy tool to promote innovation, which encourage the development of new technologies, and increase the fund of human knowledge (Burk and Lamely, 2003). To accomplish this end, the patent modelled to creates a general set of legal rules that govern a wide variety of technologies.

The authors utilize this part of the research to denote the contemporary challenges in gendered aspects in patent law practice.

As indicated by Hagen, based on an empirical research published on the legal practice on the theme, "Essay on Women and Intellectual Property Law: The Challenges Faced by Female Attorneys Pursuing Careers in Intellectual Property", based on the author, it was indicates that less female lawyers are involved in the litigation process in American intellectual property law, particularly patent law. As indicated by the above research, bachelor's degree and proof of scientific and technical training equivalent to that received for a bachelor's degree in one of the recognized technical fields is needed to qualify to patent litigation in American patent litigation. Though it is not required everywhere in patent litigation, women in technological and technical sectors are less recognized. The same issue applies universally for women in many fields including attorneys engaged in litigation too.

V. LITIGATION AND FEMINIST LEGAL THEORY

Legal practice has been recognized in gendered parameters universally since its beginning. Internationally women were allowed to study law and enter the bar relatively after a long time to that of men. Pursuing legal education and a career, especially in the legal practice were influenced by perceptions and societal norms regarding women. (Mendis et. al., 2008) This affects inevitably on the IPL practice.

Further, the litigation process of IPL itself denotes the gendered dimensions. As indicated above in Hagen's research "Essay on Women and Intellectual Property Law": The Challenges Faced by Female Attorneys Pursuing Careers in Intellectual Property, a case study based on Sandra, a five year intellectual property litigator, Hagen indicates that there are still many obstacles for women as Sandra (the interviewee) puts it, "dare to trespass" into the former boys' club of intellectual property litigation. Further Hagen adds a model (Rosenthal, 1974) for a client and lawyer relationship in Intellectual Property Law as client is on equal status with the attorney and participates actively in the professional relationship for a more satisfied client.

As the outcome of the above research carried out by Hagen, This type of interaction is favoured by the trademark attorneys who were interviewed, and may be an additional factor explaining why there are more female trademark attorneys and why there are fewer female intellectual property litigators. This aspect of trademark law fosters an atmosphere in which the attorney and the client work together to achieve the same goal. In light of the Hagen's empirical survey, this part of the research indicates that though it is a different jurisdiction, the outcome is

applicable beyond borders as it is very apparently applicable in intellectual property litigation universally.

VI. CONCLUSION

Based on the above discussion, with three main findings on feminist interpretations on intellectual property law authors entail in their concluding observations.

Social construction of gender, unequal bargain power in political relations and its institutional application were also common in the area of intellectual property law. Specifically in the areas of copyrights law, the historical discrimination as indicated above undermined females as authors and traditional knowledge bearers.

Secondly, this reality has made an impact on women's litigation in current IPL related practice such as in trademarks and patent laws. The technological knowledge-based barriers as well as socially constructed gender roles in legal practice made a negative contribution in this regards. Further, this phenomenon could be described and termed as an "unconscious bias" Unconscious bias is a single term used by Justice Ruth Bader Ginsburg to describe generations-long societal attitudes on gender roles. However; its impact on female litigators is irreparable.

Thirdly, to overcome the above contemporary challenges in the area of intellectual property law, these historical discrimination and the contemporary challenges such as "unconscious bias" should be taken to the limelight in order to eliminated further discrimination and for the betterment of the future of intellectual property law as whole.

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Paper ID: 378

Contracts formed during Frustrations and Force Majeures: An Anti-Crisis Shield for Consumer Protection against Boilerplate and Limited Liability Clauses

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Abstract – All productions and consumptions are outcomes of various contracts between producers, intermediates (whole-sellers, retailers, brokers, dealers, suppliers) and consumers. In a force majeure or frustrating situation barging power and freedom of contract drastically get altered and curtailed for consumers comparative to superior position of intermediaries due to rattle in economy. Such impediments provide ideal opportunity for them to include various exemption and limited liability clauses in contracts especially for standard form consumer contracts victimizing inferior consumers leaving no choice other than consenting to such contracts. This paper looks at primarily the legal validity of application of force majeure and frustration principles on contracts formed during such impediments. Secondly, study examine how consumer contractual rights were altered and curtailed by intermediaries through boilerplate and various limited liability clauses during force majures and frustrations plus their legal implications. Study discussed and reflected the gaps and laps in domestic laws in such frustrated and force majeure situations comparative to Polish and Singaporean laws. Research findings affirmed the legal error in application of force majeure and frustration principles on contracts formed during impediments. Further, it was highlighted that domestic consumers encounter comparatively higher legal risk than the Polish and Singaporean consumers on such scenarios and emphasised the vitality of strengthening domestic consumer protection legal framework to remedy the same.

Keywords - **contract, frustration, force-majeure, boilerplate-clauses, limited-liability-clauses**

INTRODUCTION

The entire social fabric is a web of various and diverse contracts among different parties. Thus, under impediment like frustration or force majeure situation wide range of contracts get affected comparative to ordinary cause of business. Out of which sales of goods contracts becomes the foremost common, significant and indispensable form of contract that becomes crucial for everyone in everyday life as well as exposed to a greater risk relative to other forms of commercial contracts in such impediments. Besides, their necessity becomes clearly apparent especially in frustrated and force majeure crisis. Thus, real robustness of the contract law is effectively able to test in such force majeure and frustrated situations to determine whether it is necessary to recalibrate the existing doctrines or to develop new laws. Similarly, contract is a law based on the foremost notion of freedom of contract. Thus, governing law of contract is basically depend on the intension of parties and rule of construction or how contract was primarily constructed. Any contract stems and sustain through transactions and relationships between two or more parties. In a frustrated or force majeure situation such transactions and relations encounter drastic alterations comparative to normal sales of goods contract due to rapid reformations made to business models and also due to formation of remote contracts rather than entering contracts through ordinary mode of meeting face-to-face. Hence, most of the time contacts formed during force majeure or

frustrated context, contracting parties becomes strangers instead of known parties. This becomes especially common and evident in

most crucial sales of goods contracts such as food, pharmaceutical and hygiene product related consumer contracts due to their nature of essentiality and scarcity on such conditions. Generally upon such market conditions consumer demand for essential goods will arise while the production and supply of the same will get slowdown and disrupted significantly due to endless predictable and unpredictable causes such as closing of production entities, inaccessibility to raw materials and workers, logistic and delivery issues both domestic and international (imports and exports), problems pertains to harvesting and production, due to perishability of such items, storages and inventory limitations, etc. Simultaneously, the same said reasons confer extraordinary bargaining power on sellers and other intermediaries to dictate both conditions and warranties on such sales of good contract by drastically curtailing buyers' freedom of contract leaving either less or no choice for them.

Correspondingly, the recent COVID-19 impediment upended global consumer landscape and confinement measures forced consumers to shift to online purchases. This move further exacerbated elderly and low-income consumers' behaviour while resulting online scams seek to take advantage of the crisis. E.g. Between the period of January 2020 to mid-April 2020 Federal Trade Commission of United States received more than 22,000 consumer complaints about COVID-19 related frauds which amounts over USD 22 million worth consumer losses (The Organization for Economic Co-operation and Development, 2020).

As a common practise on such impediments, contracts already formed prior to such situation tends to rely on two major principles namely frustration and force majeure. Nonetheless, contract law has overlooked the application and legal implications of said two principles for

contracts formed during such impediment. Once Lord Justice Denning stated, it is not possible to expect from contractual parties to have 'foresight of a Prophet, or his lawyer with the draftsmanship of a Chalmers' but contrary Justice Viscount held that fate of contractual parties depends 'on the construction of contract' and denied the role of court on imply terms 'what is just and reasonable' into a contract. This controversial approaches in contract law in ordinary sense get further worst for the contracts that are formed during an impediments due to the question of applicability of the said principles of frustration and force majeure.

II. RESEARCH PROBLEM

Contract law based force majeure clauses and common law principle of frustration are the two predominant fundamental principles available for a contract on impediment either to absolve contractual obligation and liabilities of sellers and others intermediaries. Further, such impediments sets the landscape to deploy unfair commercial practise through restriction and curtailing consumer freedom and rights reference to terms of contract.

Although there are heap of literature and case laws pertains to the aforementioned principles with respect to contracts formed either pre or post impediment situations, there is a serious lacuna in both domestic and international laws on their applicability for a contract formed in the cause of an impediment. Thus, this study specifically focused on the research problem of legality in application of common law principle of frustration and contract law principle of force majeure for contracts formed during an impediments and their legal implications especially on consumers at large. Accordingly, four research questions were formulated 1) Does application of contract law principle of force majeure to a contract formed during an impediment is legally valid? 2) Does application of common law principle of frustration to a

contract formed during an impediment is legally valid? 3) How does application of contract law principle of force majeure and common law principle of frustration affect on consumer contracts during an impediments? 4) What is the legal applicability of principles of force majeure and frustrations to contract during impediment in Sri Lanka comparative to Polish and Singaporean laws and what are the recommendations suggested for domestic legal reforms. Thus, objectives of this study is to 1) Examine the legal validity of applying contract law principle of force majeure to a contract formed during an impediment 2) Examine the legal validity of applying common law principle of frustration to a contract formed during an impediment 3) Explore and assess the legal implications of application of contract law principle of force majeure and common law principle of frustration on consumer contracts during an impediments 4) Compare and contrast the legal applicability of principles of force majeure and frustrations to contract during impediment in Sri Lanka comparative to Polish and Singaporean laws to make recommendations for domestic legal reforms.

III. METHODOLOGY

This is a qualitative comparative research based on critical analysis of domestic black letter law comparatively with Polish and Singaporean laws buttressed with empirical methodologies. Data gathered primarily through national and comparative legislations, case laws, directives and regulations made by respective jurisdictional statutory authorities. Those were further strengthen with peer reviewed law journals, books, contributions and reviews made by professional experts of contract and commercial law areas. Research was mainly restricted to contracts formed in the cause of impediment and to the application of frustration and force majeure principles in such contracts. The key limitation of the study is the absence of both domestic and international case law and research literature pertains to the main research problem.

IV. RESULTS AND DISCUSSION

Principle of Force Majeure

In a situation of impediment, party can rely first on the force majeure clause if the formed contract comprised of such a clause. The word force majeure derived from French law which means irresistible super human or superior force and typically these clauses refer as 'acts of god' such as floods, fire, hurricanes, earthquakes, tsunamis, and similar situations like sudden and unforeseen lockdowns, curfews lasted for a certain period of time due to pandemic or epidemic diseases and other acts of man which are disruptive and unforeseen such as industrial actions, strikes, insurrections, riots, explosion and wars[1] which are beyond the control of parties to contract. Therefore, force majeure is an event or situation which is unforeseeable (at the time of formation of contract), unavoidable and impossible to overcome by the parties to a contract[2]. Under English law, there is there is no blanket definition for force majeure rather it was left for parties to define exactly what they consider to be force majeure in particular under a given contract. Hence, force majeure clauses should set out a list of matters that qualify under force majeure, with an explanation of contractual consequences along with specific conditions and exceptions. As stipulated by such clauses either one or both parties to contract will entitle to excuse or suspense of performance of whole or part of the contract upon the occurrences of certain specific acts, events or circumstances that are reasonably beyond the control of parties to contract. Additionally they will not become liable for failure to perform their obligations as articulated by the contract. Consequently, due to the draconian effect of the doctrine unduly onerousness and expensiveness does not mount to impossibility

[1] Gupta, H. (2020) Force majeure and frustration of contracts in Covid-19 emergency, Oireachtas Library and Research Services,1-8

[2] McDermott, P. A & McDermott, J.(2017) Contract law, 2nd ed. Bloomsbury Professional, Dublin,21

of performance of contract and does not absolve parties' obligations and liabilities under such force majeure clauses. Thus, under temporary force majeure will suspend the performance of contract while the definitive force majeure will either lead to cancel or terminate the contract. English law requires to satisfy number of conditions like causation between force majeure and performance of contract, mitigation efforts, notice of requirement and consequences of establishing force majeure event etc. Moreover, as a common practise courts interpret such clauses strictly.

Principle of Frustration

On the other hand in absence of such force majeure clause in a contract common law principle of frustration coming to force. English law doctrine of frustration becomes applicable where performance of contract becomes impossible, illegal or fundamentally or radically different than it was intended at the time of formation of contract due to non-faulty of contractual parties. Cases based in frustration broadly falls in to three subcategories; impossibility of agreed performance, impossibility of resulting the mutually agreed purpose of the contract and significant change in to mutually agreed state of affairs. Upon the successful proof of frustration, it will automatically discharge all obligations of the contractual parties by immediately terminating the contract without any further steps. In circumstances where total failure of performance of contract taken place due to frustration, court most likely to order to return money what has already been paid.[3] Whereas, in partial frustration, such order only available when court deem where part of the contract mounts to a separate contract.[4] Due to the assigned high hurdle of establishing "impossibility of performance" to avoid open the flood gates under such claims, court shows resistance to invoke this doctrine in a normal contractual context.[5]

Similarly, actions and decisions of state and public authorities trigger change of ordinary law in such frustrating and force majeure situations tend to create opportunity for intermediaries including sellers of the supply chain of sale of goods to use the prevailing condition to make use for unjust enrichment specially through inclusion, alteration and exclusion of certain terms to contract which are not possible or prohibited under normal cause of business.

Legality of Application of Principles of Frustration and Force Majeure for Contracts Formed During Impediments

Generally frustration does not require any explicit provision in the contract. However, contract does not mount to frustration if a valid contract term deals with the said or similar situation and parties have foreseen or have applied their mind to the frustrating event at the time of formation of the contract. Similarly, force majeure clause only enforceable where the said event or impediment is external, unpredictable, irresistible and inevitable. Thus, principle of frustration and force majeure clauses becomes inapplicable where contractual parties have experience the frustration or force majeure and if they are reasonably aware of the level of control or outcomes of the said impediment and respective implications on the intended contract at the time of formation of contract.

Thus, application of principles of frustration and force majeure clauses become fundamentally questionable for a contract that formed during a force majeure or a frustration because those principles stipulate as exceptional provisions to normal contractual context which come in to force in an unforeseen extraordinary impediment situation to avoid the breach of contract. Thus, contracts formed

[3] Fibrosa vs. Fairbairn [1943]AC 32 HL

[4] Ringsend Property Ltd vs. Donatex Ltd [2009] IEHC 568

[5] Taylor vs. Caldwell (1863) 3 B & S 826; Ringsend Property Ltd vs. Donatex Ltd [2009] IEHC 568

during a frustration or force majeure such conditions mounts to the normal contractual context rather than an exception contrary their normal legal application. Therefore, two major remedies that are available for contracts that formed before or after a force majeure or frustration becomes rebuttable and fundamentally non-applicable for contracts formed in the cause of a force majeure or frustration due to four reasons; first, event or impediment exist at the time of formation of contract. Secondly, event or impediment have reasonably foreseen or experienced by the contractual parties at the time of forming the contract. Thirdly, contractual parties able to formulate their contractual terms inter alia reasonably to suit the special contractual condition considering available options and possibilities to cater or mitigate the said impediment and its consequences. Lastly the event or impediment contractual context becomes the normal contractual context for such contracts.

Contracts Formed During Frustration and Force Majeure and Consumer Protection During Impediment in Sri Lanka

There are three major legislations pertains to sales of goods and consumer protection in Sri Lanka; Sale of Goods Ordinance No.11 of 1896 (hereinafter SOGO), Unfair Contracts Terms Act No.26 of 1997 (hereinafter UCTA) and Consumer Affairs Authority Act No.09 of 2003(as Amended) (hereinafter CAAA). SOGO is the bedrock statute for sale of goods but provides little assistant to situations of force majeure or frustrations. Hence, all roads will leads to either force majeure clauses in consumer contracts or common law doctrine of frustration pertains to those contracts that are already formed prior and posy of such impediment. Following the Unfair Contract Terms Act of 1977 U.K., UCTA was formulated based on the notion of test of reasonableness to strike a balance between exemption, limited liability and boilerplate clauses mainly contain in consumer contracts to uphold consumer rights and consumer protection. But UCTA also neither contain any special provisions pertains to frustration or force majeure nor stipulate application of the said law related to frustration or force majeure conditions. Similar lacuna prevails in the CAAA. Hence, domestic sale of goods and consumer protections laws seriously lacks laws and regulations relates to frustration and force majeure conditions.

In a frustration or force majeure condition sellers may enter exemption, limited liability and indemnity clauses to safeguard self-interest while further including other abusive boilerplate clauses to standard form contracts to exploit consumer rights and freedom by means of ; (1) price gouging (2) pressuring the buyer to “take or pay” for the goods; where “take” specified the amount of goods delivered by the seller which differ to buyer ordered quantity or to “pay” the seller the penalty for full or partial non-acceptance of the delivered goods, (3) where seller failed to deliver the contractual goods and force the buyer to “cover” by the substitution offered upon sellers choice (4) instead of upgrading the quality of damage or defect goods with superior quality goods by replacing them with inferior quality goods through “degradation”, (5) refusal and restriction of buyer examination of goods before acceptance of the goods (6) inclusion of non-refundable payment terms, (7) unreasonable time frames for deliveries, (8) prohibition or restriction on consumer order cancelations, (9) providing incomplete and misleading information and advertising on goods and (10) refusal or restriction certain modes of payment for a buyer such as cash or credit cards etc.

Hence, lacuna in all three major statutes pertains to sale of goods and consumer protection on their applications and implications in the cause of frustration and force majeure, domestic unprotect buyers greatly felt to defend for themselves. Thus, present lacuna in domestic sale of goods and consumer protection laws often fall back in the

absence of an expression of contrary on intention by the parties by exposing consumers for greater domination and exploitation of the sellers and intermediaries especially during impediments.

Consumer Protection During Impediment in Poland

Polish law does not permitted to alter or curtail or to suspend obligations and liabilities enforced on seller or intermediaries in relation to consumers which are applicable under normal condition during frustration or force majeure even though it is difficult to fulfil them as usual. Similarly legislature enforced certain procedural measures such as; (1) to impose monetary fines for infringement of consumers' collective rights and interests or unfair use of contractual advantage[6] (2) regarding failure to comply with the obligation relates to maxim prices/price margins as stipulate by respective authorities empower to impose a fine and for repeated such failures to imposed a fine of ten percent of trader's preceding year annual turnover[7] during impediments.

Simultaneously, the Office of Competition and Consumer Protection established a special platform to report unfair commercial practises in terms of withdrawal[8], return, refund and exchange of goods and services on impediment. Also, due to the crucially of protecting small-scale businesses on such market vulnerability and simultaneously acknowledging their critical role amidst the impediment, those sole-traders whom does not acquire professional character legally declared and treated equivalent to consumers while temporarily reducing their regulatory duties for a tenure of one year.[9]But quazi-consumer protection measures were enforced through prohibition of abusive clauses, providing additional warranties for defects and granting right for consumers to withdraw distance contract within 14 days.

Consumer Protection During Impediment in Singapore

There are several statutes related to sale of goods in Singapore under normal cause of business; Sale of Goods Act (Cap.393 of Singapore), Supply of Goods Act (Cap.394 of Singapore), Unfair Contract Terms Act (Cap.396 of Singapore), Sale of Goods (United Nations Convention) Act (Cap.283A of Singapore), Misrepresentation Act (Cap.390 of Singapore) and Price Control Act (Cap.244 of Singapore). The Consumer Protection (Fair Trading) Act of 2009 (CPTFA) applies to most of the consumer transaction excluding sale for land and houses and prawn brokering. Section 2(1) of CPTFA defined the term "consumer" and it covers consumers' right to cancel regulated contracts[10], lemon law remedies for the consumer and suing the supplier for unfair practises[11]. The Consumer Association of Singapore (CASE) is the authorized agency to enforce consumer protection laws and The Competition and Consumer Protection Commission of Singapore (CCCS) administer and enforce CPTFA.

Singapore has no legislation on force majeure and COVID-19 (Temporary Measures) Act No.14 of 2020 (hereinafter CTMA) formulated to provide relief to certain scheduled contracts formed prior to 24th March 2020 to temporary freeze legal rights and obligations of contracting parties until the said the law is in force and

[6] Article 21 and 29 of Consumer Rights Act of 2014

[7] Article 106 of Competition and Consumer Protection Act of 2007

[8] Article 12 and 27 of Consumer Rights Act of 2014

[9] Article 62(1) of Anti-Crisis Shield Act 2020

[10] Regulation 2 of The Consumer Protection (Fair Trading) Act of 2009 - Regulated contracts referred to direct sales contracts, long-term holiday product contracts, time share contracts and time share related contracts

[11] Section 4 of The Consumer Protection (Fair Trading) Act of 2009 defines unfair practise.

permitting to proceed under original contractual context when the condition become under control. Thus, CTMA will not applicable to contracts formed or renewed after 25th March 2020.Therefore, in order to ascertain the relief provided under this statute it is vital to establish the the contract was formed prior to the impediment. Also, force majeure clauses and Frustrated Contracts Act (Cap.115 of 1959) revised in 2014 (hereinafter FCA) will prevail over CTMA. Hence, it is important to scrutinize the clauses in contract against the evidence available to determine whether non-performance of contract is occurred due to COVID-19 or otherwise. Hence, Singaporean law indirectly differentiated the contracts formed prior to impediment and contracts formed during the cause of impediment. Further, Singaporean laws laid the statutory remedies precedence order in an impediment.

Moreover, according to Section 5(c) of FCA, it becomes applicable for sale of goods contract other than Section 7 of the Sale of Goods Act (Cap. 393) specific goods that becomes perishable before the risk passed to buyer. The Alliance Concrete Singapore Pte Ltd vs. Sato Kogyo(S) Pte Ltd [12] decided that even though force majeure clauses were included in to commercial contracts as boilerplate clauses such clauses should interpreted in the their own wording and based on considering the difficulties encountered by the contract parties under the light to commercial law. Therefore, Singaporean both statutory and common laws were extended to grant better protection for the contractual parties in general and also specially for consumers at large.

Findings and Recommendations

Although modern consumer rights and protection originated in United State of America, Sri Lankan written consumer protection laws able to trace from 10th century onwards through Badulu Dem inscription.

(Amarawansa Thero, 1969). Despite the said history, comparative to the selected two selected jurisdictions prevailing domestic sale of goods and consumer protection laws by and large does not protect consumers/buyers especially under force majeure or frustrated contractual contexts and greatly felt to fend for themselves. Thus , it is necessary for legislature to intervene to control the inclusion of consumer abusive and exploitative various exemption, limited liability, indemnity and boilerplate clauses specially reference to standard form consumer contracts to uphold consumer rights and protection in general and particularly in impediment situations.

Further, it is essential to address the lacuna in present law pertains to frustration and force majeure conditions with appropriate and effective statutory enactments similar to Frustrated Contracts Act in Singaporean law and by assigning a priority order on laws pertains to force majeure and frustration to determine which should take precedence, freezing of existing contracts until impediment is under control, insertion of force majeure clauses retrospectively for pre pandemic contracts[13] etc. Correspondingly, application of sanctions like penalties for traders who breach consumer protection laws in impediment like Polish law will support to averse consumer victimization on conditions. Similarly, the options available under force majeure and frustration in normal cause of business for intermediaries able to get alter and increase under change of laws with government intervention on such pandemics[14] therefore it is

[12] Alliance Concrete Singapore Pte Ltd vs. Sato Kogyo(S) Pte Ltd [2013] SGHC 127

[13]Hutchinson, G. B. (2020) Is the Coronavirus outbreak frustration or event? Commercial Law Practitioner, 27(3), 42

[14] Stuttaford, S. & Renton, A. (2020) Managing commercial contracts during Covid-19 pandemic, Castletown law,1-3

vital to strike a balance between among producers, intermediaries and consumers in impediments. Furthermore, involving with respective global consumer protecting bodies such as International Consumer Protection Enforcement Network (ICPEN) will help to protect e-consumer both within and beyond national boarders while uplifting consumer protection standards to international level during normal and impediment conditions.

V. CONCLUSION

Although literally it apparent that sellers tend to become more victimize in impediments but in reality buyers becomes the actual victims due to necessity and high dependability of essential consumer goods, restriction on accessibility, scarcity of goods and services, limitation of alternatives and substitutes for such essential commodities. The outbreak of COVID- 19 pandemic and its resultant crisis created an ideal force majeure or frustration situation which forced both legislature and law confronting host of hard questions to rethink how they can and should intervene in all dimensions of social life in ways which previously unimagined.

Therefore, crisis provided an impetus to review the ability and effectiveness of present contract law regimes for impediments and it is evident there is a gap and uncertainty in present contract law on how to address rights, remedies and reliefs for contractual parties that are formed amidst an impediments. Simultaneously, it necessary to have a more thorough look at how to legally address domestic commercial contracts formed during an impediment and respective consequences especially on domestic consumer contracts and consumer rights in such impediments.

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

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

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

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

I. INTRODUCTION

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

[1] Companies Act No 07 of 2007.

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

[3] [1897] A.C 22

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

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

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

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

II.RESEARCH OBJECTIVES

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

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

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

III.RESEARCH METHODOLOGY

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

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

[6] [1993] 1 SLR 22.

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

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

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

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

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

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

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

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

IV.LITERATURE REVIEW

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

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

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

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

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

V.ANALYSIS

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

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

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

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

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

VI.RECCOMANDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. INTRODUCTION

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

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

II. METHODOLOGY

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

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

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

III. DISCUSSION AND ANALYSIS

A. Force Majeure Clauses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) The impediment is unforeseeable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

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

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

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

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

INTRODUCTION

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

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

II. RESEARCH METHODOLOGY

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

AN INTRODUCTION TO APIs AND ISSUES UNDER COPYRIGHT LAW

A Brief Overview of APIs

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

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

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

Storms Ahead: The Oracle v Google Saga

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

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

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

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

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

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

Common Arguments Regarding the Copyright Protection of APIs

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

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

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

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

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

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

IV. THE POSITION OF APIs UNDER SRI LANKAN COPYRIGHT LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

unconsidered claims of copyright infringement.

V. CONCLUSION

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

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

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

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

Session Chair: Mohan Peiris PC

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

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

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

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

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

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

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

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Paper ID: 494

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

Reseach Methodology

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

RESULTS AND DISCUSSION

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

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

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

General language in preambles of BITs

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

Reserving policy space for the regulation of the environment in general

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

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

Reserving policy space for environmental regulation for specific subject matter

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

Exceptional clause to indirect expropriation

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

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

None-lowering environmental standards

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

Environmental matters and investor-state disputes

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

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

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

General promotion of progress in environmental protection and cooperation

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

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

CONCLUSION

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

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

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

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

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

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

I. INTRODUCTION

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

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

II. RESEARCH PROBLEM

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

III. METHODOLOGY

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

IV. DISCUSSION AND ANALYSIS

Environmental Impact Assessment

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

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

Analysis

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

Sand filling project

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

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

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

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

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

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

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

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

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

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

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

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

The sand mining project

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

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

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

Public trust doctrine

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

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

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

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

Violation of the Public Trust Doctrine

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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

INTRODUCTION

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

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

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

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

RESEARCH METHODOLOGY

Methodology

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

Methods

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

CURRENT SOCIAL BACKGROUND ON MARITAL RAPE AND ECONOMY OF SRI LANKA

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

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

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

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

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

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

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

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

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

I. LEGAL VIEWPOINT ON MARITAL RAPE

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

A. Case Laws

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

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

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

B. International Law

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

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

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

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

C. Domestic Law

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

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

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

D. Understanding the Reality

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

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

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

A. Irrevocable Consent

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

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

B. Blackstone's Marital Unity Theory

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

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

C. Lack of significance compared to non-marital rape

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

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

D. Privacy in Marriage

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

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

E. Difficulty in Proof

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

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

F. Probability of Misuse

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

III. ECONOMIC VIEWPOINT

A. Coase Theorem

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

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

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

- In a country where marital rape is illegal

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

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

- In a country where marital rape is legal

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

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

B. Cost Analysis

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

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

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

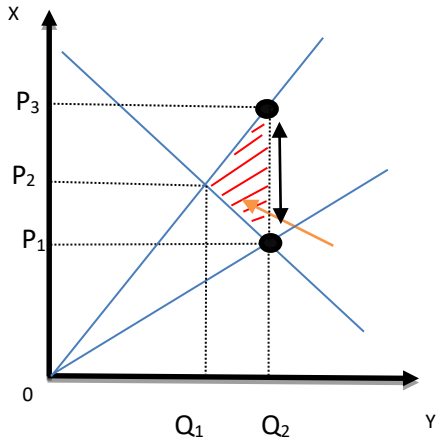

Fig.2 – Graph on marginal social cost of marital rape

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

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

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

CONCLUSION

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

RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

Keywords— Rule of Law, Sustainable Development, National Growth

INTRODUCTION

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

METHODOLOGY

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

Rule of LAW

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

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

International Standards on sustainable development

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

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

LINK BETWEEN SUSTAINABLE DEVELOPMENT AND RULE OF LAW

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

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

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

BARRIERS ON ACHIEVING SUSTAINABLE DEVELOPMENT IN SRI LANKA

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

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

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

JUDICIAL ACTIVISM

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

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

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

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

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

MENDING THE LOOPHOLES

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

I.INTRODUCTION

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

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

II. METHODOLOGY

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

III. DISCUSSION

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

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

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

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

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

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

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

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

1. *Ad hoc Reparations Initiatives*

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

Table: Different Reparations Schemes in Sri Lanka.

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

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

Source: National News Papers in Sri Lanka

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

2. ***Office for Reparations***

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

Session Chair: Dr. Dan Malika Gunasekera

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

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

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

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

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

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

Paper ID: 651

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

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

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

I. INTRODUCTION

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

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

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

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

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

II. METHODOLOGY

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

III. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION AND RECOMMENDATIONS

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

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

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

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

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

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

Remuneration should be expressly agreed upon by the both parties.

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

Research Problem

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

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

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

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

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

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

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

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

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

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

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

THE MINISTER'S ROLE AND ITS EQUITABLE NATURE

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

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

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

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

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

JUSTICE AND EQUITY IN ARBITRATION

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

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

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

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

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

JUSTICE AND EQUITY IN LABOUR TRIBUNALS

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

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

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

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

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

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

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

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

JUSTICE AND EQUITY IN INDUSTRIAL COURTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE RIGORS OF ENACTING LEGISLATION TO REMEDYTHESITUATIONUSINGTHE ORDINARYPROCESSOFLEGISLATIVE ENACTMENT

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATIONS

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

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

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

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

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

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

CONCLUSIONS

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

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

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

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

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

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

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

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

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

Keywords— Employment Security, Probationary employees, contract of employment

I. INTRODUCTION

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

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

II. METHODOLOGY

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

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

III. RESULTS AND DISCUSSION

A .The definition of a probation

The definition of a probation is,

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

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

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

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

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

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

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

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

accepting the dismissal of a probationary during the contractual period.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Comparison of Sri Lankan and South African Approaches.

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

Table 1. Comparison of Sri Lankan and South African Approaches

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

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

IV. CONCLUSION AND RECOMMENDATIONS

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

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

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Author Biography

I'm an attorney-at-Law and a lecturer in law attached to the Department of Legal Studies, The Open University of Sri Lanka. I have done my LL.B Degree in the Faculty of Law, University of Colombo in year 2012. Then I completed LL.M in 2017 with a merit pass in the same university. Currently, I'm teaching labour law for the LL.B students and doing several researches i relating to the various aspects of labour law.

Paper ID: 27

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

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

Keywords— Covid-19, National Economy, Sri Lanka

I. INTRODUCTION

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

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

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

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

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

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

II. METHODOLOGY AND EXPERIMENTAL DESIGN

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

III. RESULTS AND DISCUSSION

A. Impact of labour legislations on national growth

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

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

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

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

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

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

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

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

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

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

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

[5] JDSUPRA (2020). '*UK Employment Law Changes and Response to Covid-19'.* [online] Available at: https://www.jdsupra.com/legalnews/uk-employment-law-changes-and-response-13552/ [Accessed 4 June 2020].

[6]Coronavirus Act 2020. United Kingdom. Available at:http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted/data.htm [Accessed 4 June 2020].

[7] ibid

[8] CIPD (2020) *Recent and Forthcoming Legislation,* Available at: https://www.cipd.co.uk/knowledge/fundamentals/emp-law/about/legislation-updates [Accessed 4 June 2020].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

should complete a continuous five years period in employment.

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

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

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

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

IV. OBSERVATIONS AND RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

Session Chair: Shavindra Fernando, PC

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

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

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

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

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

Sessionchairappreciatedtheeffortsof researches and wished well for their future endeavours.

Paper ID: 668

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

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

Keywords— Freedom of expression, national security, Emergency regulations

I. INTRODUCTION

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

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

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

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

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

II. THEORETICAL FRAMEWORK

A.The State, National Security and Human Rights

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

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

B. Constitution, Parliament and Judicial Review

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

III. Discussion

A. Scope of Freedom of Expression in Sri Lanka

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

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

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

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

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

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

B. Restrictions on freedom of expression in Sri Lanka

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Sri Lankan Experience and International Standards

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

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

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

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

IV. CONCLUSION

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

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

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

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

I.INTRODUCTION

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

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

II. RISK OF BEING OBESE

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

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

III. BAD ADVERTISING AS A CAUSE FOR OBESITY AMONG CHILDREN

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

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

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

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

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

IV.OBJECTIVE OF THE STUDY

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

V.METHODOLOGY

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

VI. DISCUSSION AND FINDINGS

A.State party obligation under international law

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

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

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

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

sector under the CRC the general comment emphasis that

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

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

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

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

B.Sri Lankan legal framework

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

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

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

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

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

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

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

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

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

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

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

C. Good practices of other counties

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

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

VII. CONCLUSION AND RECOMMENDATION.

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

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

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

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

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

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

Key Words- Income, conceptual Framework, interpretational spheres

I INTRODUCTION

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

II DEFINITION OF THE TERM ACROSS JURISDICTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition,

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

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

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

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

4
5 Ibid
6 *Bond V Barrow Haematite Steel Co* 1902 – 1Ch 353
7 Ibid
8 Ibid
9 A term of art has a particular meaning in its own special context.
10 William Hewett, *The Definition of Income,* (vol15, American E.R.,1925)
11 *Tennant* v *Smith* 1892, 3TC 158
12 Ibid
13 *AG of British Columbia V Ostrum*12 TC 586
14 Ibid
15 *Vander Berghs Ltd* V *Clark (*1935) UKHL TC_19_390
16 Ibid

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

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

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

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

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

The Sri Lankan Context

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

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

The Indian Context

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

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

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

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

[19] Ibid

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

[21] Ibid

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

[23] Inland Revenue Act 2006, S. 217

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

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

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

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

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

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

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

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

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

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

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

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

Sri Lanka

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

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

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

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

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

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

According to facts, as stated, are as follows,

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

Soertz J opined that,

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

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

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

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

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

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

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

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

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

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

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

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

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

India

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

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

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

According to the case,

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

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

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

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

In *Navinchandra Mafatlal v CIT*[51],

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

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

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

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

[49] Ibid

[50] Ibid

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

[52] Ibid

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

[62] Ibid

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

[64] Ibid

[65] Ibid

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

[67] Ibid

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

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

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

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

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

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

D. the Summary of the paper

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

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

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

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

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

Key Words: Participatory Democracy, Local Government Institutions, Decentralization

I.INTRODUCTION

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

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

II.METHODOLOGY

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

III.DISCUSSION

A. ConceptualUnderstandingof Participatory Democracy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Participatory Democracy in Action

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

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

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

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

C. DecentralizationandLocal Government

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

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

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

D. DecentralisationinSriLanka:A General Overview

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

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

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

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

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

1. *Problematizing citizen participation in Local Government*

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

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

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

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

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

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

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

2.1 Analysis under the Constitution

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

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

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

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

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

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

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

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

2.2 Analysis under the legislative framework

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

2.3 Analysisundertheinstitutional framework

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

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

3. TowardsParticipatoryLocal Governance: Issues in Sri Lanka

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

democratic if it does not have the system of local governance

-Havenga-2002,UniversityofPretoria
(Wijesundara 2017)

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

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

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

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

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

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

IV.CONCLUSION

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

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

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

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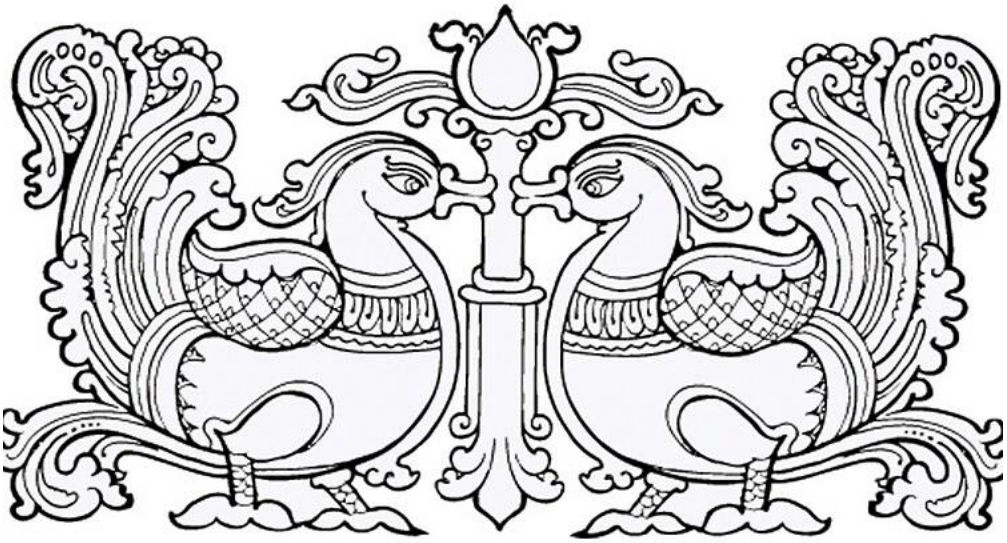

Poster Session

Paper ID: 23

Way towards Re-Introducing Criminal Defamation in Digital Diplomacy Affecting National Security: A Comparative Analysis with India

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Abstract— At present, defamation in Digital Diplomacy which is also known as cyber diplomacy or E-Diplomacy has become a significant issue due to its liberty and speedy dissemination of expressions in real time regardless of their validity. Thus, this research aims at finding out the possibility of re-introducing the statutory right of criminal defamation in Sri Lanka regarding digital diplomacy affecting national security. The objectives of this research involves identifying whether defamatory statements which affect the national security in digital diplomacy could be covered by reintroducing criminal defamation laws to the existing legal framework of Sri Lanka and to introduce necessary amendments to the existing legal regime to fill the gaps in the current system of law. The methodology of this research is a combination of Black-letter methodology and the comparative research methodology. These methodologies are used in order to provide a descriptive legal analysis on the area. Moreover, this researchwouldemployaqualitative analysis of primary data including Constitutional provisions, Penal Code provisions, the Computer Crimes Act and judicial decisions and secondary data of journal articles, books and the internet. Additionally, this research will discuss the Indian legal regime relating to the said subject area to highlight the differences in the Sri Lankan and Indian legal regimes. The studyindicatesthesignificanceof reincorporating criminal defamation laws with necessary amendments to the Sri Lankan legal system with a view of addressing the prevailing issues relating to digital diplomacy affecting national security. Finally, the study concludes providing effective recommendations to the said issue while protecting the national security of the State and balancing strong inter-state relationships within digital diplomacy at least to a certain extent.

Keywords— Defamation, Digital Diplomacy, National Security

I. INTRODUCTION

"Let us never negotiate out of fear, but let us never fear to negotiate."

-John F. Kennedy-

Diplomacy is a crucial element which 'allows a statetoaccomplishtheirforeignpolicy objectivesandcoordinatetheirendeavour through dialogue and negotiations to influence the behaviour and subsequent decisions of foreign governments.'[1] At present, it has evolved into a digital platform by way of so-called digital diplomacy. This couldbeconsideredasa strengthening point in traditional diplomacy. Digital diplomacy means the utilization of digital tools of communication (which is also referred to as social media) by diplomats to communicate with each other and also with the general public,[2]throughvirtualcommunications methodswherestakeholdersbuildcomplex relationships among each other, even before the physical presence of them. Furthermore, it has effectively minimizedtheexclusivepolicy control of States and created a platform for people to express their opinions directly and in

[1] Ross, A.. Digital Diplomacy and US Foreign Policy. *The Hague Journal of Diplomacy* 6(3-4): 451-455.
[2] Lewis, D.. Digital Diplomacy. Gateway House. <https://www.gatewayhouse.in/digital-diplomacy-2/ >accessed 28 May 2020.

real time[3] towardsgoodgovernance by incorporating a common pool of ideology of the generalpublicwithoutfollowingthe dictatorship ideology.

For instance, in India, the Indian Foreign Secretary handles their official Twitter accounts to clarify the questions and take suggestions as well as to interact with people who want to let them know the information about family members who were stuck in Libya. And as a result, 18,000 Indian citizens were rescued from Libya during the 2011 civil war. Here, Prime Minister Narendra Modi has called his ambassadors to "remain ahead of the curve on digital diplomacy"[4] because of its aspect of massive beneficiality towards the unpredictable situations that arise between inter States, even sometimes States are reluctant to use digital diplomacy due to its risks or the challenges that they have to face by using it. Moreover, the recent proposed Agreement between Sri Lanka and USA which is called as the Millennium Challenge Corporation Agreement led to a wide publicdiscussionwhichresultedin dissemination of information in digital platforms via videos, posts, articles etc on the aftermath of the Agreement if the proposed Agreement was to be executed. This resulted in reconsideration of the decision of signing the said Agreement because it highlighted the adverse impacts to the national objective, sovereignty and national security which ultimately made the proposed Agreement rendered inoperative.

Therefore, Sri Lanka, being a middle income country can get the full benefit out of its cost efficiency, if Sri Lanka has strong legal safeguards. Furthermore, when analysing the Sri Lankan domestic legal system, the criminal defamation laws which had been repealed from the Penal Code has led to the necessity of re-introducinganexpressrighttocriminal defamation relating to issues arising with regard to national security in digital platforms.

II. METHODOLOGYANDEXPERIMENTAL DESIGN

Theresearchmethodologywouldbea combination of Black-Letter Methodology and Comparative Research Methodology. Under this, a comparative analysis between Sri Lanka and Indian jurisdictions is conducted in order to distinguish the concepts in law. Moreover, the research would employ a qualitative analysis of primary data such as constitutional provisions, other relevant statutory provisions and judicial decisions and secondary data of journal articles, books, research papers and the online sources.

Specifically, the Sri Lankan context is analyzed based on the primary sources including the 1978 Constitution, Penal Code No. 2 of 1883 and the Computer Crimes Act No.24 of 2007, whereas the Indian context is analysed referring the Indian Constitution 1950, the Indian Penal Code Act No.45 of 1860 and the Indian Code of Criminal Procedure 1973.

The extent of this research is limited only to the Sri Lankan and Indian jurisdictions. Moreover, onlyalimitednumberofjudicial pronouncements will be discussed in both the Sri Lankan and Indian contexts, because the research area is broad. Another limitation is that the researchislimitedtotheBlack-Letter MethodologyandComparativeResearch Methodology.

III. RESULTS AND DISCUSSION

A. Effect of defamatory statements in Digital diplomacy

At present, digital diplomacy has become an emerging trend involving both merits and demerits. On one hand, it facilitates two ways communication, creates open conversations through social media platforms such as Twitter, Facebook, youtube channels, instagram, apps etc which pave the way for a State to communicate withboththelocalandinternational

[3] Jayatilaka,C. The Effects of Digital Diplomacy on International Relations: Lessons for Sri Lanka, <https://lki.lk/publication/the-effects-of-digital-diplomacy-on-international-relations-a-lesson-for-sri-lanka/> accessed 28 May 2020.
[4] Lewis, D.. Digital Diplomacy. Gateway House. <https://www.gatewayhouse.in/digital-diplomacy-2/ > accessed 30 May 2020.

community, extend diplomatic networks and relationships,leadstotransparencyand decreases financial and other related costs. And as a small state, Sri Lanka can reduce the financial cost when executing foreign policies as well as by promoting national interest to the internationalcommunitywhilegradually influencing public opinion.

On the other hand, best practices on digital diplomacy involve many challenges including confidential information leakage, hacking of the accounts, user anonymity, accountability of the information and dissemination of digital content within a short period of time in a massive community regardless of their geographical location and validity of the information.. The scandal of WikiLeaks is illustrative of this.[5] In this case, WikiLeaks published secret files which included some of a massive collection of confidential emails from Syrian government officials and an overview of U.S. military detention policies. This was criticized by former President Barack Obama as a threat to the U.S. national security.[6] Thus, at present modern diplomacy is facing many changes at a fast rate which ultimately will disruptively affect the national security and inter-state relationships between States, if digital diplomacy is not maintained properly. Moreover, this will also affect international politics and the public will try to act as virtual diplomats by influencing diplomacy subjectively, because of their own experience, educational background, age and gender etc through digital platforms, with groundless arguments and opinions which will lead to conflict of national interest.

Moreover, if the general public tries to respond toinformation relatingtonationalinterest according to their own perspectives by going beyond the limitations specified in Article 14(1)(a) of the Constitution,[7] it will affect not only the national security, but also the breakdownoflonglastinginter-state relationships among nations, because of their lack of knowledge about the risks involved in digital platforms. It may lead to complex crises in relation to the physical war, even though the root causes might occur in the virtual environment.

For instance, recently, the former Minister of Finance has tweeted stating that "Pictures from UL 504 from London taking passengers to Shanghai via Colombo: the Sri Lankan crew seen posing with the Chinese flag! The question is why China did not choose one of their own airlines to carry their citizens home. They have over a dozen international carriers!"[8] For instance, this statement might adversely affect the long lasting inter-state relationships with China based on the subjective interpretations of the general public. Further, this might affect more because the person who had tweeted the above statement is one of the credible political figures in the country. As a result it may adversely affect the national security of the country which might lead to inter-state wars between countries.

Moreover, at present there are many instances relating to creating and attempting to trend hashtagsrelatingtotheLTTEterrorist movement such as #eelam ,#eelamlibrary, #backtoeelam etc by LTTE friendly diaspora community , even though the Sri Lankan Military had successfully defeated the said terrorist group more than 10 years ago. Therefore, the said LTTE movement might arise strongly in the digital platform by way of a bottom up approach in near future which may be a challenge to Sri Lanka'snationalsecurity.The Republic of Kosovo would be illustrative of this. It being a newest middle income country and having lack of state recognition in the international arena after declaration of its independency from Serbia,

[5] Wikipedia, *WikiLeaks,* <https://en.wikipedia.org/wiki/WikiLeaks> accessed 28 May 2020

[6] Michael Ray,'WikiLeaks', *Encyclopaedia Britannica* (edn 2020) <https://www.britannica.com/topic/WikiLeaks> accessed 28 May 2020.

[7] The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Art.14(1)(a).

[8]https://twitter.com/mangalalk/status/1250324245474754560?lang=en.

has acquired through part of their governmental digital campaign which is led by individuals & non-state actors by way of creating digital content such as videos, hashtags, blog post related to images, landmarks information etc according to their interests and passion as well as pointing out the location as State in online maps in order to acknowledge the international community positively about the existence of Kosovo's identity as an independent Statewhileallowingtheinternational community to generate it in digital platform instead of high costly diplomatic methods to gain state recognition. Moreover, it is crystal clear that means of digital diplomacy is strong enough to create a revolutionary footprint either by building up a nation or destroying a nation. Thus, itisnecessarytoprovideeffective recommendations to address the said issue under the concept of defamatory publications to avoid adverse interferences to the national security.

B. Indian legal regime relating to defamation and digital diplomacy

India is a country which recognizes criminalizing defamationintheirPenalCode.Themain argument was whether defamation should be considered as a wrong which falls under the category of civil, criminal or both.[9] Section 499 of the Indian Penal Code[10] provides for defamation which states that person is said to defame another whoever by words spoken or intendedtobereadorbysignsorvisible representationsmakesorpublishesany imputation relating to any person intending to harm or knowing or having reason to believe that the imputation will harm the reputation of the person. Further, the said section provides for some exceptions which express that it is not defamation to impute truth which public good requires to be made or published opinion expressed in good faith respecting the conduct of a public servant and touching any public question and publication of true reports of courts. Section 500 of the Penal Code[11] on the other hand provides for the punishment for defamation which states that whoever defames anothershallbepunishedwithsimple imprisonment for a term which may extend to two years or with fine or with both highlighting that criminal defamation has been recognized in India.

Article 19(1) (a) of the Indian Constitution[12] guarantees the right to freedom and expression of citizens of India. Simultaneously, Article 19(2) confers certain restrictions to be imposed on all fundamental rights including freedom of speech and expression. These restrictions relate to "interest of sovereignty and integrity of India, security of state and friendly relations with foreign states."[13] Furthermore, according to Section 199(1) of the Indian Code of Criminal Procedure,[14] "no court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code except upon a complaint made by a person aggrieved by the offence."[15] Further, as per the Section 199(2), if an offence falling under Chapter XXI of the Indian Penal Code is committed against a person who is the President, Vice-President, Governor of a State, Administrator of a Union territory or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State regarding his conduct in discharge of his public functions, a Court of Session may take cognizance of such offence upon a complaint in writing made by the Public Prosecutor.[16]

In Subramanian Swamy v The Union of India[17], several petitioners were politicians who were charged with criminal defamation. The issues

[9] Chaudhary, P., Defamation in India - IPC Section 499/500 vs FreedomofSpeech,(edn 2017) <https://www.clearias.com/defamation-freedom-speech/> accessed 29 May 2020.
[10] Indian Penal Code Act No.45 of 1860.
[11] *ibid*.
[12] The Constitution of India, 1950.
[13] *ibid*.
[14] The Indian Code of Criminal Procedure, 1973
[15] *ibid.*
[16] ibid. Section 199(2).
[17] Writ Petition (Criminal) No.184 of 2014.

that were discussed in this case were whether Sections 499 and 500 of the Indian Penal Code is in line with Article 19(2) of the Constitution and theissueofsupremacyoverlargerpublic interestoverindividualinterest. Here,the Supreme Court was of the view that it was a reasonable restriction on the right to freedom of expression while further emphasizing that the Penal Code provisions are not disproportionate. Additionally, the court held that proportionality and reasonableness of a restriction should not be considered from the viewpoint of the person upon whom the restrictions are imposed but considering the viewpoint of the interest of the general public.

Apart from this, recently, the 'Times of India' has reportedanarticlerelatingtocriminal defamation which stated that a Delhi Court has directed the Chief Minister Arvind Kejriwal to appear before it for a complaint filed against him for retweeting a defamatory video against the Prime Minister Narendra Modi.[18]However, this casewasbroughtintheperspectiveof maintaining political stability.

When analysing the above facts, it is clear that if an issue relating to political interest arises due to a defamatory statement in digital diplomacy, Indian jurisdiction has a remedy to resolve it through criminal defamation. Therefore, this could be considered as a merit, because it is better to have at least something rather than not having any mechanism to address the issues arising in the digital platform. Yet, the true aim should be to maintain the national interest and the national security rather than protecting the individual interests which are beneficial for their own survival.

Moreover, it is important to identify the locus standi in relation to criminal defamation cases. As per Section 199 of the Code of Criminal Procedure, no court shall take cognizance of the offence except upon a complaint made by the aggrieved person. This is because'aggrieved person' does not mean the person defamed. And according to Section 499 of the Penal Code, any person whose reputation has been damaged can sue for defamation. Here, 'any person' may refer to a single individual, an association or collection of persons or a company. Therefore, it seems that locus standi can be brought in light of the concept of Public Interest Litigation. However, when analysing the decided cases in India, it is clearthatthisdependsonthefactsand circumstances of each case. Maulik Kotak v State of Maharashtra[19] demonstrates this. In this case it was held that a complaint for defamation should be filed by the aggrieved person and by the person defamed and not by any other person who was not defamed.

C. Sri Lankan legal regime relating to defamation and digital diplomacy

Article 14(1)(a) of the Sri Lankan Constitution guarantees "the freedom of speech and expression including publication to every citizen in Sri Lanka."[20] As the Indian Constitution has imposed certain restrictions on the freedom of speechandexpression,theSriLankan Constitutionhasalsoimposedcertain restrictions with regard to freedom of speech, expression and publication under Articles 15(2) and 15(7) of the Constitution.[21] According to Article 15(2), Article 14(1)(a) shall be subjected to certain restrictions in the interest of racial and religiousharmonyorinrelationto parliamentary privilege,contempt of court, defamation, incitement to an offence.[22] Further, accordingtoArticle15(7), therearesome restrictionsimposedonArticle14which includes the interest of national security and public order. And it should also be noted that the Constitution, being the supreme law of the

[18](2019) 'Defamatory video: Delhi CM Arvind Kejriwal asked to appear before court on December 13', *The Times of India,* 30th November <https://timesofindia.indiatimes.com/city/delhi/defamatory-video-delhi-cm-arvind-kejriwal-asked-to-appear-before-court-on-december-13/articleshow/72308358.cms> accessed 30 May 2020.

[19] Criminal Writ Petition No.428 of 2007.

[20] The Constitution of the Democratic Socialist Republic of Sri Lanka, Art.14(1)(a).

[21] *ibid.*

[22] *ibid* Art.15(2).

country, should be given priority over all other laws of the country. Therefore, every publication should be subjected to the limitations prescribed in the Constitution, even though new trends have emerged as a result of new technological developments.

ComputerCrimesActNo.24of2007was introducedtoidentifycomputercrimes, procedureforinvestigationandprevent computer crimes and matters connected thereto. This Act covers offences relating to hacking in digital platforms.[23] Additionally, Section 6 of the said Act deals with computer crimes committed against national security, public order & national economy. However, it does not extend to cover defamatorystatementspublishedindigital platforms, specifically activities which generate the digital diplomacy against the interest of the State as well as national security of the State. It could be argued that even though civil actionscanbepleadedbywayofdelictual actions for defamation, it is not sufficient for instances which involve national interest and national security of the state. This has led certain issues to go unaddressed since there is no provision on criminal defamation in the Penal Code at present[24], even though earlier there were provisions on criminal defamation under Chapter XIX of the Penal Code 1883 which was titled as 'OF DEFAMATION', particularly which was identical to the defamation Chapter in the Indian Penal Code. Section 479 of this Chapter provided for the offence of defamation whereas Section 480 provided for the punishment for defamation. In the case of Sinha Ratnatunga v The State[25] it was held that a statement may be defamatory, even though the readers do not believe it to be true and it was further held that the Penal Code makes the requisite criminal intention or knowledge an additional ingredient for defamation. This emphasizes the situation prior to 2002 where criminal defamation was part of the Penal Code. Thus, the amendment which repealed the defamation chapter in the Penal Code has created a gap in the existing legal system that needs to be addressed to secure national security while maintaining the inter-state diplomatic relationships strongly through digital platforms.

IV.OBSERVATIONSAND RECOMMENDATIONS

Therefore, when analysing the above facts it can beobservedthatdefamatorystatements published in digital platforms which relate to theinterestofnationandinter-state relationships is not widely addressed by the Computer Crimes Act and the Penal Code does not stipulate any provision for defamation, even though the Constitution contains provisions on restrictions imposedonprotectionagainst defamatory statements which can affect the nationalinterestandnationalsecurity.
Consequently, following recommendations were made after identifying loopholes in the law while comparing the Sri Lankan and the Indian legal systems.

Incorporate a clear and a wide definition of criminal defamation than what is included in the Indian Penal Code to the Sri Lankan Penal Code which is not inconsistent with the supreme law of the country: the Constitution, because if an overlap arises between the two it will affect the Rule of Law and the public interest. Thus, it wouldbeeffectivetoincludethephrase "national security" to the proposed provision to giveprominencetoaddresstheissues specificallyarisingwithregardtonational security through digital diplomacy.

Re-introduce or propose an amendment to the Penal Code which makes everyone liable for criminal defamation irrespective of their status or the position, specifically with regard to issues relating to national interest and inter-state relationships.

According to Section 199(2) of the Indian Code of Criminal Procedure, it could be identified that personsholdinghigherofficesofthe

[23] Section 3 of the Computer Crimes Act No.24 of 2007.
[24] This was repealed by the Penal Code (Amendment) Act No.12 of 2002.
[25] [2001] 2 Sri LR 172.

government have been given immunity from making defamatory contents in digital platforms which affect the national security and inter-state relationships. Therefore, it would be effective to imposeliabilityregardlessoftheirhigher positions. If not it could be considered as them havingunequalaccesstolawwhichis inconsistent with the Constitutional provisions and would be a violation of the concept of Rule of Law.

UnlikeintheIndiansituation,itwouldbe effective to authorize Public Interest Litigation inordertoallowapersontorepresent a community with regard to defamatory issues arisinginrelationtonationalsecurity, specifically in digital platforms, because it is the obligation of every citizen "to uphold and defend the Constitution and the law"[26] and "to further the national interest and to foster national unity."[27]

Communication professionals can be hired by the governmentofficialstoruntheirsocial mediaaccountsonbehalfofthemwhile maintaining confidentiality.

Social media training courses can be conducted effectively to educate diplomatstoprotect national security.

The standards of the contents of Twitter and Facebook pages should be maintained regularly to overcome national security issues that might arise relating to digital diplomacy.

Increase judicial activism in Sri Lanka in a manner which will allow the judiciary to play an active role in interpreting issues falling under criminal defamation.

V. CONCLUSION

The study reveals that criminal defamation is not a part of the Sri Lankan legal regime after it was repealed by the Penal Code (Amendment) Act No.12 of 2002. Even though the Computer Crimes Act was brought because provisions of the Penal Code was inadequate to facilitate the emerging new trends of offences with regard to unauthorizedaccesstocomputers,the Computer Crimes Act has not extended to cover the defamatory acts in digital diplomacy in order to safeguard the national security and inter-state relationships. Therefore, it would be effective to re-introduce criminal defamation to the Sri Lankan legal system in a way that issues arising out of digital diplomacy can also be addressed.

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[26] The Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 28(a).
[27] *ibid* Art. 28(b)

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Punishments under the Quarantine and Prevention of Disease Ordinance in Sri Lanka: Adequate to Fight a Pandemic?

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Abstract – The society needs more laws to protect the people from COVID-19. Recently, the increasing number of people who are violating the quarantine laws in Sri Lanka due to the insufficient punishments that comes under the Quarantine and Prevention Disease Ordinance No.03 of 1897. In this situation, the national security fails to punish people because the legislature has not given sufficient attention to this matter. In this research it is expected to understand how the current legislature has supported in punishing the general public who violated quarantine laws in the current context of Sri Lanka. Further, in this research it is expected to address the research problem of, whether the prevention measures should help national growth and the security through the provisions of punishments under Quarantine and Prevention of Disease Ordinance in Sri Lanka is enough in expected level. This research is mainly based on both primary and secondary data. By analyzing those data, it defines the issueswithregardtotheOrdinance and recommendations and conclusion will provide solutionforpunishmentsregardingthe quarantine laws. So it will be better to re-enact quarantine laws which should be suitable for the present and future time period in Sri Lanka.

Keywords- Pandemic epidemic laws, National growth and security, Quarantine and Prevention of Disease Ordinance

INTRODUCTION

Background to study

History of health system of Sri Lanka began during the king Pandukabhaya's period and then during the colonial period many things were introduced.[193] Among them Quarantine and Prevention of Disease Ordinance was enacted in 1897.[194] Further, this ordinance was introduced to prevent the introduction of plague and all contagious or infection diseases to Sri Lanka and the spread of such diseases in and outside Sri Lanka. The above mentioned Ordinance contains twelve sections and the Minister of Health and Indigenous Medical Services were granted power to make necessary regulation thereunder.

However, Sir Lanka has witnessed many large out breaks of emerging and re-emerging infectious diseases like plague, cholera, yellow fever, typhus and small pox and etc. in past years. In 2019 novel coronavirus named as COVID-19 by the WHO has spreaded in the wholeworldtodayincludingSriLanka. Currently,topreventandcontrolthis pandemic, Sri Lanka is governed under the QuarantineandPreventionofDisease Ordinance No. 03 of 1897.

Legalframeworksareimportantduring emergency situations as they can delineate the scope of the government's responses to public health emergencies and also, the duties and rights of citizens. Therefore, the section 05 of the Quarantine Ordinance described regarding the punishments of guilty person who are committing offences against above ordinance. Whether it mentioned several punishments in the Ordinance it was questionable though these punishments are adequate to fight a

[193] Dr.Sunil De Alwise, Health issues in Sri Lanka, www.bidti.lk
[194] Quarantine and Prevention of Disease Ordinance No.03 of 1897.

pandemic in 2020. By breaching quarantine laws people were violating fundamental rights: right to life. For example, many were hiding their travel history,breachedthecurfewrulesand importantly theincidentthathappened in Suduwella area in Ja-Ela; government had to quarantine sailors from Welisara Navy Camp.[195]

Thesekindofviolationsshowsthatthe punishments that comes under the quarantine ordinance should be renewed according to the current situations.

Research problem

In this research, it is intended in exploring the following question: Why the Quarantine and Prevention of Disease Ordinance in Sri Lanka has not implemented laws to control the situationin2020byusingmoresevere punishments?

Research objectives

To find out the existing laws that emphasiz the penalizing applicability of the Quarantine and Prevention of Disease Ordinance.

To pinpoint the issues regarding the punishing section of Quarantine and Prevention of Disease Ordinance relating to national growth and security.

To suggest recommendations to Quarantine and Prevention of Disease Ordinance to control the pandemic situation in Sri Lanka.

II. METHODOLOGY

This research has mainly recognized as a Doctrinallegalresearchthereforegives accentuationonsubstantivelawrules, principles, ideas and legal theories. Mainly this study continued around lawful suggestions and legal claims on the lawful recommendations of the Courts, and other traditional legitimate materials. The qualitative data utilized in this research.Thestatutes,casereports, internationalstandardsonrelevantlaws, knowledgeonexpertisetookasprimary sources. The Quarantine and Prevention of Disease Ordinance No.03 of 1897, the Public Security Ordinance No 25 of 1947, the Disaster Management Act No 13 of 2005, Penal Code No. 2 of 1883 and Quarantine Act of Canada referred as primary sources. And also data gathered in library base by going through Journal articles, internet articles etc. as secondary sources. Furthermore, qualitative data gathered from primary and secondary sources.

This research conducted on black letter method andInternationalcomparativeresearch method. Also this research paper filled the gaps of QPDO related to the punishment for those who are violating the quarantine law and how to implement the legislations regarding this matter.

III. ANALYSIS

Issue of the Quarantine and Prevention of DiseaseOrdinancesectionregarding punishments

UndertheQPDO,section5definethe punishments of violating quarantine laws and it says that, 'if any person is guilty of an offence against this Ordinance, he shall be liable on convictionbeforeaMagistratefor imprisonment or either description for a term not exceeding six months or to a fine not exceeding one thousand rupees, or to both. Furthermore, nothing in this section contained shall affect the liability of any person to any punishments or penalty to which he is liable under any enactment other than this Ordinance, but so that a person shall not be punished twice forthesameoffence.'Inhere,these punishmentsarenotenoughtofighta pandemic because comparing to the present the punishmentsshouldbedeveloped.The communityshouldfearforviolatingthe quarantinelawsbyknowingthetough punishments. In some developed countries, they enacted new quarantine laws and

[195] COVID-19 pandemic in Sri Lanka, www.wikipedia.com

punishments only for COIVD-19. This way the relevant authorities were able to reduce the quarantine lawviolatorsandcontrolthesituation according to their will.

Existing other legislations in Sri Lanka to reduce the quarantine law violators

In Sri Lanka there are several legislations to controlandpreventquarantinediseases.
However, when dealing with the COVID-19 the government mainly base on QPDO and for punishments the relevant authorities base on penal code and PSO and also DMO can be used. Other than QPDO, in Penal Code chapter 19 discusses about the punishments and offences affecting the public health, safety, convenience, decency and moral. Under that, in section 262 define the punishments for negligent act likely to spread infection of any disease dangerous to life and it says that 'whoever unlawfully does any acts hall be punished with imprisonment of either description for a term which may extend to six months or with fine or with both'. And also,underthesection263definethat, 'whoever maliciously does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or withboth'.Further,disobediencetoa quarantine rule, punishments comes under section 264 and it says that, whoever knowingly disobeys any rule shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Other than that, section 16 (3) of PSO describes that, 'if any person contravenes an order made he shall be guilty of an offence and shall on convictionaftersummarytrialbeforea Magistrate, be liable to rigorous imprisonment for a term not exceeding one month or to a fine not exceeding one hundred rupees or to both suchimprisonmentandfine'.Alsosome punishments were mentioned in the DMO relevant to the pandemic situation but Sri Lankan government did not use it. However, above mentioned legislations help to prevent andcontroltheCOVID-19thoughthe punishmentsarenotenoughtofighta pandemic.

Comparison of quarantine laws between Canada vs. Sri Lanka

Most of the countries enacted new laws to control and prevent the covid-19. Among them, Canada introduced an Act to prevent the introduction and spread of communicable diseases in 2005.under that the Quarantine Act of Canada define 'every person is guilty of an offence if they cause a risk of imminent death or serious bodily harm to another person while willfully or recklessly contravening this Act or the regulation and moreover, if any person who commits an offence above section is liable on conviction on indictment, to a fine of not more than $1,000,00 (Rs. 184,740,000/-) or to imprisonment for a term of not more than three years or to both and on summary conviction, to fineofnotmorethan$300,000(Rs. 55,422,000/-) or to imprisonment for a term of notmorethansixmonthsortoboth'. Considering these punishments, Sri Lanka is having slight punishments as mentioned above. However, the importance in here that these laws have helped those countries to reduce the law violators while number of Sri Lankan quarantinelawviolator wereraisedup. Therefore, above international laws can be adaptedtoQuarantineandPreventionof Disease Ordinance in Sri Lanka.

IV. RECOMMENDATIONS

- Making sure that the quarantine laws address alltheloopholesidentifiedincurrent QuarantineandPreventionofDisease Ordinance No 03 of 1897

UndertheQPDOsection5definethe punishments of violating quarantine laws and those punishments are not enough to fight a pandemicbecausethisOrdinancewas established during the colonial period and now Sri Lanka is passing the 21st century. But the

legislations were not developed according to the time period. Therefore, above mention section should be amended and made necessary regulations.

- Developing the punishments of curfew rule under the Public Security Ordinance No 25 of 1947

Under the PSO section 16 explains the curfew andthepunishments.Initsection16 subsection 1 defines the curfew as, 'no person in such area shall, between such hours as may be specified in the order, be on any public road, railway, public park, public recreation ground or other public ground or the seashore except under the authority of a written permit granted by such person as may be specified in the order'. Further,inthesamesectionsubsection3 describes the punishments for violating the curfewanditsaysthat,'ifanyperson contravenes an order made under this section, he shall be guilty of an offence and shall on convictionaftersummarytrialbeforea Magistrate, be liable to rigorous imprisonment for a term not exceeding one month or to a fine not exceeding one hundred rupees or to both such imprisonment and fine'. Further, looking in to these punishments show that these were enacted during the colonial period and not adequate to current situations. Due to the lack of punishments the community violate the curfew rules and in here, it's so hilarious to say that 40,095 people violated the curfew rules in Sri Lanka while other countries patients rate were increasing in same amount. Considering abovesituation,theselawsshouldbe developed and the punishments should be re-enacted.

- Using the punishments which come under the Disaster Management Act instead of Quarantine and Prevention of Disease Ordinance.

The Disaster Management Act was enacted for whereas human life, property and environment ofSriLankaisbeingthreatenedand endangered due to certain disasters taking place within the territory of Sri Lanka. Though this Act could be used to reduce the violators of quarantine laws but the government did not use the laws that contain in this Act. Further in Disaster Management Act section 24 explain that, 'every person who assaults, obstructs, threatens, intimidates, abuses or insults any person exercising any power or discharging any duty conferred on or imposed on such person by this Act, shall be guilty of an offence under this Act and shall on conviction after summary trialbeforeaMagistratebeliableto imprisonment of either description for a term not exceeding twoyearsortoafinenot exceeding twenty five thousand rupees, or to both such imprisonment and fine'. The reason for recommending this Act is that, it was enacted in the very recent past with comparing to QuarantineanPreventionofDisease Ordinance and also the punishments were adequate to control the situation.

- Holding awareness program regarding existing quarantine laws and punishments

Continuingly, informed on problems related to violating quarantine law and the sections that lay down in Quarantine and Prevention of Disease Ordinance. Then what punishments that the Quarantine Ordinance can take against thecommunityweremention edinthe Ordinance but the community is not aware about this. So, it provides opportunity to violate the quarantine laws that the community should follow. Sri Lankan health system, Sri Lanka Army, Police officers and relevant authorities shall hold awareness programs regarding the sections of offences and punishments by using socialmedia,governmentalandnon-governmental organizations meetings. For an instance, Tamil Nadu police released a prank video showing lockdown violators put in an ambulance with a (mock) covid-19 patient. This will give worth opportunity to reduce violating quarantine laws and will support to control the pandemic.

- Introducing international laws to domestic laws

As mentioned above, Quarantine Act of Canada helped to reduce the law violators. Therefore, above international laws can be adapted to QuarantineandPreventionofDisease Ordinance in Sri Lanka.

V. CONCLUSION

According to the analysis it was understood that there have been the QPDO as the key support that has been given through the legislature for the punishment to the general public who violates quarantine laws in peak period of COVID -19 in Sri Lanka. The laws in the ordinance has been established in the colonial period of the country and still no any required amendments were done based on that. Considering the number of cases has been reported only in the period of quarantine in the recent past started in 20th March 2020, it can be concluded that the provisions under the QPDO and Penal code of Sri Lanka has not been able to punish the people who violate the laws specially during the curfew period because of there are insufficient laws to penalize.

Finally, the punishment section of QPDO ordinance fails to punish people because the quarantine laws are aged. Mainly many states still have lack of implementation strategies such as providing punishments and preventive measures to reduce to violating quarantine laws. In this situation the general public do not respect the laws because of those punishments are not tough to them. According to the above facts, mainly Sri Lanka using quarantine ordinance and penal code to punish those people who violate the laws. Finally, this research tries to give awareness to the general public regarding the punishments under quarantine laws. As a conclusion, this paper suggests to implement quarantine laws in Sri Lanka based under punishments and adopt international laws to the domestic laws to help national growth and security of Sri Lanka.

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ABBREVIATION

QPDO- Quarantine and Prevention of Disease Ordinance

PSO- Public Security Ordinance

DMA- Disaster Management Act

WHO- World Health Organization

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Effectiveness of Foreign Portfolio Investment with regard to Multinational Corporations in the Long Run

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Abstract - This study was conducted to exploretheapplicationofPortfolio Investments in situations where Foreign Direct Investment (FDI), although stable, does not seem to be compatible with the conductofMultinationalcorporations within a country. In this study the research question that appears would be, "Is it possible to use portfolio investment by multinational corporations in the long run when direct investment is chosen to be withdrawn?". This study aims to discuss variousbenefitsandascertainthe effectiveness of the Portfolio Investment by including world examples of developing countries and at the same time investigates the position of portfolio investment by the statepartiesandthemultinational corporations when difficulties arise on FDI in the long run. To collect data for the study, secondary data will be gathered using the Black Letter method. FDI and Portfolio Investment are two different types under InternationalInvestmentLaw.FDIis covered bycustomary international law whereas Portfolio is not. While FDI tends to be more stable, Portfolio measures up to it by having benefits with regards to income, liquidity etc. This study mainly analyzes the situationsinMalaysiaandIndia.In conclusion, after analyzing the positive and negative aspects of both types of Investment, it can be when difficulties arise with FDI, the use of portfolio Investment can help mitigate issues that arise. It is recommended for developingcountriestomakeuseof PortfolioInvestmentinamoreliberal manner to take advantage of its benefits for the further development of the country's economy.

Keywords: **Direct, Portfolio, Investment, Multinational**

RESEARCH PROBLEM AND OBJECTIVES

Research Problem

Foreign Direct Investment is considered to becomparativelystablethanForeign Portfolio Investment. However, there is a tendency that multinational corporations withdraw from Foreign Direct Investment in the long run. In such a backdrop is it possible to use Foreign Portfolio Investment which is considered to be less stable than Foreign Direct Investment.

Research Objectives

- To identify the benefits of Foreign portfolio Investment
- To investigate the position of Foreign Portfolio Investment among multinationalcorporationsand between states
- Toidentifythereasonsfor withdrawalfromForeignDirect Investment in the long run

METHODOLOGY

The studyisbasedonForeignDirect Investments and Portfolio Investment and discussed the effectiveness of using Portfolio Investment when there are withdrawals of Direct Investment. Basically, it means to mitigate the negative effects that could arise from direct investment and

to ensure the smoothflowofeconomywithoutany distractions. This study was done using library research and to collect data for the study it used several secondary sources to clarify the question "Would it be possible to use Portfolio Investment by multinational corporations in the long run when Direct Investment is chosen to be withdrawn?". For data analysis in this study, qualitative data wasanalyzed.Thisdatawasgathered throughinternetarticles,books,judicial decisions,treatiesandsomeother information supplied by websites as well. Thelimitationsofthestudyarethat quantitative data is not deeply analyzed and it only g two major examples as Malaysia and India.

I.INTRODUCTION

International investment law has two parts which can be divided as Foreign Direct Investment and Portfolio Investment. In the internationalspherethenatureof investment is more focused on FDI and Portfolio investments are not taken into consideration. Accordingly, Foreign Direct Investments are protected under customary international law because there are enough treaties and laws to govern it. At the same time Portfolio Investments are not under customary international law.Thereare arguments on these as well. In history there are instances where portfolio investments are identified by treaties. Therefore, it is a proved fact that FDI is more stable than the portfolioinvestments.Toclarifythe problem,itisnecessarytoknowabout definitions of both FDI and FPI. Accordingly, the issue here takes the view that, when there are difficulties with FDI, the host states can mitigate the position through several statepoliciesaccordingtothestate's economy and can choose the way of Portfolio investments". Here it mainly considers about two countries as examples; one which once ledtoeconomiccrises (Malaysia) and another which has fast growing economy (India). Both these states use state policies towards the FDI and even though FDI is more stable use portfolio investment in a moreliberalwaytotakecompatible advantages.

II.FOREIGN DIRECT INVESTMENT

Simply this is defined as investment of physical assets or the money which passes by the home state which is the state of the investorpassestohoststateasan investment. As mentioned by the IMF and OECD, direct investment means obtaining a lasting interest by a resident entity of one economy (direct investor) in an enterprise that is resident in another economy (the direct investment enterprise). These are utilized in the open market economies. FDI's influences to the host state more likely a capital investment. Mergers, acquisitions, logistics, retail and other forms of areas suppliestheexamplesfortheFDI.

Traditionally FDI includes only the physical assets but in the modern context it has been expanded to several non-physical assets and intangiblerights.Moreover,theseare protected under customary international law and Intellectual property, Contractual and Administrative rights are discussed in them.

III.PORTFOLIO INVESTMENT

Portfolio investment is based on shares, debentures, bonds, etc. With regard to IMF, portfolio investment is defined as cross-border transactions and positions involving debt or equity securities, other than those include in direct investment or reserve assets. On the other hand, it is known as hot money as well.

In terms of the international investment law FDI or FPI investments protected under several treaties. Among those treaties' portfolio investments are included in some. Portfolio investments have distinguished features from primary shares in certain companies which use foreign investment as

a vehicle. These are not under shares which are ordinarily traded but are instruments that directly connected with the companies assharesorindirectlyconnectedas promissorynotesandbonds.Amajor purpose of having portfolio investment is to raise capital for ventures. It can be done by savingorcirculatingaboveinstruments through stock exchange or through other markets.Thisshouldbeencouragedto include under investment treaties because to increase the capital flows, and also it is the interest of the developing countries to encourage their flows. On the other hand, there is an argument against to include portfolioinvestmentsinthetreaties.
Accordingly host state has a duty to protect theseunascertainableholdersofthe instrumentsanditcontinuouslychange their identities. In fact, they can pull out of a state. Therefore, value of these instruments can be questioned in view of the financial crises which caused in the previous mass departure of portfolio capital.

In the case of *Fedax vs. Venezuela* domestic holders of promissory notes, who were not entitled to protections have transferred the notes to another foreign citizens of a country with an investment treaty. After that they becomeentitletoclaimagainstthe particular state because the treaty protected portfolio investments.

IV.COMPARISON OF FDI AND FPI

Both FDI and portfolio investments involve the situations funding in another country but these two have distinguish features in nature of holding, the degree of control and term etc. Accordingly, in FDI the degree of control is high as investor obtaining both management rights and ownership rights, portfolioinvestmentshaveonlythe ownership rights the control is very less. Role of investors in FDI is active and in portfolio it is passive. FDI is a long-term investmentwithphysicalassetsand portfolioinvestmentisashort-term investment with financial assets. Moreover, the management of project are efficient in FDI than the portfolio investments. With all these facts entry and exit are not easy thing for FDI but it is relatively easy for portfolio investments. FDI results in transfer of funds, technologyandotherresourcesbut portfolios are results in capital inflow.

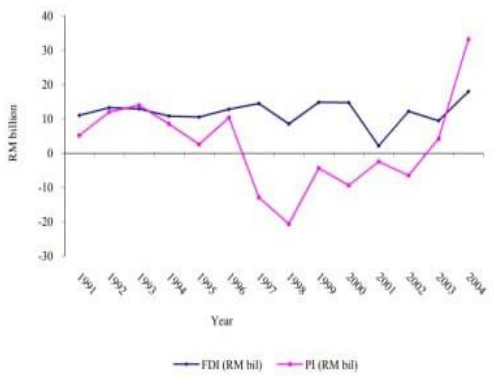
V.EFFECTIVENESSOFPORTFOLIO INVESTMENT IN HOST STATES

Sudden withdrawal of portfolio funds from Asian countries has been affected to the Asian Economic crises which held in 1997.It proves the fact that portfolio investment is unstable in the meaning of FDI and it can be withdrawn at any time as investor wishes. On the other hand, FPI is lacking some characteristics that can be protected under the international policy protection as well. Although these facts are established when there are difficulties towards the FDI then host states are mitigating those difficulties and using portfolio investments to their economic systems. Countries such as China, Malaysia, India and Sri Lanka are using portfolio investments in the above manner.

Malaysia uses three types of capital control measures. They are indirect capital controls, control on the capital account and direct capital control. The beginning of the East Asia's financial crises was serious thing which happend in 1997 on Thai baht. Here they invested short term investments and after they pulled out all the money exposure had led to gushing default and after that currency devaluations started. Malaysian ringgit, Indonesian rupiah and Philippine peso were affected as a result of this issue. In the post-crisis's era both FDI and portfolio have helped to overcome the issue and balance payment theory which determined the mobility differentiate hot money and FDI. The statistics for Dependent Variables (1991-2004) proved that introduction of capital controls was helped to promote

soundenvironmentforportfolio investments. Without portfolio investment it isnoteasyforMalaysiatogrow economically solely with the use of FDI.

Figure 1 : The Flows of FDI and PI 1991 Through 2004



Normally in developing countries they need money to their own growth. All Asian countries have same features on this section. India is known as the fast-growing major economy in the world and they have 7.4% GDP rate for 2019 as well. Here India has taken several steps to liberalize their foreign investments and as a result of that can improvetheirbusinesses.Inbound investment routes are there that global investors can go beforetheirattractive destination points. FPI framework investors given chance to make their investments in listed equities and other securities. For this they need to register and take the license which were granted by Indian custodian in its manner specified as a DDP through regulations, 2014. Each investor needs to obtain a tax file. India recently change their tax exemptions as long-term capital gain tax wereremovedwithSingaporeand Mauritius. India has a restrictive FDI regime. With regard to Indian ventures it was ranked 57th in the GCR 1999.Even the banking sector needs to use reciprocal investment rights but government pauses restrictions on FDI. Lack of clear cut and transparent sectoral policies for FDI and high tariff rates on imported capital good used for export, limited scale of export processing zones can be known as difficulties in FDI sector. Specially there is no liberalization in exit barriers as well. So, that means they have their own state policies with difficulties towards FDI. Therefore, they have given more liberal way to FPI.

In respect of these examples it can be justified that sound economic states such as USA, England, France can use 100% FDI but if the states having difficulties on FDI they can mitigate their positions and can use portfolio investments as well.

VI.BENEFITSOFPORTFOLIO INVESTMENT

Benefiting by using portfolio investment is a far-reachingandfutureadvantage.
Sometimes, it would give advantages to another generation. On the investors side a wise investment can guard his initial investment and state parties can grow their economies within a short term. Not only the profits gained through shares, there are certain privileges.

A.Diversification

When investing an investor needs to allocate capital in a correct manner in order to reach the benefits in financial market. In a creation of diversified PI it can spread capital across more than one investment category. On the other hand, can diversified into multiple asset classes will help safeguard investors capital and at the same time host states can develop several industries in a short period of time by using hot money.

B.Potential

It is known as a major advantage to the investor. Individuals may be unprepared for their investments. Basically, what they do is placing money in bank saving accounts. It is a protected way but compared to share market and other portfolio investments they cannot grow profits in the financial market. By having PI the position is to potentially earn sizable profits and individuals can prepared for their own future targets. Accordingly, to the host states also can make taxes and safeguard

the investments by attracting investors by providing more facilities.

C.Income

Stocks will create steady income stream for many distributions. Investing in bonds and securities are other ways to make income through PI.

D.Liquidity

Unlike investing in real estates, equities or other fixed income instruments such as shares, securities and etc. can be traded based on supply and demand. Therefore, in PI's both investor and the host states can convert these instruments to cash if necessary.

VII.CONCLUSION

FDI is an investment basically used physical assets and other intangible rights in another country.Hereittransferredfunds, resources, technology etc. Accordingly, the investors have active management on these investments. Foreign Portfolio investment means investment which made through financial assets. From portfolio investments it can gain short term profits and investors do not have control over the investment. Direct investments are more stable than the portfolio investments there are some instances that portfolio investments are recognized by treaties. *Fedax vs. Venezuela* case is an example for the above recognition which has done to promissory notes. Even if the FDI is more stable than portfolio investments, multinational companies can withdraw the direct investment in the long run. Therefore, when there are difficulties towards the FDI the host states can mitigate the position by using their states policies and can make considerations on the portfolio investments as done by the Malaysia and India as an example. Thus, portfolio investment can make replacements in terms of FDI and it has more hidden advantages in short term.

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Proportionality as a Separate Ground of Judicial Review: A Myth or Reality in United Kingdom and Sri Lanka

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Abstract— Administrative Law (AL), is the law which controls the governmental power that is exercised by the Administrative Authorities (AAs). The major purpose of AL is to retain the governmental power within their legal boundaries with prima facie intention of upholding the rule of law and to protect the citizens against the abuse of such power. Under Judicial Review (JR), the court exercises its inherent power to determine whether the actions taken by the AAs are lawful or unlawful and to award suitable remedy. The Doctrine of Ultra Vires is considered to be the central principle of AL. However, with the developments in relation to current changing patterns of the field of AL, courts have identified other grounds of JR such as Unreasonableness, Irrationality, Proportionality, Legitimate Expectation and Public Trust Doctrine in order to challenge the decisions of the AAs. Nevertheless, some arguethattheseidentifications unnecessarily expand the boundaries of JR. Especially with regard to Unreasonableness and Proportionality, some scholars argue that these two grounds are identical and identificationofproportionalityasa separategroundisanunnecessary expansion of the boundaries of JR. On the other hand, some argue that these grounds havetheiruniquefeaturesand proportionality provides a better protection in safeguarding individual rights. Therefore, in the presentt context the problem is whether the application of proportionality in order to challenge the decisions of the AAs is a myth or reality. In this regard, this paper will provide a comparative analysis *about position of unreasonableness, irrationality and proportionality in United Kingdom (UK) and Sri Lanka (SL)* to identify *whether the* application of proportionality in above jurisdictions is a myth or reality. Also this paper will discuss the importance of identifying new grounds of JR while emphasizing the significance of proportionality as a ground which does not expand the boundaries of JR. In carrying out the research, author uses both primary and secondary sources which include statutes, case laws, books, journal articles, websites and internet articles.

Keywords — Administrative Law, Judicial Review,Unresonableness, Proportionality

I. INTRODUCTION

In the modern society, complications between the AAs and the citizens have become a common issue. In order to govern these complicated relationships, AL has becomeanecessarymechanism.

Traditionally,AAs havemainlyreceived their powers by Parliamentary Acts and their responsibilityistoexercise their powers within the four corners of the Act. In addition to statutory power, AAs exercise discretionary powers since, in a welfare society AAs must necessarily take decisions to face different circumstances. Therefore, the main objectiveofAListokeep the governmental power within their frontiers and to protect the common citizens from any abuse of governmental power exercised by the AAs (Talagala, 2011).

The ultimate remedy of AL is to achieve administrative fairness by seeking a writ. To seek a writ there must be a ground of JR which

has recognized by the courts. The Doctrine of *ultra vires* is considered to be "the central principle of AL". Moreover, the principles of natural justice also can be identified as a well-established ground of JR. "Though the doctrine of *ultra vires* was considered as 'the central principle of AL' it has moved from *ultra vires* rule to concern for the protection of individuals and for the control of power rather than powers or vires" (Oliver, 2000, p.543). As a result, judiciary has recognized several grounds of JR to be compatible with emerging situations in order to promote good administration.

The analysis of unreasonableness and proportionality under UK Human Rights Act 1998 has a long history of scholarly debate and judicialarguments.Itisarguedthat proportionality review in the context of the European Convention on Human Rights (ECHR) goesmuchfurtherthanWednesbury Unreasonableness (WU) in requiring the court to consider whether a 'fair balance' has been struck as between the rights of an individual and the interest of the community (Srirangam, 2016). Therefore, it is important to analyze these two concepts comparatively to identify whether the recognitionofmoreEuropeanfriendly proportionalitytestwouldbean unnecessary expansion of the frontiers of JR and whether it is a myth or reality in the present context.

Inthispaper,SectionIIprovidesthe methodology and Section III and IV respectively explains the origin and development of the WU and Irrationality in the context of UK and SL, as WU and Irrationality are necessary to explain the concept of Proportionality. Further, Section V discusses the origin and development of the proportionality in the context of UK and SL and Section VI explores the comparative analysis between UK and SL in relation to status of these two concepts while focusing to answer to the questions of "Has the unreasonableness been replaced by the proportionality?" and 'Whether the concept of proportionality is a myth or reality?" by giving special reference to UK and SL. Section VII suggests recommendations and finally Section VIII provides the conclusion.

II. METHODOLOGY

For the purpose of this research qualitative data collection methods were used and a library based research was also conducted for further information. In order to collect primary data, statues and number of case laws in UK and SL were used. The data gathered from books, journal articles, blogs and internet articles were used as secondary sources to enrich this research.

Moreover, a comparative analysis was conducted between UK and SL, to evaluate theapplicationoftheprincipleof unreasonableness and proportionality as grounds of JR in each judicial system and to examine whether the unreasonable has been replaced by the proportionality.

III. WEDNESBURY UNREASONABLENESS

The principle of unreasonableness as a ground of JR was emerged in the case *of Associated ProvincialPictureHousesvWednesbury Corporation* (1948). Corporation was acting under the Sunday Entertainment Act's authority and accordingly Corporation may allow the opening of cinemas on Sundays subject to conditions as the authority thinks fit. Provincial Picture Houses have been granted a license to operate a cinema subject to the condition that no children under 15 years of age are allowed. The court held that the Corporation had made an unreasonable decision and no reasonable authority could have come to take such decision. When giving the judgment Lord Greene defined unreasonableness as "a general description of things that must not bedone".Thereaftertheconceptof unreasonablenesswasknownas Wednesbury Unreasonableness.

When a decision taken by the AA is not reasonable, the court can challenge the decision based on unreasonableness. In order to determine whether a decision is reasonable, the court will consider whether the decision is within the range of reasonable responses that the decision-makermighthavehadinthe circumstances (Law Wales, 2016).

After the introduction of WU English courts have referred to this principal when giving judgments. In the case of West Glamorgan County Council v Rafferty (1987), under Caravan Sites Act the council had a duty to provide camping sites for gypsies. However, a group of gypsies was being evicted by the council from council land without providing an alternative and adequate accommodation. Lord Gibson stated that "that the council decision was not a decision a reasonable council could reach". Moreover, in Regina v Newham London Borough Council, ex parte Sacupima and others (2001), the council was under a statutory obligation to provide temporary houses for homeless families. To fulfill this obligation some of the homeless families were sent to different seaside towns. Those towns were nearly 100 miles far from London city and exceptions were made only when such a move would seriously threaten the health of a person. Lord Latham stated that "the council's rigid policy, which took no account of the effect on an adultperson'semployment,achild's education, or a person's ongoing medical care, was WU". From above cases it can be concludedthatEnglishcourtshave recognized Unreasonableness as a ground of JR.

Also Dr. Shivaji Felix (2006) states that Wednesbury principle has become one of the most acceptable principles in English law (EL).

Since Sri Lankan legal system greatly influenced bytheEnglishALdevelopments,when discussingabouttheapplicationof unreasonableness in SL, eventually courts have referred to this principle when giving decisions and it can be proved through several case laws. Inthecaseof*Gooneratneandothers v CommissionerofElection* (1987) the Commissioner refused to register the Eksath Lanka Janatha Pakshaya (ELJP) as a recognized political party. The plaintiff argued that the decision given by the Commissioner is unreasonable and his right under Article 12 of theConstitutionwasinfringed.Justice Sharvananda stated that the Commissioner was wrong and unreasonably refused ELJP registration as a political party. Further, in *Flying Officer Ratnayake v Commander of the Air Force and others* (2008) the petitioner was a flying officer of Air Force and he argued that he was dismissed without being convicted by a Court Martial. According to Air Force Act the dismissal of an officer from the Air Force can be done only upon a conviction by a Court Martial. While citing the Lord Greenes' explanation on how to exercise discretion reasonably? In Wednesbury case, Abrew J. stated that the decision of the respondent is unreasonable.

Analyzing above cases it can be said that, when giving the judgment not only in past in recent time also Sri Lankan courts have recognized unreasonableness as a ground of JR. As a result, an aggrieved party was able to rely on unreasonableness and prove that the decision taken by the AA is not reasonable. Further, it has allowed judiciary to create standards in accordance with current trends.

Althoughjudiciaryhasrecognized unreasonableness as a ground of JR it raises issues concerning certainty or clarity. This is because unreasonableness as a ground of JR is very ambiguous and broad concept. Thus, many scholars (Peiris, Zamir) have defined unreasonableness in their own ways.

For instance, Professor G.L. Peiris (1987) states,unreasonableness,"isa comprehensive term which embraces a wide variety of defects including misdirection, improper purpose, disregard of relevant considerationsandadvertenceto immaterial factors". Accordingly if the decisions taken by the AAs are based on above four factors the judiciary can quash the decision based on unreasonableness.

ProfessorZamir(1992)defines, "Unreasonableness is different from other

grounds for the review of administrative discretion,notably,irrelevant considerationsandimproperpurposes. Irrelevantconsiderationsandimproper purposesexaminetheadministrative process…Ontheotherhand, unreasonableness,accordingtothe traditional view, does not seem to examine the process, but rather the end product". Accordingly, he completely distinguishes unreasonablenessfromirrelevant considerationandimproperpurpose. However,ProfessorPeirisconcludes unreasonablenessincludesabovetwo factors as well. Likewise, many scholars have defined unreasonableness in different ways as there are no rigid and coherent standards toshowcasewhattheprincipleof unreasonableness is. What was reasonable before 50 years ago might not be reasonable today and also what is reasonable today might not reasonable after 50 years of time (Marked by Teachers). Moreover, it can be said that the principle of unreasonableness gives judiciary an unnecessary power to interfere with administration decisions and judges tend to apply subjective approach when deciding cases. As a result, the tendency towards increasing uncertainty in the law has become major issue.

Furthermore, this principle has been misused in many courts, Paul Craig (2010) declares analyzing 200 cases, and the court cites Wednesbury principle but in fact applies a more lenient test. Some cases deploy terms such as 'higher scrutiny' or 'anxious scrutiny' without precisely elaborating the meaning of these terms. According to Craig, in many cases courts have applied different terms without mentioning the termunreasonablenessbutappliedsame principles of unreasonableness. He argues that by way of higher scrutiny or anxious scrutiny courts have referred to the same principle of unreasonableness. Also some cases merely conclude that a decision is or is not reasonable, does or does not defy logic, was or was not a decision that a reasonable authority could have made without reasoning their conclusion. Sometime courts have quashed the decisions by just saying unreasonable without giving proper reasoning.

As a result of these disadvantages and broadness of the principle of unreasonableness, courts had to find alternatives and they introduced two aspectsknownasirrationalityand proportionalitywhichareevolvedfrom unresonableness.

IV. IRRATIONALITY

The concept of irrationality arises from the case of *Council of Civil Service Union v Minister of Civil Service* (1984) (GCHQ case). In this case Lord Diplock has referred to irrationality rather than unreasonableness. He explained that, "it applies toadecisionwhichis sooutrageousinits defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". Further he stated that, "irrationality by now canstandonits'ownfeetasanacceptable ground on which a decision may be attacked by JR".

By analyzing the decision in GCHQ case, some scholarsarguedthatthisisstill unreasonableness, in contrast, some scholars argued that it is a separate ground of JR.

For instance, Dr. Felix (2006) states that "since then the Wednesbury principle has moved on to become one of the major grounds of review in English AL and the principle has been equated with irrationality". Alsohehascited,"the Wednesbury principle, commonly regarded as a synonymforjudicialreviewengaging irrationality, was subsequently to become one of the most widely accepted principles of English AL" (Forsyth & Hare, 1998). However Wade and Forsyth argue the interpretation in irrationality is different from WU and this is also known as anxious scrutiny.

The significance of recognizing irrationality as a separate ground of JR is that, petitioners can rely upon irrationality and prove that the decision taken by the AA is not rational and seek a writ. Both English courts and Sri Lankan courts have recognized irrationality as a ground of JR. In recent case of Obar Camden Limited v The London Borough of Camden (2015) Camden Borough Council had granted full

permission to convert a public house into residential flats subject to several conditions. The plaintiff argued that the decision of the council was irrational. The court submitted the decision in favor of the plaintiff and quashed the decision of the Council.

Further,inSesadiSubasinghe(appearing through her next friend) v Principal, Vishaka Vidyalaya and 12 others (2011), the father of the petitioner complained that his child was initially selected to the Visakha Vidyalaya yet later rejected from the final list by the panel. The court held that the rejection of the child was highly unreasonableandirrational. Whengivingthejudgmentjustice Gooneratne stated that, "irrationality is one ofthecommonlawgroundsofJRof administrative action. It is presumed that public authorities are never empowered to exercise their powers irrationally therefore irrational action byapublicauthority is considered to be ultra vires".

From above two recent cases it is clear that irrationalityasagroundofJRisstill recognized by the English and Sri Lankan courts.

V. PROPORTIONALITY

Proportionalityisaconceptwhich originated and well established in European AL.LordDiplockintroducedthe proportionality into EL in GCHQ case. In this case he has widened the grounds of JR by referring to other grounds as irrationality, illegality and procedural impropriety. The concept of proportionality can be said as an aspect which resulted from WU. Zamir (1992)statesthat,"theconceptof proportionality is a basic element in fair administration.Administrativepower should not be exercised in a manner which inflictsinjuryonprivateinterests unproportionally to public needs".

Basically, proportionality mainly considered about individual rights. The decisions taken by the AA may sometimes impose some obligationsonindividualrightsofthe citizen. In that occasion judiciary examined the proportionality between the decision of the AA and the individual right which has been limited. Further, AAs are always under an obligationtomaintainasenseof proportionandbalancebetweenits decisions and the public interest, so that the authoritywillbeabletoguaranteeits decisions have had minimum impact to the public interest. According to Craig and De Birca (1998), a test with four elements can berecognizedtodeterminethe proportionality of a decision.

Whether,intheapplicable circumstances, the disputed measure is the least restrictive;

Whetherthereiscorrespondence between the importance attached to a particular aim and the means adopted to achieve it and whether such means are necessary for its achievement;

Whether the impugned act is suitable and necessary for the achievement of its objective and whether it does not impose excessive burdens upon the individual; and

Whether there is any balance between the costs and benefits of the measure under challenge.

In the case of Bank Mellat v H M Treasury (2011) Lord Sumption identifies another test for proportionality which commonly used in modern context.

(i) Legitimate aim;

(ii) Suitability (rational connection);

(iii) Necessity;

(iv) Proportionality in the narrow sense.

The position of proportionality as a ground of JR in UK, obtained mixed responses before the enactment of Human Rights Act 1998 (Felix, 2006). Sovereignty of the parliament can be shown as a reason for this situation since proportionality as a ground of JR is much towards judicial activism. However, after the enactment of

Human Rights Act in 1998 (HRA), proportionality has become a valid ground of JR since it specifically deals with individual rights. In the case of R (Daly) vSecretaryofStatefortheHome Department(2001)thesecretaryhas introduced a new policy with regard to searching cells stating that prison officers are empowered to examine the prisoners legal correspondents in the absence of a prisoner concern. HouseofLordsby examining the legality of the new policy stated that excluding prisoners was not proportionatewiththerightsofthe prisoners as the policy infringed a prisoner's common law right under the ECHR. Further, in AvSecretaryofState for the Home Department(2004)applicants were foreigners who had not been subjected to criminal charges, had being imprisoned and kept without a trial. They challenged the lawfulness of their detention on the basis that it was contrary with the terms of ECHR. House of Lords stated that the decision was disproportionate.

From above cases it can be concluded that English courts have challenged the decisions oftheAAbasedonproportionality. Moreover, it can be argued that in every aspect English courts have used this concept with regard to individual rights. Since UK has a separate act which includes human rights, in enforcing those rights, proportionality as a ground of JR has become a useful mechanism. Therefore in present, the court uses the rights based approach and as a result human rights can be empowered by writs.Itisfacilitatedbyunwritten constitutioninUK(Udayanganie,2013). Accordinly, it is evident that application of proportionality is a not a myth in the UK.

In SL, similar to the cases which pointed out under unreasonableness, most of the cases whichrefertoproportionalityareFR petitions. This is mainly because, when interpreting constitutional provisions courts haveutilizedseveraladministrative principlesmostlythenaturaljustice, proportionality, reasonableness and public trust doctrine (Gomez, 2006). In particular, Article 12(1) of the 1978 Constitution which recognizesabroadconstitutionalright namely,"Righttoequality"hasbeen interpretedbycourtsutilizing administrative principles. Therefore, when there is a FR petition, courts tend to utilize administrativeconceptstojustifytheir decisions by following right based approach. It exihibits that there is a mix betweenFRjurisdictionandwrit jurisdiction in Sri Lanka (Gomez, 2006).

In AbeysekaravCompetentAuthority (2000) the claimant challenged the legality ofcertainregulationssorttoimpose censorship of the transmission of sensitive military information. The claimant argued that freedom of expression under Article 14(1)(a) has been violated. Supreme Court heldthat,theregulationswerenot disproportionate. FurtherinIndrajith Rodrigo v CECB (2009) it was based on an application to a Labour Tribunal about a termination of a workman. Court held that, the defendant decision to terminate the plaintiffwasnotdisproportionate.By analysing these cases, it can be said that the conceptofproportionalityhasbeen accepted as a valid ground for JR and it is not a myth but a reality in SL.

VI.UNREASONABLENESSAND PROPORTIONALITY IN THE UK AND SRI LANKAN CONTEXTS

Even though, Sri Lankan courts have used proportionality in FR petitions it has not become the sole ground for their decisions. The importance of proportionality is whether it has been able to recognize a right, which is not recognized by the Constitution.

Unlike the UK, there is no separate Human Rights Act in SL. However, Chapter III of the 1978 Constitution of Sri Lanka mainly

focuses about FRs of the citizens. According to Article 17 of the constitution, if there is a violationofFRbytheexecutiveor administrative action recognized by the constitution, a person can file an application in the Supreme Court under Article 126. Therefore, it is argued that there is no need to mix wirt jurisdiction and FR jurisdiction with each other since, written constitution in SL helps in laying down the writ jurisdiction and FR jurisdiction as two separate grounds. Therefore, there is no necessity to protect FR through writs (Udayanganie, 2013).

Nevertheless, the question is, whether all FRs of the citizens are recognized by the Constitution or not. The answer is clearly 'NO' because, only a limited number of rights havebeenrecognizedbythe1978 Constitution.Thus,theimportanceof recognition of proportionality comes into force, when a decision of an AA violates individual rights which are not recognized by the Constitution.

For instance, in Bulankulama and Others v. Secretary,MinistryofIndustrial Developmentandothers(2000), AmerasingheJ.states,theproposed agreement for exploration and mining of phosphateislikelytoresultin disproportionatelyandunreasonably damaging the surrounding environment. Further, he identifies the importance of protecting international rights under the Stockholm Declaration on the Human Environment (1972) and the Rio Declaration on Enviroment and Development (1992) in exploiting natural resources. Therefore, it can be said that when recognizing rights which are not identified by the Constitution, proportionality can be used as a useful mechanism to enforce and absorb such rights.

As a result it is argued that, proportionality came forward in the phase of human rights throughEuropeanizationofUKand Internationalization of Sri Lanka. Therefore, limitations on FRs should be proportionate to the value of relevant right (Udayanganie, 2013).

When answering the question "Has the unreasonableisreplacedbythe proportionality?.", there are mixed responses by many scholars (Taggart, Zamir, Felix). In R v Cambridge Health Authority, Ex parte B (1995) court decided proportionality cannot be considered as a separate ground of JR. Furtherheldthat,"Wednesbury reasonableness and proportionality are different tests. The test of proportionality is not needed in the English legal system. Wednesbury test provides a sufficient test". This case was decided before the arrival of HRA and it exhibits that courts have refused to consider proportionality as separate ground of JR. However, even after the arrival of HRA some judges [Smellie CJ., Lord Walker in Pro-Life Alliance (2003), Wild J. in PowercoLtdvCommerce Commission (2005)] refused to recognize proportionality as a separate ground for JR. In R (Pro-Life Alliance) v BBC & Others (2003) Lord Walker stated "Wednesbury test for all its defects had the advantage of simplicity and it might thought unsatisfactory that it must now be replaced by a much more complex and contextually sensitive approach".

Nevertheless, many scholars in the past and presentupheldtheviewthat unreasonableness should be replaced by the proportionality.Forinstance,inR (Alconbury Developments Ltd) v SS for Environment (2001) the court held that even without reference to the 1998 act the time has come to recognize proportionality as a partofEL. "Trying to keep Wednesbury principle and proportionality in separate compartments seems to be unnecessary and confusion". Moreover, in R v Secretary of State for the Home Department (2002) court recognized proportionality as a part of EL.

ReferringtotraditionalWednesbury standards Lord Cook held "I think that the day will come when it will be more widely recognized that the Wednesbury case was an unfortunatelyretrogressivedecisionin English Administrative Law". A modern scholar Gewanter (2017), while agreeing to majorityacademicviewstatesthat proportionality will eventually replace WU. Also he stated that "…what is understood to be proportionality review currently will not be the standard used in future cases. Instead, it will bear the hallmarks of both current Wednesbury and proportionality, becoming a new hybrid doctrine". In recent cases of KennedyvInformationCommissioner (2014) and Pham v Secretary of State for the Home Department(2015)courtshave recognized proportionalityasageneral groundofJRwhichconfirmsthat proportionality has become a reality in the UK.

Not only English scholars but also Sri Lankan scholars(Felix,Peiris)claimedthat unreasonableness must be replaced by proportionality. Dr. Felix (2006) in his article states "Wednesbury standard of review has outlived its utility and is of marginal relevance in contemporary judicial review in Sri Lanka". Further he states, althoughcourtshaverecognized unreasonableness in many cases, when the cases analyzed critically, it exemplify in most ofthecasescourtshaverelied on proportionalityratherthan unreasonableness. Prof. Peiris (1987) also argued, in modern law unreasonableness would certainly acquire less significant than is actually was.

From above scholarly arguments and cases it is evident that in UK, there is a replacement of unreasonableness by proportionality to some degree. However, still proportionality has not been able to completely eliminate unreasonableness because, there's a still room for reasonableness at some point. As mentioned in R v Secretary of State for Foreign and Commonwealth Affairs (2015) "proportionalitychallengewherea fundamental right is not involved". Further, accordingtoTaggart(2008),where administrativedecisionsinvolverights, proportionalityshouldreplacethe unreasonableness test as a distinct head of review. Proportionality involves a more intense analysis of the decision and the merits of a decision will be more relevant. Such an intense analysis is justified when rights are involved. Where rights are not involved, but rather 'public wrongs', the orthodox WU will be the only appropriate head of review as an intense review is not justified (Ferrere, 2007, p.39-40).

In SL, although proportionality acts as an effective mechanism, still there is no evidence to prove that courts have replaced the unreasonableness by proportionality. Even so, sooner proportionality will find its proper place in both UK and SL as Dr. Felix (2006) states it will only be a matter of time. Nonetheless, the proportionality did not completely replace the unreasonabless, from above judicial proceedings and scholarly argumentsitisunarguablethatthe application of proportionality as a separate ground of JR has become a reality in the present conext.

As mentioned earlier unreasonableness is very broad and it's an umbrella term concept which can include many concepts. In this regard proportionality is not a novel concept and it has been already in existence as a part of unreasonableness. Further, it's a well-known fact that it was derived from unreasonableness as a narrowed concept in ordertoavoiddefectsofthe unreasonableness. As both concepts have many similar characteristics Dr. Nehushtan (2017)statesproportionalityand unreasonableness are non-identical twins.

VII. RECOMMENDATIONS

When considering individual rights, it is clear that proportionality provides a more sufficient test than WU. In the Sri Lankan context, courts tend to follow right base approach and in this regard proportionality can be utilized as a useful mechanism in identifying individual rights which are not recognizedbythepresent Constitution. However, when incorporating international rights to domestic legal system, judiciary must be very mindful not to incorporate rights which contradict with the constitutional provisions since, the Constitution is the supreme law of the country.

VIII. CONCLUSION

The ultimate goal of AL is to protect the citizens from abuse of power by the AA and upheld Rule of Law. In order to achieve its goal, courts have recognized new grounds of JR other than traditional grounds. In a modernsociety,introductionofnew grounds of JR is essential because, in some occasions traditional grounds may not be compatible with emerging situations. In every concept there are pros and cons, thus in order to avert negative impacts, new grounds must come into force. That is the only way where the law prevails in a developing society.

It is true that unreasonableness provides a sufficient test to challenge administrative decisions, however when it comes to individualrightsproportionalitymay providemoreadequatetestthan unreasonableness. Especially in a country like SL where there is no separate human rights act, proportionality would be a useful mechanism to enforce and safeguard such rights in case of a violation by the AAs. Therefore, it can be said that, recognition of proportionality as a separate gorund would not be an unnecessary expansion of the frontiers of JR because, itisapart of unreasonableness which acts as a useful mechanism to enforce individual rights.

Moreover, by analysing all the cases and scholaryargumentsitisevidentthat proportionality as a separate ground of JR is not a myth but a reality in both UK and Sri Lankan AL. At the same time it is important to note that the proportionality test should not be a myth in a country like SL, becuase when decisions of the AAs affect the rights of citizens which are not recognized by the Constitution, affected parties must be privileged to challenge such decision and seek a remdy. In this regard proportionality would be an adequate mechanism to fulfil the said requirement.

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Abuses against Juvenile Offenders as National Security Threats; Rehabilitation and Reintegration of Juvenile Offenders in Sri Lanka

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Abstract - Not every child or youth is fortunate enough to have a childhood they would like to remember. A handful of youngsters tend to end up in prison, as juvenile offenders. All too often, the concern offered by the government for children does not extend to those juvenile offenders who are yet vulnerable children when caught up in the wrong side of law despite the fact that they are also a portion of this society and the future of the country. Abuses against juvenile offenders who are perceived to be threats to the national security of the country that seem to be a phenomenon in the global context therefore remains as a hidden layer in Sri Lanka with less concern. Hence, it is of vital importance to every human being in the society to establish a stable foundation that could raise juvenile offenders as productive adults with a guarantee of a brighter future. It is true that, the deliberation drawn towards the juvenile offenders and juvenile justice in Sri Lanka by the government and the society have been increased to a considerably higher level due to the initiatives taken in the view of reintegrating juvenile offenders into the society through rehabilitation making the punishments more effective. However with the rise of the rate of juvenile offenders and abuses towards them in the recent years, it may be precisely pointed out that the existing policies and laws are not sufficient enough to reflect a proper solution for the protection of juvenile justice leading to the question, how a considerable concern with efficacy could be devised in the country regarding this issue. Therefore, this study intends to critically analyse the prevailing legal framework and to assess the institutional initiatives relating to juvenile offenders, failures in the existing system and to provide necessarylegislativeandinstitutional approaches for rehabilitation in order to properly reintegrate juvenile offenders for the enhancement of juvenile justice through the protection of juvenile offenders as a solution for the issue of effectively punishing juvenile offenders and preventing abuses against juvenile offenders that has become far more complex and sensitive in its entirety whilst striking a balance between juvenile justice and protecting national security. The objective of this study will be achieved by the utilization of both qualitative and quantitative research methods that involves a broad assessment of current legal instruments, their gaps and their adequacy to a relevant extent.

Keywords— Juvenile Offenders, Juvenile Justice, Rehabilitation

I. INTRODUCTION

Sri Lanka being a country that has committed for the guaranteeing of rights of children to develop to their full potential in a safe and caring environment and to eradicate all forms of abuse and violence against children however, faces the crucial issue of juvenile offenders. Juvenile offender being alluded as a child under the age of 18 years and charged of committing a crime or any illegal activity, as per the statistics of the Department of Prisons for 2017 reveal that the young offenders who are in the number of 428 are of age 16 and below (Joseph, 2019). In Sri Lanka criminal law pertinent to children and youngsters, who are resolved as not mature enough to be considered answerable for criminal acts is the juvenile justice. According to this juvenile justice system it attempts to rehabilitate and

reintegrate children who are under the purview of juvenile justice law instead of severely punishing them (De Silva, 2010) as a result of seeking a way to win the struggle that has been experiencing by every nation on initiating a form to effectively punish a juvenile. The question that is of grave significance with regard to juvenile offenders phenomenon is apart from the society's sole perspective that juvenile offenders are a threat despite of recognizing the abuses against the juvenile offenders as the real threat to the national security is to pause and think about how did these children or youngsters end up in becoming a threat to the society as well as to their own self. Therefore this research aims to seek the root causes for a child to become a threat as a juvenile offender, to evaluate the adequacy of utilizing necessary legislative and institutional approaches to rehabilitate and reintegrate juvenile offenders into the society as productive citizens, to formulate a proper legal framework to safeguard and make juvenile offenders acceptable to the society and to draw the deliberation of the authorities to recognize the importance of protecting juvenile justicebyputtingforwardfurtherlegal recommendationsandproperinstitutional practices for the minimization of unfavourable impacts to this vulnerable party as well as to the society.

II. METHODOLOGY

For the purpose of achieving the objective of the research and for the completion of the study a blend of both qualitative and quantitative research methods were accompanied. The qualitative research method was adopted by utilizing primarysourcessuchasthe Constitution, legislations, conventions, statutes and judicial decisions and secondary sources suchasbooks,journals,webarticlesand newspapers respectively that has identified legal issues associated with juvenile offenders and juvenile justice through the data obtained. Theargumentoftheresearchwasalso supported by the judicial decisions from the Indian Jurisdiction and verifiable data acquired through the adoption of quantitative research method which obtained statistical data from the records and reports of the Department of Prisons and the Training School for Youthful Offenders with regard to the rate of increment of juvenile offenders in the rehabilitation centres. Through the employment of both the qualitative and quantitative research methods this study was able to assist certain claims and comeintocertainconclusions.Thekey limitation of the study was that the findings werenotbasedondataobtainedfrom interviews.

III.JUVENILE OFFENDERS

To begin with, it is pertinent to discuss and understand as to how the notions of juvenile and juvenile offenders are perceived and shaped under the Sri Lankan legal perspective. With the understanding of the vital importance to define a child in order to provide the necessary protection to a child or a youngster under juvenile justice there are several statutes in Sri Lanka that deal with children specifically such as; Adoption of Children's Act No. 24 of 1956, Children and Young Persons Ordinance (CYPO) No.48of1939,Conventionon Prevention and Combating Trafficking in Women and Children for Prostitution No.30 of 2005 and EmploymentofWomen,Young persons and Children Act No.47 of 1956 and Lanka Children. CYPO being the main domestic legal instrument with regard to juvenile justice has defined a child as a person beneath the age of 14 years and a youngster as a person between 14 and 16 years (Children and Young Persons Ordinance 1939) whereas, Children's Charter has defined a child as a person beneath the age of 18 years. Be that as it may, juvenile offender can be alluded as a child or a youngster who is charged of committing a crime or be part ofunlawfulactivityandwhoiswithan antisocial,hostile,violentanddisobedient behaviour where the offences they commit can range from petty offences such as begging, sale

oftobacco,pettystealing,vagrancy, prostitution, trafficking of heroin or narcotic drugs, consuming alcohol in a public place, causing mischief, force, criminal force, assault and simple hurt to serious crimes such as robbery,grievoushurt,physicalassault, murder, sexual abuse and offences against State such as terrorism (Niriella, 2020).

A. Legal Framework pertaining to Juvenile Offenders in Sri Lanka in light of Juvenile Justice

Juvenile Justice being the criminal law applicable to juvenile offenders there are several legislative enactments that have been established to deal with the law relating to juvenile justice in Sri Lanka. The law pertaining to the administration of juvenile justice is contained fundamentally in the Children and Young Persons Ordinance No. 49 of 1939 which is applicable to persons below the age of 16 years. This Ordinance also accommodates the foundation of juvenile courts for the hearing of any charge against a child or youngster, aside from where the alleged charge is on murder, attempt to murder, culpable homicide not amounting to murder, attempt to commit culpable homicide or on robbery (UNICEF, n.d.). In addition CYPO has also stipulated provisions with regard to the procedures involving children in the juvenile court that are Magistrate Court and Primary Courts which exercise juvenile justice such as, these courts should be presided over by a Juvenile or Children's Magistrates and that the Children's Magistrate is required to clarify the substance of the supposed offence in simple language. In addition, Youthful Offenders (Training Schools) Ordinance No. 28 of 1939 and Probation of Offenders Ordinance No. 42 of 1944 provide for thedetentionofjuvenileoffendersand probation of juvenile offenders respectively. Furthermore, the Penal Code Act No. 2 of 1882, Code of Criminal Procedure Act No. 15 of 1979 and the Prisons Ordinance No. 16 of 1877 in the samemannercontainseveralprovisions applicable to juvenile offenders (UNICEF, n.d.). Whilst prohibiting imprisonment of children except in cases where the court confirms they are of unruly or debased character that they cannot be detained by a remand home or a certified school by the CYPO (Children and Young Persons Ordinance 1939), it along with the Prisons Ordinance also provides for a partition of juvenile prisoners from adult prisoners (Prisons Ordinance 1877). As per Section 75 of the Penal Code that has provided several sections with regard to offences committed by children has described 8 years as the minimum age of criminal responsibility (Penal Code 1995). Under Section 76 it also provides that those who are above 8 years but below 12 years cannot be punished except where they have attained sufficient maturity (Penal Code 1995) and likewise, as per Section 288 of the Code of Criminal Procedure persons under the age of 18 years cannot be imposed with death sentence (Code of Criminal Procedure Act 1979). It is obviously critical to remember that the Constitution of Sri Lanka as well provides specific rights that can be enjoyed by a child in a similar manner as other citizens.

B. Issues in the existing Legal Framework

Age is the central factor of the classification of adults and children in any circle. As per the prior discussion it is apparent that in Sri Lanka there exist a confusing and an incompatible situation with regard to defining a child and a youngster. A child who is defined under CYPO as a person beneath the age of 14 years and a youngster as a person between 14 and 16 years is not the same under Children's Charter of Sri Lanka which defines a child as any person under the age of 18 years. However, under CYPO persons between 16 to 18 years are not considered as a juvenile. Furthermore, in the YouthfulOffenders (Training Schools) Ordinance No. 28 of 1939 it has provided those who have arrived at the age of 16 and who have not yet arrived at the age of 22 as youngsters (Youthful Offenders Training Schools Ordinance 1939). In the same manner,

the Sri Lankan Penal Code which sets 8 years as the minimum age of criminal liability provides that children above 12 years can be charged with criminal liability despite considering if they have attained sufficient maturity to understand the nature of their conduct although a person under 14 years and person under 18 years is defined as a child who is immature or irresponsible under the CYPO and Children's Charter. It is also noteworthy that in the situation where the age 16 has been made the minimum age to have sexual consent legally, the provision of 12 years as the minimum age to marry of a Muslim girl under the Muslim Marriage and Divorce laws could be in contradiction where having sexual intercourse with a girl under 16 years is made a punishable offence on the ground of statutory rape under the Penal Code that could lead to a minor married to a Muslim girl a juvenile offender for committing rape wrongfully. These befuddling situations have made the undertaking of executingjuvenilejusticestandards troublesome, uncertain and also inconsistent.

When children coming into contact with the justice system there are several shortcomings that would violate the rights of juvenile offenders as children such as according to the CYPO it is not required to explain a child about the progress of his or her case or about the judicial process.

Whenitcomestojudicial proceedings, provisions regarding therighttolegal representation of children are not provided under the CYPO.

According to Section 42(2) of CYPO a detention order made by an approved or certified school lasts for a 3 years period of time which is longer than the period an adult would be detained for a similar offence (Children and Young Persons Ordinance 1939).

Although the probation officers (PO) are tasked to ensure care and protection of children in the justice system under the CYPO the act fails to specificallymention the roleofPOsin facilitatingthe reintegrationofjuvenile offenders to the society.

Another key gap in observance of the law and enforcement is that special Juvenile Courts dealing with offences committed by juveniles hasnotbeenofferedimpacttoona countrywide premise. In fact, there is just a single Juvenile Court and that is in Colombo.

Moreover, the delays in the adjudication of cases that occur every now and again have antagonistic results on juvenile offenders, especially when they have not been discharged on bail and are sent to remand homes on pending trial (De Silva, 2010). When dealing with juvenile offenders the interruptions that may occur in the schooling will then consequently be a grave negative outcome of the law's delay.

C. Child's Perspective; What causes for a child to become a Juvenile Offender

"Children are like clay, that can be moulded into any shape" It is of fundamental concern to examine the personal, social and financial impacts which would conceivably be added to make a child a juvenile offender instead of letting this get out of hands as humans in the society who should rather stop and think for a while why these children have become offenders at such a young age making them ended up in correctional centres for juvenile offenders. In response, it is justifiable to be in the opinion that these children could have a blend of numerous reasons which especially includes abuses against children that drove them to choose a criminal way of life where adults could partly be held liable.

When looking into visible personal and social factors several causes for a child to become a juvenile offender can be found. Due to broken families, living with an abusive parent or parents and living with a divorced parent a child would not be able to receive enough love, care and acceptance which are essentially

required for their potential to become a good human. Apart from these, living with a family of criminals or having a mother who is a sex worker would lead for the rejection of a child from the society. In the same sense there is a high possibility for orphans who have been rejected from his or her own parents to become part of criminal gangs during their path of seeking for belonginess, acceptance and their own happiness. As per the records of a Child Activity Survey which was done in the year 2016 it has revealed that children under the age group of 5 to 17 years, 3% of children live with father only, 15.7% live with mother only and 3.5% of children live without both the parents (Child Activity Survey, 2016). Apart from these visible factors there are some other causes that are overshadowed in the society which would impact a child personally and socially. Domestic violence that could be termed as family violence would abuse a child mentally and physically; mentally through verbal abuse, emotional abuse,neglectofeducationalneeds, psychological maltreatment and physically through injury upon child which includes burning, hitting, beating and harming. This situation gets far dirtier when a child gets sexually abuse by an adult or a relative when she or he is with a lower protection where they have beenleftalonebytheirparents intentionally or unintentionally for instance having a mother who is working as a migrant worker. As per the records of NCPA in 2015 among their complaints, 2317 were regarding cruelty to children, 885 neglecting of children, 735 on sexual harassment and 433 were on rape (National Child Protection Authority Report, 2015). Besides the aforesaid causes, illiteracy, immaturity, moving into a strange society,irresistibleimpulsesandearly psychological maturity could also impact a child negatively.

Modern day technology also seems to have a role in causing a child to become a juvenile offender with the bad influence of present-day movies that represent sex and violence in a greater level which could make a child to experience those things happen in the movies in reality. Moreover, economic aspects also have a significantcontributionintheoffences committed by juveniles. When poverty comes into scene there are several neglects of the basic needs of children that can be identified such as inability to provide children with proper education and other basic necessities in life which could lead a child to commit offences such as theft in order to fulfill their desires whereas, in the similar manner but for different intention children of rich families with busy working parents tend to involve in such petty offences for the sake of being distant from feelings of isolation or for the sake of fun (Niriella, 2020).

For further clarification on the importance of considering the root causes of making a child to become a juvenile offender by looking into Indian judicial decisions the very recent case *Mukesh v. State* (Mukesh Singh v State, [2017]) famously known as Nirbhaya Judgment can be taken into account. Firstly, it is important to note that while sentencing the four adult defendants to death by hanging on the convictions for rape, murder and assault the juvenile convict was given only imprisonment of three years as per Juvenile Justice Act of India. The second fact to be noted is as per the record of the Juvenile Justice Board that tried him, the investigation conducted by them in seeking for the causes that made the juvenile offender in this case brutal. Evidence revealed that the offender was weighed down by poverty since his childhood he was a person who has fled from home as a small boy and on the day of the fateful night of the crime he was landed on the bus where the victim was raped by mere chance (Press Trust of India, 2017).

In spite of the hardship in prioritizing the specific causes to become juvenile offenders the above causes can be recognized as having much contribution to the issue leading to come into a conclusion that one day the victims of

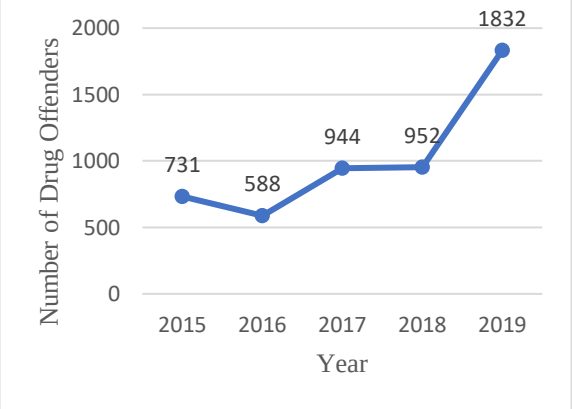
child abuse may repeat the violent acts they experienced as a juvenile offender or as well as an adult offender.

D. National Security Perspective; Abuses against Juvenile Offenders as National Threats

According to the criminal law framework in the country, the offences committed by juveniles cannot be disregarded any longer due to the statistics that have demonstrated an expansion of juvenile crime in Sri Lanka in the recent years. Very high number of children and youngsters fall prey to allurements and has consequently violated the law (Chirlesan and Chirlesan, 2013). Not just the quantity of wrongdoings committed by youngsters has expanded yet additionally the degree of their violence.

Figure 1: Drug offenders according to age group,

2015-2019

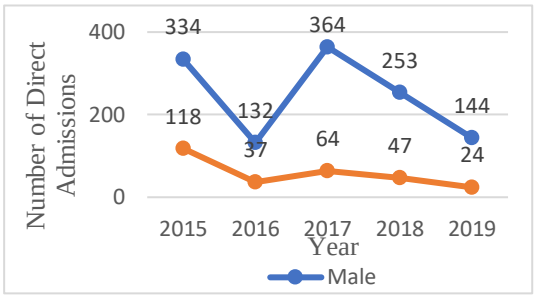


Source: Department of Prisons, 2020

For Instance, the above chart shows the increment of drug offenders who are under the age group of 16 and under 22 years during the last five years.

According to the statistics of the Department of Prisons for 2017 reveal that the young offenders who are in the number of 428 which represent 384 males and 64 females are of age 16 and below (Department of Prisons, 2020).

Figure 2: Direct Admissions of Unconvicted Prisoners according to Age Group 2015-2019



Source: Department of Prisons, 2020

Above chart shows the number of direct admissions of unconvicted prisoners that have been made in the years of 2015, 2016, 2017, 2018 and 2019of those who are under the age group of below 16 years.

However what is of vital importance to be the topic of discussion is the abuses faced by juvenile offenders under the purview of the legal framework relating to juvenile justice instead of giving so much gravity for the topic of threats done by the juvenile offenders to the society through the offences committed by them, as being persons who are incapable of attaining sufficient maturity to understand the nature and the consequences of their conducts. Hence, it may be unfair and wrong to ignore a child for the reason of becoming an offender in a situation where the juvenile offender being under the age of 8 years since it is considered to be the minimum age to have mens rea to commit a crime.

Be that as it may, it can be observed that abuses against juvenile offenders could be the most controversial issue which is not yet resolved because more than the reasons that made a child or a youngster a juvenile offender, the abuses faced by the juvenile offenders when they are detained or when they are being ignored by the society as well as from the juvenile justice system of the country can be of greater impact for them to be serious offenders leading to the issue of threats to national security.

When looking into the issue of abuses against juvenile offenders several violations of their rightsandabusescanberecognized significantly.

In case of child combatants who are being re-institutionalized in Sri Lanka for being direct participants of war which was front by the Liberation Tigers of Tamil Eelam (LTTE are often detained on groundless suspicion and frail evidence for the fact of being a part of an armed group or for being a relative of a terrorist family member. Due to gaps in the existing legal and institutional framework with regard to juvenile offenders also some issues have arisen such as making juvenile offenders share the same cells with adult prisoners during remand which could lead to additional risks of physical and sexual violence as well as making their behaviourworsebymakingthem accompaniedbyexperiencedoffendersor criminals. In the same manner with law's delay negative impacts to their education may occur depriving their right to freedom which includes their right to education and also their right to employment which could abuse a child or a youngster mentally. Most importantly because of the ignorance of the society and the juvenile justice system of the country with regard to the protection of a child that could lead children or youngsters to face serious abuses and threats as mentioned earlier can make the worse type of juvenile offenders with so much hate towards the society they live in. Violent young offenders are often known to have come from homes of criminal parents where children have been forced to act as couriers for drugs (Joseph, 2019). Consequently there have been very recent instants where children have been found while transferring heroine or any narcotic drug in public places such as in buses, trains and near schools. Indeed, this can be considered as the main reason for the birth of many drug addicted or alcoholic juveniles. Although prostitution is described as one offence that is committed by juvenile offenders the consequence of engaging in prostitution could make a juvenile offender a victim of mental and physical abuse with interrupted education, broken families and lifestyles, mental illnesses as well as health problems such as sexually transmitted diseases in situations where poor girls are forced to sell their bodies. In contrary to such situations there are also some other situations where young people being rejected in their villages when they get released from institutes that have been established for the treatment of juvenile offenders such as certified or approved schools. Accordingly, it can be observed that there is a direct nexus between child abuse and juvenile offenders where it can be clearly assumed that child abuses cause an abused child to become a violent juvenile offender later in the future.

IV. REHABILITATION AND REINTEGRATION OF JUVENILE OFFENDERS

Discipline, punishment and imprisonment are from numerous points of view are as old as the historical backdrop of the humankind. Although modern world has experimented intensely with theideaandthoughtofdisciplineand punishment; in case of juvenile offenders the ultimateaimneedstoconsistentlybeat endeavour at rehabilitation and reintegration (Paper Due, 2014). Due to the reason of taking a therapeutic approach rather than a harsh or a punitive approach by the Juvenile Justice Courts in imposing punishments towards juvenile offenders as the first option they are sent to correctionalcentresprioritizingthe importanceofrehabilitationinorderto properly reintegrate them into the society. Mental growth of children, development of professional training opportunities, moulding towards good behaviour and qualities and to make a juvenile offender acceptable to the society (Gunawardhana,2020)canbe considered as the aims of each and every rehabilitation process conducted by all the institutions established for the purpose of treating juvenile offenders in Sri Lanka.

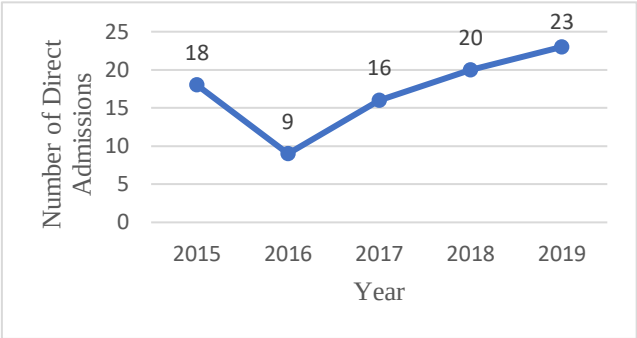
A. The existing Rehabilitation System for Juvenile Offenders

The rehabilitation of juvenile offenders waiting on the probation or in custodial care is

managed by the Department of Probation and Child Care (Gunawardhana, 2020). In Sri Lanka juvenile offenders are rehabilitated in remand homes, certifiedschoolsandapprovedschools. Therefore, it can be stated that there are three types of correctional institutions that are built up for the rehabilitation of children and young persons during the period of punishment under the Children and Young Persons Ordinance (CYPO). At present there are 18 remand prisons where two centres have been operating at Pallansena and Taldena for juvenile offenders as Correctional Institutions for Youthful Offenders. Furthermore, there are four Certified Schools that are located in Makola, Hikkaduwa, KeppetipolaandRanmuthugalaandone Training School in Watareka, Homagama. For a period not exceeding one month a juvenile offender who is under the age of 16 years could be sent to a remand home whereas for a maximum period of three years a young person could be sent to a certified or approved school whereactivitiesonrehabilitationare conducteduringthatperiod.Itisalso importanttonotethefurnishing of formal education and vocational training to children while they are staying at these institutional centresthatarefortreatmentof uvenile offenders where systematic vocational training which includes motor mechanism, carpentry, sewing work, agriculturalworketc.and education through the government schools in the surrounding with some necessary facilities.

Figure 3: Direct Admissions at the Training School for Youthful Offenders, Homagama according to the

age group 2015-2019



Source: Department of Prisons, 2020

The above chart shows the number of direct admissions that have been made to the Training School for Youth Offenders at Homagama in the years of 2015, 2016, 2017, 2018 and 2019 of those who are under the age group of 16 and below 17 years.

B. Issues in the existing Institutional Framework and the Rehabilitation System

Throughtheassessmentofinstitutional practices including the prevailing rehabilitation system with regard to juvenile justice in Sri Lanka several gaps can be identified.

In the adoption of rehabilitation for the juvenile offenders in order to reintegrate them it is confronted with numerous issues that arise on thegroundsofbothpracticalandlegal standards.

Duringthevocationaltrainingprograms conductedincorrectionalcentresforthe rehabilitationofajuvenileisbasically centralized upon training them only on home science,engineeringworkandsewing.
Therefore, it is clear that there is a lack of a proper and a well-advanced vocational training programs in the certified or training schools. Despite the fact that the number of the admissions of juvenile offenders are on raise the institutional correctional framework's capacity has not reached out in shape at a similar rate. Because of this reason various functional issues have been made with respect

to the institutional rehabilitation programs in Sri Lanka. Lower standards in the institutes, shortage of institutes, the insufficient allocation of space to conduct particular activities that helpstheprocessofrehabilitation, overcrowding, hardships in giving appropriate consideration and assurance to the juveniles, challenges in leading the treatment programs in a legitimateway,thecurrentrecovery strategies that do not sufficiently address the issues of the juveniles, monetary constraints of running great rehabilitation programs, lack of staffforthelackofpreparationand qualifications of the existing staff and the denial ofthechildrenafterrehabilitationbythe society as well as by their own relatives can be added to list of practical issues in the prevailing rehabilitation system in the country.

Also, another prominent issue with regard to the probation and correctional centres where rehabilitationprocessesareconducted is children as juvenile offenders who are within the justice system are not provided with proper educational facilities and legal assistance

The partitionthatisrequiredtobe incorporated between adult prisoners and juveniles during remand is likewise not strictly adhered in every case. In the same manner, juveniles are once in a while accompanied by adults in remand.

Another unacceptable practice which is in need of earnest revision is that of setting youngsters who are taken into police custody except for reasons of criminal offences along with the individuals who have carried out such offences.

Moreover, the knowledge gap and inadequate trainingofpoliceofficersregarding requirements pertaining to justice of children.

Also,withregardtotheprobationand correctionalcentreswhererehabilitation processes are conducted; children as juvenile offenders who are within the justice system are not provided with proper educational facilities and legal assistance

Besides the aforesaid issues due to the inadequacy of the legal framework prevailing with regard to juvenile justice as well give rise to certain specific issues in the rehabilitation system. Infringement of child rights which includes ill-treatment, torture and their right to privacy and health, interruptions in education due to law's delays can be added to the list of defects in the laws regarding the rehabilitation and reintegration system in Sri Lanka.

V. CONCLUSION

Children being the future of the country, every child should be provided with a decent childhood through the strengthening and guaranteeing of their rights and pride which may pave the path for development of the nation. Hence, it is the responsibility of each and every adult citizen in the society to protect children from social evils regardless of whether they are victims of abuse or juvenile offenders. Besides the community-based protection of children, rehabilitation institutions also play an active role with regard to the protection of juvenile justice in the country. It could be stated that when the juvenile justice system draws theirdeliberationstronglytowards rehabilitation and reintegration it becomes a win-win situation for the child offender as well as to every other person in the society. Therefore from the perspective of the national security of the country also adhering to rehabilitation instead of punitive punishments could help mitigate threats towards the national security where rehabilitation operates as a fruitful process of managing the violent nature of a juvenile offender by conducting in-depth analysis in seeking for the root causes that transformed a child to an offender as well as by focusing on their special needs and measures that are to be taken according to the nature and the offence of each juvenile where

it is evidenced that criminal acts of most of the juvenile offenders are symptoms of grave emotional and physical abuse. For the sake of the protection of juvenile justice and the national security the relevant legal authorities as well as the society must do better in addressingthecriticalissuesthatafflict children.

VI. RECOMMENDATIONS

With the pressing need to scrutinize and minimize the institutional challenges faced by the country and for the issues in the existing Legal Frameworkpertainingtojuvenile offenders in light of juvenile justice in Sri Lanka following recommendations can be provided;

- For the shortfall in the definition of a child the Sri Lankan legal framework relating to children should clear the confusion and ambiguity in the term 'child'. As being a member state to the Convention on the Rights of the Child (CRC) Sri Lanka is lawfully bound to implement into its domestic legal framework the declarations of the Convention. Hence, a new definition can be proposed to the term 'child' that is in align with the CRC definition of child.
- In the same manner, any person under the age of 18 years should be uniformly defined as a child and the Penal Code should be amended to increase the minimum age to 12 years as to hold a child criminally liable.
- Scrutinizing juvenile court activities along with introducing a proposal to establishjuvenilecourtsona countrywide premise and revising the legal standards and regulations in order to diminish the delays in the laws can be recommended to resolve the functional issues in the juvenile court proceedings.
- Establishingtherighttolegal representation ensuring that the best interests of children are protected in matters regrading juveniles in the justice system.
- Strengtheningthelegalframework pertaining to the protection of children from all kinds of abuse with a special reference to the protection of juvenile offenders and filling the knowledge gaps between police officers and probation officers with regarding to the laws on juvenile justice.
- For the partition issue of preventing the juvenile offenders being mixed with adult prisoners during remand, laws should be implemented on the relevant authorities to look into this matter strictly without any mistake.
- It is clear that although juvenile justice isupheldinSriLanka,itlacks legislations and enactments relating to juvenilejutice.Henceaspecial legislative enactment can be formulated whichstipulatesprovisionsfor the protection,treatmentand rehabilitationandreintegrationof juvenile offenders in the purview of juvenile justice.

In the perspective where rehabilitation and reintegration are considered as essential for the protectionofjuvenileoffendersand guaranteeingtheirrightstheexisting rehabilitation system has been overshadowed by certain issues as mentioned in the research. Therefore, in order to resolve such issues following recommendations can be provided;

- Firstly, it is important to note the absence of a Rehabilitation Act for the treatment and rehabilitation of juvenile offendersinSriLanka.Hence,the rehabilitation processes for juvenile offenders should be based on a special rehabilitationpolicythataimsto regulate

training programs for the rehabilitationbyidentifying their specialneeds,tostandardize rehabilitation processes,toprescribe minimum qualifications for the staff dealingwithjuvenileoffenders,to establish and improve well-advanced vocational training programs that help theprocessofrehabilitation,to introduce proposals for the institution ofmorerehabilitationcentres,to allocate financial facilities to provide the juvenile with their special needs and necessities as well as to provide enough space in such centres, and to provide after care programs that can be conducted after reintegrating a juvenile offender into the society as a productive citizen.

- Moreover, a juvenile justice scheme should be well established through the appointment of a Juvenile Justice Board and Special Juvenile Police Units to deal with juvenile offenders.
- Filling the knowledge gaps between police officers and probation officers with regarding to the laws on juvenile justice.
- Finally, it is clear that as the most important suggestion with regard to the protection of the juvenile justice system in the country the administration of juvenile justice which includes the treatment and protection of juvenile offenders should be strengthened from a policy, institutional and a legislative viewpoint.

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ABBREVIATIONS

CYPO- Children and Young Persons Ordinance

NCPA- National Child Protection Authority

CRC- Convention on the Rights of the Child

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Paper ID: 464

Need of Legal Recognition for Distance Working in PostCovid19 Sri Lanka: An Empirical Approach

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Abstract— The COVID-19 pandemic immensely affected the employer-employee relationships within the industrial sector leading to drastic issues with regard to labour relations providing room for distance working concept. Though the Home Work Convention,1996functionsasan international legislation which regulate distant workers, it is pertinent that Sri Lanka has not signed and ratified the convention due to existing controversies such as the absence of a proper procedure of claiming compensation, occupational safety and health for distant workers, mechanism of evaluating the exact hours of work and issues with regard to salaries, social security andgratuity,jobsecurityandsocial problems faced by women employees etc. Therefore, the entire research focuses on the need of an effective legal and regulatory framework which safeguards the rights of distant workers recommending to enact a separate legislation which ensures the rights of distant workers while strengthening its regulatory framework in advance.

Keywords -Legalandregulatory framework,Distant-workingconcept, Home Work Convention

I. INTRODUCTION

This research paper focuses on the required improvementsofSriLankanlegal framework within Post-Covid19 Sri Lanka. It is obvious that the traditional system which managed employer-employee relationships subjectedtoarapidchangewithinthe recentlyexperiencedpandemicsituation. This lead to a lacuna within the legal system paving way for the need of legal and regulatory framework to promote distant workingconceptwithregardto maintenance of labor relations.

The virtual pause of business activities functioned as the basis and resulted in the identification of the decrease of the expected future income. This leads the empoyers towards harsh and arbitrary decisions on employee management. However, this paper analyses the significance of adhering to the fundamental principlesoflawprio to arbitrary decisions and further the job securityoftheemployeesshoudbe ensured.Therefore, it is necessary to discuss how far is it justifiable to allow pay cuts and employmentterminationsbasedon extraordinary circumstance such as Covid-19 pandemic. The entire research paper deals with the lacuna of Sri Lankan law on distant working concept highlighting the issues of direct incorporation of Home Work Convention emphasizingtheneedofa separate legislation which ensures the rights of distant workers.

II. METHODOLOGY

The required data has been collected using primaryandsecondarysources.When refering to primary sources, the relevant statutes were used throughout the research together with available case laws and the secondary sources include the journal articles and reports in relation to labour standards. Furthermovingaheadfrom blackletter approach the research also

paved the way for gathering empirical data with the objective of addressing the issues in a practicalbasisviainterviews.The interviews were held with the authorites of International Labour Organization, Trade Unions, Employers'Federations as well as leading Academics in the field of Labour Law and these interviewerswereselected purposefully in order to accomplish the objectiveof theresearchpaper via innovativerecommendationswhich preserve the authenticity and credibility of the research.

III. DISCUSSION

With the current wave of Covid-19 Pandemic theconventionalmodelofworking subjected to a drastic change leading to the needofspecificlegalandregulatory framework which regulates the employees who are being subjected to the newly emerged distant-working concept.

When referring to the Sri Lankan context, it isobviousthatthegovernmenthas introducedspecifichealth guidelines in order to ensure the safety of employees withintheofficeenvironmentvia the implementationofprecautionary mechanisms which regulate the spreading of Corona virus. This situation has provided room for the employers to formulate special regulationsinordertoregulatethe employees resulting them to decide working hours as well as number of employees which can be accommodated. (Epidemiology Unit - Ministry of Health - Sri Lanka, 2020)

However, the absence of a proper legal and regulatory framework within Sri Lanka has worsened the issue leading to the arbitrary decisions of the employers irrespective of hazardous impact of it towards working sector. When referring to international legal framework,itisobviousthatthe International Labour Organization (ILO) which is a part of United Nations forms the relevant rules and regulations which are essential in case of regularizing labour relations by resolving disputes among tri-parties namely Employers, Employees and the Government.

Thedistant-workingconceptwhich acquired the attention of post covid-19 Sri Lankan society lead to the discussion of pros and cons of the applicability of *Home Work Convention* (HWC) 1996, (No.177) which was introduced by ILO and classified under the category of conditions of employment referring to specific categories of employees. Ithasalsobeenidentifiedthatthis convention has been signed and ratified by ten countries around the world such as Albania,Argentina,Belgium,Bosnia, Bulgaria,Finland,Ireland,Netherlands, North Macedonia and Tajikistan.

However, Sri Lanka hasn't ratified this convention yet due to existing controversies such as the absence of a proper procedure of claiming compensation, occupational safety and health for distant workers, mechanism of evaluating the exact hours of work and issues with regard to salaries, social security and gratuity, job security as well as matters with regard to issues of maternity benefits and social problems faced by women employees and threats against freedom of association which means the absence of an exact procedure of joining trade unions are among the major concerns which need to be addressed within legal framework. Though the inspections are to be carried out in actual workplaces, the process of inspecting the work done at residential levels require a special procedure of inspection in advance.

According to the preamble of the HWC (1996) it's evident that there exists many internationallaborconventionsand Recommendations laying down standards of generalapplicationconcerningworking conditionswhichareapplicablefor homeworkers such as *Equal Remuneration Convention* 1951 (No.100), *Discrimination*

(Employment and Occupation) Convention 1958 (No.111), *Minimum Age Convention* 1973 (No.138), *Freedom of Association and ProtectionoftheRighttoOrganize Convention*1948(No.87)and*Rightto OrganizeandCollectiveBargaining Convention*1949(No.98)andthese conventions are among the fundamental conventions of ILO.

During an interview conducted on 3rd July 2020 the senior expert in legal and regulatory reforms, Ms. Shyama Salgado stated that the time has ripen up to initiate a socialdialogueontheemerging jurisprudencewithregardtodistant working concept together with the special focus towards the process of digitalization and facilitation ensuring socio-political and economiccommitmentsalongwith International labour standards prior to the process of incorporation of the home-work convention. She further prided over the fact that any convention cannot be incorporated solely without a comparative analysis on existing jurisprudence.

As per the HWC (1996,art.1), if a person engages in occupation in his or her home or in other premises of his or her choice, other than the workplace of the employer for remuneration which results in a product or servicespecifiedbytheemployer irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions such personisconsideredtobea homeworker.

When referring to the Sri Lankan context, there exists employees who already in employmentbasedonacontractof employment as well as the employees to be recruited in order to utilize the distance working concept. Since the first category of employeesengageinparticular employmentsbasedonacontractof employment they should be either directed to partly or occasional distance working conceptandaccordingtotheHWC (1996,art.1(b))specifiesthefactthat personswithemployeestatusdonot become homeworkers within the meaning of thisconventionsimplybyoccasionally performing their work as employees at home, rather than at their usual work places. However, the pandemic situation leads to the turning point within the industrial sector as well as the entire business world leading to the increased recognition of the second categoryofemployeeswhoaretobe recruited as distant workers and this will also pave the way for the need of resolution of numerous issues prevailed with regard to employeesincaseofremuneration, discrimination, freedom of association as well as recognition of their rights though it mighttakeaconsiderableperiodfor adaption of this newly emerged concept of distance working within the community.

Though the aforesaid HWC (1996) functions as a statute which provides for the legal protection of the rights of distant workers, the Article four of the convention leads to the confusion whether it actually safeguards the rights of distant workers in case of practical application withinSri Lankancontext. According to the second limb of Article four of the convention, the equality of treatment isexpectedtobepromoted.Eventhe reference towards The Constitution of the Democratic, Socialist, Republic of Sri Lanka (1978,art.12)guaranteestheRightto Equality. However, though Sri Lankan legal frameworkspecifiestheprocessof safeguarding the rights of employees within the workplace, there isn't any specific legislation which guarantees the rights of distant workers

During an interview conductedon7th September 2020 with the Assistant Director General of Employer's Fedaration of Ceylon, Mr.Chamil Perera stated that they being the employers have already formulated a special policy named " Remote Work Policy" within the existing legal framework on labour relations with the objective of managing the employeeswhoworkfromhome.This clearly denotes how Remote work policy has already recognized residential premises as the actual work place of the distant worker. He further stated that the policy specifies two categories of distant workers namely, the employees who work under distance working concept as per the request of the management and the employees who work based on their personal requests. However, the policy framework highlights the fact that the final discretion is upon the company to decide the employees who will be subjected to distance working and how long he or she would render his or her service as per the agreementbasedontheirmutual understandingandconsent.Healso emphasized the fact that in case of any dispute which arise with regard to distant workers, the Workmen's compensation Act can be applied. However, he also pointed out that the absence of twenty four hours coverage for the employees might negatively impact on the safety of employees during working hours since it's hard to identify the exact working hours within the distance working concept.

When referring to foreign jurisdictions, the manner in which occupational safety and health is assured it's obvious that in a recent case, Michel Carroll was killed by her de facto partner, Steven Hill, while working from their family home in New South Wales (NSW) on June 16, 2010. Carroll and her partner were employed as financial advisers by family company S L Hill & Associates Pty Ltd. Carroll's workplace was inside the family home and her employment was deemed by the NSW Court of Appeal to be a substantial contributing factor to her being killed. Carroll had two dependent children, a teenage son and a newborn baby, who made claims for death benefits under the *Workers Compensation Act* 1987 (NSW). The Workers CompensationCommissiondetermined Carroll died as a result of an injury arising in the course of her employment and payments were ordered for her children. (Hilsop 2020)

This landmark case clearly denotes the significance of a legal framework regarding distant workers and currently Sri Lanka needs such strong legal and regulatory framework for the process of safeguarding the rights of distant workers in advance. Though the existing room for injuries and illnesses within work environment is unavoidable the employers as well as the government is responsible for occupational safety and within the scope of distant working concept the procedure of claiming compensation, occupational safety and healthofdistantworkersshouldbe reassured.

During an interview conducted on 3rd July 2020, based on the existing procedure of claiming compensation, occupational safety and health of distant workers in Sri Lanka, the Senior Lecturer, Ms. Shyamali Ranaraja who contrasted the difference of procedure of claiming compensation on actual work place and home being a distant worker emphasized the fact of absence of a proper procedureofdeterminingwhetherthe particular employee subjected to injury or illness while he or she is working or not. She further highlighted the fact that Sri Lankan legal system requires improvement and ensure the rights of distant workers.

Whenconsideringthemechanismof evaluating the exact hours of work under the distant-workingconcept,it'shardto calculate the exact hours of work. However, according to Section 3 of the *Shop and Office employees Act No.15 of 1954,* the normal period during which any person may be employed in or about the business of any shop or office, on any one day shall not exceed eight hours and in any one week shall not exceed forty-five hours. Further, any interval allowed for rest or for a meal are excluded from the decided hours of work. Within the distant working concept, since the employee is expected to work from home there exists the difficulty in obtaining the proper calculations of the exact hours of work due to the invisibility of distant works which hiders the inspection process due to impracticality. Either the HWC (1996) nor the Labour department is silent on this matterandthereexiststheneedof incorporationofaproperlegaland regulatory mechanism of evaluating the exact hours of distant workers.

The spectrum of social security of employees requires the focus towards the procedures established regarding Employee Provident Fund, Employees Trust Fund and Gratuity. TheconsiderationsonEmployment Provident Fund highlight that both employer and employees contribute the fund. The Employee Trust Fund is entirely based on employer's contribution and it seems that there exists no issue in case of functioning of these once even under distant working concept. However, when it comes to gratuity the procedure of distant workers being entitled for gratuity benefits is quite problematic. According to Section 5(1) of the *Gratuity Act No.12 of 1983* its evident that Every employer who employs or has employed fifteen or more workmen on any day during the period of twelve months immediately preceding the termination of the services of a workman in any industry shall, on termination of the services at any time after the coming into operation of this Act, of a workman who has a period of service of not less than five completed years under that employer, pay to that workman in respect of such services and the issue arises in case of deciding the guaranteed years of employment of distant workers. Though the employees who work under contract of employment have been included in the convention, the distant workers who render their service in a part time basis have been excluded. These pros and cons of the HWC (1996) lead to the need of formulating a separate statutory enactment with the objective enhancing the rights and social security of the distant working community of Sri Lanka.

Furthermore, it is necessary to ensure the equalityoftreatmentinrelatio to remunerationofthedistantworkers without any discrimination. As per Section 3 (1) of *National Minimum Wage of Workers Act No. 3 of 2016* the national minimum monthly wage for all workers in any industry or service shall be ten thousand rupees and the national minimumdailywageofa workershallbefourhundredrupees. Further the remuneration increases via the additionofbudgetaryreliefallowance.
Accordingly, the National Minimum Wage is thirteen thousand and five hundred rupees. Comparatively, within the distant working concept employers tend to reduce wages of distant employees based on the ground that they are not serving within their actual workplaces and this can be considered as a treat for the process of ensuring equal treatment.

The recent pandemic situation also resulted in a huge threat on the job security of thousands of employees. According to the DistrictLabourofficeGampaha,the pandemic resulted in many issues being a treat for job security of the employees. The officials also

mentioned the fact of arbitrary decisions of the employers such as reducing numberofemployeesandreducing remuneration lead to these issues. However, the interviews with the employers clearly denoted how the employers are in trouble in caseofpayingremunerationand maintenance of the factories. Further the pandemic situation resulted in a great lost. According to the research carried out, it is obvious that the employers have made use of twospecificprocedurestoreducethe number of employees. They either directly terminated the employees or took steps to terminateemployeesviaVoluntary RetirementScheme(VRS).When considering the issue emerged at Escual Lanka PVT LTD it has been found three hundredandfiftyemployeeswere terminated out of nine hundred and fifty employees and the employers have used VRS procedure to terminate these employees. In Helaclothin PVT LTD it has been found that the employers have taken steps to terminate the employees who are above the age of fifty-fiveyearsandtheemployeeswhose employment is less than six months. In the situation arose in "Sumithra Hasalaka" it has been found that the employees are being forced to resign by themselves. All most all these issues have arisen as a result of the pandemic and it is pertinent to mention the fact that these employees even deprive the option of moving towards distant working concept due to lack facilities and required knowledge.Therefore,thepandemic functioned as a huge threat for thousands of employees depriving their job security and there isn't any doubt regarding the need of effective rules and regulations which ensure the job security of employees either they work at office or home.

The distant workers also face numerous issues in case of claiming maternity benefits. When considering women who are being employed, it's obvious that they have to serve both at office and home and the distant-working concept provide a sought of relief for them to manage their day-today responsibilities. However, the issue arises with regard to the process of determining the exact hours of work of a mother or a pregnant lady under maternity leave and the absence of such a mechanism is among the lacunasofthelegalandregulatory framework for distant workers.Though Section3(1)of the *Maternity Benefits Ordinance No.32 of 1939* specifies the period in which any woman is entitled to the payment of maternity benefit, there is not any provision to safeguard the entitlement of distant women employees for maternity benefit.

During an interview conducted on 2nd July 2020 based on the rights of distant women workers, the Sri Lankan programing officer of International Labour Organization, Ms. Pramodini Weerasekara stated that the distant working concept would function as a kind of blessing for most of the women employees who render their duties both in work place and their homes. She further mentioned that the flexible working hours embedded within this distant working concept would indirectly facilitate these women employees for the process of fulfilling their duties. However, she also highlighted on the necessity of a strong legal framework which safeguard their rights specially in case of the matters regarding maternity benefits without leading to arbitrary decisions of the employers.

Apart from the issues regarding the treats towards their job security and maternity benefits the sudden shift towards the distant working concept also led women employees to numerous social problems. During an interview conducted on 8th of July 2020 the Joint Secretary, Free Trade

Zones and General Services Employees' Union, Mr. Anton Marcus stated that the rural women who were employed at cities lost their jobs due the pandemic situation and they no longer able to continue their service via distant working concept. Moreover, though they go back to their villages it's hard for them to get accustomed with their previous lifestyles and ultimately have to bear the brunt of numerous social issues. This opinion clearly denotes the discrepancies which need to be addressed within the legal system when incorporating distant working concept. This further leads to the realization of the need of an effective legal framework which safeguards the rights of each employee through special considerations on their socio-economic backgrounds.

The distant workers' right to join trade unions is among the core issues within the scope of rights of distant workers. When referring to International standards it's obvious that, as per the *Freedom of Association and Protection of the Right to Organize Convention* (1948, art.2) Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organizationconcerned,tojoin organizations of their own choosing without previous authorization. Further, *Right to OrganizeandCollectiveBargaining Convention* (1949, art.1(1)) highlights that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment and Article 2(1) of it provides that the Workers' and employers'organizationsshallenjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration. Moreover, though the homework too ensures that the equal treatment should be provided to both categories of employees, which means both distant workers and employees who work under a contract of employment. However, the issues arise with regard to the right of distant workers to join existing trade unions leading to the doubt about the practicality of equal treatment for distant workers and this leads to the necessity of a specific legal protection for distant workers.

Therefore, it is necessary to address the aforesaid issues of the legal system and it is evident that here exists the difficulty of direct incorporation of the HWC(1996) due to the above discussed issues within the convention and the dualistic approach maintainedbytheSriLankanLegal framework right after the judgement issued in *Nallaratnam Singharasa v. Attorney General (2013) 1 SRI L. R.* where the court held that the international conventions do not become a part of the domestic law until thespecificlegislationsareenacted.
Therefore, instead of signing and ratifying the Home work convention it is better to enactaspecificlegislationinorderto safeguard the rights of distant workers addressing all of the above discussed issues and within the pandemic such a legislation consists an extreme timely significance in advance.

IV. RECOMMENDATIONS

As per the aforementioned analysis, its obviousthatthetimehasripenupto introduce a separate legislation for the regulation of distant workers while ensuring therelationshipamongtri-parties. Therefore, it is important to focus on the conflicting issues within the concept of distance working in comparison with the approaches of foreign jurisdictions such as HomeWorkConvention(HWC)1996, (No.177)inordertodraftaneffective statutory enactment which safeguard the rights of distant workers while paying a special attention towards both kinds of employees, either the employees under a contract of

service or the newly recruited distant workers. Furthermore,itis necessary to strengthen the regulatory framework of the distant workers via the legal recognition of the policies such as Remote Work policy which has been introducedthroughtheEmployers' Fedaration of Ceylon and this might lead to an on-going social dialog which would result in the formation of a strong legal and regulatory framework for distant workers in advance.

V.CONCLUSION

The research proved that there exists a need of a legal and regulatory framework which ensurestherightsofdistan workers. However, it is obvious that numerous issues hinder the direct incorporation of HWC (1996) to the Sri Lankan legal system. Further, it was revealed that minimal attention has been given by the government towards the newly emerged distant working concept and the drastic change caused through the use of this concept will indirectly contribute the National Growth of the country in the long run.

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