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EDITORIAL NOTE

With the presentation of Issue I of Volume 02, the KDU Law Journal (KDULJ) begins its second year of publication. We take pride in publishing the current issue on time as planned amidst the challenges presented by the COVID-19 pandemic, as it signifies the commitment of the Faculty of Law of KDU towards sustaining the journey of knowledge sharing embarked upon in the interests of the legal community and the general public.

KDULJ is a compilation of peer-reviewed articles of national and international authors of various legal backgrounds, including legal professionals and legal academics. Articles are written on an array of legal topics particularly beneficial to law undergraduates in their academic studies. It is intended that the Journal would expand national and global knowledge sharing and contribute as a useful resource for legal education while also elevating the reputation of KDU.

All articles published in the KDULJ are original products of the respective authors. The current issue claims an impressive line-up of articles examining timely legal issues through analytical and comparative perspectives. These articles are rich in diversity but intertwined by novel insights they provide that advances the frontiers of the respective fields of Public and Private Law.

Submissions to the KDULJ have been growing steadily, making it difficult to select the articles for publication. The dedication of the Panel of Reviewers in getting the articles reviewed within a limited period is sincerely appreciated. Editorial Committee also expresses gratitude to the members of the Advisory Committee, Manuscript Editors, and staff of the Faculty of Law for their invaluable support for the publication of the KDULJ.

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General Sir John Kotelawala Defence University, Sri Lanka

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KDU Law Journal
General Sir John Kotelawala Defence University, Sri Lanka

Volume 02, Issue 01
March, 2022

ISSN 2783-8870

TABLE OF CONTENTS

KDU Law Journal
General Sir John Kotelawala Defence University, Sri Lanka

Volume 02, Issue 01
March, 2022

ISSN 2783-8870

Benefits and Drawbacks of Imposing a Non-Delegable Duty of Care on Private Healthcare Facilities in Malaysia – A Comparative Analysis on the Common Law and the Malaysian Law Approach

Ammira Abu Samah*

Abstract:

The recognition of tortious liability between private healthcare facilities and their independent contractor or consultants is undeniably one of the most difficult conundrums in today's Malaysian jurisprudence. Although the common law has long established the doctrine of non-delegable duty of care and a few Malaysian courts have followed suit, it is still debatable on how imposing such strict liability would affect the private healthcare facilities due to the very nature of the relationship between the private hospitals and their independent contractor or consultants. On that note, this article will conduct a comparative analysis on the common law and Malaysian law approach in addressing non-delegable duty of care through existing case laws and infer the benefits and drawbacks from imposing such liability to these private healthcare facilities in Malaysia. By the end of the discussion, this article aim to establish that it is appropriate to impose non-delegable duty of care to the private healthcare facilities in Malaysia notwithstanding the identified benefits and drawbacks.

Keywords: *non-delegable duty of care, private healthcare, tortious liability, common law, Malaysian law*

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Introduction

The principle of non-delegable duty of care has long been present in the common law realm particularly in employment relationships. As a general rule, an employer can be held vicariously liable for the negligence of its employee in the course of the employment. However, it is different in the case of independent contractor as an employer will not be held vicariously liable for any act done by their independent contractor[1]. Contrary to this traditional view, the common law has evolved and recognized a separate liability governing the employment relationship between a party or organization who engages independent contractors which is known as non-delegable duty of care.

In the context of Malaysian private healthcare system, it is not unusual for the private healthcare facilities to employ their consultants as independent contractors[2]. The consultants will give services on their own accord while collaborating with the hospital, and the hospital in return will provide the premises, tools and assisting staffs to these consultants[3]. In such circumstances, it is always an issue as to whether these private hospitals should be held liable for the consultants' negligence or tortious acts since the nature of the employment were not based on the traditional contract of service which would otherwise render private hospitals vicariously liable for the conduct of its consultants.

On that note, this article aims to identify the benefits and drawbacks of having non-delegable duty of care imposed on private healthcare

[1] Foster, N.J. 'Vicarious Liability and Non-Delegable Duty in common law actions based on institutional child abuse', (2015) University of Newcastle- From the Selectedworks of Neil J Foster.<http://www.academia.edu/29652790/Vicarious_Liability_and_Non-Delegable_Duty_in_Common_Law_Actions_Based_on_Institutional_Child_Abuse>

[2] Under the Malaysian Private Healthcare Facilities & Services Act 1998, "private healthcare facility" means any premises, other than a Government healthcare facility, used or intended to be used for the provision of healthcare services or health-related services, such as a private hospital, hospice, ambulatory care centre, nursing home, maternity home, psychiatric hospital, psychiatric nursing home, community mental health centre, haemodialysis, centre, medical clinic, dental clinic and such other healthcare or health-related premises as the Minister may from time to time, by notification in the Gazette, specify.

[3]Sarah Lau, 'The doctrine of non-delegable duty of care: a commentary on Dr Kok Choong Seng and Sunway Medical Centre Berhad v Soo Cheng Lin', 2017, Skrine, <http://skrine.com/?option=com_content&view=article&id=1796>

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

facilities and following the analysis of these arguments, this article will be concluded on whether it is appropriate or inappropriate to impose a non-delegable duty of care on the private healthcare facilities in Malaysia.

The Doctrine of Non-Delegable Duty of Care

Historically, private healthcare facilities were considered as charitable institutions which provide medical services to poor people and in those days, private healthcare facilities would provide facilities for individual physicians to administer actual care to the patients[4]. Due to their charitable concept, not only it was inappropriate, but it is also inconsistent with the societal interest to impose any sort of liability on these private healthcare facilities. Thus, private healthcare facilities were given absolute immunity from any tortious liability arising from the negligence of its physicians[5].

Throughout the years, the roles of these private healthcare facilities are no longer limited to providing mere facilities to its physicians. This is due to the fact that private healthcare facilities had began to provide full healthcare services to the public, just like public hospitals[6].

One classic example of the application of non-delegable duty of care on a private hospital was expounded in the English Court of Appeal case of ***Gold v Essex County Council***[7]. In this case, an infant Plaintiff was treated by a radiographer who was in the employment of the Respondents at one of their county hospitals. The radiographer failed to provide adequate screening material in giving Grenz-ray treatment to the infant Plaintiff and as a result, the infant Plaintiff suffered injury to her face.

It was held that the hospital owes a duty to provide radiography treatment to the infant with care and the hospital would be liable if

[4] R Montefusco, "Hospital Liability for the Right Reasons: A non-delegable duty to provide support services", 2012, <https://pdfs.semanticscholar.org/ea62/26993e0d29ef823c9f7406ae3d03a63782ca.pdf>
[5] Prof Dr Puteri Nemie John Kassim and Su Wai Mon @ Faridah, "The Workings of Vicarious Liability in Medico-Legal Cases: A judicial Analysis", Malayan Law Journal Articles (2014) 1 MLJ cxlv
[6] Ibid
[7] ***Gold v Essex County Council*** [1942] 2 KB 293

the radiographer, who was employed to perform the duty on behalf of them, act without due care and committed tortious act. The Court of Appeal had agreed in unison that the hospital in this case was indeed liable for the radiographer's failure to provide adequate screening materials to the infant plaintiff.

Another example of the application of non-delegable duty of care of a private hospital in common law was seen in the landmark case of ***Roe v Minister of Health and Another***[8]. In this case, the Appellants were both anesthetized by the 2nd Respondent who was the spinal anaesthetic for their operations. Unknown to any of them, the spinal anaesthetic used, which was contained in glass ampoules, were contaminated by phenol and this had caused both Appellants to be paralysed from waist downwards. The trial judge however held the hospital was not responsible for any of the 2nd Respondent's negligent act because the 2nd Respondent was in fact a visiting anaesthetist to the hospital and the claimants had also failed to establish negligence on the 2nd Respondent's part.

On appeal, his Lordship Denning LJ disagreed with the trial judge's findings and/or reasonings. According to his Lordship, the hospital authorities are responsible not only for their nurses and doctors, but they are responsible for the whole staff including their anaesthetists and surgeons and regardless of their employment status whether permanent or temporary, resident or visiting, whole-time or part-time as they are still the agent that the hospital hired to give treatment to the patients. The 2nd Respondent was held to be the servant or agent of the hospital and the hospital therefore was liable for the 2nd Respondent's act. However, the Court of Appeal agreed in unison on the part of negligence, that neither the 2nd Respondent's or any of the staff in the hospital had been guilty of negligence in failing to detect the presence of the phenol in the ampoules as it is reasonably impossible for them to detect the crack with their medical knowledge at that time.

[8] *Roe v Minister of Health and Another* (1954) 2 QB 66

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Based on the above authorities, it can be concluded that non-delegable duty of care is not merely a duty to take care, but a duty to ensure that care is taken or given. Thus, if a hospital had a function to be performed and the hospital then delegates that function to it consultant and negligence occurs in the performance of the delegated function, then the consequence of such negligence will constitute a breach of duty on the part of the hospital who had delegated the duty to the consultant in the first place[9].

The Benefits and Drawbacks of Imposing Non-Delegable Duty of Care to Private Healthcare Facilities in Malaysia

As of to-date, literature review on few landmark decisions have shown that the Malaysian courts have followed the common law approach and recognized the doctrine of non-delegable duty of care of private healthcare facilities. However, it is still debatable whether the imposition of this non-delegable duty of care would bring any benefits or drawbacks to the private healthcare facilities in general.

There are two notable benefits that can be achieved from imposing non-delegable duty of care to private healthcare facilities.

First of all, regardless of whom the private healthcare facility has engaged to perform their task, the concept of non-delegable duty of care can be used to impose liability on the private healthcare facility for the breach of their own duty towards their patients based on the relationship between the hospital and the patient[10]. This is especially important in situation where there is no vicarious liability in the first place, for example where the patient was harmed due to system failure and no individual tortfeasor can be identified or where the patient was actually harmed by a third party while patient was under the custody of the healthcare facility.

The imposition of such liability can be seen in the Malaysian Federal

[9] Kanchana Chandran and Kaipana Chandran, "Negligence: Non-delegable Duty of Care, the Malaysian Perspective", Malayan Law Journal, (2017) 1 MLJ ci

[10] ***Dr Kok Choong Seng & Anor v Soo Cheng & another appeal*** [2018] 1 MLJ 685

Court case of ***Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal***[11]. In this case, the Respondent had a giant retinal tear with detachment to his right eye and upon the 1st Appellant's advice, the Respondent undergo an operation at the 3rd Appellant's hospital which was then performed by the 1st Appellant. However, the Respondent's post-surgery condition deteriorated and he underwent a second surgery based on the 1st Appellant's suggestion. The Respondent had then developed an extensive haemorrhage in his right eye after the said surgery and his eye was permanently blind due to a later retinal detachment.

The High Court allowed the Respondent's claim on medical negligence against the two doctors and found that the hospital was vicariously liable. The Court of Appeal was of the opinion that a hospital has a reasonable duty to provide a patient his medical needs upon the patient's admission to the hospital and the hospital cannot be mere custodial institution to just provide a place where consultants meet and treat their patients. Therefore, on appeal, the hospital was held vicariously liable for the 1st and 2nd Appellants' actions and the Court of Appeal had relied on the doctrine of non-delegable duties in coming to this conclusion.

The Federal Court however was of the opinion that the High Court and Court of Appeal had erred in concluding that the hospital's liability was the same as the liability for non-delegable duty of care regardless of the employment status of the two doctors. The Federal Court nevertheless concluded that the hospital had owed a non-delegable duty of care to the patient to ensure that reasonable care was taken in the anaesthetic services provided and therefore the hospital was indeed liable for the breach of this duty. The Federal Court also acknowledged that the applicability of the UK Supreme Court case of Woodland v The Swimming Teachers' Association and Others[12] in Malaysia in which a non-delegable duty of care should be

[11] *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* (2018) 3 MLJ 281

[12] *Woodland v The Swimming Teachers' Association and Others* [2013] UKSC 66

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

imputed only insofar as it would be fair, just and reasonable in the circumstances of each individual case, and concluded that it could extend to private healthcare institutions in relation to its consultants, who as independent contractors, perform medical treatment within its facilities.

Thus, it can be said that the non-delegable duty of care is beneficial as it does not exempts private healthcare facilities from liability despite them outsourcing their duty to their consultants, but it is must be so far as it is fair, just and reasonable in the circumstances of the case.

Secondly, non-delegable duty of care helps the court to impose a primary duty on hospitals to ensure their patients' safety by monitoring their physician practice within the hospital facility. This was also in consonance with the words of his Lordship Md Raus Sharif CJ in the Malaysian Federal Court case of ***Dr Kok Choong Seng & Anor v Soo Cheng Lin and another***[13] appeal whereby his Lordship stated that this non-delegable duty is in essence a positive duty to ensure that reasonable care is taken to protect the claimant as a patient from any harm.

In this regard, it is argued that despite being a private hospital, the hospital is still a healthcare facility which provides healthcare services to the public. Thus, the hospital owes a duty of care to its patients regardless of its business arrangement with its professional consultants[14]. A patient knows nothing of these arrangements and a patient only know that he was treated in the hospital by people whom the hospital authorities appointed for which the hospital authorities must be answerable for the way in which he was treated[15]. Therefore, by imposing this responsibility to the hospital, it is beneficial as it sorts of giving an undertaking to the patient that the hospital would take reasonable care in providing the patient's medical needs.

[13] ***Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal*** (2018) 3 MLJ 281
[14] V. Sharveena Thevy, "Malaysia: Are private hospitals now responsible for doctors who are independent contractors thanks to "common sense"?", 2017, <http://www.conventuslaw.com/report/malaysia-are-private-hospitals-now-responsible-for/>
[15] ***Cassidy v Ministry of Health*** [1951] 2 KB 343

On the other hand, there are also several notable drawbacks from imposing this non-delegable duty of care to private healthcare facilities in Malaysia.

First of all, unlike the general application of tort of negligence, a non-delegable duty is not a duty to take reasonable care but it is actually a duty to oversee that care is taken[16]. Since it is not a form of strict liability unlike the doctrine of vicarious liability, there are always options for a duty-ower to take in order to avoid from being subjected to this duty. One example would be in case of no antecedent patient-hospital relationship, which will be further elaborated below.

Secondly, even though the liability for the breach of this duty is similar to vicarious liability, it is pertinent to note that a non-delegable duty is only imposed on the employer alone as it is a primary and non-derivative liability[17]. Regardless of the hospital's arrangement with the consultant, the consultant is not and will not be caught liable under this doctrine. In that sense, it is somewhat unfair to impose this non-delegable duty to the hospital especially when such duty to take reasonable care is not even within the job scope of the hospital.

Thirdly, the doctrine will only be imposed on the hospital if it is just, fair and reasonable. This point was in fact based on the Woodland case where the UK Supreme Court has extended the law of negligence to include a non-delegable duty of care on the part of the duty owed to the extent that it is just, fair and reasonable. The UK Supreme Court in that case held that the school owed the Claimant a non-delegable duty as the school had assumed responsibility and control over the student during the swimming lesson since it was within school hours and that it was fair, just and reasonable to hold the school liable for injury caused by the negligence of the swimming company to whom the school had delegated its educational function and control over the student[18].

[16] "Non-Delegable Duties and Vicarious Liability", Law of Negligence Review, <https://static.treasury.gov.au/uploads/sites/1/2017/06/R2002-001_NonDelegable.pdf>
[17] Ibid
[18] ***Woodland v The Swimming Teachers' Association and Others*** [2013] UKSC 66

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

This concept of fair, just and reasonable was also upheld in the Malaysian Federal Court case of Dr Kok Choong Seng[19]. In that case, the claimant brought an action against Dr Kok Choong Seng and the Sunway Medical hospital whereby the claimant claimed that he suffered injuries due to Dr Kok Choong Seng's negligence and that the Sunway Medical hospital owed him a non-delegable duty to ensure that he was treated with care by the healthcare personnel in the hospital. The trial High Court judge held that Dr Kok Choong Seng was liable for his negligence and the hospital owed a non-delegable duty to ensure care is taken for the Claimant regardless of Dr Kok Choong Seng's capacity as an independent contractor.

On appeal, the Court of Appeal dismissed the hospital's appeal on liability as the Court of Appeal affirmed the non-delegable duty of care imposed on the Sunway Medical hospital. The Court of Appeal held that the claimant became a patient of the hospital upon admission and therefore had established an antecedent relationship with the hospital. Since the hospital is a healthcare service provider, there was an assumption of a positive duty (also known as non-delegable duty of care) on the hospital to protect the claimant from harm.

The Federal Court however disagreed with the findings of the Court of Appeal and his Lordship Md Raus Sharif CJ concurred with the decision of the English Supreme Court in Woodland that the non-delegable duties should only be imposed on private hospital where it is fair, just and reasonable which would depend on the circumstances of the case[20]. Thus in that case, the Federal Court held the Hospital not liable for breach of a non-delegable duty to the patient as the patient had reasonably expected the operation to be conducted by Dr. Kok Choong Seng himself and the Hospital was merely providing the relevant facilities for the patient's admission and operation.

Fourthly, non-delegable duty of care can only be applied when there is an antecedent patient-hospital relationship[21]. In deciding so, the

[19] ***Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal*** (2018) 3 MLJ 281
[20] Ibid
[21] Ibid

personal choice of the patient is a relevant factor in determining this relationship. The author RK Nathan back in 1998 was of the opinion that private hospitals are not liable for the negligence of their doctors because the hospital's liability would depend on who employs the doctor[22]. According to the author, if it was the patient himself who appoints and employs the doctor, the hospital will not be liable for the doctor's negligence. However, if the doctor, whether he is a consultant or not, was employed and paid by the hospital themselves and not the patient, the hospital will be vicariously liable for his negligence in treating the patient.

RK Nathan's opinion was based on Lord Denning's decision in ***Cassidy v Ministry of Health***[23]. In that case, the claimant was a patient at a hospital run by the Defendant and he requires routine treatment to set the bones in his wrist. During the operation, one of the Defendant's doctors were negligent and had caused the claimant's fingers to become stiff. Due to this, the claimant sued the Defendant on the basis of vicarious liability. The English Court of Appeal held that it must be established that the doctor is a servant of the Defendant before they can impose liability on the Defendant. A person is said to be a servant of the defendant if he was chosen for the job by the defendant and is fully integrated into the defendant's organisation.

The opinion of RK Nathan was then followed by the Malaysian High Court in the case of ***Dennis Lee Thian Poh & Ors v Dr Michael Samy & Anor***[24]. In that case, the High Court judge was of the opinion that the deceased and the 1st Plaintiff were in fact bound by the hospital's conditions of service which stated that all consultants at the hospital were independent practitioners whose instructions would be carried out by the hospital and its nursing staff. Furthermore, the evidence revealed that the deceased has specifically chosen the 1st Defendant as her obstetrician and she has engaged the 1st Defendant herself. On

[22] RK Nathan, "Nathan on Negligence", (1998), Malayan Law Journal Sdn Bhd.
[23] In the Cassidy case, the doctors in the hospital were appointed by the Defendant and was not chosen by the patients themselves. Furthermore, they were fully integrated into the hospital thus making them the Defendant's servants.
[24] *Dennis Lee Thian Poh & Ors v Dr Michael Samy & Anor* [2012] 4 MLJ 673

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

the preponderance of these evidence, the High Court concluded that the doctrine of non-delegable duty is inapplicable to the hospital.

Similarly, in the Federal Court case of Dr Kok Choong Seng, the patient himself engaged the service of Dr Kok Choong Seng and he was admitted to the Sunway hospital on the recommendation of Dr Kok Choong Seng. The apex court inferred from this circumstances that the patient had reasonably expected the operation to be conducted by Dr Kok Choong Seng with due care regardless of where Dr Kok Choong Seng would refer him to and in such situation, it can be seen that the Hospital was merely providing the relevant facilities required for his admission and operation. Due to this, the apex court was of the opinion that the hospital cannot be held liable under the non-delegable duty of care in the absence of such antecedent relationship with such patient.

An antecedent patient-hospital relationship however would be established if the patient enters into the hospital and then relies on the hospital's internal system to refer him to any suitable doctor on duty. In such situation, the apex court in Dr Kok Choong Seng case held that the hospital having accepted the patient and undertaken to treat him may well be under a non-delegable duty of care to ensure that he is treated with due care, by whomever the hospital engages to do so. The Federal Court however stated that the extend and scope of the hospital's duty of care towards the patients however would still vary from patient to patient especially when it involved the patient's personal choice of medical treatments and physicians and whether in such circumstances it is fair, just and reasonable to impose liability to the private hospital.

Finally, in order to succeed in a claim made under the doctrine of non-delegable duty of care, the claimant must expressly plead the doctrine on non-delegable duty of care as against the private hospital ab initio. In the Malaysian Court of Appeal case of ***Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) and other appeals***[25], the patient and her parents filed a counterclaim against

[25] Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) and other appeals [2018] MYCA 188

the hospital's claim for unpaid medical bills. It was clear that their counterclaim against the hospital was based on vicarious liability and not on the cause of action of non-delegable duty of care and it was only during the late stage of the submissions that this doctrine was brought up in Court. The Court of Appeal in dismissing the appeal on the counterclaim emphasized on the importance of expressly pleading the doctrine of non-delegable duty of care against the hospital from the very beginning of the suit. Even if it was not expressly pleaded, the Federal Court in Dr Hari Krishnan case held that it is sufficient so long that the claimant pleaded particulars of the hospital's own negligence and pleaded the essence of a non-delegable duty of care, that is the hospital has a duty of care to ensure that reasonable care is taken to the plaintiff[26].

The Applicability of the Doctrine of Non-Delegable of Care in Private Healthcare Facilities in Malaysia

Based on the above discussions, it is submitted that it is currently appropriate to impose such liability on the private healthcare facilities regardless of the identified drawbacks as discussed previously.

First of all, there is now a unifying framework of principles in determining the existence of non-delegable duty of care of a party as discussed in the Woodland case. There are five defining features to the framework, namely:

a) the claimant is especially vulnerable and dependent on the defendant's protection from the risk of injury;

b) there is an antecedent relationship between the claimant and the defendant that would lead to the assumption of responsibility on the defendant to protect the claimant from harm;

c) the claimant has no control over how the defendant chooses to perform the duty assumed, whether personally or otherwise;

[26] *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal.* [2018] 3 MLJ 281

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

d) the defendant has delegated to a third party a function which is an integral part of its positive duty towards the claimant, and also the custody and control incidental to that function; and

e) the third party was negligent in the performance of the very function assumed by the defendant and delegated to him.

If all the above features are satisfied, it is without a doubt that a hospital would owe a non-delegable duty of care towards its patient. The establishment of this framework itself together with the five defining features are considered a stepping stone in the law of negligence since there was no guideline in the past with regards to the establishment of this duty outside the category of extra-hazardous activity[27].

Secondly, the implementation of this non-delegable duty is necessary in order to avoid a person who is accused of a breach of his obligation from escaping liability[28]. In the context of private healthcare services, imposing this non-delegable duty would prevent the hospital authorities from escaping the liability of its consultant's negligence in treating their patient simply because they have outsourced the healthcare service to the consultant[29]. It is only in exceptional cases can the hospital escape this liability.

Notwithstanding the above, the law as of to date is clear that non-delegable duty of care for private healthcare facilities in Malaysia should only be imposed so far as it would be fair, just and reasonable to do so[30]. In cases where the hospital was merely providing the relevant facilities required for the patient's admission and operation or the fact that it was the patient who chose the physician himself thus absolving the contractual obligation between the hospital and the patient, this would definitely defeat the patient's chances of succeeding in a non-

[27] Low Kee Yang, "Non-Delegable Duty of Care: Woodland v Swimming Teachers Association and Beyond", 2015, < http://v1.lawgazette.com.sg/2015-03/1261.htm>.
[28] As per Lord Greene in ***Gold v Essex County Council*** (1942) 2 KB 293.
[29] Ibid.
[30] A Parson, "Care home briefing 132 – Care homes, schools, hospitals, prisons: the problem of 'non-delegable duty of care'", London, RadlicffesLeBrasseurLLP, 2014, <https://www.rlb-law.com/briefings/care-homes/care-homes-schools-hospitals-prisons-the-problem-of-the-non-delegable-duty-of-care/>.

delegable duty of care claim. In other words, a private hospital could be liable for its independent contractor if the hospital delegates to the contractor the very duty which the hospital themselves has to fulfil. Therefore, this helps to prevent the private healthcare facilities from avoiding duty of care towards its patient especially in cases where vicarious liability is not enforceable.

Finally, in the words of Lord Sumption in the Woodland case, it has long been the policy of law to protect the vulnerable and dependant persons which in the hospital context, it would refer to the patients, therefore it would justify the necessity of the duty to see that care is taken for the safety of the patient. Furthermore, it is not a strict liability as it only a duty to ensure that reasonable care is taken. Therefore, it is reasonable for the private healthcare facilities to be answerable for any tortious act by its delegate.

Conclusion

As a conclusion, despite any business arrangement between an independent doctor and the private healthcare facilities, the private health facilities are still providing services to the member of the public and the private health facilities cannot escape the accountability of the negligence done by its consultants practising in their facilities. The first and foremost importance in any private healthcare facilities would be the wellbeing of their patients and since patients are especially dependant on the protection of the hospital from any risk of injury, it is therefore necessary not only for justice to be done to them but that it should be seen done. Therefore, while taking into account the benefits and the drawbacks, it can be concluded that it is appropriate to impose the doctrine of non-delegable duty of care on the private healthcare facilities in Malaysia.

KDU Law Journal
General Sir John Kotelawala Defence University, Sri Lanka

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Scaling Impartiality and Independence of Arbitrators in Commercial Arbitration: A Comparative Legal Perspective

Namudi Mudalige*

Abstract

Commercial arbitration being one the most favoured Alternative Dispute Resolution (ADR) mechanisms in the corporate world, manifests private justice, confidence as well as flexibility throughout its process while preserving party autonomy. However, in Sri Lanka, arbitration is not commonplace or often practice resolving commercial disputes and reluctance to resort to arbitration is evident, even after more than two decades of the enactment of the existing statute; The Arbitration Act, No. 11 of 1995. This issue can also be identified by the massive number of court cases in terms of commercial matters. The legal framework on arbitration needs well-crafted reformations and the concerns on 'impartiality' and 'independence' of arbitrators should be provided with better legal interpretations. Impartiality and the independence of arbitrators are universally accepted norms within the arbitral proceedings. In the arbitration process, justice is perceived and visible through the behaviour of the third party who is called the 'arbitrator/s' who is appointed to resolve the matter between the parties. Hence the legal principles must be evaluated on how these two cardinal norms are measured in the Sri Lankan jurisdiction to provide a better legal approach to the Sri Lankan arbitration legal framework. This article seeks to approach the issue in a comparative legal perspective with special reference to the laws of the United Kingdom and the United States of America while considering the international benchmarks of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and

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UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. The study follows the black letter approach in law and the international and comparative legal research methodology predominantly. Further, it recommends legal reformation to the existing law on arbitration with the objective of promoting ADRs into the commercial dispute resolution sphere and embracing confidence towards commercial arbitration when pursuing private justice.

Keywords: *Private Justice, Impartiality and Independence of Arbitrators, Party Autonomy, Commercial Arbitration, Alternative Dispute Resolution*

Introduction

Arbitration can be identified as an out of court dispute resolution/ settlement mechanism which is also known as one of the most preferred Alternative Dispute Resolution (ADR) mechanisms in the world. Hence arbitration is triggered by way of an inwritten agreement between the parties to the dispute, resolution obtained through the arbitration process is considered as a matter of private justice. It is said that

> '[i]nternational arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment…in short, [arbitration] is an effective way of obtaining a final and binding decision on a dispute or series of disputes, without reference to a court of law…'[1]

Arbitration provides a substantial amount of freewill to parties to control over the arbitral process which is utilized to resolve their dispute. Through the party autonomy concept, it will provide a levelled playing field without assuming a 'home court advantage' to anyone in the dispute. Arbitration offers a more neutral forum, where each side believes it will have a fair hearing[2]. Flexibility and the autonomy of the

[1] Nigel Blackaby and others, Redfern and Hunter on International Abitration (5th edn, Oxford University Press 2009) para 1.01.
[2] MargaretL Moses, The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2012) 1.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

parties are the key reasons for the attraction towards arbitration by the corporate community.

Considering the advantages of arbitration is pertinent in this discussion. Neutral forum and the likelihood of enforcement of the award without legal complications were emphasized as advantages in an empirical survey conducted by Christian Buhring-Uhle[3]. Preference to neutral third-party intervention instead of upper hand of the 'home court' can be justified since the availability of the fair playground in arbitration. On the other hand, unified international legal principles based on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) such as pro enforcement biasness leave domestic courts with no choice but to recognize and enforce arbitral awards without much discretion. The private nature of the process is another aspect to be recognized as an advantage. Corporate culture is built upon confidential and sensitive business information. Thus, dispute resolution mechanisms should also entail the same culture to facilitate the corporate requirements in the community. There are two reasons behind it; corporate secrets are held confidential for business purposes and secrecy over negative outcomes of dispute. Therefore, arbitration provides the best platform to serve the corporate world with a confidential setting to resolve disputes.

In Sri Lanka, arbitration has not yet become the most preferred mechanism to resolve commercial disputes. Arbitration Act No, 11 of 1995 was enacted with the special purpose of facilitating the corporate world with an effective method of settling disputes and attracting investments by providing infrastructure such as effectual dispute resolution. However, reference to court procedure is still in place despite, the two-decades-old enactment that was supposed to facilitate the dire needs of the business community in dispute resolution.

Impartiality and independence are the two cornerstones that strike a balance between the fairness and justice attained through

[3] Christian Buhring-uhle, 'A Survey on Arbitration and Settlement in International Business Disputes'. In ChristopherR Drahozal and RichardW Naimark (eds), Towards a Science of International Arbitration (Kluwer Law International 2005)

arbitration. If impartiality and independence are not aligned properly, the arbitration process can be considered compromised and the foremost advantage of arbitration will be hindered accordingly. In the Sri Lankan Act, it is stated that impartiality and independence of the arbitration can be challenged[4]. However, there is no other guidance or interpretation provided to measure and assess the impartiality or independence.

Methodology

The study is a qualitative research based on two main legal research methodologies; namely, the black letter approach in law and international and comparative research methodology. The black letter approach was utilized to analyze the current legal requirements on the impartiality and independence of arbitrators. It was compared the Sri Lankan law with the international standards embedded in the New York Convention, 1958) and the UNCITRAL Model Law on International Commercial Arbitration, 1985, as amended (hereinafter referred to as the 'Model Law') while considering the standards set in the United Kingdom and the USA. The article comparatively reviews the need for change in the law on arbitration specifically on requirements of impartiality and independence of arbitrators.

Impartiality and Independence of Arbitrators

The previous USA approach to impartiality and independence of arbitrators was different from the internationally accepted norm. It was considered that an arbitrator who was appointed by a particular party as non-neutral and he was expected to favour the party-nominated. Statutorily[5] as well as judicially[6] partial approach of the arbitrator towards the party-nominated was regarded as legal. In the case of *Del Monte Corp v Sunkist Growers*[7], in accordance with the

[4] Section 10 (1) of the Arbitration Act, No 11 of 1995 (Sri Lanka) reads that where a person is requested to accept appointment as an arbitrator, he shall first disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, and shall, from the time of his appointment and throughout the arbitral proceedings, disclose without delay any circumstances referred to in this subsection to all the parties and to the other arbitrators, unless they have already been so informed by the arbitrator.
[5] AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes 1977 (USA).
[6] Del Monte Corp v Sunkist Growers 10 F 3d USA (1993).
[7] ibid.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

arbitration agreement, each party was provided with the opportunity to appoint one arbitrator and thereafter they had agreed mutually to appoint the third arbitrator. One of the Party-appointed arbitrator's impartiality was challenged based on the pre-meetings held between witnesses and the arbitrator before the commencement of the arbitral proceedings. However, in the appeal, the court decided that

> '[a] party-appointed arbitrator must consider the evidence of record in good faith and with integrity and fairness. The fact that [the arbitrator] may have been predisposed towards Del Monte's case is not sufficient to vacate the arbitration award. The evidence relied upon by Sunkist is insufficient to support a finding that [the arbitrator] acted improperly either before or during the arbitration hearing. Therefore, the district court did not abuse its discretion in denying Sunkist's motion to vacate the arbitration award.'[8]

The AAA/ABA Code of Ethics for Arbitration in Commercial Disputes of USA has now been amended[9] and conforms with the international legal standpoint of impartiality and independence accrued in arbitrators during the arbitral proceedings. Article 12 (2) of the Model Law, recognizes the impartiality and independence of arbitrators as mandatory obligations.

Obligation to be impartial and independent are regarded as two inter-related but different concepts. Impartiality is a more subjective concept compared to independence. Impartiality is considered as essential to an arbitrator than independence in many instances and it is a non-waivable obligation. Independence is objective since it is not related to the state of mind of the arbitrator. Rather, it is linked to the relationships of the arbitrator, economically, personally, or professionally.

8 ibid.

9 'The Code of Ethics for Arbitrators in Commercial Disputes was originally proposed in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. It was revised in 2003 by an ABA Task Force and a special committee of the AAA. The Revised Code was approved and recommended by both organizations in 2004…'
American bar association, 'Code of Ethics for Arbitrators in Commercial Disputes' (American Bar Association, 1 July 2014)<https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/Code_Ethics_Com_Arb_Ann/> accessed 14 October 2021.

In this context, measuring impartiality objectively is a daunting task compared to the evaluation of the independence of an arbitrator due to the abstract nature and the subjectivity attached to impartiality. Occurrence of partiality during the arbitral process that raises justifiable doubts on the conduct of the arbitrator, may be wielded because of the discretionary power given to him. The state of mind to balance the impartiality requirement while attending the discretionary power is rather overwhelming. The flexibility embraced during the arbitral process may also be a challenge to such discretionary power and the impartiality notion expected from the arbitrator. The Arbitration Act, c 23 (UK) has not deviated from the non-waivable requirement of impartiality of the arbitrator and it is indispensable to adhere to it.

Lack of impartiality and independence may adversely impact the arbitral proceedings in many aspects. Breach of coherent principles in the process dilutes the whole legal structure of the proceedings as well as the arbitral tribunal. On the other hand, lack of proper mechanism domestically as well as internationally to the challenges arise due to the impartiality and independence issues of arbitrators, impact upon the same system.

The Arbitrators' Duty to Disclose

In accordance with Section 10 (1) of the Arbitration Act, No. 11 of 1995 of Sri Lanka[10] arbitrator is obliged to disclose any fact which is likely to give rise to justifiable doubts to his impartiality or independence. Disclosure is considered an essential undertaking and cornerstone of an arbitrator's duty of independence[11]. The Sri Lankan law is not clear about when the justifiable doubts might occur and what kind of information that required disclosure. When considered the English Law, by virtue of Section 33 (1) (a), it is the general duty of the arbitral tribunal to act fairly and impartially[12]. Section 24 (1) provides impartiality as one of the grounds to remove an arbitrator

[10] See n 4.

[11] Dominique Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues' [2012] 27(4) American University International Law Review 789, 793.

[12] Arbitration Act 1996 cl 33(1 (a)) reads, '[t]he tribunal shall…act fairly and impartially as between the parties, giving each party a reasonable 244 opportunity of putting his case and dealing with that of his opponent…'

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

from his office[13]. A recent decision by the Supreme Court of the United Kingdom (UKSC) it was established the English law position whether and to what extent an arbitrator may

> '…accept appointments in multiple references on the same or overlapping subject matter with only one common party, without thereby giving rise to an appearance of bias; and do so without making disclosure to the party who is not the party in common…'[14]

In the UKSC decision of ***Halliburton Company v Chubb Bermuda Insurance Ltd*** [15] (Formerly known as Ace Bermuda Insurance Ltd) it was applied the objective test of fair-minded and informed observer and detachment in relation to the appearance of bias. When considering the duty of disclosure, it was determined whether the arbitrators have a legal duty to disclose all or specific factors and whether disclosure relevant to apparent bias. UKSC reiterated that 'facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased'[16]. UKSC decided that failure to disclose imply the apparent bias on the part of the arbitrator while confirming that due to disclosure as a 'continuing duty'.

The legal position of the USA is pertinent to discuss in this context. The language of the Federal Arbitration Act allows to vacate arbitration awards where it is evident partiality or corruption in the arbitrators[17]. New York Arbitration Act and the Uniform Arbitration Act of 1955 require prejudice to be proven due to the partiality of the arbitrator to set aside the award. However, the US law is silent on challenging the appointment of the arbitrator by a party to the arbitration procedure.

[13] Arbitration Act 1996 cl 24(1 (a)).
[14] Racheal O'grady, 'To disclose or not to disclose? UK Supreme Court defines standards for arbitrator's impartiality and duty of disclosure'(Mayor Brown, 27 November 2020) <https://www.mayerbrown.com/en/perspectives-events/publications/2020/11/to-disclose-or-not-to-disclose-uk-supreme-court-defines-standards-for-arbitrators-impartiality-and-duty-of-disclosure> accessed 14 October 2021.
[15] [2020] UKSC 48.
[16] ***Halliburton Company v Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd)*** [2020] 1 SC 1 (UKSC) [27](Lord Hodge).
[17] 9 USC Section 10 (2) (1994).

The Standard of 'Justifiable Doubt' and Challenging the Arbitrator's Office

The standard of 'justifiable doubt' to measure the impartiality and the independence of arbitrators was first introduced by the UNCITRAL Arbitration Rules in 1976 by virtue of Article 10 (1)[18]. It was reiterated that the same standards are applicable to both party-nominated arbitrators and neutral arbitrators. However, many experts in the field agree that the guidance provided to determine the standards of 'justifiable doubts' by way of statutory recognition, case law or any other means is weak. Some argue that the standard should be measured in a subjective perspective rather than an objective viewpoint[19].

If party autonomy is the foundation of arbitration, then a 'justifiable doubts' standard adopted by most arbitral institutions should be respected[20]. In the English case of ***AT & T Corp v Saudi Cable Co***[21] it was held that the same test applied to a judge in a court should be applied on a complaint of bias. In the AT & T case, the arbitrator's appointment was challenged since he lacked independence. It was further held that,

> '...it would be surprising if a lower threshold for disqualification applied to arbitration than applied to a court of law. The courts are responsible for the provision of public justice. If there are two standards, I would expect a lower threshold to apply to courts of law than applies to a private tribunal whose 'judges' are selected by the parties. After all, there is an overriding public interest in the integrity of the administration of justice in the courts...'[22]

Application of the 'real danger of bias' test for disqualification of

[18] 'An arbitrator may be challenged only if circumstances exist that give rise to the justifiable doubts as to his impartiality or independence', Section 10 (1) of UNCITRAL Arbitration Rules (1976).
[19] See AJ van den Berg, 'Justifiable Doubts as to the Arbitrator's Impartiality or Independence' [1997] 10(1) Leiden Journal of International Law 509-519.
[20] Hong-Lin Yu and Laurence Shore, 'Indepence, Impartiality, and Immunity of Arbitrators-US and English Perspective' [2003] 52(1) International and Comparative Law Quarterly 935, 939
[21] ***AT & T Corp v Soudi Cable Co*** [2000] 2 All ER 625 (CA).
[22] ***AT & T Corp v Soudi Cable Co*** [2000] 2 All ER 625 (CA) (Lord Woolf).

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

arbitrators was upheld by the English Court of Appeal accordingly. It is noteworthy that the relationship and the link towards a specific field build his expertise. However, the same relationship may be regarded as a ground for challenge in appointment based on lack of independence which is incongruous. *AT&T* also teaches that the State courts frame the boundaries within which matters of disclosure, independence and impartiality are finally decided[23].

In the US case of ***Commonwealth Coatings Corp v Continental Casualty Co***.[24] the Supreme Court held that the non-disclosure of the long-standing business relationship (although not significant) led to partiality and undue means. However, the promising approach in Commonwealth Coatings did not prevail in the US legal framework. In the case of ***Merits Ins Co v Leatherby Ins Co.***[25] it was carved a new standard which is identified as the 'serious doubt test. It has been criticized that the 'serious doubt test' for non-provision of satisfactory explanation as to how it relates to 'appearance of bias' leaves Commonwealth Coatings invisible[26].

Impact of Party Autonomy towards Challenging the Arbitrator's Office

By virtue of Section 10 of the Arbitration Act, No. 11 of 1995, when the arbitrator's disclosure does not satisfy the duties of impartiality and independence, any party can object to his appointment as the arbitrator. According to the provision, the party can appeal to the High Court if he is not satisfied with the determination by the arbitral tribunal. However, the legal standpoint in Sri Lanka is unclear in many ways. It does not give the clear ruling as to when the justifiable doubts may occur. On the other hand, if it is a sole arbitrator, whether he is allowed to decide on his own about the impartiality or independence of himself is uncertain. Inarticulacy of the legal standpoint about impartiality and independence may lead to hinder the fairness of

[23] Hong-Lin Yu and Laurence Shore, 'Indepence, Impartiality, and Immunity of Arbitrators-US and English Perspective' [2003] 52(1) International and Comparative Law Quarterly 935, 942.
[24] 393 US 145 (1968).
[25] 715 F 2d 673 (7th Cir 1983).
[26] Hong-Lin Yu and Laurence Shore, 'Indepence, Impartiality, and Immunity of Arbitrators-US and English Perspective' [2003] 52(1) International and Comparative Law Quarterly 935, 948.

the total system of arbitration since it is at the party's discretion to challenge the justifiable bias and selecting the panel to determine about such bias according to Section 10 (3) of the Arbitration Act, No. 11 of 1995[27].

Conclusion and Recommendations

Independence and impartiality underpin the entire arbitral process. Without their assured vitality, arbitration as the favoured dispute resolution method in international commercial contracts will have a troubled future[28]. Arbitrators' fundamental duty to disclose all the material facts which may give rise to justifiable doubts to his impartiality and independence needs to be reiterated and respected. Series impairment of the same duty should give the opportunity to challenge the arbitrator's appointment at the commencement and afterwards to apply for an order of setting aside the award.

It is certain that there is a need for law reformation to recognize a proper standard on arbitrator's impartiality and independence to avoid the denial of justice. On the other hand, the judiciary must consider a narrow approach in the application of the 'justifiable doubt' test in the cases on lack of independence although the approach to measure impartiality is unaltered. Two concepts; impartiality and independence should be scaled in two different approaches accordingly. Party autonomy in considering waiving off the disclosure requirements should be narrowed down by way of expressed legal provisions.

In conclusion, statutory reformation is required to the Sri Lankan law on arbitration to identify a proper legal mechanism to inquire into the impartiality and independence of the arbitrators to evade ambiguous approaches as in the US. Processes of inquiry can be of two folds; challenging the sole arbitrator and challenging a member of panel of arbitration. However, both processes should be addressed before the court of law to cultivate confidence and fairness in the process further.

[27] Section 10 (3) of the Arbitration Act, No 11 of 1995 (Sri Lanka) reads that a party who seeks to challenge an arbitrator shall, unless the parties have decided that the decision shall be taken by some other person, first do so before the arbitral tribunal, within thirty days of his becoming aware of the circumstances which give rise to doubts about the arbitrators' impartiality or independence.

[28] Hong-Lin Yu and Laurence Shore, 'Indepence, Impartiality, and Immunity of Arbitrators-US and English Perspective' [2003] 52(1) International and Comparative Law Quarterly 935, 936.

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Consumer Rights in the Context of Human Rights: A Legal Analysis

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Abstract

Consumers are regarded as one of the most important economic groups in a country's economy. At the international level, the United Nations Guidelines on Consumer Protection (UNGCP) recognizes several consumer rights as legitimate consumer needs, such as the right to safety, the right to be informed, the right to choose, the right to be heard, and so on. However, the concept of consumer rights receives less attention than other right-based approaches such as human rights. Therefore, there is an ongoing debate about whether consumer rights could be considered as human rights or not. Since there are no exclusive lists of human rights, and consumer rights are individual rights rather than group rights, arguments are emerging to consider consumer rights as soft human rights at the very least. Therefore, the main objective of this paper is to analyze the proposition to consider consumer rights in the context of human rights and to highlight the significance as well as the benefits of elevating the concept of consumer right into the umbrella concept of human rights. This study is a doctrinal legal study that employs a qualitative research paradigm as the primary research method. Data is gathered using primary and secondary sources of literature.

Keywords: *Consumer Rights, Human Rights, Consumerism, Third Generation Human Rights*

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Introduction

The concept of consumer rights is a much broader concept which encapsulates a wide range of rights and privileges entitled by general consumers. As Larson and Lawson clearly opine 'the extent and coverage' of consumer rights have been subjected to numerous changes from time to time[1]. Therefore, as the authors argue, it is difficult to determine 'the purpose and scope' of consumer rights precisely[2]. In general, consumer rights can be defined a body of rights and privileges entitled by general consumers.

However, presently, the United Nations Guidelines on Consumer Rights (UNGCP) and some other international legal instruments recognize certain rights such as the right to safety, right to be informed, right to choose, right to be heard etc. as the basic consumer rights[3]. Also, there is an ongoing debate about whether consumer rights could be considered as human rights or not. As Devi highlights, some of the basic human rights concepts such as "the concepts of life, liberty, equality, and dignity are very well connected with consumer behavior "[4]. The main objective of this paper is to analyze the argument of considering consumer rights in the context of human rights and to highlight the importance as well as the benefits of elevating the concept of consumer rights into the broad range of human rights. In order to obtain an in-depth understanding of the concept, the first few sections of this paper shall discuss the origin and evolution of the concept of consumer rights, consumerism and human rights. Later, this paper shall analyses the supposing and opposing view for recognizing the concept of consumer rights in the context of human rights. In conclusion, this paper shall draw attention to the utility of upgrading the concept of consumer rights as a human right.

This study is a doctrinal legal study that employs a qualitative research paradigm as the primary research method. Data is gathered

[1] G Larsen and R Lawson, "Consumer Rights: An Assessment of Justice" (2012) 112 Journal of Business Ethics 515
[2] ibid
[3] See Guideline 5 of the UNGCP
[4] Devi T, "Legal Regime for the Consumer Protection and Its Human Rights Perspective" (2015) 3 International Journal of Law and Legal Jurisprudence Studies 316

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

using primary and secondary sources of literature. This study looks at international legal instruments pertaining to consumer rights and human rights, Constitutions of the selected countries and legislations as primary sources. Secondary sources of the research include journal articles, research papers, books, and web resources, among other things.

Evolution of Consumer Rights

In ancient legal history, it is difficult to identify a separate legal category referred to as 'consumer law' or 'consumer rights'. This is because as Benohr explains, "buyer was not believed to be in need of special legal protection"[5]. It can be assumed that due to the agricultural economy, only limited occasions of consumer-supplier transactions could have occurred and in such a context, it was obvious that the legal system paid minimal attention to develop a separate consumer law. However, as many legal scholars denote, the buyer's interests were protected against the fraudulent acts of the merchants even in the ancient times [6].

In ancient Roman Law, there were many contractual obligations and actions against the seller in order to protect the buyer's interests. Roman law recognized the contract of buying and selling as *ex consensus*, which implied the consensus among buyer and the supplier[7]. Benohr provides two examples for the legal mandates against the seller which intended to protect buyers interests in Roman Law. Those are i) "action against the seller in order to protect buyers from any hidden defects of goods purchased" and ii) "principles of seller had to be good faith in seeking not to cause damage to the buyer"[8]. Moreover, as the principle of *culpa levis in abstracto* emphasized, "the seller had to keep the asset in good condition as a good householder, being liable for any damage caused by its fault"[9]. Therefore, it is evident that, though the term 'consumer rights' was not stipulated, the Roman Law recognized the buyer's or consumer's rights to some extent.

[5] Iris Benöhr, EU Consumer Law and Human Rights (Oxford University Press 2013)
[6] SB Zharkenova and LS Kulmakhanova, "Consumer Rights Protection in International and Municipal Law: Problems and Perspectives" (2015) 18 European Research Studies 147; Benohr (n5)
[7] M Radin, "Fundamental Concepts of the Roman Law" (1924) 12 California Law Review 393
[8] Benohr (n 5)
[9] Olariyu M, "Contracts in Roman Law" (RePEc) <http://www.rebe.rau.ro/RePEc/rau/clieui/SP14/CLI-SP14-A9.pdf> accessed August 01, 2021

In addition to the Roman law, ancient Indian society also recognized the protection of buyer's rights. As Devi highlights, from the ancient Vedic period (5000 BC to-2500 BC) many pieces of evidence could be found with regard to protecting consumer interest[10]. According to Manu's Code of Conduct to Traders, "man who behaves dishonestly to honest customers or cheats in his prices shall be fined in the first or in the middlemost amercement"[11]. Furthermore, *Kautilya's Arthashastra* mentioned that "using of unstamped weights and measures, pressing and forging false weight and measures….etc. are considered as cheating and was fined heavily"[12].

Both these ancient Roman and Indian examples reveal that the concept of consumer rights originated from a very early period although it was not categorized as a separate law. The modern application of the concept of consumer rights could be found in the early 1960s[13]. Particularly in the American context, consumer rights are subjected to huge political attention and opened the doors to constitute separate consumer policies due to the serious damage caused to the consumers as a result of the power imbalance between consumers and the suppliers in the health sector[14].

This background paved the way for U.S President John F. Kennedy's historic speech on consumer rights in 1962. President Kennedy in his Congressional speech declared four basic rights as the consumer rights; namely, the right to safety, the right to choose freely, the right to be informed and the right to be heard[15]. In this speech, President Kennedy was deeply concerned about the consumer's needs and elaborated the importance of protecting consumer rights as follows:

> If consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if the consumer is unable to

[10] Devi (n 4)
[11] AR Prasad, "Historical Evolution of Consumer Protection and Law in India" [2008] Journal of Texas Consumer Law 132
[12] Devi (n 4); Prasad (n 11)
[13] Benohr (n 5)
[14] ibid
[15] Larson and Lawson (n 1)

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

> choose on an informed basis, then his dollar is wasted, his health and safety may be threatened, and the national interest suffers. On the other hand, increased efforts to make the best possible use of their incomes can contribute more to the well-being of most families than equivalent efforts to raise their incomes[16].

As a result of President Kennedy's revolutionary approach, various consumer movements were established and later in 1985, the United Nations constituted the UNGCP by expanding Kennedy's "Bill of Consumer Rights". The UNGCP was revised in 1999 and 2016. Most importantly, Guideline 5 of the Revised UNGCP indicates the legitimate needs which the guidelines are intended to meet. According to the Guideline 5, the legitimate needs are;

a) Access by consumers to essential good and services
b) Protection of vulnerable and disadvantaged consumers
c) Protection of consumers from hazards to their health and safety
d) Promotion and protection of the economic interests of the consumers
e) Access by consumers to adequate information
f) Consumer education
g) Availability of effective consumer dispute resolution and redress
h) Freedom to form consumer and other relevant groups or organizations
i) Promotion of sustainable consumption patterns
j) Protection for using electronic commerce that is not less than the other form of commerce
k) Protection of consumer privacy.

Hence, it is evident that the UNGCP considered the protection of consumers using e-commerce and the protection of consumer privacy as parts of the legitimate needs[17]. Thus, it can be argued that the concept of consumer rights has widened its scope from time to time according to the needs of society and modern consumers.

[16] "John F. Kennedy: Special Message to the Congress on Protecting the Consumer Interest." (The American Presidency Project 1999)< http://www.presidency.ucsb.edu/ws/?pid=9108> accessed 23 May, 2021

[17] UNCTAD secretariat, "Consumer Protection in Electronic Commerce Note by the UNCTAD Secretariat"(United Nations Conference on Trade and Development 2017) <https://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf. > accessed October 14, 2021

Consumer Protection and Consumerism

As a result of the evolution and recognition of consumer rights, different parties like international organizations, State parties and Non-Governmental Organizations (hereinafter NGOs) worked towards to safeguard consumer rights. As Chaudhry, Chandhiok and Dewan correctly define,"consumer protection means safeguarding the rights and interests of consumers. It includes all the measures aimed at protecting the rights and interests of consumers"[18]. The UNGCP is the main international legal instrument which aims to provide comprehensive consumer protection mechanisms at the global level.

As a result of the growing global and regional attention for consumer rights protection, the concept of consumerism has emerged as a revolutionary concept. The term 'consumerism' denotes the idea of consumer movements or consumer activism[19]. Moreover, Devi has further observed that it refers to "the broad range of activities of government, business, and independent organizations that are designed to protect individuals from policies that infringe upon their rights as consumers"[20]. One of the main objectives of consumerism is to reduce the power imbalance between the supplier and the consumer[21]. Therefore, it can be argued that on the one hand, consumerism is a positive social force which encourages and compels all the stakeholders to safeguard the consumer interest. On the other hand, consumerism can be considered as a leading concept which empowers the consumers in order to be aware and safeguard their own rights[22].

Notably, as Devi points out, there were various reasons behind the rise of consumerism historically. Particularly, the increase of literacy and education, the rise of prices of products, product variations and competition of the market, as well as the state intervention on consumer-supplier relationship have tremendously influenced consumers to be

[18] K Chaudhry,T Chandhiok and P Dewan, "Consumer Protection and Consumerism in India" (2011) 1 International Journal of Multidisciplinary Research 83
[19] Devi (n4)
[20] ibid
[21] KB Bello, JB Suleiman and I Danjuma I, "Perspectives on Consumerism and Consumer Protection Act in Nigeria" (2012) 4 European Journal of Business and Management 72
[22] Devi (n 4)

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

more aware of their rights and stand against the monopolistic powers of the traders and multinational companies[23]. Then, as a result of the consumerism and consumer movements, the traditional contract law principle of caveat emptor-let the buyer beware- is no longer valid in the modern commercial contracts and instead of that, the concept of caveat venditor-let the vendor beware- is prevailed[24]. Steiner and Steiner have clearly emphasized this argument as follows;

> Consumerism does not mean Caveat Emptor-Let the Buyer Beware. It is replaced by Caveat Venditor-Let the Seller Beware. It does mean, however, that protecting the consumer is politically acceptable and that the government will survey consumer demands for better treatment and respond to them with new guidelines for regulations over business[25].

Therefore, it can be argued that the concept of consumerism has directly or indirectly impacted on the establishment of consumer protection mechanisms at the global, as well as the domestic level. However, in the Sri Lankan context, consumerism is still in a very primitive position. According to Dr. Saman Kalegama, the Executive Director of the IPS, "in Sri Lanka, consumerism and consumer activism are less organized and less powerful "[26].

Consumer Rights in Human Rights Context

As discussed in the previous section, as a result of consumerism and other positive movements for safeguarding consumer rights, the concept of consumer rights has been subjected to legal recognition at the international and domestic levels. UNCTAD highlights that presently, 51 percent of the countries worldwide are having separate consumer protection legislation[27]. As a result of this focused attention,

[23] ibid

[24] G Kaur, "Concept of E-Consumerism: A Need to Revamp Movement for E-Consumerism in India" [2015] SSRN Electronic Journal; Narveson J, "Consumers Rights in the Laissez-Faire Economy: How Much Caveat for the Emptor" (2004) 7 Chapman Law Review 181; Devi (n 6)

[25] Steiner GA and Steiner JF, Business, Government, and Society: a Managerial Perspective: Text and Cases (Random House Business Division 1980)

[26] Nanayakkara S, "Sri Lankan Consumers Seen as Powerless" (The Island2015) <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=121569> accessed October 11, 2021

[27] "Online Consumer Protection Legislation Worldwide" (Unctad.org) <https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Consumer-Protection-Laws.aspx>

some scholars argue that consumer rights should be included and protected as human rights[28]. Therefore, this section analyses this ongoing debate and the benefits of strengthening consumer rights protection in an online context.

Nature and Scope of Human Rights

The term 'rights' is "itself controversial" and subjected to scholarly debate[29]. According to the natural law perspective, rights are inherent to mankind by nature and it reflects the social value of the community[30]. As John Lock has emphasized in his social contract theory, in the state of nature every man was entitled to some inalienable rights as the right to life, liberty, and property. As a result of the social contract between the citizens and ruling government, the Government in power should have an obligation to ensure the rights and wellbeing of the citizens[31]. Conversely, the positivist approach highlighted that "if a rule of conduct cannot be enforced, it is meaningless to describe it as a law"[32]. Therefore, positivism only accepted the specific rights derived from the legal order or the constitutional structure of the legal system[33]. All these theoretical underpinnings have influenced to develop the concept of human rights which has widespread acceptance in the global community today.

The United Nations defines human rights as "rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status"[34]. Former Commonwealth Secretary, Sridath S. Rampal provided a very interesting introduction for human rights as follows;

> Human rights are as old as human society itself, for they derive from every person's need to realize his essential humanity.

[28] FO Ukwueze, "Towards a New Consumer Rights Paradigm: Elevating Consumer Rights to Human Rights in South Africa" (2016) 32 South African Journal on Human Rights 248; Devi (n 6); S Deutch, "Are Consumer Rights Human Rights" (1994) 32 Osgoode Hall Law Journal 538

[29] Shaw M, International Law (5th edn Cambridge University Press 2003)

[30] ibid

[31] MDA Freeman, Lloyds Introduction to Jurisprudence (6th ednSweet & Maxwell 1994); P Sieghart, The International Law of Human Rights (2nd ednClarendon Press 2003)

[32] Ibid

[33] Show (n 29)

[34] UN.Org, "Human Rights" <http://www.un.org/en/sections/issues-depth/human-rights/> accessed June 11, 2021

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

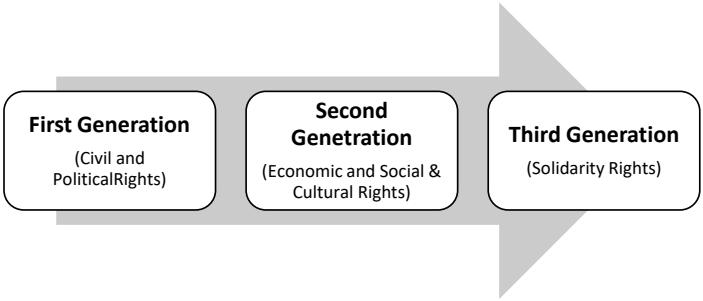
> They are not ephemeral, not alterable with time and place and circumstances….they are important, sometimes essential elements of the machinery for their protection and enforcement; but they do not give rise to them. They were born not of man, but with man[35]".

As this statement highlights, human rights can be defined as an indispensable set of rights inherent to mankind without any discrimination. The United Nations Declarations of Human Rights (hereinafter UDHR) in 1948 was the first attempt to safeguard human rights and fundamental freedoms by the United Nations[36] (hereinafter UN). The preamble of the UDHR emphasizes that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". In 1966, the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic Social and Cultural Rights (hereinafter ICESR) were adopted by the UN and the most importantly, both these covenants have binding authority, unlike the UDHR.

All the rights included in the UDHR, ICCPR, ICESR and other human rights treaties can be classified into different categories and generations. Basically, human rights are categorized as civil, political, economic social and cultural rights. Today, three generations of rights are discussed as a modern classification of human rights[37]. First time in 1977, a French jurist Karel Vesak characterized human rights in term of 'three generations'[38]. The following figure 1 presents the three generations of human rights.

[35] International Commission of Jurists, Development of Human Rights and the Rule of Law (Pergamon Press 1981)
[36] Sieghart (n 31)
[37] SH Sadeghi, MR Sarani and H Ravandeh, "The Concept of 'Right' and Its Three Generations" 5 International Journal of Scientific Study 37
[38] P Macklem, "Human Rights in International Law: Three Generations or One?" (2015) 3 London Review of International Law 61

Figure 1: Three generations of human rights



According to Vesak's classification, first-generation rights include civil and political rights such as the right to life, freedom of expression, equality before the law, right to vote etc. Particularly, those rights are enshrined in both the UDHR and ICCPR[39]. The Second generation is concerned with economic, social and cultural rights including the right to work, freedom of association, the right to education etc. Mainly, the ICESR contains the second generational rights[40]. Most importantly, Vesak recognizes the third generation as "one that the international community is now embarking on[41]". Sadeghi and others opine that the third generation ascertained as a result of 'new needs of human[42]'. Vesak has named them as 'solidarity rights' which include the right to development, right to a healthy environment, right to self- determination etc[43]. However, in contrast to the Vesak's three- generation approach, Macklem argue that understanding human rights in three generations is inaccurate and misguided[44].

When analyzing consumer rights in the human rights context, there is an ongoing debate about whether consumer rights could be considered as a third generation right? Moreover, it is questionable whether consumer rights have the potential to become "soft human

[39] ibid; Cornescu A, "The Generations of Human Rights," the Conference Proceedings, Masaryk University (2009)
[40] Cornescu (n 39)
[41] Macklem (n 37)
[42] Sadeghi, Sarani and Ravandeh (n38)
[43] Macklem (n 43); Cornescu (n 37)
[44] Macklem (n 37)

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

rights[45]?". The following section briefly demonstrates the positive and negative arguments for considering consumer rights as human rights.

Are Consumer Rights Human Rights?

The concept of consumer rights has become more relevant since the end of Second World War II[46]. As discussed in the previous section, human rights have also gained great importance and widespread acceptance in the global community through the UDHR, ICCPR, ICESR and other international and regional legal instruments. In recent decades, several scholars have paid attention to include consumer rights into the human rights context. Deutch has made a significant contribution to develop this argument by suggesting that "consumer rights have the potential to become soft human rights leading finally to full recognition as human rights[47]".

In order to build up this thesis, Deutch has used several arguments. First, he contends that there is no exclusive list of human rights and there are no common criteria to determine or accept a particular claim as a human right. Also, human needs have changed from time to time and therefore he argues "there is no reason to prevent the inclusion of additional rights". Second, he recognizes consumer rights as individual rights instead of group rights[48]. Thus, Deutch argues that consumer rights should be acknowledged as human rights. Third, he emphasizes the co-relation between the right to human dignity and consumer rights as follows:

> In a consumer society, protection of (the) individual consumer is part of maintaining human dignity. If not given the right to fair trade, the right to a fair contract and the right of access to court a person's dignity is disregarded[49].

[45] Kingisepp M, "The Constitutional Approach to Basic Consumer Rights. "[2012] Juridica International 49
[46] Imperatore L, "Consumer Rights under International Law" (Nomodos2018) <http://nomodos-ilcantoredelleleggi.it/2018/03/22/consumers-rights-under-international-law/> accessed October 16, 2021; Deutch (n 33)
[47] Deutch (n28)
[48] ibid
[49] ibid

Ukwueze also supports this argument and emphasizes that protecting the consumer is not only limited to protecting human life but it also embodies the notion of protecting human dignity against monopolistic powers of companies[50]. Fourth, Deutch argues that some of the modern theories of human rights such as the theory of justice, principles of fairness and equality also provide the basis for consumer protection and accordingly it can be justified consumer rights as human rights[51].

All these arguments presented by Deutch and other scholars indicate that consumer rights have the potential to be considered as third generation human rights. As mentioned earlier third-generation human rights have emerged as a result of the new needs of the people. But still, those rights are considered as soft laws, which only have limited binding force. As Benohr denotes, third generation rights play a subordinate role and remain contested[52]. Therefore, as these scholars claim there is a need to include the consumer rights also into the category of the third generation until it obtains the full recognition as human rights.

Moreover, scholars point out that consumer rights protection as a base for acknowledging and implementing some human rights which are enshrined in the international human rights instruments. Benohr claims this as "implicit consumer protection in human rights agreements[53]". The first example of this argument is the right to an adequate standard of living. As Imperatore highlights "in modern society (the) right to consume seems to be an essential part of the right to the adequate standard of living[54]". Article 25 (1) of the UDHR recognizes the right to the adequate standard of living as follows;

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services…"

[50] Ukwueze (n 28)
[51] Deutch (n28)
[52] Benohr (n 5)
[53] ibid
[54] Imperetor (n 48)

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Accordingly, it can be argued that although the UDHR does not include the particular term of consumer protection, in a broad sense Article 25 (1) serves as a basis for consumer protection.

Moreover, Article 11 of the International Covenant on Economic Social and Cultural Rights (ICESCR) also highlights the right to an adequate standard of living including the "right to adequate food, clothing, housing and to continuous improvement of living conditions". Deutch emphasizes that consumer protection as an implementation of these rights and means to achieve these goals[55]. Following Deutch's argument Ukwueze highlights the same opinion and states that "adequate food necessarily includes the quality of food, safety, information and fair price, all of which are achieved through consumer protection legislation[56]".

Furthermore, Article 12 of the ICESCR envisages the right to physical and mental health. It further includes the "improvement of environmental and industrial hygiene and the prevention of disease". Right to safety and prevention of individuals from hazardous products is also one of the basic rights of consumers, as well as the main goal of consumer protection[57]. Therefore, it can be argued that Article 12 of the ICESCR also impliedly acknowledges consumer rights as human rights.

Ukwueze and Benohr further observe that, right to access to justice, right to fair trial and right to redress which are enshrined in the many international human rights instruments are closely connected with consumer protection[58]. Article 8 of the UDHR states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". As mentioned in the Guideline 37 of the UNGCP, development of a fair, effective, transparent, and impartial mechanism to address consumer complaints is an essential task of consumer protection process. In addition to that, the right to education, which is embodied in Article 13 of the ICESR is also compatible with the consumer's right to

55 Deutch (n 28)
56 Ukwuez (n 28)
57 Ibid; Benohr (n 5)
58 ibid

education enshrined in the Guideline 42 of the UNGCP[59].

In addition to international human rights instruments, some regional human rights instruments also expressly and impliedly recognize consumer rights protection as a part of human rights. For example, Article 38 of the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter'), highlights that "Union policies shall ensure a high level of consumer protection[60]". It can be argued that this provision is a direct recognition of consumer protection as human rights. However, Kingisepp contends that this provision forms "only a broader constitutional view that a high level of consumer protection is part of the Union's mission[61]". Nevertheless, as Benohr argues some provisions of the European Convention of Human Rights (hereinafter ECHR) impliedly acknowledges consumer rights as human rights. As she observes, Article 10 and 11 of the ECHR include freedom of expression and freedom of association, "which may protect the right of consumers or consumer organizations to form opinions and to receive and divulge information[62]".

Moreover, in the international level, the UNGCP acts as the major legal instrument for the protection of consumer rights. Even though the UNGCP does not have a binding force as same as an international convention, the global acceptance of the UNGCP can be considered as a general recognition of consumer protection as a universal right[63]. In its early stages, Deutch viewed the UNGCP as an implementation of ICESR and the UDHR. Therefore, it can be argued that today, consumer rights are in the process of acquiring their validity as a third-generation human rights in the international arena.

Furthermore, there are instances of constitutional recognition of consumer rights in the domestic level[64]. Article 60 (1) of the Constitution of the Portuguese Republic recognizes consumer rights as constitutional rights. According to Article 60 (1);

[59] Deutch (n 28)
[60] Kingsapp (n 45)
[61] ibid
[62] Benohr (n 5)
[63] ibid; Ukwueze (n 28)
[64] (Kingisepp (n 45)

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

> Consumers shall possess the right to good quality of the goods and services consumed; to training and information; to the protection of health, safety, and their economic interests; and to reparation for damage.

This provision has more importance when considering consumer rights as human rights because it directly recognizes consumer rights as fundamental rights[65]. In addition, the Constitution of Spain also includes a provision in Chapter III, which deals with "the Guiding Principles of Economic and Social Policy". Accordingly, Article 51 of the Constitution of Spain states that "the public authorities shall guarantee the protection of consumers and shall, by means of the effective measures safeguard their safety, health and legitimate economic interests". Both these constitutional initiatives pave the way for making a strong argument in favor of upgrading consumer rights into a similar level of human rights[66].

Notably, the aforementioned arguments and examples clearly support the view of considering consumer rights as a part of human rights. However, there are some opposing arguments which refute the view of elevating consumer rights into the context of human rights. On the one hand, there is a common hesitation in the international legal sphere to upgrade new rights as human rights. As Benohr has correctly pointed out, "the gradual proliferation of new human rights claims in law and politics has led to some skepticism and suggestions for stronger quality controls of these rights[67]". On the other hand, some scholars like Kingisepp argue that there is no need to recognize consumer rights as human rights. He pointed out two reasons for refusing human rights value of the consumer rights. First, as he argues, a violation of a human right leads to death or dire suffering and, in contrast, violation of a consumer rights does not normally cause such drastic consequences. Second, consumer rights do not contain the characteristic of 'abstractness' which include human rights[68].

[65] Ukwueze (n 28); Kingisepp (n 45); Deutch (n 28)
[66] Ukwueze (n 28)
[67] Benohr (n 5)
[68] Kingsepp (n 48)

However, according to the researcher's point of view, it is difficult to accept Kingisepp's first argument because, as discussed earlier basic consumer rights like the right to safety, right to be informed etc. are directly connected with right to life and right to health. Therefore, it is submitted that any violation of basic consumer rights have a serious impact on human lives.

Conclusion

The main theoretical analysis of this paper focuses on the existing debate on recognizing consumer rights in the context of human rights. Generally, it is evident that the concept of consumer rights has less attention compared to the other right based approaches like human rights. Notably, in addition to the UNGCP, there is no internationally recognized legal instrument which is directly relevant to the consumer rights protection. From the International law perspective, as mentioned earlier, the UNGCP is a soft law which does not have legally binding force towards the state parties[69].

Conversely, human rights are a well-known and globally accepted, legally enforceable phenomenon through several international conventions and protocols. Therefore, elevating consumer rights as a part of human rights would positively impact on safeguarding consumer rights in various ways. First, it will cause to gain more attention to consumer rights violations occurring when face to face as well as online consumer transactions. Second, it is obvious that, if consumer rights are recognized as human rights, it will strengthen consumer rights protection[70]. Particularly, some basic consumer rights including the right to privacy, right to information and right to redress could be implemented as human rights and it will enhance the protection given for consumers against serious infringement of their rights.

[69] Y Yu and DJ Galligan, "Due Process of Consumer Protection: A Study of the United Nations Guidelines on Consumer Protection" [2015] FLJS <https://www.law.ox.ac.uk/sites/files/oxlaw/oxford_ungcp_due_process_w_fljs_logo.pdf. > accessed July 8, 2021

[70] M Eseyin and CW Chukwuemeka, "Articulating Consumer's Rights as Human Rights in Nigeria" (2018) 72 Journal of Law, Policy and Globalization 124

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Stalking and Cyber Stalking: A Comparative Analysis of the Legislative Responses in Sri Lanka, Canada, the United Kingdom and Australia

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Abstract

The act of stalking has its own silent effects on victims at times even it could prove fatal. Yet owing to the complex nature of the conduct of stalking, it has evaded the attention of the legislature particularly in Sri Lanka. Through the expansion of the technology, the act of stalking had been updated furthering the impact, yet surprisingly, it still has failed to secure the attention of the legislature. This paper seeks to define and analyze the terms of stalking emphasizing on cyber stalking in the Sri Lankan context. To attain this objective, the Black Letter approach has been utilized together with comparative research methodology, with the United Kingdom, Canada and Australia. Further, this paper uses qualitative analysis of legislative enactments and case law as primary data and books and journal articles as secondary data. This article concludes with the view that Sri Lanka requires legislative intervention to address the real threat of cyber stalking.

Keywords; *Stalking, Cyber stalking, Harassment, Victims, Legislative Response*

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Introduction

The event of cyber stalking can be identified as another extension of criminal conduct of a perpetrator using enhanced electronic capabilities, to attain the end of causing violence against another[1]. The act of stalking has been addressed extensively by other jurisdictions apart from Sri Lanka. Even in those jurisdictions the act of stalking encompasses relatively novel characteristics[2]. Stalking reflects a more trait description similar to shoplifting, hooliganism and vandalism, rather than being categorically confined to a legal matter[3]. In an attempt to gather a more generic meaning for the word 'Stalking', the act of one or the course of repetitive conducts of one, which inflicts intrusion and unsanctioned communication on another, prolonging and persisting to the extent that the recipient of such acts would feel threatened and intimidated[4]. The act of stalking itself is an accumulation of several motive and purposes, which are intrinsic to human behavior and emotions such as jealousy, resentment, obsession and the overwhelming desire to infer control over someone[5]. When characteristics of the victims are concerned, mostly existence of some form of acquaintance is common, such as a former partner or a relative, but the incident occurring between complete strangers are not unusual[6]. Stalking of celebrities and popular figures can be easily elevated into domestic violent encounters[7].

From close observation, the act of stalking can be identified to be manifested through various activities ranging from, following constantly keeping surveillance, to repetitive acts of communications such as texts messages, phone calls and emails to the victim[8]. It may further extend to sending or leaving the victim with offensive materials and sometimes

[1] J. Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 365.
[2] The Oxford English Dictionary cites the first example in 1984
[3] C. Wills, 'Stalking: The Criminal Law Response' (1997) Criminal Law Review 463, 463.
[4] R. Purcell, M. Pathe and P. E. Mullen, 'Stalking: Defining and prosecuting a new category of offending' (2004) 27 International Journal of Law and Psychiatry 157,157.
[5] E. Ogilvie, 'Stalking: Legislative, policing and prosecution patterns in Australia', (2000) 34 AIC Research and Public Policy Series 19, 20
[6] A.G. Burgess, J.E. Douglas and R. Halloran, 'Stalking behaviours within domestic violence' (1997) 12 Journal of Family Violence 389.
[7] S. Walby and J. Allen, 'Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey' (2004) Home Office Research Study 276.
[8] P. Tjaden and J. Thoennes, 'Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence against Women Survey' (1998) US Department of Justice, Office of Justice Programs 10.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

committing violence against the property of the victim[9]. The consistent occurrence of these acts for a prolonged period of time, from days, months and even years, can be identified in the acts of stalking. It is this persistence that proves a grave psychological threat to the victim even though apparent physical violations are absent[10]. Further these psychological effects of stalking can lead to various adverse impacts resulting in, sleep deprivation, anxiety, depression, suicidal tendencies and post-traumatic stress disorder[11].

The adverse effect and the conduct of stalking is not a novelty in any jurisdiction, yet it still holds a difficult area for prosecutions in absence of a specific offence tailored to suit it[12]. This difficulty is rather more pronounced when proving the threat or fear caused in the absence of actual threatening conduct. Therefore in many jurisdictions, prior to the introduction of anti-stalking legislation, the prosecution had to rely on other possible offences such as offences against the person and property, and other harassment prohibition legislations[13]. The introduction of the offence of stalking is to cater to the gap, for the offence itself relies not on a single act but the impact that one such act could have collectively throughout a passage of time, culminate anxiety and uncertainty in the mind of the victim[14].

Methodology

This paper is relying on the qualitative approach in conducting the research and gathering the required data. As the primary source of data gathering legislative enactment of various jurisdictions such as the United Kingdom, Canada, Australia and Sri Lanka and judgments delivered by the courts of those respective jurisdictions were used,

[9] Emily Finch, The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution, (1st edn, Routledge-Cavendish, London 2001) 289–305

[10] P. Tjaden and J. Thoennes, 'Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence against Women Survey' (1998) US Department of Justice, Office of Justice Programs 10.

[11] I.Grant, N.Bone and K.Grant, 'Canada's criminal harassment provisions: A review of the first ten years' (2003) 29 Queen's Law Journal 175, 185–8

[12] J.Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 366.

[13] Emily Finch, The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution, (1st edn, Routledge-Cavendish, London 2001) 119–72

[14] J.Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 366.

and from the secondary data gathering books, journal articles and web articles were utilized. The choice of the above jurisdictions was based on the collective advancement of anti-stalking laws in those countries to be stated side with Sri Lankan legislative responses to the similar matter.

Cyber Stalking- The Novel Way of Stalking

The meaning of the word stalking itself is indeed vague with lack of precision, therefore the word of cyber stalking cannot be defined without imprecision. In rather simplistic form it can be identified as the act of stalking conducted through and by the use of technology, such as social media, emails, internet and other such communication enhancements[15]. These communication technological developments tend to facilitate more stalking compared to the offline environment by removing the traditional restraints put between the victim and the offender, it may even facilitate as a direct line of communication that would be impossible for the stalker to establish in an offline environment[16]. The other factor which encourages such behavior is the pseudonymity one can attain on the internet, by this pretence, one who would normally be discouraged to stalk may be encouraged through the safety of the visage to contact the victim and use threatening messages and conduct[17]. This aspect of absence of physical contact may prove to be a further aggravation, by leading the stalker to entertain fantasies and encouraging more narcissistic traits towards the victim, later to manifest into violence, through the humiliation of rejection[18].

To summarize, cyber stalking in a legal context is the prolonged and repeated use of abusive behaviors online (a course of conduct or conduct)

[15] L. Ellison and Y. Akdeniz, 'Cyberstalking: The regulation of harassment on the Internet' (1998) Criminal Law Review, Special Edition in 'Crime, criminal justice and the Internet' 29.
[16] M. McGrath and E. Casey, 'Forensic psychiatry and the Internet: Practical perspectives on sexual predators and obsessional harassers in cyberspace' (2002) 30 Journal of the American Academy of Psychiatry and the Law 81, 85.
[17] L. Ellison, 'Cyberstalking: Tackling harassment on the Internet' in D. S. Wall (ed.), Crime and the Internet (London: Routledge, 2001) 143.
[18] M. McGrath and E. Casey, 'Forensic psychiatry and the Internet: Practical perspectives on sexual predators and obsessional harassers in cyberspace' (2002) 30 Journal of the American Academy of Psychiatry and the Law 81, 85.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

intended 'to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate[19]'.

Cyber stalking can be categorized as follows and these categories are not exclusive to cyber stalking, these overlap and combine with the traditional form of stalking.1) Establishing communication with the victim.2) Publication of victims' unconsented information 3) Victim's electronic device being targeted 4) Surveilling the victim 5) Ongoing threatening behavior.

Legislative Responses

Cyber stalking proves rather more challenging to govern and regulate than the already complex anti-stalking legislation. When regarding the forms of cyber stalking they prove more complex than traditional stalking but it mirrors similar traits as the latter. Hence by broadly defining traditional stalking, most jurisdictions have incorporated cyber stalking to the same. Thus, the tendency is to couple it under the general offence of stalking. However, difficulties arise when some jurisdictions such as Canada have used narrow definitions and identifies it as a distinct category of its own[20].

Furthermore, in some jurisdictions cyber stalking is counter under the umbrella term of harassment[21]. Though not profound there are other jurisdictions which had demarcated more serious cases of stalking from harassment offences, creating a separate offence[22]. There is a repository of ideas which suggest this method is to be most favored among the rest[23].

In the jurisdiction of Australia, any specific anti-stalking Federal laws

[19] Online Harassment Field Manual, 'Defining "Online Abuse": A Glossary of Terms' <https://onlineharassmentfieldmanual.pen.org/defining-online-harassment-a-glossary-of-terms/> accessed 25 October 2021.

[20] J.Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 375; N. H. Goodno, 'Cyberstalking: A new crime: Evaluating the effectiveness of current state and federal laws' (2007) 72 Missouri Law Review 125

[21] T. McEwan, P. Mullen and R. MacKenzie, 'Anti-stalking legislation in practice: Are we meeting community needs?' (2007) 14 Psychiatry, Psychology and Law 207, 215.

[22] Ibid.

[23] T. McEwan, P. Mullen and R. MacKenzie, 'Anti-stalking legislation in practice: Are we meeting community needs?' (2007) 14 Psychiatry, Psychology and Law 207, 215.

are absent, apart from the law which prohibits the usage of carriages to harass individuals[24]. Yet this gap has been addressed at State levels catering for the offence of stalking[25]. In order to confine this discussion the focus of this paper will be on section 21A of the Crimes Act 1958 (Vic), which gives a ten year maximum sentence[26]. The section makes it an offence when someone engages in a course of conduct having an intention to inflict harm on the victim, mental or physical, or the conduct which arouses fear of safety in the victim or any other person.

When the Canadian jurisdiction is considered, stalking can be identified as conduct that would constitute an offence under the laws on harassment. The Section 264(1) of the Criminal Code criminalizes the conduct of anyone who causes any reasonable man to apprehend a fear of their safety or the safety of anyone known to them, whether the conduct is done intentionally to harass the victim or was reckless about that fact[27]. The interesting fact about the legislation regarding the topic in Canada is that it does not require the conduct to be a course of conduct, merely a single act is sufficient to make one culpable[28].

The United Kingdom through the use of section 1 of the Protection from Harassment Act 1997[29], has described, a course of conduct that would amount to harassment with the intent or in the absence of intent having knowledge that such conduct would amount to harassment. In the same Act through section 4 it sanctions more serious acts of causing fear on one through a course of conduct[30].

It can be seen through this fraction of jurisdictions presented, the unanimous need for the enactment of anti-stalking laws, yet even the more general form of stalking without the involvement of cyber technology, proves to be a complex issue, making it difficult to promulgate specific

[24] Criminal Code Act 1995 (Cth) ss 474.15–474.17 (Crowther v. Sala (2007) 170).
[25] Queensland was the first Australian state to enact specific anti-stalking laws in 1993; see Criminal Code Act 1899 (Qld), s. 359E. Also see Crimes Act 1900 (ACT), s. 35.
[26] Crimes Act 1958 (Vic) s 264(1).
[27] The Canadian provision was introduced in 1993, and carries a maximum penalty of 10 years' imprisonment: Criminal Code s. 264(3)
[28] ***R v. Pastore*** (2005) OJ no 2807.
[29] Protection from Harassment Act 1997, s 1.
[30] Protection from Harassment Act 1997, s 4.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

legislations[31]. The difficulty is to draft specific legislation to address the issue of stalking without sanctioning the legitimate activities conducted by persons. This hurdle is usually addressed by the legislature by using border terms to define the conduct and basing the fault elements on the impact the act has on the victim[32]. To water down the adverse effects of these legislations on legitimate purposes, such as investigative journalism, defenses have been introduced in many jurisdictions[33].

Elements of Cyber Stalking

From a careful analysis of such legislations, three common ingredients could be differentiated. Those are 1) Conduct Element 2) Fault Element 3) Impact on the Victim.

a. Conduct element

In addressing the element of conduct, two positions prominently taken by legislatures in different jurisdictions can be identified. One approach is to mention the word 'course of conduct' and leave it undefined, similar to the United States federal provisions[34]. In contrast the other manner is to define the 'course of conduct'. In the UK the law is undefined on this point, which had included speech to the definition, and necessity of at least two instances of conduct[35]. This approach can be understood as feasible as it provides the courts with enough flexibility to apply its mind, yet the unspecific nature of the law, regarding the conduct which ought to be or not be criminal, is problematic particularly when one is faced with the choice to determine whether the conduct they are about to do is permitted by criminal law or not[36].

The latter approach of definitely specifying the course of conduct, or in some extreme cases even to list out the conducts, has been taken

[31] J.Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 367.
[32] Ibid.
[33] See for example, Protection from Harassment Act 1997 (UK), ss. 1(3) and 4(3), and Crimes Act 1958 (Vic), s. 21A (4).
[34] 18 USC § 2261A(2)
[35] Protection from Harassment Act 1997 (UK), s. 7(3)–(4). Even where there are two incidents, the circumstances must be such that they may properly be described as a 'course of conduct': see Lau v. DPP [2000] EWHC QB 182
[36] J.Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 368

as the legislative approach in some jurisdictions[37]. This approach of course narrows the room for the court to interfere flexibly yet it keeps a consistent law. Canada can be taken as an example in this regard. Criminal harassment in Canada specifies the conduct to be 1) Following someone repeatedly from place to place. 2) Repeated direct or indirect communication with someone. 3) Watching the living space or the dwelling house, place of residence, place of work, or other such places. 4) Committing conducts that are threatening to other persons of someone akin to them[38].

b. Fault element

When considering the fault elements, there are two underlining principles various jurisdictions have adopted. One is to consider the importance of the fault element to narrow down an otherwise broad spectrum. Assigning a fault element to a definition such as the intention or recklessness has been the way to comply with this principle. For example, the US Federal rules require the conduct to be intentional to impose sanctions[39]. In Canada the knowledge or the recklessness of the offender should be proved[40]. The other principle of consideration is the acknowledgment of the fact that most of the stalkers do not intend any harm but rather pursue to establish relationships with the target through their misguided methods[41]. Most times they would not even possess the knowledge that the acts they perform do harass the other person[42].

c. Impact on the Victim

This element acts as a limitation on the scope of the offence in many anti-stalking laws. The impact on the victim should at least be sufficient to arouse fear in the victim for their safety. Therefore the provisions which emphasize this element focus more on the impact the conduct makes on the victim rather than the nature of the conduct[43]. This cannot be taken as an objective view, in various jurisdictions this principle has

[37] J.Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 368
[38] Criminal Code RSC 1985, c C-46 (Can), s 264(2)
[39] 18 USC § 2261A(2)
[40] Criminal Code RSC 1985, c C-46 (Can), s 264(1)
[41] J.Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 368.
[42] I.Grant, N.Bone and K.Grant, 'Canada's criminal harassment provisions: A review of the first ten years' (2003) 29 Queen's Law Journal 175, 185–8.
[43] J.Clough, Principles of Cybercrimes, (1st publication, Cambridge University Press, Cambridge 2010) 374.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

been adopted subjectively. In the UK, it is a prerequisite to prove that the conduct harassed the victim, and the definition of harassment contains itself the causing of distress or alarm to a person[44]. On the other spectrum of this principle, some jurisdictions have done away with the requirement of an impact on the victim by the conduct, but rather rely on the nature of the conduct itself regardless whether the victim had the knowledge of that particular conduct[45].

Legislative Response in Sri Lanka

In Sri Lanka cyber stalking including cyber harassment has been increasing exponentially over the past few years, preying on countless victims[46]. Most stalkers target vulnerable teenage girls because it is easy to evade criminal penalties as victims in this category are fearful to report due to the social stigma associated and may feel defenseless having minimal recourse from law enforcing bodies.

The officer in charge in Arumapperuma states that 'there are women who are being stalked and harassed by men on different social media accounts. There are complaints of money extortion. Some women do sexual favors as they are threatened[47]'. A recent popular case was the Mt Lavinia child sex trafficking case; some of the offenders committed cybercrimes such as cyber harassing, sharing of obscene material via cyberspace together with crimes committed in a physical level[48]. The plausible reason for the rise in cyber stalking and cyber harassment is that no clear or rigid legislation covers cyber stalking in Sri Lanka. Stalkers and harassers are fearless to commit crimes either because they are unaware that they are committing a crime or due to the relaxed law enforcement mechanism regarding cybercrimes.

[44] Protection from Harassment Act 1997 (UK), s 7(2).

[45] T. McEwan, P. Mullen and R. MacKenzie, 'Anti-stalking legislation in practice: Are we meeting community needs?' (2007) 14 Psychiatry, Psychology and Law 207, 215.

[46] One-Text Initiative, 'Porn and Nudes: Delving into Cyber Exploitation in Sri Lanka' (22 March 2021) <https://onetext.org/index.php/admin/OneText/contents_view/en/Articles/477> accessed 27 October 2021.

[47] Nadia Fazlulhaq, ,'Sri Lanka 'groping in the dark' on how to deal with cyber-bullies',The Sunday Times (Colombo, 7 March 2021) <https://www.sundaytimes.lk/210307/news/sri-lanka-groping-in-the-dark-on-how-to-deal-with-cyber-bullies-434821.html> accessed 27 October 2021

[48] Pavani Hapuarachchi, , '17 arrested in Mt. Lavinia Child sex trafficking ring', NewsFirst (30 June 2021) < https://www.newsfirst.lk/2021/06/30/17-arrested-in-mt-lavinia-child-sex-trafficking-ring/> accessed 26 October 2021.

Unintentionally, the lax laws regarding the crime encourage stalkers to exploit victims boldly.

However, the Computer Crimes Act covers cybercrimes thus one can argue that cyber stalking is dealt within this Act to a limited extent[49]. Sri Lanka was the first South Asian State to assent to the Budapest Convention (the Convention on Cybercrime)[50]. The Computer Crimes Act is largely based on this convention, even though some features such as child pornography are not addressed.

Section 2 of the Computer Crime Act provides broad jurisdiction to include complaints irrespective of whether the person resides, the crime was committed, device or service used, or the loss or damage was caused to a person or corporation, in Sri Lanka or outside Sri Lanka[51]. However the Computer Crimes Act has thus far been interpreted in a narrow scale to substantively include computer related crimes and hacking offences[52], whereas relatively modern Cybercrimes such as that affects one's integrity, well-being or reputation have been vaguely defined. Specific definitions are not provided by any legislation for offences such as cyber stalking, cyber bullying, cyber harassment, hate speech, cyber defamation, cyber-squatting and cyber gambling[53]. Therefore, since the Computer Crimes Act is the primary statute that deals with crimes committed via cyberspace, it can be interpreted to consider crimes such as cyber stalking and cyber harassment as a computer crime. Cyber stalking comes under computer integrity, accessibility and confidentiality of data. Section 7 of the Act categorizes obtaining unlawful data as an offence and section 10 states that unauthorized disclosure of information enabling access to a service is an offence[54]. Attempt to commit an offence under this Act, abetment and conspiracy is dealt with under sections 11, 12, 13 respectively.

[49] Computer Crimes Act No 24 2007.

[50] Damithri Kodithuwakku, 'An evaluation of the legal framework of cyber-crimes in Sri lanka' (2019) Junior BASL 1, 4; Convention on Cybercrime [23 November 2001], available at: <https://www.refworld.org/docid/47fdfb202.html> accessed 28 October 2021.

[51] Computer Crimes Act No 24 2007 s 2.

[52] Jayantha Fernando, 'Cybercrime Legislation – Sri Lankan Update' (2016) COE 1, 2

[53] Damithri Kodithuwakku, 'An evaluation of the legal framework of cyber-crimes in Sri lanka' (2019) Junior BASL 1, 4.

[54] Computer Crimes Act No 24 2007 ss 7, 10

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

These sections can relate to cyber stalking cases. However, these provisions have not been critically analyzed by the judiciary to allow for such extension or inclusion[55]. Therefore, victims of cyber stalking or other non-defined cybercrimes cannot be protected under the Computer Crimes Act due to the lack of knowledge and inadequate interpretations of the law[56]. Offenders and law enforcing bodies may also be ignorant about the law due to its ambiguity. Therefore, though Sri Lanka was progressive in enacting the statute, the implementation and enforcement of the legislation are lagging.

The right to privacy is not provided by law expressly in Sri Lanka. However, Sri Lanka has ratified the International Covenant on Civil and Political Rights (ICCPR) thus is obliged to follow the rights enshrined in the treaty. Article 17 of the ICCPR guarantees the right to privacy[57]. However, the domestic law enacting the ICCPR does not provide for the right to privacy. Article 11 of the Constitution provides for the fundamental right that 'no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment[58]'. A case of cyber stalking may be brought under this guaranteed right[59]. However, no case has been brought before the court to comprehend the judiciary's interpretation. Another legislation that may embody cyber harassment is under section 345 of the Penal Code, which is in regards to sexual harassment in a non-cyber platform[60]. Similarly, section 374 of the Penal Code relates to extortion and section 483 relates to criminal intimidation[61]. Furthermore, the Domestic Violence Act, Obscene Publication Ordinance, Child Protection Authority Act, etc. protect individuals from harassment[62]. Thus, it is evident that though there is a multitude of laws that cover sexual harassment, defamation, domestic

[55] Aparrajitha Ariyadasa, 'Harassment Beyond Borders: Sexting, Cyber Bullying and Cyber Stalking in Social Media. Can Sri Lanka Protect Victims?' (2019) Papers SSRN 1, 6.
[56] Ibid.
[57] International Covenant on Civil and Political Rights 1966 art 17; International Covenant On Civil and Political Rights (ICCPR) Act, No. 56 of 2007 (Sri Lanka).
[58] Constitution of the Democratic Socialist Republic of Sri Lanka, art 11.
[59] Aparrajitha Ariyadasa, 'Harassment Beyond Borders: Sexting, Cyber Bullying and Cyber Stalking in Social Media. Can Sri Lanka Protect Victims?' (2019) Papers SSRN 1, 7; Constitution of the Democratic Socialist Republic of Sri Lanka arts 17, 127.
[60] Penal Code (Sri Lanka), s 345.
[61] Penal Code (Sri Lanka), s 374, 483.
[62] Obscene Publications Ordinance, s 2; Prevention of Domestic Violence Act No 34 of 2005; National Child Protection Authority Act (No. 50 of 1998)

violence and abuse, no success has been achieved. This is due to the lack of cases being reported and subsequently, case law not being interpreted before the judiciary and the lack of awareness of the current legislation. Therefore, a novel piece of legislation is optimal that specifically relates to cyber stalking and cyber harassment.

The law enforcing agency in Sri Lanka is the Criminal Investigations Department ('CID') with the Cyber Crimes Division focusing on cybercrimes. According to the Cyber Crimes Division ('CCD') there were more than 1000 cyber bullying cases in 2018[63]. Unfortunately, crimes of cyber stalking reported to the body are almost non-existent due to the lack of an acceptable statute encompassing the area of cyber stalking.

Other enforcement bodies include Sri Lanka's Computer Emergency Readiness Team ('SLCERT'), Information and Communication Technology Agency ('ICTA'), Telecommunication Regulatory Commission, Children and Women's Bureau among others. SLCERT has been an effective body in resolving cyber security and forensic issues. SLCERT collaborates with ICTA to combat cyber-attacks[64]. However, its role in regards to cyber stalking is limited. For example, it is involved in resolving cyber cases in regards to social media platforms such as Facebook in rudimentary ways such as reporting profiles directly to Facebook on behalf of the victim.

Another challenge with the enforcing bodies, is the lack of empathy and sensitivity held to complaints. Victims are not comfortable in sharing their experiences, due to the male dominate law binding authorities. This is reflected in the poor reporting rate to investigating bodies. Also, the absence of secure locations and systems to report cyber-crimes, not protecting the confidentiality of the victim, need for oral evidence in court are some problems with regard to reporting cyber-crimes[65]. Moreover, the mentality of the people of Sri Lanka

[63] Aparrajitha Ariyadasa, 'Harassment Beyond Borders: Sexting, Cyber Bullying and Cyber Stalking in Social Media. Can Sri Lanka Protect Victims?' (2019) Papers SSRN 1,4.
[64] Ibid, 7.
[65] Ashan Dharshana, 'Are the Sri Lankan Cyber-Crime Laws Sufficient to Safeguard it Professionals and the Victims of Cyber-Attacks In Sri Lanka?' (12 January 2020) <https://medium.com/@ashanruwanpathirana/are-the-sri-lankan-cyber-crime-laws-sufficient-to-safeguard-it-professionals-and-the-victims-of-7bfb748ab487 >accessed 28 October 2021.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

must change, they must admit the fact that cyber stalking has become part of internet culture. By being open to change, it will assist victims in seeking support without fear and shame. Other issues in combating cybercrimes in Sri Lanka are problems of identification, lack of computer forensic expertise to conduct investigations and minimal international support in identifying cyber stalkers.

These challenges can be significantly mitigated by the introduction of the Data Protection Act and cyber defamation laws[66]. Also, by creating awareness of the issue among the public, incorporating advanced technology, monitoring social media, creating strong institutions that ensure implementation of the law and safe and secure reporting, establishing prevention strategies and coping mechanisms for the victims. On a positive note, the Women in Need and the Grassrooted Trust closely works with the Sri Lanka Police Women and Children's Bureau and the CCD to bring in proper mechanisms to tackle sensitive cases when recording cyber harassment[67]. However, stringent laws are mandatory to be enacted at a governmental level for successful progress.

Conclusion

The COVID -19 pandemic has augmented the crisis as more people are utilizing the internet and social media frequently in Sri Lanka. Even though, the offences are proscribed by law, no legislation directly discusses these crimes committed via cyber platforms. Therefore, this proposition can be altered if new cases come up before the judiciary and are interpreted in favor of the Computer Crimes Act and other existing legislation or alternatively, a new piece of legislation can be enacted which specifically deals with cyber stalking which details the protections, punishments, enforcement mechanisms and penalties. Sri Lanka must learn from the successful experiences of countries such as the UK, Canada and Australia and adopt a new and thorough legislation that will effectively combat cyber stalking and fill the void in regards to the law.

[66] Asha H Mendis, 'Seeker Are You Protected? Social Media and Protection Granted to Women in Sri Lanka' (2019) 20(7) Journal of International Women's Studies 319, 330.
[67] One-Text Initiative, 'Porn and Nudes: Delving into Cyber Exploitation in Sri Lanka' (22 March 2021) <https://onetext.org/index.php/admin/OneText/contents_view/en/Articles/477> accessed 26 October 2021.

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Volume 02, Issue 01
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Admissibility of Computer Evidence in Sri Lankan Courts: A Comparative Analysis with Other Jurisdictions

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Abstract

The information technology is one of the constantly evolving and emerging subjects in the global arena. Gathering, conservation, communication and presentation of the computer derived evidence must fulfill legal requirements with regard to the admissibility of computer evidence. Computer evidence that was gathered in a way that was not in accordance with the law will be declared inadmissible. In many jurisdictions there was a challenge in admissibility of computer evidence. Evidence (Special Provisions) Act, No. 14 of 1995 and Electronic Transaction Act, No. 19 of 2006 two special legislations enacted for the admissibility of computer evidence in court proceedings in Sri Lanka.

In considering the current situation in Sri Lankan justice system, there is a dual regime governing admissibility of computer evidence and it has resulted number of issues in terms of admissibility of computer evidence. Further Sri Lankan judiciary in several cases, has taken up two different approaches while interpreting the prevailing law of admissibility of computer evidence. Therefore, there is an uncertainty in Sri Lankan system relating to admissibility of computer evidence. Therefore, it is high time to find a comprehensive solution to resolve this lacuna in Sri Lankan law.

Keywords: *Admissibility, Admissible evidence, Computer Evidence, Judicial discretion, Legislation, Legal System*

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Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Current Legal Framework Governing the Admissibility of Computer Evidence in Sri Lankan Courts

According to the No 14 of 1895 of the Evidence Ordinance of Sri Lanka there are two types of evidence namely oral evidence and documentary evidence[1]. However, there is no universal or unique interpretation for the Computer evidence. In terms of the provisions of the guidelines and explanatory memorandum on Electronic Evidence in Civil and Administrative Proceedings issued by the Council of Europe, "Electronic Evidence (Computer Evidence) is defined to mean any evidence derived from data contained in or produced by any device, the functioning of which depends on a software programme or data stored on or transmitted over a computer system or network[2]".

Neither Sri Lankan Evidence (Special Provisions) Act nor the Electronic Transaction Act No:19 of 2006 does not interpret "Computer Evidence". However, in the light of several interpretations made on the computer evidence[3], Computer Evidence can be defined as, any evidence that created, recorded, stored, or produced or transmitted in electronic form and includes computer evidence, digital audio and video, mobile phones, digital fax machines and any evidence that is derived from electronic devices such as computers and their peripheral apparatus, computer networks, mobile telephones, digital cameras and other portable equipment such as data storage devices and the internet and it can be created from digital devices such as telecommunication or electronic devices.

When considering the statutory provisions in Sri Lanka, there are no provisions in the Evidence Ordinance of Sri Lanka in respect of the admissibility of computer evidence. In terms of the section 03 of the Civil Law Ordinance No:05 of 1852 as amended, "*in all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks,*

[1] Section 03 of the Evidence Ordinance of Sri Lanka.
[2] Guidelines and Explanatory Memorandum on Electronic Evidence in Civil and Administrative Proceedings adopted by the Committee of Ministers of the Council of Europe on 30th January 2019.
[3] Guidelines and Explanatory Memorandum on Electronic Evidence in Civil and Administrative Proceedings adopted by the Committee of Ministers of the Council of Europe on 30th January 2019.

and banking, principals, and agents, carries by land, life and fire insurance, the law to be administrated shall be the same as would be administrated in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka[4]". However, Sri Lankan Judiciary has been very reluctant to apply this provision in judicial decisions.

Since there is no specific provision in the Evidence Ordinance with regard to admissibility of Computer Evidence, Sri Lankan legislature had to incorporate specific provisions into certain enactments in order to enable recognition of computer evidence. Intellectual Property Act, No.36 of 2003, Payment and Devices Act, No.30 of 2006, Computer Crimes Act, No.24 of 2007, Information and Communication Technology Act, No.27 of 2003, Payment and Settlement System Act, No.28 of 2005, are examples of such laws. In addition, to above legislations, the Evidence (Special Provisions) Act, No.14 of 1995 and Electronic Transactions Act, No.19 of 2006 (as amended) by Act No.25 of 2017 are two special statutes enacted for the purpose of admissibility of computer related evidence in court proceedings in Sri Lanka. These statutes have created a dual regime governing admissibility of computer evidence in Sri Lanka.

Moreover, it can explain a dual regime governing computer evidence in Sri Lanka as the Sri Lankan Judiciary in several cases has taken up two different approaches while interpreting the prevailing law of admissibility of computer evidence in Sri Lanka. However, it is a question whether the existing law is adequate to provide effective solutions to modern day challenges triggered by technological development and issues arising out of usage of computers and other devices. There is an uncertainty in Sri Lankan system when interpreting the existing law relating to the admissibility of computer evidence.

Commercial world has made several attempts to resolve issues relating to Computer Evidence. As a result in 1996, United Nations Commission on International Trade Law in its resolution adopted by the General

[4] Civil Law Ordinance No. 05 of 1982 section 03.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Assembly adopted the Model Law on Electronic Commerce, which is well known as UNCITRAL Model Law on Electronic Commerce. UNCITRAL Model Law on Electronic Commerce (1996) mainly focused on the issue of legal obstacles in usage of electronic commerce.

In the year 2005, the United Nations Convention on the Use of Electronic Communications in International Contracts was adopted for the purpose of introducing globally recognized standards in the area of electronic commerce and to guide member countries in enacting their domestic laws. Especially as a result of the adoption of the ECC, developing countries in the South Asian region such as; Sri Lanka, India took steps to enact a special legislation in respect of the Electronic Transactions. Accordingly, in the year 2006, Sri Lankan legislature enacted the Electronic Transactions Act No:19 of 2006 as amended by Act No:25 of 2017.

In terms of the provisions of section 22 of the Electronic Transaction Act, nothing contained in the Evidence (Special Provisions) Act No:14 of 1995 shall apply to and in relation to ant data message, electronic document, electronic record or other document to which the provisions of this act applies[5]. Accordingly it is important to note that the provisions of the Evidence (Special Provisions) Act will cease to apply, when a given matter is within the domain of the Electronic Transaction Act.

In the light of the key provisions of the Evidence (Special Provisions) Act and the Electronic Transaction Act[6], it is very clear that there are separate provisions governing admissibility of computer evidence in Sri Lanka. And also there are separate requirements in both legislations in respect of admissibility of computer evidence in Sri Lanka. Furthermore, the Electronic Transaction Act has specifically excluded some important transaction from the Act. Moreover, a unique procedure is to be followed when placing evidence before the court. Therefore, it is obvious that when considering the aforesaid provisions of the Evidence (Special Provisions) Act No:14 of 1995 and the Electronic Transaction Act No:17 of 2006 as

[5] Section 22 of the Electronic Transaction Act.
[6] Section 3, 21 of the Electronic Transactions Act.

amended by Act No:25 of 2017, there is a dual regime governing computer evidence in Sri Lanka.

Judicial Approach of Sri Lanka in Respect of the Dual Regime Governed by the Evidence (Special Provisions) Act and the Electronic Transaction Act

As a result of the aforesaid dual regime governing admissibility of Computer Evidence in Sri Lanka, a number of issues concerning admissibility of computer evidence have come into light in recent time. When examining the several judgments delivered by the Sri Lankan judiciary in this regard, it can see emerging case law take two directions as describe below.

Prior to the enactment of the Evidence (Special Provisions) Act, the Sri Lankan judiciary was of the view that the computer evidence could not be admissible in terms of the Evidence Ordinance of Sri Lanka.

In ***Banwell v Republic***[7] Justice Colin Thome held that the computer evidence is in a category of its own. It is neither original evidence nor derivative evidence. Under the law of Sri Lanka, computer evidence is not admissible under section 34 of the Evidence Ordinance or under any other section of the Evidence Ordinance. In the case of ***P.C. Mayappan and Others v K.S. Manchanayake***[8] Justice Sansoni held that the mere stamping of the firm's name was not a sufficient signature within the meaning of section 92 (1) of the Bills of Exchange Ordinance for the purpose of rendering the firm liable as indorses[9].

However, in some decided cases the Sri Lankan Judiciary took up a different view in respect of admissibility of computer evidence prior to the enactment of Evidence (Special Provisions) Act. As an example it was held in ***M.S. Aby Bakr v Queen***[10] that *"the speech that is alleged to have been reproduced in Wijesena's hearing by means of the wire recorder is a fact that, in connection with the other facts alleged by the prosecution witness regarding the making of a speech by the appellant*

[7] *Benwell v Republic* (1978/79) 2 Sri L R 194.
[8] *P.C. Meyappan and Others v K.S. Manchanayake* 61 NLR 529.
[9] Ibid.
[10] *M.S. Abu Bakr v Queen* 54 NLR 566.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

and the recording and the reproduction of it, makes it highly probable that the appellant made a speech in the same terms on the occasion in question. Therefore, it is not a fact that is otherwise relevant, it is relevant under section 11 of the Evidence Ordinance[11]". In *in Re S.A. Wickramasinghe*[12] *Justice Gunasekara held that "The words imputed to him in the rule are quoted from a report which of his speech made on a "Grundig" tape recorder. Further it appears from the affidavits of four of the deponents, who say that they heard the speech that they heard the Respondent say about the judiciary what is imputed to him in this report. There can be no doubt that he did utter the words in question in a speech made at a public meeting held on the Galle Esplanade as alleged in the Rule*[13]". In ***Kularathne and another v Rajapakshe***[14] it was decided that a taped recording a statement made in a public speech could be admissible as evidence.

In the light of the aforementioned judgments, it is very clear that, prior to the enactment of the Evidence (Special Provisions) Act, the Sri Lankan judiciary was of the view that contemporaneous recordings of public speeches could be admissible as evidence[15]. Justice T.S. Fernando held that *"the admission of evidence of a wire recorded speech is not repugnant to our law of evidence. But the court should have considered the evidence of an expert who stated at the trial that (1) there are dangers in attempting to identify speakers by their voices as relayed through tape recorders and (2) the dangers attendant upon such identification are grater in a case where what is relayed is a telephone conversation*." In ***Shaul Hameed and another v Ranasinghe and others***[16] photographs marked in the Petition of a Fundamental Rights application showing the incident were admitted as evidence.

Therefore, it is important to note that in some cases prior to the enactment of the Evidence (Special Provisions) Act as well as the Electronic Transaction Act, some computer evidence were considered

[11] Ibid, 568.
[12] ***In re Wickramasinghe*** 55 NLR 511.
[13] ***In re Wickramasinghe*** 55 NLR 511, 512.
[14] ***Kularathna and another v Ranasinghe and Others*** (1990) 1 Sri L R 128.
[15] ***K.H.M.H.Karunarathne v Queen*** 69 NLR 10.
[16] ***Shaul Hameed and another v Ranasinghe and others***(1990) 1Sri LR 128.

as admissible evidence. However, there was no specific law and was no procedure to be adopted to adduce the computer evidence under the purview of the evidence ordinance of Sri Lanka.

After the Evidence (Special Provisions) Act and the Electronic Transaction Act came into the operation, the opinion in respect of the admissibility of computer evidence has changed. In the landmark judgment of ***Marine Star Pvt Ltd v Amanda Foods Lanka Pvt Ltd***[17] the then High Court Judge Chitrasiri held that "the message received on the screen of a mobile phone which had been typed by another person from a different point and was sent with the assistance of the technology could be admitted in evidence under and in terms of the section 21 of the Electronic Transaction Act, No.19 of 2006[18]". Therefore, it was opined that a short message received by a mobile phone in the instant case could be admissible as evidence under and in terms of the section 21 of the Electronic Transaction Act. In ***Millennium Information Technology Limited v DPJ Holdings (Private) Limited***[19] the Commercial High Court of Colombo has decided that printouts of a webpage can be adduced as evidence in Sri Lanka under the provisions of Electronic Transaction Act and it is not necessary to fulfill the procedure laid down in section 07 and 08 of the Evidence (Special Provisions) Act[20].

In the light of the said quotation of the order, it is apparent that the Sri Lankan courts were of the view that legal requisites stipulated in Evidence (Special Provisions) Act need not be adhered to in matters regulated by Electronic Transaction Act.

As per the decision of the ***Gallage Prabath Pieris v Jacquelin Isabella Aponsu***[21] the High Court of Civil Appeal of Western Province case it is obvious that the Sri Lankan courts have taken the stance that the Electronic Transaction Act does not apply to (personal transactions) and the party who is seeking to lead that type of evidence should follow the

[17] *Marine Star Pvt Ltd v Amanda Foods Lanka Pvt Ltd Case HC* (Civil) 181/2007 (MR) dated 31.07.2008
[18] At pages 5 and 6 of the Order.
[19] *Millennium Information Technology Limited v DPJ Holdings (Private) Limited HC* (Civil) 257/2009 MR.
[20] Ibid, 5.
[21] *Gallage Prabath Pieris v Jacquline Isabella Aponso*, WPHCCA(Col)156/2012 dated 11.07.2014.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

procedure laid down in the Evidence (Special Provisions) Act, and not the procedure set out in the Electronic Transaction Act.

In ***Chakrawarthige Vijitha Wijerathne v Munasinghelage Pathum Chamikara Sanjeewa and Hewakotambage Yamuna Chandrika***[22] a similar decision was reached by the court in a rent and ejectment matter. In ***People's Leasing Company LTD v Muthuthantrige Iran Fernando***[23] case held that; "*The Electronic Transaction Act defines the basic rule that no data messages, electronic document, electronic record or other communication shall be denied legal recognition, effect, validity, or enforceability, on the ground that it is in electronic form. (vide section 3 of the Act). Accordingly, I am of the view that such business Ledger (e.g., Accounts Ledger) is an electronic record within the meaning of section 26 of the Electronic Transaction Act No: 19 of 2006*[24]". Furthermore, it was clearly held in the judgment that in terms of the section 22 of the Electronic Transaction Act, Evidence (Special Provisions) Act No:14 of 1995 shall not apply to and in relation to any data message or any electronic document, electronic record, or other document to which the provisions of the Electronic Transaction Act apply.

In ***Commissioner General of Inland Revenue v Janashakthi Insurance Co. LTD***[25] the Court of Appeal decided that Section 3 of the Electronic Transaction Act is clear and there is no doubt that it has been put in place by legislature to facilitate the admission of the category of Electronic evidence. In the said judgment, Justice Surasena held; thus, "*This Court notes that section 3 of the Electronic Transaction Act has provided that 'no data messages, electronic document, electronic record, or other communication shall be denied legal recognition, effect, validity, or enforceability on the ground that it is in electronic form. There cannot be any room to doubt that the above provision has been put in place by the legislature to facilitate the admission of*

[22] ***Chackrawarthige Wijitha Wijerathne v Munasinghalge Pethum Chamikara Sanjeewa and Hewakotambage Yamuna Chandrika*** 2012 WPHCCA (COL) 44/2014/LA.
[23] ***People's Leasing Company LTD v Muthuthantrige Iran Fernando*** HC(CIVIL)201/2008 MR
[24] Ibid, 6.
[25] ***Commissioner General of Inland Revenue v Janashakthi Insurance Co. LTD*** CA (Tax) Appeal 10/2013.

the category of evidence referred to in the said section. Therefore, this Court has no hesitation to conclude that the provisions of law brought in by the Electronic Transaction Act No:19 of 2006, are procedural law provisions relating to evidence rather than any substantive law provisions relating to the regime of fiscal legislation[26]".

Furthermore, in a recent case, ***Independent Television Network v Godakanda Herbal Private Ltd and another***[27] Justice Eva Wanasundara held that under section 22 of the Electronic Transaction Act, No:19 of 2006 transcript of a statement of accounts can be admissible. In the said judgment the Supreme Court of Sri Lanka was of the view that the Electronic Transaction Act No:19 of 2006 was enacted specifically to promote technological advancement to be reckoned by the regime and section 22 of the said Act makes special provisions with regard to any data message, electronic document, electronic record or other document. Therefore, the computer generated running account and the summary of the same account can be admissible as evidence under the purview of the Electronic Transaction Act No:19 of 2006.

According to the legal principles laid down in the aforementioned judgments and orders of the judiciary of Sri Lanka, it is very clear that there are two directions have created in respect of admissibility of computer evidence in Sri Lankan Courts. And also there is no unique procedure to be adopted in Sri Lanka when considering and admitting the computer evidence. Therefore as mentioned earlier the unique procedure has to be followed when admitting the computer evidence. It is very important to note that these concerns need to be addressed in order to find suitable and effective solutions.

Analysis of the Sri Lankan System With International Guidelines and the United Kingdom and Singapore Jurisdictions

On the 30th January 2019, the Council of Europe adopted guidelines in respect of the Electronic Evidence in Civil and Administrative Proceedings. For the purpose of adopting the said guidelines the European Union

[26] Vide at page 23 of the Judgment.
[27] *Independence Television Network v Godakanda Herbal Private Limited and Others*. S.C.CHC Appeal 29/11.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

appointed a committee consists of the Ministers of the Member States and it was named as European Committee on Legal Co-operation.

In this respect, the guidelines are intended to strengthen the efficiency and quality of the justice[28]. According to the preamble of the guidelines, the said guidelines are applied only insofar as they do not contradict national legislation and that they are a non-binding instrument. Furthermore, it was aimed to ensure that specific challenges relating to electronic evidence are addressed, such as the potential probative value of metadata; the ease with which electronic evidence can be manipulated, distorted or erased; and the involvement of a third party (including trust service providers) in the collection and seizure of electronic evidence. Further it was stated in the guidelines that the said guidelines apply to the resolution of disputes in both civil and administrative proceedings.

Article 2 of the guidelines speaks about the way oral evidence is to be adduced via remote link[29]. As per Article 3 of the guidelines, it is the duty of the court to ensure that the procedure followed to take evidence is fair and effective[30]. In terms of the Article 4 of the guidelines, the procedure and the technologies applied to take evidence from a remote location should not compromise the admissibility of such evidence and the ability of the court to establish the identity of the person concerned[31]. Article 6 of the guidelines provides that courts should not refuse electronic evidence and should not deny its legal effect only because it is collected and/or submitted in an electronic form. Further in terms of the provisions of Article 7 of the guidelines in principle the court should not deny the legal effect of electronic evidence only because it lacks an advanced, qualified or similarly secured electronic signature. As per Article 8, courts should be aware of the probative value of metadata and of the potential consequences of not using it. Article 9 provides that the parties should be permitted

[28] Explanatory memorandum of Guidelines on Electronic Evidence Civil and Administrative Proceedings of Council of Europe Article 3.
[29] Article 2 of the guidelines.
[30] Article 3 (a) and 3 (b) of the guidelines.
[31] Article 4 of the guidelines.

to submit electronic evidence in its original electronic format, without the need to supply printouts. According to the aforesaid provisions 6 to 9 of the guidelines, it is important to note that the duty to ensure the originality of the computer evidence, and to ensure the legal effect of the computer generated evidence lie with the court.

As per Articles 10, 11, 12, 13, 14, 15 and 16 of the guidelines, the member states should establish procedures for the secure service and the collection of electronic evidence. In the light of the said provisions, data integrity, survivability, and security should be taken in to consideration when transmitting evidence.

Furthermore, Articles 17 and 18 of the guidelines speak about the relevancy of the computer evidence. According to these guidelines, it is the duty of the court to manage actively about the relevancy of the data and the necessity of the electronic evidence in the respective courts. Further, all electronic evidence should be considered on its merits.

Article 19, 20 and 21 of the guidelines speak about reliability of the computer evidence. Courts should consider all relevant factors concerning the source and authenticity of the electronic evidence[32].

Articles 22, 23 and 24 of the guidelines contain provisions regarding the integrity of electronic data[33]. In terms of Article 28 of the guidelines the courts should archive electronic evidence in accordance with national laws.

According to the aforementioned guidelines the member states have enacted relevant laws and have incorporated the guidelines into existing laws to give recognition to electronic evidence.

It is essential to note that in terms of the aforesaid guidelines set out in the Articles to the Explanatory Memorandum to the guidelines, it is evident that the European Union has always given recognition to the electronic evidence and aforesaid principles have been introduced in order to ensure

[32] Article 19 of the guidelines.
[33] Article 26 of the guidelines.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

the right to fair trial and the validity of admitting electronic evidence in a reasonable and justifiable manner.

However, when considering the Sri Lankan system, there is no such clear procedure in respect of evaluation and admission of the electronic evidence. The Sri Lankan system does not contain a procedure clearly addressing the relevancy, reliability and the authenticity of the computer evidence. Further, statutory Sri Lankan law including Evidence (Special Provisions) Act, and Electronic Transaction Act, lacks clear guidelines to evaluate the relevancy, reliability and the authenticity of the electronic evidence. Therefore, there is no proper mechanism in Sri Lanka to store and preserve computer generated evidence and to archive the data.

Law Relating to Admissibility of Computer Evidence in United Kingdom

When considering the jurisdiction of United Kingdom, there are three main legislations in operation governing admissibility of computer evidence. These statutes are Civil Evidence Act 1995, Police and Criminal Evidence Act 1982 and Computer Misuse Act 1992[34].

According to the Section 69 (1) of the Police and Criminal Evidence Act reads thus; "In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown; (a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;(b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to effect the production of the document or the accuracy of its contents[35]".

According to the aforesaid provisions of law in United Kingdom, it is evident that in criminal cases there is a strong legislative framework to facilitate the adducing of computer generated evidence. Comparatively, in Sri Lanka the existing law does not provide a unique procedure to be adopted for submission of computer evidence in criminal trials other than

[34] Guidelines issued by the UK Association of Chief Police Officers and the US National Institute of Justice.
[35] Section 69(1) of the Police Criminal and Evidence Act.

the procedure established in the Evidence (Special Provisions) Act, No. 14 of 1995, and the party who seeks to lead computer evidence must follow the procedure establish under section 7 of the Evidence (Special Provisions) Act.

Section 03 of the Computer Misuse Act 1990, basically covers the unauthorized access (hacking), unauthorized access to computer materials with intention to commit a further crime planting a virus, unauthorized modification of data such as deleting data, introduction of malware and spyware. It is argued that that courts in the United Kingdom encountered legal uncertainty regarding application made under section 5 of the Civil Evidence Act and under section 69(1) of the Police Criminal and Evidence Act. Especially it is argued in UK that the computer evidence are hearsay evidence or real evidence. In ***R v Spiby***[36] the Court of Appeal of UK held that printouts from an automatic telephone call logging computer installed in a hotel were admissible as they constituted real evidence.

In ***Castle v Cross***[37] the court decided that a print out from a device, or recorded on a mechanical measuring device can be considered as real evidence and it can be admitted. In ***Director of Public Prosecution v McKeown***[38] the House of Lords accepted the evidence in the information provided by an intoximeter although the computer clock was inaccurate. The court was of the view that the inaccuracy did not affect the processing of the information supplied to the computer.

Furthermore in ***Grant v South Western and County Properties***[39] the Supreme Court of United Kingdom has decided that a tape recording would fall within the ambit of the meaning and the interpretation of the term 'document'. In the said judgment the court of the view that the furnishing of information had been treated as one of the main functions of a document and the tape recording was accordingly a document.
In the light of the aforesaid judicial decisions the judiciary of the United

[36] *Comden London Borough Council v Hobson* [1991] Crim.L. R 199 (C.A. Cr. D).
[37] *Castle v Cross* [1984] 1 WLR 1372.
[38] *Director of Public Prosecution v McKeown* [1997] NLOR No.135, (House of Lords).
[39] *Grant v South Western and County Properties Ltd,* [1975] Ch 185, 2 All ER, 1975.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Kingdom has always tried to interpret the existing law relating to Computer Evidence, in consist with the day today development of the technology and the computer related activities.

Law Relating to Admissibility of Evidence in Singapore

The fundamental source of the law of evidence in Singapore is the Evidence Act. This Act is not an exhaustive piece of legislation. In January 1989, the Government of the Singapore established a 'Trade Net' system and it introduced an Electronic Data Interchange (EDI) system for the purpose of offering solution for the issues arisen with development of the information technology. In order to find solutions to the issues, the Government of Singapore took steps to amend the existing Evidence Act and as a result the Evidence (Amendment) Act came into operation on 18th January 1996. Furthermore, in the year 1997 it introduced an electronic filing system to the judicial system to manage matters related to computer evidence.

According to the section 36(2) (e) of the Singapore Evidence Act, the court can call further evidence by affidavit given by an independent expert appointed or accepted by the court. Further the court may, if thinks fit, call for oral evidence of the deponent of an affidavit and or other issuer of the certificate concerning the accuracy of the computer output[40] Under the provisions of the section 35 of the Act, guidelines were provided on the weight of the evidence to be attached to any computer output tendered as evidence[41]. The court must consider all the circumstances from which inference can be reasonably drawn as to the accuracy, or otherwise or the computer output[42].

The Singapore court is given a wide and broad statutory power as well as the discretion in order to decide the accuracy of computer evidence adducing before court. However, when considering the Sri Lankan legislations, there are no such provisions to make use of when deciding on the accuracy of the computer evidence tendered before the court.

Further by introducing an amendment to section 65 of the Singapore

[40] Evidence Section 36(3).
[41] Evidence Act section 35.
[42] Evidence Act section 36(4).

Evidence Act, they have ensured that the admissibility of certain computer output as secondary evidence where the conditions for the use of such evidence is justified, where the original document has been destroyed[43].

Even though the aforesaid legal provisions of the Singapore Evidence Act reasonably address the legal issues in admissibility of computer evidence, the Singapore government has enacted a special law to govern e-commerce transactions called Electronic Transaction Act.

In the recent Judgment of ***Super Group Ltd v Mysore Nagaraja Kartik***[44] an email was admitted as the evidence under the provisions of the Evidence Act. In ***Alliance Management SA v Pendleton Lane P and Another***[45] the High Court of Singapore decided that producing of a computer printout, without producing of the original hard disk is admitted as secondary evidence under the provisions of section 35(1)(a) of the Evidence Act of Singapore.

Considering the totality of the facts set out in this chapter, it can say that United Kingdom and Singapore have several key legal provisions governing acceptance and admission of computer evidence in court proceedings, and that legal provisions of those countries are more comprehensive and adequate to address the issue of admissibility of computer evidence in trials. In contrast, there is a significant lacuna in the legal system in Sri Lanka in respect of adducing of computer related evidence in courts.

Recommendations and Suggestions

The proposal set out in this topic is for the development of the law and the procedure concerning admissibility of Computer Evidence in the Sri Lankan Courts.

Firstly, it can suggest introducing a unique and separate legislation addressing the issue of admissibility of Computer Evidence, (Digital Evidence, Electronic Evidence.) in all types of litigation in Sri Lanka. And

[43] Evidence Act Section 65 (c).
[44] *Super Group Ltd v Mysore Nagaraja Kartik* [2018] SGHC 192.
[45] *Alliance Management SA v Pendleton Lane P and Another* [2008] SGHC 76.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

also it has to introduce a special guideline and a special tool for the collection of computer evidence.

Secondly, it is essential to introduce a separate institution to support courts to identify the relevant computer related technical issues when considering computer evidence in court procedure.

Thirdly, it is suggested that it is highly important to conduct awareness programmes for Judges, Lawyers, Police Officers, as well as the public, on the importance of computer related evidence.

Fourthly, I suggest to introduce a suitable archiving service system in order to protect the validity of the data and to secure electronic evidence.

Conclusion

Admissibility of Computer Evidence is a critical issue in Sri Lankan since the legal system of the country creates a dual regime when admitting such evidence. The Evidence (Special Provisions) Act and the Electronic Transaction Act have created the said dual regime in the country. The Sri Lankan judiciary has opted to follow both these regimes.

There is no unique law in relation to the admissibility of computer generated evidence in Sri Lankan courts and there is no specific, standard guideline to follow in considering and placing computer evidence in Sri Lankan courts. Absence of a proper mechanism and a unique law, the judiciary has applied both these legal regimes in determining the admissibility of computer evidence.

Given the high number of computer related legal issues encountered by the judicial system, it is essential to have unique laws to adequately cover both substantive and procedural legal aspects concerning the admissibility of computer evidence in Sri Lanka. Moreover, there should be a clear and unique guideline to be followed in this regard by the relevant legal paternities of the country. Therefore, it is high time to find a comprehensive solution to resolve this lacuna in the Sri Lankan law.

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Volume 02, Issue 01
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Modern Industrial Challenges and Future of Work: A Way Forward

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Abstract

The influence of technology on modern industrial relations and the elimination of gender based discrimination upon employment, can be recognized as two key themes of dialogue that has gained the attention of academics at an international sphere. Both such matters hold a significant impact upon determining and crafting the future of industrial relations as it directly affects both the employers as well as the employees in carrying out day to day work operations.

Hence, this paper seeks to address both such subject matters, where at the first part of the article, the author direct the reader's attention upon how technology has impacted the so called 'typical' modes of work arrangements in the modern world and how it has re-shaped the future of industrial relations by facilitating a flexible work structure that revolves around task orientation as opposed to traditional forms of employment. At the latter part of the article, the author directs the emphasis on to a discussion on the importance of achieving gender equality in industrial relations, directed towards the elimination of gender based wage gap in the twenty first century, where it showcases the role of company policy making in aspiring and accommodating such goal, while drawing practical examples from different countries around the world on how legal authorities have mandated regulations with the aim of achieving equality upon the subject matter of employee salary payments. As the primary mode of data and information collection for the purpose of facts analyzation, the author seeks to rely on scholarly articles, related research reports, online resources, as well as other available verified academic sources in order to conduct a fruitful study

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Volume 02, Issue 01
March, 2022
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on the subject matter.

Keywords: *Technology, Employment, Equality, Gender based wage gap, Industrial Relations.*

Introduction

According to Mark Stuart, the Co-Director of 'Digital Futures' Research Centre (2019), the impact of new technologies on the future of work has been recognized as one of the most pressing policy concerns that seeks immediate attention from relevant legal authorities in redressing and modifying statutory enactments that governs labor law and employment in the contemporary world. It is clear that, technology undoubtedly has changed the traditional idea of 'employment' where it has challenged the existing systems of industrial norms to deviate from a rigid mode of work systems towards a flexible and innovative modes of employment models that requires adaptation to strive among industrial competition.

In such backdrop, this paper seeks to elaborate on the impact of technology that has revolutionized industrial relations at a universal scale, while gradually moving onto a discussion on the modern forms of work arrangements that has been introduced to the market where it has transformed the notion of employability to facilitate the modern peaks of the future of work. Later, the author moves into an extensive discussion on the positive effects and challenges that may result from the involvement of technology in business operations while analyzing both the employers as well as from the employees standpoint, by providing practical examples for the benefit of the reader in understanding the impact of technology in modern trade that plays a crucial role in deciding company succession.

Furthermore, on the discussion based upon closing of wage gap, with the aim of eliminating gender discrimination in the modern business world, this paper elaborates upon the role played by the board of management in a company on the making of company policy decisions and further, the government at large by introducing legal mechanisms to facilitate equal payment. Moreover, at the latter part of the paper, the author brings out international examples on how different countries have used law as an

effective tool of direction in ensuing the protection and its implementation of equal payment legislations that are unique to each of such legal systems differing to each country.

Research Methodology

As the primary mode of data and information collection for the purpose of facts analyzation, the author seeks to rely on scholarly articles, related research reports, online resources, as well as other available verified academic sources in order to conduct a fruitful study on the subject matter.

The Impact of Technology on Modern Industrial Relations

Today we live in a world where technology has upgraded the lifestyle of global citizenry, as it has challenged the traditional modes of day to day work-life operations, while introducing sustainable resolutions to enhance work productivity. For an example, the impact of technology on employment and business management is one of such clear indicators that demonstrates the urgent necessity for companies to adhere in to swiftly shifting market trends in a highly competitive global economy.

In such background, the traditional work systems and organizational structures have been exposed to constant transformations in the lines of production, manufacture, operations, and investment capital, associated with modern trends in supply and demand for goods and services, emergence of new forms of marketing tools, changed consumer behavioral patterns, expansion of market enterprises and innovation. Hence, accordingly organizations have adopted modern company policies based upon the adoption of technology and strategic planning that supplements such digital revolution.

Companies worldwide have now leaned towards adopting more flexible work structures that are more compatible with the utilization of technology. For an example, compared to earlier times where all work operations were done manually within four walls of an office under eight hours of rigid traditional work settings, interestingly, organizations in modern times often uses computers, online servers, automated data entry mechanisms, digital

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

tools, and advanced machinery to improve work productivity and efficiency that in return has created a task oriented workforce and employee friendly company environments.

Furthermore, such adoption of advanced technology in business management has led to the creation of new forms of market productions that has created new business avenues in the global employment market.

For an example, with the implementation of technology interconnected through the usage of mobile phones, the modern food industry has now gone a step further to make use of online food delivery apps to deliver their products to the doorsteps of the consumers. Pickme Foods, Uber Eats are few of such examples for organizations that has created thousands of new job opportunities in the labor market by recruiting delivery men/women on varied forms of employment contracts to assist the organization to reach company goals to maximize profits, while using technological advancements aligned with strategic planning to attract more customers through online marketing and promotions.

Furthermore, such high-tech usage followed by companies have led to the creation of new forms of employment models that has gone beyond the formal types of employment carder, where the organizations in the present day are actively recruiting freelances and part time workers more confidently due to the guaranteed task completion, ensured through automated and digital platforms that enhances cost efficiency and work productivity. Hence, it could be noted that, technology has shifted the typical idea of “working” in to a more flexible yet profitable work structure that has given ‘employment’ a new meaning.

Moreover, ‘work from home’ can be named as one of such popular modes of employment that can be seen in the recent years, where work is carried out by employees through online platforms with the help of storage tools as google drives, the cloud, and other.

It could be noted that, the importance of embracing these modern technological advancements were highlighted especially during the

Covid-19 pandemic, where the whole world was forced into a lockdown while companies were compelled to carry out their day to day work operations alongside of a minimum staff presence, which would have been an impossible task without the usage of technological assistance.

For an example, the conduct of formal business conferences and client meetings through the use of networking apps such as the Skype, Zoom and WhatsApp during the lockdown has have majorly paved the way for companies to continue their professional business operations without any disruption. Hence it is safe to note that, technology has completely reshaped the modern systems of work arrangements through remote access and online service models that interconnects the employer and employee within just a click of a button.

Furthermore, it could be noted that, technology has guided organizations to create a clear and a transparent flow of communication through the use of online platforms, where digital tools as email, texts, group chats and other helps to send direct messages to a larger number of receivers, avoiding any opportunity for miscommunications. Hence, such has improved the efficiency of work arrangements, speedy resolutions, collaboration, and unity of organizational work models that has maximized employer-employee engagement and innovation.

However, notably, another direct consequence of the high demand for technological adherence in the industrial sector, can be named as the corresponding shift in skill demand in the labor force, where the modern job market is aimed at creating a knowledge based workforce that compliments the digital evolution. It could be seen that the basic knowledge on IT and interrelated fields provides a competitive advantage for suitable candidates in most company openings in the modern day, as the usage of technology is undeniable in any organization in present business operations.

It is important to note that, in such a scenario, a sudden policy change in a company that aims to invest in new machinery to replace manual labor for cost reduction, may lead to the displacement of certain job roles that

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

may leave employees redundant. For example, Frey and Osborne (2013)[1] claims that 47% of U.S. workers are "at risk" of been made redundant as technology may replace such workmen job role in the recent future.

According to the World Economic Forum (Future of Jobs Report 2018), it was found that machines and technological adoption by organizations were expected to displace a larger number of traditional career opportunities, and yet however, it has also created new forms of employment for millions that maybe relevant for the future generations.

For an example, Data coaches, IT Specialists, Cyber Security Specialists, AI Trainers and translators, Database administrators and Data scientists[2] are few of such new-found job roles that were introduced by technological advancement to the current employment market.

On a positive note, it is to be noted that the adaption of technology has widen the horizons of recruitment for companies where it has granted access to the global and international talent pools. Hence, in such backdrop, modern companies hold the advantage of hiring and obtaining the best skill sets in the market regardless of country based ventures as online platforms brings out the international talent to their company doorstep.

Accordingly, 'outsourcing' can be named as a popular concept in the field of business and management in the recent times, as it provides both cost effectiveness as well as efficient task management as technology guides companies to follow multiple employment formats to gain required expertise for each project in hand, while in return providing employees the opportunity to join their dream company regardless of which part of the world it may be situated.

Hence, the use of technology has allowed the employees to have

[1] Carl Benedikt Frey & Michael A Osborne, 2013. "The future of employment: How susceptible are jobs to computerization?" Technological Forecasting and Social Change, Elsevier, vol. 114(C), pages 254-280.
2 Cecilia Amado, 'Future of work: 5 ways technology is reshaping work and the work place'(2020) <https://allwork.space/2020/01/future-of-work-5-ways-technology-is-reshaping-work-and-the-workplace>Accessed 12th April 2021

better work-life balance alongside of autonomy and flexibility while ensuing professional task achievement leading to a happy and a satisfied workforce, where on the same note allowing the employers to reduce their dependance and expenditure on physical infrastructures and to move into an effective online presence in the virtual world.

Another area that indicates the influence of technology in company management that has changed the way of traditional modes of working could be seen under the modernized role of a HR, where majority of companies are prompt to use IT tools for day today HR operations. For an example, compared to newspaper advertisements often used by HR Departments in earlier times, companies have now entered into the usage of online job portals as LinkedIn, Top-Jobs or even Facebook to attract the best candidates.

Furthermore, data management and record keeping has now become an easy task with paper free digital records that produces automated reports on employee progression that greatly assists HR in recruitment, conducting online interviews, performance evaluation, preparing pay-rolls, training, and development.

Hence, it could be noted that, technology works as the assistant helper for HR that guides the management to take well-informed decisions while reducing unnecessary job roles that may create a burden on company expenditures.

Technology, if utilized with strategic planning with a long term vison could boost up company growth, innovation, time efficiency and job enrichment while expanding company market, economic growth, operational efficiency, employee capabilities as well as improved customer experience by creating a motivating and a convenient work environment that supports its employees to reach company objectives in a well-opportune manner.

However, it is important to bear in mind that such sudden transition from manual labor to automation within a short span of time may also result in drawbacks that seeks attention for remedy aimed towards progression.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

For an example, the generational gap in IT competency reflects the need for companies to train their employee carder to meet the needs of a contemporary business world. Resistance to change, high expenses on technological investments, costs for training could be named as more of such challenges faced by companies in adopting modern tech-work structures within their traditional organizational cultures.

Furthermore, it could be noted that the legal developments in the field of labor law and cyber law is rather moving in a slow pace compared to the rapid improvements in technological advancements, resulting minimum legal protection for new forms of employment models and work structures. When examining the general overview of statutory enactments that provides for the protection of employees in Sri Lanka, the Shop and Office Employees (Regulation of Employment & Remuneration) Act[3], Wages Board Ordinance[4], Factories Ordinance[5], Industrial Disputes Act[6], Workmen's Compensation Ordinance[7], Trade Union Ordinance[8](as amended), Maternity Benefits Ordinance[9], Termination of Employment of Workmen (Special Provisions),Act[10] holds a significant importance, as such outlines the legal framework that governs the minimum age for employment, minimum wages, regulation of work hour, maternity benefits and leave, payments to employees and Termination. Furthermore, the Employees Provident Fund Act No.15 of 1958, Employees Trust Fund Act No.46 of 1980, Payment of Gratuity Act No.12 of 1983, National Minimum Wages of Workers Act No.3 of 2016 and the Budgetary Relief Allowance Act No.4 of 2016 can be further named as relevant statutory regulations connected to the topic in discussion that provides protection in handling labor relations. In addition,it is to be noted that, Sri Lanka is also recognized as a well-known member of ILO (International Labor Organization) that mandates for the advancement of social and economic justice through the adherence of international labor standards.

[3] Shop and Office Employees (Regulation of Employment & Remuneration) Act No.19 of 1954
[4] Wages Board Ordinance No.27 of 1941
[5] Factories Ordinance No.45 of 1942
[6] Industrial Disputes Act No.43 of 1950
[7] Workmen's Compensation Ordinance No.19 of 1934
[8] Trade Union Ordinance No.14 of 1935
[9] Maternity Benefits Ordinance No. 32 of 1939
[10] Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971

Interestingly, the Sri Lankan employment law does not distinguish between different categories of employment in its application as the statutes are made equally applicable to all categories of employments. However, in practice few modes of employee forms such as the Probationary Employees, where workers are employed subjected to a probation period under a contract of employment, Regular Employees who are employed under general contracts of employment, Casual Employees who are employed for a short-term needs basis, Seasonal Employees where workers are employed according to seasonal demands, and the Fixed-term employee carder who are enrolled for a fixed-term period is recognized as the main and traditional modes of employee recruitments.

Thus, on a close examination of Statuary provisions governing employee relations, one could note the room for improvements, particularly on the areas of new forms of work arrangements that swiftly gaining popular attention. For an example, the Shop and Office Employees Act[11] and the Wages Boards Ordinance[12] as the key regulatory frameworks governing the terms and conditions of employment in Sri Lanka recognizes eight hours as the standard working hour limit for a day and 45-48 hours[13] as the weekly limit for normal work hours. Hence, notably the law does not expressly provide for a mechanism for the calculation of payments or a standard minimum payment method for the employees who are working for a lesser number of hours[14], as the part-timers or freelancers. Hence, governments and relevant legal authorities are required to redress such ambiguities by making necessary amendments to facilitate the realization of maximum benefits of these technological perks of the modern world.

In conclusion under such subject matter, it could be noted that the technological infrastructure of a company greatly affects its company culture, competency, productivity, and inter-relations within company stakeholders. Both the employers and employees should embrace technological advancements in a pragmatic view that would assist them in preparation for a transformational future. Organizations are required

[11] Shop and Office Employees Act No. 19 of 1954
[12] Wages Boards Ordnance No. 27 of 1941
[13] Yashoravi Bakmiwewa, 'How to amend the Sri Lankan labor law to include flexible working arrangements' International Labor Organization 2021 pg. 03
[14] Ibid 13.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

to redesign their work structure with a cohesive strategy that caters towards a sustainable future aligned with technology, while employees are required to invest in themselves on learning new skills to gain a competitive advantage in the labor market with an eye to the future.

The Elimination of Gender Based Wage Gap in Modern Industrial Relations

Equality between different gender roles has always been a core value upheld by the UN Charter since the year 1945 with the aim of empowering all women worldwide to rise up to their fullest potentials and to lead the community in a positive direction. However, in reality, despite various introductions of numerous international treaties based upon the themes of equality, human rights, and labor laws, yet majority of the world female population are still being subjected to direct and indirect discriminatory treatments, especially in the subject matter of employability, recruitment procedures and payments, where priority is often given to the played gender roles instead of talent or competency.

In simple terms, the definition of 'gender wage gap' relates to the notion of inequality that exists between the amount of earnings between a man and woman carrying out the same tasks that requires the same qualifications and competencies, held by both equally. It could be noted that such wage gap tends to further expand for most women of color, transgender as well as immigrant women who are often subjected to inequitable treatments[15]. According to research carried out by renowned academics in the field, it has been noted that, an average female worker earns $530,000 lesser than a male due to such wage gap which clearly indicates the existing gender discrimination and unfair treatment against female workforce in the present labor markets. (IWPR 2016)[16].

[15] Elise Gould, Jessica Schieder, and Kathleen Geier, 'What is the gender pay gap and is it real'(Economic Policy Institute 2016)<https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/>Accessed on 12th April 2021

[16] Institute for Women's Policy Research (2016) 'Status of Women in the States' < https://statusofwomendata.org/explore-the-data/employment-and-earnings/employment-and-earnings/> Accessed on 11th April 2021

When examining the reasons for such disparities in payments, it could be seen that the gender wage gap is a result of many social factors that has been deeply uprooted in traditional societal thinking patterns. For an example, male dominated industries tend to hold higher wages while gender stereotype holds back women in freely choosing their dream career, by restricting them to occupy unpaid forms of work as homemaking and childbearing where such responsibilities disproportionately fall upon women due traditional customary practices. Such obligations vested upon the shoulders of women would compel female worker to shift into the part-time employee carder to balance work-home life, where the salaries and other benefits would be lower compared to a full time worker. Moreover, it is to be noted that men tend to negotiate their salary while women are more likely to be penalized for doing the same (Bowles, Babcock, and Lei 2006)[17].

Another negative outcome of the existing wage gap based upon gender roles could be identified as the increased rate of poverty, low economic security and delayed economic growth that would affect the percentage of the standard of living conditions of each country.

When examining the universal initiatives taken by international organizations for the promotion of equal salary payments and for the creation of equal opportunities for women to engage in employment, SDG 2030 plays a major role in laying out the steppingstones towards achieving equality while condemning discrimination based upon gender and other similar grounds of prejudices. Accordingly, 5th goal of Sustainable Development (SDG) on gender equality, 8th goal on decent work and economic growth and moreover, the 10th goal on reduced inequalities, directly addresses the urgent need for the elimination of gender wage gap for the benefit of the global community. Notably, these attempts have made substantial progression towards mitigating payment disparities in certain countries, yet however, such journey is far away from attaining universal equality for all female workers in the field of equal payment and employment rights.

The Convention on Elimination of all Forms of Discrimination Against

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Women (CEDAW, 1979)[18], is another noteworthy attempt made towards addressing the existing gender discrimination against female workers, where it re-affirms the urgent necessity to adhere into the adoption of legal policies that reflects equality in salary payments.

It is important to note that, in reaching gender equality based upon wages, each company employer/firm or organization plays a crucial role that directly affects the minimization of gender wage gaps, whereby the companies could adopt healthy employment practices which aims toward the introduction of non-discriminatory company policies and regulations.

For an example, at the stage of recruitment, the companies could mitigate biasness against enrollment of female workers by celebrating diversity and integration. Furthermore, such practices could be incorporated into guidelines that reflects such company policies to ensure a gender-neutral recruitment process whereby the management is focused upon obtaining the best talent pool according to qualifications, regardless of gender disparities.

Furthermore, the use of skill based assessments, improving workplace flexibilities to accommodate its employees to maintain work-life balance, encouragement of salary negotiations assisted under HR operations, ensuring a transparent process of calculating increments and promotions, company policies that encourages shared parental leave, offering fair and equal salary payments for similar job roles, advertising of salary ranges at the initial stage of advertisements, adherence and adoption of legal requirements on wage payments issued by the government are few of such proactive steps a company could take, in acting as an advocate of gender equality in the community.

Furthermore, it is to be noted that, in consideration of the national level contribution towards attaining gender equality, each state at a government level holds a greater responsibility on ensuring the mitigation of gender wage gaps while adopting and implementing international standards on

[18] The Convention on Elimination of All Forms of Discrimination Against Women 1979.

equal payment polices and regulations.

For an example, government policies in Sweden requires all major companies to maintain pay audits where it analysis the adherence of national wage policies of such companies[19]. Furthermore, in Denmark, following its National Equal Pay Act of 2014, companies that fails to meet the needs of gender audits are fined by the government as a way of compelling organizations to follow national as well as international labor law principles in their day to day business operations towards a sustainable future.

Moreover, Canada, Switzerland, France are few more of such similar countries that have taken proactive measure through the introduction of national legislations[20], that has mandated companies to follow non-discriminatory approaches in payment of wages and other increments while observing the operations and implementation of legal requirements followed by such organizations for the benefit of female workforce of the country.

In such background, interestingly, Ireland in the year 2017 took the enactment of national legislations another step further, whereby it become the first ever country to introduce a legislation that required companies to prove equality in payments made by such organizations where, audits are being carried out to ensure the compliance of such legal components (Liz Alderman, 2017)[21]. Hence, it could be noted how Governments tends to lead by example by adopting fair and best practices that are often implemented in the public sector to promote transparency in salary payments directed towards instigating private sector to follow the same in order to achieve national economy progression.

Furthermore, as recommendations for the promotion of equal wages

[19] Jill Rubery, 'Is equal pay actually possible' (BBC News 2019) < https://www.bbc.com/news/business-47212342> Accessed on 10th April 2021
[20] Ibid.
[21] Liz Alderman (2017) 'Britain Aims to Close Gender Pay Gap with Transparency and Shame', New York Times. See also, Liz Alderman, "Equal Pay for Men and Women? Iceland Wants Employers to Prove It," The New York Times, March 28, 2017, available at < https://www.nytimes.com/2017/03/28/business/economy/iceland-women-equal-pay.html>

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

and payments, unionization can be used as an effective tool for collective bargaining, to combat against discriminatory company practices and to attain resolutions upon the themes of fair work conditions and salary increments.

Furthermore, going beyond legal policies, as a major step towards obtaining gender equality, the communities must confront the traditional mindsets and thinking patterns which often overlooks the competency of women and should acknowledge the true potentials of the female workforce and their equal contribution made towards national economy.

Furthermore, shifting the so-called 'accepted social norms' and cultural attitudes that confines household work solely on women should be modified to recognize the importance of both gender roles in maintaining a healthy family life, where it would create equal opportunities and would empower women to join the work force to support their families that would unilaterally results in improved living conditions.

As another way of acknowledging and recognizing the wage gap which exists between the male and female workforce, companies could conduct gender pay gap analysis and performance reviews in order to identify the key areas that requires urgent management attention on amending company policies, in order to ensure fair treatment to all its employees regardless of gender disparities.

For an example, company polices on paid maternity leave may supplement the retention of female workers after childbirth[22], that would in return reduce the gender wage gap exists within the employee carder of the company. In the context of Sri Lanka, the Shop and Office Employees Act and the Maternity Benefits Ordinance sets out the regulations that facilitate such intention. However, it can be noted that one may come into the conclusion that such provisions are oblivious to certain dynamics of flexible work arrangements of the modern era and as such holds room for

[22] Esteban Ortiz Ospina,' Why is there a gender gap' (2018) < https://ourworldindata.org/what-drives-the-gender-pay-gap> Accessed on 9th April 2021

further modifications[23].

Conclusion

In conclusion, it could be noted that, according to the existing trends of employability and discrepancies in the payment of salaries, it would take more than 70 years for the world to eliminate gender wage gap (ILO 2016)[24], which showcases the seriousness of the issue as it directly negates the efforts of upholding human rights and female empowerment in the community. Hence, the duty to ensure fair competition and equal treatment upon payment of wages is a shared responsibility held by companies, governments, civil societies, as well as the international community, as we all are heading towards a rights-based future where each and every individual is respected regardless of one's differences in sexual orientation, color, religion, or ethnicity.

[23] Yashoravi Bakmiwewa, 'How to amend the Sri Lankan labor law to include flexible working arrangements' International Labor Organization 2021 pg. 04

[24] The World Economic Forum, Global Gender Gap Report 2020 < https://www.weforum.org/reports/gender-gap-2020-report-100-years-pay-equality> Accessed on 13th April 2021

KDU Law Journal
General Sir John Kotelawala Defence University, Sri Lanka

Volume 02, Issue 01
March, 2022

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Blunt Double Edged Sword: Double Taxation and the Impact on the Taxpayer in Cross -Border Transactions

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Abstract

Double taxation agreement is a mechanism which protects the taxpayer from being subjected to taxable liability in two separate jurisdictions. Many scholars argue that this concept encourages taxpayers to fulfill their fiscal duties. This paper attempts to examine the principles of international double taxation and the role of double taxation agreements in improving the tax system of a nation. Double taxation agreements have the potential to improve certainty for taxpayers and tax authorities. This is done by reducing double taxation, eliminating tax evasion, and encouraging cross-border trade efficiency. The author also attempts to critically assess the impact of the three aforementioned factors considering international treaties. Furthermore, the writer submits three key issues that are critical to be noted in the present discussion regarding principles of double taxation and the role of DTAs: (a) Issues arising from DTAs as bilateral agreements, (b) role of DTAs as a prevention mechanism for harmful taxation and (c) the status of principles of non-disciplinary taxation.

Keywords: *Reducing Double Taxation, Cross-border Transactions, Tax Evasion, Cross-border Trade Efficiency*

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Introduction

Taxation is commonly regarded as the primary source of revenue of a State[1]. As a rule of thumb[2], the State of residence is entitled to the collection of taxes from individuals and corporations[3]. While the above is generally practicable in the domestic forum, internationally it may be a highly contested matter. Scholars cite double taxation upon the same taxable source, gaps in law which allow the fraudulent evasion of payment of taxes and, *inter alia*, inter-state disputes as reasons for the aforementioned[4]. International Double Taxation Agreements ("DTAs") are considered to be a system to overcome such challenges[5]. DTAs are signed between States to identify the possibility of double taxation of the same income in both countries and attempt to minimise or avoid such scenarios[6].

The objectives of the research are twofold: (i) To identify the role of double taxation and (ii) To evaluate if DTAs have the potential to improve certainty for taxpayers and tax authorities by reducing double taxation, eliminating tax evasion, and encouraging cross-border trade efficiency. The writer argues that, while DTAs are a plausible approach to mitigate the negative consequences of the possibility of double taxation, it is not without flaws. In proving the above, the writer critiques each point by submitting scholarly opinions, examples from State practices and principles of international double taxation. The writer concludes by making some additional observations on the principles of double taxation and features of DTAs.

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[1] John Snape, The 'Sinews of the State': Historical Justifications for Taxes and Tax Law in Monica Bhandari (ed.), Philosophical Foundations of Tax Law (OUP 2017),p.10; See also, Stuart P. Green, Tax Evasion as Crime, in Monica Bhandari (ed.), Philosophical Foundations of Tax Law (OUP 2017) pp. 59-60

[2] Subject to some considerations which has been dealt with in the first assignment by the writer; See generally, S. Balaratnam, Income Tax in Sri Lanka:The Rules, The Principles and Practice of Income Tax (6th ed., Tax Publications Ltd. 2018), p. 236

[3] Reuven S. Avi-Yonah, International Tax as International Law (CUP 2007), p. 5; See also, Omri Marian, 'Function of Corporate Tax-Residence in Territorial Systems' [2014] 18 Chapman Law Review , p. 157

[4] W. H. Coates, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Jasiah Stamp' [1924] 87 Journal of the Royal Statistical Society, pp. 99-101; E. Gooneratne, Income Tax in Sri Lanka (Aitken Spence Printing 2009), pp. 500-501

[5] Anh D. Pham, et al., 'Double Taxation Treaties as a Catalyst for Trade Developments: A Comparative Study of Vietnam's Relations with ASEAN and EU Member States' [2019] 12 Journal of Risk and Financial Management, p. 172

[6] Mogens Rasmussen, International Double Taxation (Alphen aan den Rijn: Wolters Kluwer Law International 2011), p. 204; Angharad Miller, Lynne Oats, Principles of International Taxation (5th ed., West Sussex: Bloomsbury Publishing, 2016), pp. 110-113

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

For the purpose of this essay, tax treaties and Double Taxation Treaties refer to DTA.

Role of Double Taxation Agreements

Balaratnam argues that DTA between States protect individuals and corporates[7]. He further notes that it helps the States in agreement to recognise and clarify which sources that they may be entitled to tax in the course of assessment[8]. Scholars have opined that DTA primarily serve three purposes, which will be individually discussed under this portion of the essay.

a. Reducing Double Taxation: Do treaties reduce double taxation in all situations?

Primarily, DTA estops one State from taxing a legal personality on a taxable source which has the possibility of being taxed abroad[10], particularly where the source of the income rests. DTA protects the individual person or corporation from being taxed twice[11]. Generally, the place of residence will be entitled to levy taxes[12].

International principles on DTA mandates reciprocity in terms of the applicable taxation on disputed taxable sources[13]. This is also manifested in the Organisation for Economic Co-operation and Development ("OECD") Model DTA[14]. This creates an environment of non-discrimination as none of the States party to the DTA will be allowed to impose higher

[7] Balaratnam (n.2), p.236
[8] Ibid., pp. 236-237
[9] Pham (n.5), p. 176:"…[T]he double taxation treaty ascertains the taxing rights between signatories for the avoidance of double taxation and the prevention of fiscal evasion, alongside the removal of tax barriers to foreign trade."
[10] Reuven S. Avi-Yonah, Double Tax Treaties: An Introduction (OUP 2009), available at <https://repository.law.umich.edu/book_chapters/131> accessed on 21 July 2021, p.99; See also, D. D. M. Waidyaratne, Taxation Fiscal Policy and the Economy in Sri Lanka (Stamford Lake 2012), pp.305-306
[11] Edward J. McCaffery, James R. Hines, Jr, The Last Best Hope for Progressivity in Tax [2009] University of Southern California Law School Law and Economics Working Paper (Series No. 92), p. 82
[12] Patrick Emerton and Kathryn James, 'The Justice of the Tax Base and the Case for Income Tax', in Monica Bhandari (ed.), Philosophical Foundations of Tax Law (2017), OUP, p.163
[13] Peter Harris, David Oliver, International Commercial Tax (2010), CUP, pp.4, 104-105, 114
[14] OECD (2012), Model Tax Convention on Income and on Capital 2010 (updated 2010), OECD Publishing, available at <http://dx.doi.org/10.1787/978926417517-en> accessed on 22 July 2021, Art.24(1); See generally, Avi-Yonah (2009) (n.10), p.100

taxes on similar sources which arise in its counterpart's jurisdiction[15]. The extent to which DTAs favour both taxpayers and tax collecting States are apparent.

In the event of a conflict between a DTA and domestic laws, the provisions of the treaty must prevail[16]. In the same light, if the State attempts to reconsider its domestic tax policy, the DTA will be an infringement on its right to do so[17]. The doctrine of reciprocity may not be applicable in situations such as the US model of DTAs[18]. While tax laws are passed by the Congress in the US, DTA are ratified only by the Senate. This suggests that the DTA can, *prima facie*, contravene the domestic law.

The above situation gives rise to two issues. First, the State fails to exercise its sovereignty over domestic tax subjects as a result of its international obligations. Taxation allows the State to stabilise its social and economic standpoint. The DTA may act as a barrier than a supporting factor to the State. However, nothing bars the State contemplating an alteration to reduce taxes[19]. Second, in the event of a discrepancy between the DTA and the domestic taxation percentages, the resident individual or corporation will be subject to discrimination as they do not have the right to enjoy the rates agreed between the States and imposed in the other jurisdiction[20].

b.Eliminating Tax Evasion: Do treaties eliminate the evasion of taxes in all situations?

Some scholars argue that the main purpose of a DTA is not to prevent

[15] See generally, Bachmann v Belgian State [1992] C-204/90 (ECJ); Deutsche Shell v Finanzamt für Grossunternehmen in Hamburg [2008] C-293/06 (ECJ), ¶¶ 37–40; Cadbury Schweppes [2006] C-196/04 (ECJ); See also, S. van Thiel, European Union: Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules That Can Be Readily Applied by National Courts [2008] 48 European Taxation, pp. 279–290, 339–50

[16] Philip B. Gurney, Corporate Taxation in Australia, Hong Kong and Singapore: Observations on Some Jurisdictional and Operational Distinctions [2006] 36 Hong Kong Law Journal, p. 268

[17] Harris (n.13), p. 18

[18] Avi-Yonah (2009) (n.10), p. 100

[19] See section 2. (a)

[20] See generally, Harris (n.13), p. 92: Such issues must be ascertained in consideration of equity and fairness; See also, OECD (2012) (n.14), p. 33

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

double taxation[21], but to prevent fiscal evasion[22]. More often, this notion is reflected in the titles of DTA[23]. The most significant feature of a DTA which enables States to reduce tax evasion is the agreement to exchange information regarding tax sources and subjects[24]. This enables both State parties to identify their respective taxable sources. Given the fact that both States share information regarding their tax subjects, it is unlikely that a taxpayer can avoid paying by claiming that they are entitled to a double taxation relief as a result of being subjected to taxes abroad. It must be noted that this is a method for corporations to be active across multiple jurisdictions enjoying the public facilities and to be able to pay taxes only in its place of residence as a result of double taxation relief[25].

In Australia, a parent company can consolidate all its subsidiaries for the purpose of calculation of taxes[26]. There are two issues with this position. First, as a result of such a consolidation, shareholder dividends are not accounted in the calculation of taxes[27]. This may be considered a stunt to attract new investors and compel existing investors to pay taxes. However, when considering dividends may be excluded from the subsidiary companies, the move does not seem to serve the purpose of collection of taxes efficiently. Second, companies that are dual resident will not be entitled to the above privilege to consolidate subsidiaries[28]. Consequently, those companies will have to pay separate taxes on each subsidiary, without the exemption on the dividends. This creates animosity between the State and corporations due to discrimination and unfair treatment to

[21] Avi-Yonah (2009) (n.10), p. 99
[22] Harris (n.13), p. 18
[23] Avi-Yonah (2009) (n.10), p. 99, i. e. "Convention Between [Country X] and [Country Y] for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income."; See Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income between the U.S. and Japan, 8 March 1971; See also, Jane Gravelle, Tax Havens: International Tax Avoidance and Evasion [2009] National Tax Journal, p. 727
[24] Thomas Rixen, From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance, Review of International Political Economy (Routledge 2012), p. 211; See also, M. B. Carroll, Prevention of International Double Taxation and Fiscal Evasion: Two Decades of Progress under the League of Nations, (Geneva: Series of League of Nations Publications 1939), ¶II.A.8; See also, Henry Christensen III, et al., The Amazing Development of Exchange of Information in Tax Matters: From Double Tax Treaties to FATCA and the CRS [2016] 22 Trusts and Trustees Review, p. 901
[25] Ryo Izawa, Corporate Structural Change for Tax Avoidance: British Multinational Enterprises and International Double Taxation between the First and Second World Wars (2020), Routledge, p. 4
[26] Gurney (n.16), p. 271
[27] Ibid.; See Income Tax Assessment Act (Commonwealth) (Australia) of 1997, Part 3-90
[28] Income Tax Assessment Act (Commonwealth) (Australia) of 1997, s. 6(1)

a class.

Despite the above, it has come to light that Australia attempts to "*reciprocally eliminate dividend withholding tax*" through DTAs[29]. These agreements are not idealistic models of DTAs[30], but results of political compromise[31]. Often, DTAs specify subjective clauses to reflect the correspondence between the State parties[32]. States have even conceded to this reality[33]. This becomes problematic to corporation as it creates an uncertain environment when the life of the business are reliant on the political bargaining power of States.

c.Encouraging Cross-Border Trade Efficiency: Do Treaties Always Encourage Cross-border Trade Efficiencies?

Braun and Zagler have noted that the number of DTAs signed in the recent past have increased[34]. The main reason cited to this effect is the promotion of cross-border trade and investments[35]. The question then arises as to how DTAs can positively impact cross-border trade. What is compelling in a DTA is that two States have agreed to recognise its sovereignty in taxation[36]. For a corporation which functions in the above States, this signifies certainty and security. The corporation need not fear about any *force majeure* situations as a result of any hostility between the countries. Moreover, the company can benefit from the DTA by disclosing its taxable sources, which would grant them either a tax credit or an exemption[37], which consequently promotes cross-border investments.

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[29] See Hugh J. Ault, Brian J. Arnold, Comparative Income Taxation- A Structural Analysis (2nd ed., Kluwer Law International: Aspen Publishers 2004), p. 411
[30] Miller J in Knights of Columbus v The Queen (2008) TCC 307 (TC), ¶82
[31] Harris (n.13), pp. 18-19
[32] Ibid.
[33] P. H. O'Neill, Confronting OECD's Notions on Taxation, 10 May 2001, Washington Times, op. cit. Rixen (n.24), p. 215: "George W. Bush declared that 'The United States does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems'".
[34] Julia Braun, Martin Zagler, An Economic Perspective on Double Tax Treaties with(in) Developing Countries [2014] 6 World Tax Journal, pp. 242–281
[35] Ibid.; See generally, Pham (n.5), p. 173
[36] Avi-Yonah (2009) (n.10), p. 101
[37] Ibid., p. 100

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

A common feature in DTAs is that they significantly restrict the right to tax of the source country[38]. There can be situations where one country is benefitting more than the other, when most of the sources rest in the latter State. This is a typical situation that a DTA between a developing and developed State would encounter[39]. The tax rates must be applied reciprocally[40]. Therefore, the poorer State will have the same amount which the wealthier State ought to have gained. This puts the two States in an unequal footing, as consideration is not given to the economic stature of the States when deciding tax rates.

The above shortcoming can be easily alleviated by considering how well the economy is in the two States. In such a scenario, a developing State will be entitled to more tax than a developed State. However, in reality, investors will not be attracted to a developing State when the tax rates are higher than those in developed States. This is why developing countries engage in the formulation of DTAs extensively[41]. As a result, investors are allured to invest more and engage in cross-border transactions.

2.Double Taxation Agreements: Miscellaneous Observations

In addition to salient features of DTAs, the writer submits three key issues that are critical to be noted in the present discussion regarding principles of double taxation and the role of DTAs:(a) Issues arising from DTAs as bilateral agreements,(b) role of DTAs as a prevention mechanism for harmful taxation and (c) the status of principles of non-disciplinary taxation.

a.Tax Treaties are Confined to Bilateral Agreements

Contrary to other multilateral international treaties[42], DTAs are bilateral[43]. This suggests that the taxation over sources happen in accordance with the conditions in the DTA[44]. Additionally, States are bound to enforce DTAs over domestic tax policies[45]. If taxable sources involve two or

[38] Harris (n.13), p.104
[39] Avi-Yonah (2009) (n.10), p.101
[40] See sections 2. (a) and 2. (a)(i)
[41] Harris (n.13), p.104
[42] Treaties such as General Agreement on Tariffs and Trade or GATT.
[43] Avi-Yonah (2009) (n.10), p.106
[44] Harris (n.13), p.18
[45] See section 2. (a)(i)

more countries under the same tax subject, the issue becomes highly contested[46]. Particularly, the tax subject will be liable to pay varied taxes based on DTAs, which is against the accepted equitable principles on international taxation[47].

Moreover, these bilateral treaties system is far too rigid[48]. It limits domestic tax reforms, and if a State wishes to make amends to its domestic policy, they are required to renegotiate terms with the other State[49]. Since only two States are privy to the terms of a DTA, the change in domestic policy would require the State to engage in multiple negotiations with all States they share DTAs with. This is a rather cumbersome and impractical mechanism as consequence of its rigidity.

b. Do Tax Treaties Truly Counter Harmful Tax Competition?

Harmful tax competition can be detrimental to the interests of developing States[50]. DTAs are considered to be a deterring factor on harmful tax competition[51], as it operates on principles of reciprocity. However, DTAs are usually based on existing domestic tax laws and practices of States subject to minor variations as a result of the correspondence between States[52]. This becomes an issue, as previously discussed, when developed countries engage in negotiations over DTAs with their developing counterparts. It is reasonable to assume that the DTA ultimately boils down to the bargaining power of the States[53]. This is unhealthy in the long-term. Developing countries agree to DTAs as they consider the move to be a sign of legitimacy[54]. As a consequence, they will be bound by taxation policies which may contravene their domestic policies or even be harmful for the larger economic development of the State.

[46] Harris (n.13), p. 18
[47] Ibid.
[48] Ibid., pp. 18-19
[49] Ibid.
[50] OECD, Harmful Tax Competition: An Emerging Global Issue (1998), available at <https://read.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en#page3> accessed on 30 July 2021, ¶¶45-46
[51] Harris (n.13), p.105
[52] Avery Jones, et al., The Origins of Concepts and Expressions Used in the OECD Model and Their Adoption by States [2006] British Tax Review, pp. 695–765
[53] See section 2. (b)(ii)
[54] Harris (n.13), p.104

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

c.Non-discrimination Principles in International Taxation are Weak

The OECD Model, which is said to be adopted verbatim as DTAs[55], has weak provisions on non-discrimination[56]. Art.24 of the OECD Model serves a dual purpose: to prevent discrimination by a State over (i) residents and (ii) nationals of the treaty partner state[57]. Non-discrimination implications extend in light only to residents of the other State. This means that the source State will be subject to limitations, while the resident State is free to act[58]. It must be noted, however, that courts have taken a different approach, and have committed to the application of non-discriminatory principles even on behalf of source States[59]. This proves that the even the most widely accepted principles of DAT are not without flaws.

Conclusion

DTAs are a result of competing interests between States and their taxation policies. It is a protection of significant importance that is available to a person liable to pay taxes. As a consequence of circumvention of double taxation, DTAs render the benefits of eliminating tax evasion, promotion of cross-border trade efficiency, prevention of harmful taxation policies and establishment of non-discriminatory principles. However, as it was argued throughout this piece, the protections and the benefits are not flawless. In conclusion, the writer notes that the essence of this research essay is to showcase that, though DTA is no ideal mechanism to answer all concerns pertaining to double taxation with absolute certainty, the rights and privileges rendered to the taxpayers and tax authorities are satisfactory to a great degree.

[55] Knights of Columbus v The Queen (2008) TCC 307 (TC)
[56] Harris (n.13), p. 92: Referring to Art. 24 of the OECD Model Convention.
[57] Avery Jones, J., et al., The Non-Discrimination Article in Tax Treaties [1991] British Tax Review, Part I pp.359-385, Part II pp.421-452
[58] Ibid.
[59] ***Kraus v Land Baden-Wurtemburg*** [1993] C-19/92(ECJ); Cadbury Schweppes [2006] C-196/04 (ECJ); See generally, S. van Thiel, European Union: Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules That Can Be Readily Applied by National Courts, 48 European Taxation, pp.279-90, 339-350: ECJ has been restrictive in interpreting non-discrimination.

KDU Law Journal
General Sir John Kotelawala Defence University, Sri Lanka

Volume 02, Issue 01
March, 2022

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A Reflection on the Sri Lankan Legal Regime Relating to Maternity Protection

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Abstract

Pregnancy and maternity are vulnerable times for working women due to health and safety hazards, work-related stress, job insecurity, loss of career opportunities, promotions, and progression etc. Mostly, they experience bias and discrimination from their employers due to the difficulty in matching up to the productivity of their male counterparts. In response to that, the International Labour Organization has introduced three main Conventions on maternity protection with the aim of safeguarding rights of pregnant women at the workplace. This paper attempts to see whether Sri Lanka is in line with these Conventions by taking domestic instruments on maternity protection into consideration. Through the analysis in this paper, it becomes evident that the Sri Lankan law on maternity protection does not uniform and discriminate working women based on the type and the sector of employment they belong to. Therefore, it is indisputable that to promote gender equality and women's empowerment, it is necessary to have robust maternity protection laws which guarantee pregnant women's and nursing mother's job security and access to equal opportunities and treatment in the workplace.

Keywords: *Conventions, maternity protection laws, maternity rights, maternity benefits, discrimination.*

* LL.B (Hons) (Colombo).

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Introduction

Women face discrimination at the workplace due to the simple reason of their reproductive roles, because they are viewed as primary caregivers which comes with a burden if employed in a workplace. Expectant women and nursing mothers require adequate time to give birth, recover, and nurse their children. This results in discriminating women in job interviews solely based on their gender and marital status. Consequently, pregnancy and maternity become vulnerable times for working women, as there can be health and safety hazards coupled with job insecurity during such periods. Thus, adequate maternity protection is needed to preserve health of the mother and her newborn, and to further ensure gender equality, women's empowerment, job security, continuation of flow of income and equal access to employment and treatment in the workplace[1]. By taking measures to safeguard pregnant workers will enable them to combine their reproductive and productive roles successfully and combat all forms of discrimination in employment based on maternity. Hence, it is important to strengthen maternity protection and extend it to include all types of women workers in the economy.

This paper tries to analyse into what extent International Labour Organization (ILO) Conventions on maternity protection have been domestically incorporated into the laws of Sri Lanka by identify gaps and giving recommendations to improve the effectiveness of such provisions.

International and Domestic Legal Framework on Maternity Protection

The ILO has set out international standards on maternity protection by introducing three Conventions[2]: namely Maternity Protection Convention, 1919 (No.3), Maternity Protection Convention (Revised), 1952 (No. 103) and Maternity Protection Convention, 2000 (No. 183). These Conventions ensure that working women are not subjected

[1] 'MaternityProtection' (International Labour Organization) <https://www.ilo.org/travail/areasofwork/maternity-protection/lang--en/index.htm> accessed 5 May 2021.

[2] These ILO Conventions on maternity protection safeguard women's employment rights at the workplace during maternity, and occupational safety and health components that are essential to protect the health of pregnant and nursing women and their children.
See International Labour Office; Social Protection Department, 'Social protection for maternity: key policy trends and statistics' (2015) 1 <https://www.usp2030.org/gimi/RessourcePDF.action?ressource.ressourceId=51579> accessed 5 May 2021.

to discrimination at the workplace due to their reproductive roles. Sri Lanka has only ratified Maternity Protection Convention (Revised), 1952 (No.103) and yet to ratify the latest Maternity Protection Convention, 2000 (No.183). Additionally, Sri Lanka also has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[3]. These Conventions impose an international obligation on Sri Lanka to promote equal opportunity for employment by guaranteeing maternity rights of women at the workplace. This paper attempts to analyse whether the Sri Lankan legal framework on maternity protection is in line with the aforesaid ratified Conventions.

The domestic legal framework relating to maternity protection in Sri Lanka mainly comprises of four statutory instruments covering different sectors of women in the labour market. The Maternity Benefits Ordinance No. 32 of 1939 (as amended) applies to women employed in trades[4] while the Shop and Office Employees (Regulation of Employment and Remuneration) Act No.19 of 1954 (as amended) applies to women employed in shops and offices[5]. While the above two statutes cover the private sector women workers, Volume I of the Establishment Code of the Government of Democratic Socialist Republic of Sri Lanka (Establishment Code) provides maternity benefits to women employed in the public sector. Moreover, the University Grants Commission Circular No.10/2013 governs the female employees in the university community. Furthermore, the Women's Charter of Sri Lanka emphasizes prevention of gender-based discrimination against women on grounds of marriage and pregnancy[6]. Hence, it is needed to be analyzed whether these domestic instruments are in line with the international obligations cast down on Sri Lanka.

Application of Provisions of the Conventions in Sri Lanka

a. Informal Sector

Although Maternity Protection Convention (Revised), 1952 (No.103) extends to protect non-industrial and agricultural occupations, including

[3] Convention on the Elimination of All Forms of Discrimination Against Women (UN General Assembly, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13) Hereinafter referred to as "CEDAW".
[4] Maternity Benefits Ordinance No. 32 of 1939 (as amended), s 21.
[5] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), s 18A.
[6] Women's Charter (Sri Lanka), art 11.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

domestic workers and women wage earners working at home[7], Maternity Benefits Ordinance No.32 of 1939 (as amended) only applies to women workers employed in 'trades'[8] which excludes domestic workers and wage earners working at home from maternity protection[9]. This contravenes Sri Lanka's international obligations as Sri Lanka has not opted out of applying maternity protection to these groups of workers as provided in the Convention[10]. However, the term 'trade' does not necessarily justify the exclusion of domestic workers and wage earners working at home as the term could potentially accommodate them on the basis that they engage in an occupation or an undertaking[11]. This lack of maternity protection leading to job insecurity and increased risk of poverty forces them to return to work prematurely and puts both mother's as well child's health in danger[12]. Therefore, in order to reconcile local laws with international standards, the Ordinance must be interpreted widely to include 'all wage earners', irrespective of being in the formal or informal sector, having the right to obtain maternity protection and be free from pregnancy related discrimination. Even though Article 10(i) of the Women's Charter of Sri Lanka emphasizes women including the ones in the informal sectors should not be discriminated on the grounds of maternity and be given equal rights in employment, this has not been incorporated into the Ordinance. Additionally, if Sri Lanka ratifies Maternity Protection Convention, 2000 (No.183) in future, it would further expand Sri Lanka's obligation to include all employed women, including those in atypical forms of dependent work[13], as this Convention does not limit the scope of maternity protection only to the women in formal sector of the economy.

b. Casual Women Employed in Trades

A casual pregnant woman employed in trade is not entitled to any

[7] Maternity Protection Convention (Revised), 1952 (No. 103), art 1(3)(h).
[8] Maternity Benefits Ordinance No. 32 of 1939 (as amended), s 21.
[9] Unfortunately, due to this exclusion by Maternity Benefits Ordinance No. 32 of 1939 (as amended), women in the informal sector have been made more vulnerable by taking away their legal right to obtain maternity leave.
[10] Maternity Protection Convention (Revised), 1952 (No. 103), art 7.
[11] Sabrina Eusfally and others, 'Sri Lanka: Domestic Workers' (March 2015) Law and Governance, 18 <https://www.veriteresearch.org/wp-content/uploads/2018/06/Sri-Lanka-Domestic-Workers-Legal-Policy-Framework-No.-1.pdf> accessed 5 May 2021.
[12] International Labour Office; Social Protection Department, 'Social protection for maternity: key policy trends and statistics' (2015) 1 <https://www.usp2030.org/gimi/RessourcePDF.action?ressource.ressourceId=51579> accessed 5 May 2021.
[13] Maternity Protection Convention, 2000 (No. 183), art 2.

benefits as Maternity Benefits Ordinance No.32 of 1939 (as amended) clearly excludes employees whose nature of work is casual from the ambit of the Ordinance[14]. However, there is no such restriction in Shop and Office Employees (Regulation of Employment and Remuneration) Act No.19 of 1954 (as amended) which covers every female person employed in business of a shop or office[15]. Similarly, the Establishment Code[16] and the University Grants Commission Circular No.10/2013[17] award maternity benefits to all permanent, temporary, casual and trainee female officers. This disparity in law leads to unequal treatment towards women employed in a similar type of employment. For example, placing casual women workers employed in garment factories, agriculture, and plantation estates in a more vulnerable situation by the Ordinance raises the question on why equals are being treated unequally. Hence, the Ordinance must be amended to include all types of wage earners including the casual employees, as Maternity Protection Convention (Revised), 1952 (No.103) does not place such a restriction based on the type of employment.

c. Maternity Leave

The Maternity Protection Convention (Revised), 1952 (No.103)[18] mandates a twelve-week maternity leave comprising of a compulsory leave not less than six weeks after childbirth, to facilitate the mother to recover and rest[19]. This is intended to protect women from being pressured to return to work, which could be detrimental to their health and the child. In case of a delivery of a live child, a women worker shall be entitled to ten weeks of maternity leave under Maternity Benefits Ordinance No. 32 of 1939 (as amended)[20] and seventy days of maternity leave under Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended)[21]

[14] Maternity Benefits Ordinance No. 32 of 1939 (as amended), s 21.
[15] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), s 18A.
[16] Establishment Code, Volume I, Chapter XII, s 18:1.
[17] University Grants Commission Circular No. 10/2013, s 1(a).
[18] Maternity Protection Convention (Revised), 1952 (No. 103), arts 3(2) & 3(3).
[19] It is to be noted that article 4 of Maternity Protection Convention, 2000 (No. 183) mandates a minimum of 14 weeks and its accompanying Recommendation No.191 goes further and suggests member States to increase it to at least 18 weeks.
[20] Maternity Benefits Ordinance No. 32 of 1939 (as amended), s 3(1)(a).
[21] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), s 18B(2)(a).

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

after her confinement[22]. However, only the Ordinance provides extra two weeks of maternity leave up to the date of her confinement in cases of both live and still births[23]. On the other hand, in case of a live childbirth, public sector workers and university employees are entitled to eighty-four working days of full pay maternity leave which includes four weeks of compulsory leave[24]. Similarly, in the case of a still birth or the death of the child before the expiry of six weeks from the date of the childbirth, both public sector workers and university employees are entitled to six weeks of full pay leave[25]. On the contrary, both the Ordinance and the Act is silent on whether a private sector worker is entitled to full pay leave if her child died before the expiry of six weeks from the date of childbirth. Nevertheless, both the Ordinance and the Act provides for maternity leave of four weeks if the confinement does not result in delivery of a live child[26].

Thus, it can be seen that the entitlement for maternity leave differs based on the sector of the employment. Hence, this discrimination between pregnant women based on the sector of their employment must be abrogated, and all should be equally treated by giving twelve weeks of maternity leave including compulsory leave of six weeks as mandated by the international obligations. If Sri Lanka ratifies the Maternity Protection Convention,2000 (No.183), then it will impose an obligation on the State to extend maternity leave up to fourteen weeks. This will further ensure that maternity rights of working women are being guaranteed.

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[22] Up until the Maternity Benefits (Amendment) Act, No.15 of 2018, women regulated by Maternity Benefits Ordinance No. 32 of 1939 (as amended) only had 84 calendar days of maternity leave. This was discriminatory considering majority of women employed in Sri Lanka are governed by this and their maternity leave was lesser than the ones governed by Shop and Office Employees (Regulation of Employment and Remuneration) Act No.19 of 1954 and the Establishment code. Moreover, they had lesser number of days of maternity leave depending on the number of children they already had, which was hugely discriminatory towards working mothers with family responsibilities. This discriminatory provision was similarly applied to the women covered by Shop and Office Employees (Regulation of Employment and Remuneration) Act No.19 of 1954 (as amended). With the Maternity Benefits (Amendment) Act, No.15 of 2018 and Shop and Office Employees (Regulation of Employment and Remuneration) (Amendment) Act, No.14 of 2018, this discriminatory provision was removed giving all women equal number of days of maternity leave irrespective of the number of children.

[23] Maternity Benefits Ordinance No.32 of 1939 (as amended), s 3.

[24] Establishment Code, Volume I, Chapter XII, s 18:1:2; University Grants Commission Circular No. 10/2013, s 1(a)(i).

[25] Establishment Code, Volume I, Chapter XII, s 18:2:4; University Grants Commission Circular No. 10/2013, s 1(a)(iv).

[26] Maternity Benefits Ordinance No.32 of 1939 (as amended), s 3(1)(b); Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), s 18B(2)(b).

d. Extension of Maternity Leave

The Maternity Protection Convention (Revised), 1952 (No.103) provides additional leaves before and after confinement in case of illness medically certified arising out of pregnancy and confinement[27]. Such additional leave where an illness arises is not available to women covered under Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended) and Maternity Benefits Ordinance No.32 of 1939 (as amended). This is a serious discriminatory deficiency in the law as such women are more vulnerable to serious health risks than the public sector and university workers. Only university workers can obtain an additional six months leave if they are suffering complications arising from childbirth[28]. However, this is unsatisfactory as such additional leave does not entitle her to any payment which is contrary to what is provided by the Convention No 103[29]. Also the Establishment Code is silent on whether a woman can obtain paid additional leave in such situations.

Progressively, the domestic legal regime goes a step further and provides extension of maternity leave in cases where the child needs to be looked after. Public sector employees has the facility of obtaining eighty-four days half pay and another eighty-four days no pay leave if required for the purpose of looking after the child[30]. University workers have a limited right where they can obtain an additional six-month no pay maternity leave in a situation where the child is in an abnormal condition requiring the mother's personal care[31]. However, neither Maternity Benefits Ordinance No.32 of 1939 (as amended) nor Shop and Office Employees (Regulation of Employment and Remuneration) Act No.19 of 1954 (as amended) entitles private sector female workers such a right to extend their maternity leave. Hence, this discriminatory treatment between sectors of employment must be eradicated by making provisions giving all working women equal right of additional leave as per the Maternity Protection Convention (Revised), 1952 (No. 103).

[27] Maternity Protection Convention (Revised), 1952 (No. 103), arts 3(5) & (6).
[28] University Grants Commission Circular No. 10/2013, s 1(d)(i) & (ii).
[29] Article 4 of Maternity Protection Convention (Revised), 1952 (No.103) provides that when a woman is on maternity leave as per given in article 3, she will be entitled to cash and medical benefits.
[30] Establishment Code, Volume I, Chapter XII, ss 18:3 & 18:4.
[31] University Grants Commission Circular No. 10/2013, s 1(d)(i) & (ii).

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

e. Paternity and Parental Leave

In Sri Lanka, women are cast down with the primary duty of upbringing the child which places working women at a disadvantage than men. Yet the law has done little to change this attitude by providing meaningful paternity[32] and parental leaves[33] to enable men to play more equal parts in child-rearing. By providing such leaves will indirectly benefit working women as the father's support in child-rearing is also employed which will lessen the burden on women. Even though providing parental and paternity leave will be a burden on the employer, nevertheless in the long run it will help to avoid the cost of having to hire and train new employees to replace those who chose to leave to look after their children. It will also benefit the employer as it can increase the overall productivity of work due to raising the morale of the employees.

Sri Lanka has introduced paternity leave of three days only to the male public servants which has to be claimed within one month of the birth of the child[34]. However, this is discriminatory as private sector male workers and informal sector workers do not enjoy such a right. It is also questionable whether three days of paternity leave is enough to lessen the burden on women in child-rearing. Whilst Women's Charter of Sri Lanka emphasizes the State should work towards granting of parental leave[35], such provisions haven't been incorporated into the law.

Moreover, although there are no ILO standard exists concerning paternity and parental leave, conclusion number 27 of the 'Resolution Concerning Gender Equality at the Heart of Decent Work' adopted by the International Labour Conference in 2009 addressed the Governments to include paternity and parental leave. Thus, Sri Lanka need to challenge this cultural stereotyping on woman as being the primary caregivers, by bringing laws

[32] Paternity leave aims to enable fathers to spend time with the mother and their newborn at childbirth, participate in events or celebrations related to its birth, and to carry out other related formalities.
[33] Parental leave refers to a relatively long-term leave available to either parent, allowing them to take care of an infant or young child over a period of time, usually following the maternity or paternity leave period. See A. T. P. L. Abeykoon, Ravi P Rannan-Eliya and others, 'Study on the Establishment of Maternity Protection Insurance in Sri Lanka' Institute for Health Policy (2014) 22.
[34] Establishment Code, Volume I, Chapter XII, s 18:11.
[35] Women's Charter (Sri Lanka), art 11(2).

to provide sufficient paternity and parental leave and recognizing that both mothers and fathers have equal and shared responsibilities as breadwinners and caregivers. Hence, by enabling both men and women to play more equal parts in child-rearing will ultimately promote gender equality and equal opportunities and treatment in the workplace[36].

f. Nursing Breaks

The Maternity Protection Convention (Revised), 1952 (No.103) entitles a woman to nurse her child by interrupting work, which shall be counted as working hours and be remunerated[37]. There is a wide disparity in our law with regard to nursing intervals as those governed by Maternity Benefits Ordinance No. 32 of 1939 (as amended)[38] and Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended)[39] receive two nursing intervals per day till the child is one year old, while public employees[40] receive only one hour per day to leave the workplace early till the child is six months old. On the contrary, university workers are entitled to two nursing periods of one hour each per day till the child is one year old[41]. This shows that the public workers have been put in an unfavourable position than the private sector workers. Both the Ordinance and the Act entitle women workers to a nursing interval of not less than thirty minutes where an employer provides a creche or a suitable place, and to an interval of not less than one hour where there is no creche provided. However, it is questionable whether such nursing intervals are practical considering the time of traveling from workplace to home to breastfeed the child. Since CEDAW stipulates that States should promote establishment and development of a network of child-care facilities to enable parents to combine family obligations with work responsibilities and participation in public life[42], Sri Lanka should make provisions for the establishment of creches and child-care facilities near

[36] International Labour Office; Conditions of Work and Employment Programme, 'Maternity Protection Resource Package- From Aspiration to Reality for All, Module 5: International rights and guidance on Maternity Protection at work' (2012) 41 < http://mprp.itcilo.org/allegati/en/m5.pdf> accessed 5 May 2021.
[37] Maternity Protection Convention (Revised), 1952 (No. 103), arts 5(1) & 5(2).
[38] Maternity Benefits Ordinance No. 32 of 1939 (as amended), s 12B.
[39] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), s 18I. It is to be noted that until the Shop and Office Employees (Regulation of Employment and Remuneration) (Amendment) Act, No. 14 of 2018, women governed by this Act did not have any nursing intervals.
[40] Establishment Code, Volume I, Chapter XII, s 18:6.
[41] University Grants Commission Circular No. 10/2013, s 1(b).
[42] Convention on the Elimination of All Forms of Discrimination Against Women, art 11(2)(c).

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

to the workplace for the betterment of women workers in all sectors of employment.

Considering this issue of nursing intervals, Maternity Protection Convention,2000 (No.183) has introduced the system of transferring daily breaks into a daily reduction of working hours[43]. This progressive enactment can be adopted into our law to minimise the drawbacks in the current legal framework relating to nursing breaks. Even though the World Health Organization recommends exclusive breastfeeding for infants until the age of six months and to continue to breastfeed for two years or beyond, Sri Lanka is falling behind this as the law only allows nursing intervals up to one year of age of the child. Hence, it is clear that our law must be unified by giving equal amounts of nursing breaks to working mothers, without any discrimination based on the sector of employment.

g. Occupational Safety and Health

CEDAW stipulates that States should ensure effective right to work of pregnant women and prevent discrimination by providing special protection to them during their pregnancy in types of work that proved to be harmful[45]. Lack of occupational safety protection measures in the working environment during pregnancy leads to exposure to hazards that can result in health risks and complications[46] for the mother and her unborn child[47]. Jobs involving exposure to toxic and biological chemicals, and excessive physical labour are injurious to the health of pregnant women, especially during first three months of pregnancy as it is the most vulnerable period for the development of the fetus[48]. Such situations force women to choose either between working in an unsafe environment or leaving their job.

[43] Maternity Protection Convention, 2000 (No. 183), art 10.
[44] Infant and young child nutrition, Fifty-fourth World Health Assembly, Seventh plenary meeting (18 May 2001) 2.
[45] Convention on the Elimination of All Forms of Discrimination Against Women, art 11(2)(d).
[46] Moreover, excessive work-related stress, anxiety, unsuitable workloads, or other detriments in the workplace can also put mother's health and her unborn baby at a risk. See Ngeyi Ruth Kanyongolo, 'Maternity Protection at the Workplace' (International Workshop on Maternity Protection, Kingdom of Lesotho, 23 –24 April 2013).
[47] International Labour Office, Conditions of Work and Employment Programme, 'Maternity Protection Resource Package - From Aspiration to Reality for All, Module 12: Assessing national legislation on Maternity Protection at work' (2012) 8 < http://mprp.itcilo.org/allegati/en/m12.pdf> accessed 5 May 2021.
[48] H. M. Salihu, J. Myers, E. M. August, 'Pregnancy in the workplace' [2012] 62(2) Occupational Medicine 88, 94.

The Women's Charter of Sri Lanka emphasizes the State should prohibit employment of women during pregnancy in types of work proved to be harmful to them and to the unborn child[49]. However, only Maternity Benefits Ordinance No. 32 of 1939 (as amended)[50] and Shop and Office Employees (Regulation of Employment and Remuneration) Act No.19 of 1954 (as amended)[51] provides provisions for prohibiting employment of a pregnant woman in any work which may be injurious to the woman or her child during the last three months of pregnancy and first three months after confinement. However, this is problematic as pregnant women's health is most crucial not only during the last three months but especially during first six months[52]. Thus, our law which only concerns about the health and safety during the last three months of pregnancy is unreasonable and unjustifiable. Moreover, similar provisions protecting women workers from health hazards during pregnancy cannot be seen in the laws governing public sector and university employees. This is also problematic as they are also being discriminated and differently treated, which is unreasonable as all women are on an equal footing during their pregnancy times.

Since Maternity Benefits Ordinance No.32 of 1939 (as amended) excludes casual workers from its ambit, casual women employed in garment factories, agriculture, and plantation estates have been put in a more vulnerable state than those who are governed by the Ordinance and the Act. Even though they are ones who are being more pressured to return to work amidst the unsafe environment and health risks mainly due to income insecurity, the Ordinance provides no remedy for them. It is also questionable whether the existing laws and regulations truly address the health risks posed to expectant mothers by the ongoing COVID-19 pandemic. Therefore, our law must be amended to protect health of expectant mothers from work which may be harmful to them throughout the pregnancy period without having any exclusions and public private sectorial division[53].

[49] Women's Charter (Sri Lanka), art 11(vii).
[50] Maternity Benefits Ordinance No. 32 of 1939 (as amended), s 10B(1).
[51] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), s 18D(1).
[52] Priya Soma-Pillay, 'Physiological changes in pregnancy' Cardiovasc Journal of Africa [2016] 27(2) 89, 91.
[53] If Sri Lanka to ratify Maternity Protection Convention, 2000 (No. 183), it would further State's obligation as article 3 makes States to ensure that pregnant or breastfeeding women are not obliged to perform work which is prejudicial or poses a significant risk to the health of the mother or the child.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

i. Job Security

Maternity Protection Convention (Revised), 1952 (No.103) makes it unlawful for an employer to dismiss women from work during their maternity leave[54]. CEDAW also provides that States should take measures to prohibit dismissal on the grounds of pregnancy, marital status and maternity leave[55]. This protection is provided to women so that they will not be discriminated based on engaging in reproductive behaviour[56]. The Women's Charter of Sri Lanka highlights that the State should prohibit dismissal of women on the grounds of marriage, pregnancy or of maternity leave[57]. Accordingly, Maternity Benefits Ordinance No.32 of 1939 (as amended)[58] and Shop and Office Employees (Regulation of Employment and Remuneration) Act No.19 of 1954 (as amended)[59] protect employees in the private sector from dismissal due to maternity reasons, which shifts the burden of proving termination happened due to reasons other than maternity onto the employer. However, female employees in the public sector do not enjoy such a protection as the law is silent on this matter. Nevertheless, there have been no cases of dismissal of public workers on grounds of maternity so far[60]. This shows that the public sector is de facto compliant with the Convention, but not on a de jure basis[61]. On the other hand, public workers are being protected from discrimination based on maternity leave for salary increments, promotions, and pension schemes[62], whereas private sector workers do not enjoy such a right. Thus, this lack of uniformity in our law must be addressed by giving women equal safeguards relating to job security during pregnancy.

[54] Maternity Protection Convention (Revised), 1952 (No. 103), art 6.
[55] Convention on the Elimination of All Forms of Discrimination Against Women, art 11(2)(a).
[56] Article 9 of Maternity Protection Convention, 2000 (No. 183) provides stronger employment protection by requiring measures to ensure that maternity does not cause discrimination, including in access to employment, and explicitly prohibits pregnancy tests as part of candidate selection procedures except in very limited specific circumstances.
[57] Women's Charter (Sri Lanka), art 11(iv).
[58] Maternity Protection Convention, 2000 (No. 183) ss 10 & 10A.
[59] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), ss 18E & 18F.
[60] A. T. P. L. Abeykoon, Ravi P Rannan-Eliya and others, 'Study on the Establishment of Maternity Protection Insurance in Sri Lanka' Institute for Health Policy (2014) 14.
[61] ibid.
[62] Establishment Code, Volume I, Chapter XII, s18:9 and University Grants Commission Circular No. 10/2013, s 1(d)(iv).

k. Employer Liability Schemes

Employer liability schemes which make employers bear the entire cost of maternity benefits unfortunately works against the interests of women workers, as employers may get reluctant to hire women in order to avoid costs. As a result, employers' liability schemes have long been viewed as detrimental to the interests of women[63]. In Sri Lanka, maternity benefit payments are financed through employer liability schemes[64]. This is not compliant with Maternity Protection Convention (Revised), 1952 (No.103) which imposes an obligation on Sri Lanka to replace employer liability financing of maternity cash benefits with either a scheme financed by public funds or a social insurance scheme[65]. Thus, Sri Lanka should move towards bringing social insurance schemes which are funded through employer and employee contributions and complemented by government funds to improve social security coverage for working women.

Conclusion

Sri Lanka is progressive being compliant with the international standards on maternity protection at the workplace. However, there are certain limitations and disparities in the law as discussed above which discriminates pregnant women and nursing mothers based on the type and sectorial division of their employment. This lack of uniformity in maternity protection laws, which treats pregnant women differently even though all of them are facing similar problems during maternity, must be done away with. Hence, Sri Lanka needs to uniform the domestic legislation governing maternity rights and protection at the workplace by making legal reforms which guarantee job security, occupational health and safety, social insurance schemes, paternity and parental leave, nursing breaks, childcare facilities, extension of maternity leave to all employees without any discrimination based on the sector of employment. Additionally, by ratifying Maternity Protection Convention,2000 (No.183) will further impose an obligation

[63] A. T. P. L. Abeykoon, Ravi P Rannan-Eliya and others, 'Study on the Establishment of Maternity Protection Insurance in Sri Lanka' Institute for Health Policy (2014) 24.
[64] Maternity Benefits Ordinance No. 32 of 1939 (as amended), s 5.
[65] Maternity Protection Convention (Revised), 1952 (No. 103), arts 4(3) & 4(8). However, ratification of Maternity Protection Convention, 2000 (No. 183) by Sri Lanka would negate such noncompliance as it authorizes employers to bear the cost of maternity benefits for countries like Sri Lanka, which have legislated for employer liability prior to the adoption of the said Convention.

Volume 02, Issue 01
March, 2022

ISSN 2783-8870

on Sri Lanka to reform the domestic laws up to the present international standards. It is indisputable that strong maternity protection laws which enable women to actively participate in the labour force will ultimately improve economic efficiency of the country. Therefore, by amending maternity protection laws to safeguard labour rights of working women as discussed in this paper will make Sri Lanka in line with the international standards.

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Cross Fertilization between Administrative Law and Fundamental Rights: Broadening Ambit of Judicial Review in Sri Lanka

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Abstract

This paper critically analyses the cross-fertilization between Administrative Law and Fundamental Rights. Administrative Law constitutionalizes through the Fundamental Rights. Due to this reason Fundamental Rights come under Administrative Law and it is a part and parcel of Administrative Law. According to the Merriam-Webster dictionary the word "cross-fertilization" is defined as an interaction or interchange between cultures, ideas or categories, especially of a broadening or productive nature. Applying this definition for scope of Administrative Law and Fundamental Rights, we can assume that cross-fertilization between Administrative Law and Fundamental Rights means the interaction between each other to broaden the scope of each other. This paper identifies that cross fertilization contributes to Administrative Law concepts to expand one of its subject branches. That is Fundamental Rights. During the past, this transaction has been taking place impliedly improving and enhancing the concepts of Administrative Law and Fundamental Rights. This paper further aims to elaborate that cross-fertilization between Administrative Law and its subjects branch Fundamental Rights has been broadly emphasized in judicial review of Sri Lanka. The resultant of all this is the development of the scope of Administrative Law and its fragment Fundamental Rights, paving the way for constitutional supremacy.

Keywords: *Cross fertilization, Administrative Law, Fundamental Rights, Judicial Review, Constitutional supremacy*

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Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Introduction

The mutual exchange of ideas, concepts and techniques between Administrative Law and its discipline Fundamental Rights have paved the way for cross-fertilization between Administrative Law and Fundamental Rights, resulting a mutual benefit for each other. Cross fertilization has immensely contributed for the development of the scope of Administrative Law as well as Fundamental Rights. By alleging the concepts of Administrative Law and Fundamental Rights, courts take decisions and give judgments which help to improve the scope of Administrative Law and Fundamental Rights.

Operations of administrative agencies, such as rule construction, adjudication, and implementation of regulations of government are governed by the Administrative Law. Administrative Law is a part of public law. The administration shall act as per the regulations of the legislature to keep the Administrative Law active. The primary purpose of Administrative Law is thereby to maintain the powers of government within their legal bounds, so as to safeguard the citizens against their abuse[1]. It is the responsibility of public authorities to exercise their powers within the four corners of the legislation. The grounds of judicial review are important in this context and up-to-date judicial review of administrative action has acquired many developments in its application[2]. Although the "doctrine of ultra vires" was considered as the "fundamental principle of Administrative Law", it has now progressed from ultra vires regulation to concern on behalf of the individual's protection and for the control of power other than control of vires. Hence, the current tendency is to sustain the principles of virtuous administration in the country. On the other hand, the Administrative Law in Sri Lanka with regard to judicial control has developed specific philosophies namely: legitimate expectation, natural justice, proportionality, public trust doctrine and right to equality[3].

Within the context of Sri Lanka, basically, the discretionary powers of

[1] Wade & Forsyth, Administrative Law, (10thed.) Oxford: Oxford University Press, 2009 (pp.04)
[2] Thakshila Udayanganie, 'Ensuring good administration through development of judicial review in Sri Lanka:Special reference to fundamental rights based jurisdiction as ground for judicial review',2012,(pp.182)
[3] ibid 182.

public administrative authorities can be challenged in two ways: writs and Fundamental Rights. System of Fundamental Rights in Sri Lanka is similar to the system that is prevailing in India, where the principles of good governance and public trust doctrine are in place. Therefore, the scope of exercising the power of judicial review of given jurisdiction has enhanced. Due to this, the exercise of judicial power of the people by the judiciary and for upholding the rule of law has been held high[4]. Therefore, the main purpose of writing this term paper is to critically analyze the effectiveness of using Fundamental Rights based approach to challenge administrative action the way it enhances the good administration.

Currently, it has been recognized that there is a cross-fertilization between Fundamental Rights and its main study field i.e.; Administrative Law, and it is believed that Administrative Law prevailing in Sri Lanka has moved towards a rights based approach. Therefore, the common view held by philosophers is that Administrative Law concepts have been utilized to pave the way for the development and expansion of its discipline Fundamental Rights. Fundamental Rights have been used to expand the ambit of Administrative Law concepts. In some cases Fundamental Rights have been used to issue writs, when Fundamental Rights petitions are being heard in the Supreme Court. Judges have referred to Administrative Law concepts like proportionality and public trust doctrine. Attention now has been focused on expanding the scope of the control of administrative action to areas of Fundamental Rights with the development of the cases in the superior courts. As per the Fundamental Rights jurisdiction and article 12(1) of the 1978 constitution, the judge can uphold the principle of rule of law via equality before the law[5]. This can be regarded as one of the essential features of good and fair administration.

The Cross-Fertilization between Administrative Law and Fundamental Rights Aid to Broaden the Ambit of Judicial Review

In order to get a better understanding as to how Administrative Law

[4] ibid 182.
[5] ibid 183.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

and its subject branch Fundamental Rights nourish each other, it is better to identify each ground of judicial review and observe how it has affected each other.

The final action one can take under Administrative Law is writ. According to the 1978 constitution the writ jurisdiction was introduced on a constitutional foundation. Article 140 grants power to issue writ to the court of appeal, Article 154 gives power to provincial high courts to issue a writ in limited circumstances involving exercise of power under a law or statute covered by a matter in the provincial council list of the constitution. In some circumstances Parliament may specify that the writ jurisdiction of court of appeal be exercised by the Supreme Court.

In the case of ***W.A.C Perera V Prof Daya Edrisinghe***[6], it was stated that, "the fact that by entrenching the Fundamental Rights in the constitution, the scope of the writs has enlarged its implicit in article 126(3), which recognizes that a claim for the infringement of a Fundamental Right[7]". Due to this reason we can see the writ alleged with Fundamental Rights and the scope of writ jurisdiction has improved as well as the Supreme Court decision in Mundy case and the court of appeal's decision in Kunantham case. Both decisions were willing to see a violation of Fundamental Rights as being an independent ground of review in an application for a writ[8].

The main purpose of Administrative Law is to keep the powers of government within their legal bounds, so as to protect the citizens against their abuse[9]. Administrative authorities acting outside the power or act beyond the power is called 'Doctrine of Ultra Vires'. Doctrine of Ultra vires is one of the judicial grounds of Administrative Law. Galligan observes that the doctrine of ultra vires has been extended and developed to mean "Acting beyond principles of good administration[10]". Administrative

[6] [1995] 1 S.L.R. 148 at 156

[7] Dandris Gunaratna."Judicial response to the Concept of Sovereign power of people" in S.Marsoof and N.Wigneswaran[Eds]

[8] Mario Gomez, 'Blending Right with Writs :Sri Lanka Public laws new Brew' 475.

[9] H.W.R. Wade & C.E Forsyth, Adnimistrative Law.[10th ed] oxford university press, 2009, pg 30.

[10] Talagala,C. (n.d.). The Doctrine of Ultra Vires and Judicial Review of Administrative Action. The Bar Association Law Journal.

power is generally derived from legislation. Legislation confer power on administrative authorities for specified purposes, sometimes laying down the procedure to be followed in respect of exercise of such power. The article 4 (a) of the constitution legislation reflect the will of people and the will of people includes their rights and impliedly it protects fundamental rights, and it assists to develop the scope of doctrine ultra vires.

A novel concept of grounds of judicial review regarding Administrative Law was introduced by Lord Diplock. This was relating to the case of GCHQ, where he explains illegality, irrationality procedural impropriety and proportionality.

Lord Diplock described illegality as a ground of judicial review and he further states that the decision maker should understand correctly, the law that regulates his decision making and should stand by it. It is an indication that administrative authorities give decisions according to the law, which means it is in line with the legislature. As Fundamental Rights are already included in the legislature. Lord Diplock's new prospects to illegality has indirect effects on Fundamental Rights.

Unreasonableness is discussed in the main topic, under the irrationality. If the administrative authority has used the power to take a clear unreasonable decision, the court could exercise its jurisdiction to protect the rights of citizen and declare that the act is ultra vires. When court exercises to protect the rights of the citizens, the court should consider the Fundamental Rights. As a result of that, the judgments develop the scope of not only unreasonableness but also the Fundamental Rights, as Fundamental Rights also is alleged with it.

Long before Fundamental Rights were enacted, courts used *Wednesbury's unreasonableness* and ***CCSU*** case of irrationality as a judicial review[11]. Shivaji Felix is of the view that *Wednesbury's unreasonableness* was an established ground for judicial review against arbitrary action to claim

[11] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (1948) 1 KB 223; *Council of Civil Service Union v. Minister of Civil Service* (1984) All ER 935.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

equality in Sri Lanka[12]. For example, in the case of *Gunarathne*[13], the claimant argued that his right to equality was violated, and the decision was unreasonable. Sharvananda, the Chief Justice believed the respondent has misdirected himself and he refused to provide what was requested by the petitioner.

In Sri Lankan case of ***Mohomed V Land Reform Commissioner***[14], the petitioner gives a house for rent to another person and at a certain time he refused to pay the rental and the land reforms commissioner ordered the tenant to leave the house. It was combined with fundamental rights and freedom to movement and of choosing his residence. The court gave a decision combined with Fundamental Rights. This decision supported to improve the unreasonableness concept as a separate judicial review.

Proportionality is considered as a part of judicial ground of Administrative Law. Administrative measures should be reasonable for proportionality when applied to reach the expected result. The doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck not merely whether it is within the range of rational or reasonable decision. Secondly, the proportionality test may go further than the traditional grounds of review as much as it may go further than the tradition to be directed to the relative weight accorded to interest and considerations. Thirdly, the heightened scrutiny test developed is necessarily appropriate for the protection of human rights[15].

Legitimate expectation is, when a decision is taken by an administrative authority affecting some legal right, liberty or interest of the persons affected, can legitimately expect that it will be treated fairly, or some rules of fair procedure is applied in taking a decision by the relevant administrative authority. In Sri Lankan case ***Multinational Property Development Ltd V Urban Development Authority***[16], U.D.A approved a project by the petitioner company to construct a car park complex on the

[12] Shivaji Felix, Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka, 113
[13] ***Gunarathne v. Commissioner of Elections*** [1987] 2 Sri.L.R 165.
[14] [1988]1 S.L.R. 154.
[15] S Marsoof. "The explanation canvas of judicial review", The Bar Association Law Journal.
[16] [1996] 2 S.L.R. 51

said land and decided to allocate the land on ninety-nine years lease. The sums agreed were paid and the final draft was ready. After the change of government, the U.D.A. decided not to allocate the land to the petitioner company. The individuals who had legitimate expectations could sue for benefits and there was a violation of Fundamental Rights. They appealed before the court for benefits taken away from them. When the court gave the judgment for the legitimate expectation case, Fundamental Rights also were considered. This is a good example that improved legitimate expectation as a separate judicial ground.

Natural justice is a technical terminology for the rule in contrast to bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*). While the term natural justice is regularly retained as a general concept. It has largely been replaced and extended by "duty to act fairly". Here, two main rules are based on Fundamental Rights, when the court exercises natural justice, automatically Fundamental Rights come into play. In the case ***Izadeen V Director of Civil Aviation***[17], the petitioner was a pilot holding a commercial pilot license. The Director General of civil Aviation who suspended the petitioner had been questioned during the inquiry and the statements were recorded. Director General asked the petitioner in writing to show cause as to why his commercial pilot license was cancelled. It is essential that the petitioner to be heard in his defense. There was a failure of a fundamental principal. The right to be heard in judicial proceedings is considered as a Fundamental Right under the constitution of Sri Lanka[18] and violation of this right can be corrected by invoking the fundamental right jurisdiction of the supreme court of Sri Lanka[19]. Cases of this nature impliedly developed the scope of natural justice.

Fairness and Public Trust doctrine are also separate judicial grounds of Administrative Law. Fairness demands, that the state should observe rigorously its own internal standards and guidelines. Fairness may also require a response that is proportionate to the alleged misconduct.

[17] [1996] 2 S.L.R. 348
[18] The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 12(3)
[19] The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 126.

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

To the Supreme Court "fairness lay at the root of equality and equal protection[20]". The key concept of the public trust is that the court has to observe, that those who wield public power should hold such power in trust. Discretionary powers given to public institutions are never untrammeled. They are to be used to achieve the purpose for which they were conferred. Arbitrary and unreasonable decisions are the antithesis of fair play and equal treatment that violate the trust placed in public officials. ***Hearher Therese Mundy V Environmental Authority and others***[21] case made clear that the Supreme Court could enact the notion of the public trust into an application for a writ and held that it was a separate ground of review.

In Sri Lanka there has been a considerable progress in the public interest litigation arena, and the courts have liberalized rules relating to standing or locus standi and permitted not only persons aggrieved but also others to challenge the violations of Fundamental Rights, thus helping to stand as a separate ground of judicial review in Administrative Law. The constitution has advanced in writ jurisdiction with regard to fundamental rights, and sometimes been creative in expanding the scope of people's sovereignty by relaxing the rules on locus standi through concepts such as public interest litigation and public trust.

Cross fertilization does not help to improve only one segment or one concept, it helps both parties to improve gradually.

Above mentioned facts prove that fundamental rights do help to improve scope of judicial review in Administrative Law. How Administrative Law helps to improve its fragment fundamental rights is a separate judicial review. As mentioned earlier, Sri Lankan courts however had the climate to engage in activism without being unnecessarily shackled by ultra vires, so much so that the judiciary has been so bold as to extend their control of administrative action even to the field of fundamental rights.

[20] Mario Gomes, (n.d.). Blendind Rights with Write: Sri Lankan Public Law"s New Brew.456.
[21] ***Hearher Therese Mundy V Environmental Authority and others***, Supreme ourt minutes of January 2004.

Cross fertilization between Administrative Law and its segment, Fundamental Rights forms the Constitutional Supremacy

One of the features of public law jurisprudence since the early 1990's has been the case law that developed under article 12 of the constitution under the current constitutional procedure for the enforcement of Fundamental Rights. The Supreme Court is the first and final court of jurisdictions. A case should be disposed of within 18 months, though sometimes it may take one year. This is a quick procedure. Supreme Court not only provide justice for citizens seeking redress because of violations committed by state but also the public officials who had been discriminated against or treated unfairly. Latter Article 12 has become their main legal weapon and resulted in a large body of jurisprudence emanating from the court. Supreme Court's interpretation of the equality and equal protection constitution guarantees the justice for the victims.

As per the "Galle Face Case" the Supreme Court held that the right to freedom of speech, expression and publication contained in Article 14 of the Constitution included by implication the right to information. The Urban Development Authority (UDA), in refusing to provide information about the purported lease of 'Galle Face' to the petitioner, had violated the petitioner's right to information.The UDA's action was also in violation of the constitutional right to equal protection of the law since its 'bare denial of access to official information' in the absence of specific reasons was an arbitrary exercise of power.

Case laws of Administrative Law aids its fragment Fundamental Rights to stand as an independent ground of review. The case of Mundy demonstrates how the Supreme Court could expand the control of administrative action into the area of Fundamental Rights[22]. It is pertinent to note that Sri Lankan courts have interchangeably used principles in Administrative Law jurisprudence in Fundamental Rights which has substantially enriched the scope of judicial review.

[22] C Talagala, 'The doctrine of ultra vires and judicial review of administrative action', BALJ [2011] Vol XVII pp 84-94

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

Perera V Prof Daya Edirisinghe[23]

A Student of fine arts at the University of Kelaniya applied a writ of mandamus and the court stated that the article 12 of the constitution read together with the rules and exam criteria of the university, grants a duly qualified candidate a right to degree. The university had to grant the degree without discrimination. Though the university has a discretion, it should be exercised without violating article 12. Although the application was a writ under article 140, court held the stand that the university discretion must be exercised with article 12 and it impliedly confirmed that Fundamental Right is an independent ground of review.

Karunadasa V Unique Gemstones[24]

Supreme Court held for writ application was of the view that the article 12 maintained the view that, natural justice required the provision of reasons by public administrators. The reason was important protection offered by the law and facilitated a subsequent review of the decision. Article 12 made it even more compelling that a person be told the reasons for the adverse decision.

Dissanayaka V Kaleel[25]

There is no writ but an action brought under section 99 (13) of the constitution. The Supreme Court noted that Article 12 of the constitution required an expansive,rather than a restrictive, interpretation of the principles of natural justice. To the court, fairness lay at the root of equality and equal protection.

Piyadasa V land Reform Commission[26]

The cabinet had approved a scheme to provide land to tenant cultivators. The criteria had been announced by the ministry of plantation industries and the petitioners satisfied with the criteria. While the land was transferred to one group of cultivators, the transfer of the land to the petitioners was halted. The Supreme Court on appeal granted mandamus to compel the transfer of the land. Doing this was discriminatory and amounted to a

[23] [1995] 1 S.L.R. 148
[24] [1997] 1 S.L.R. 156
[25] [1993] 2 S.L.R. 135
[26] [1994] 2 S.L.R. 178

violation of article 12. Although the application was a writ, its expression was a Fundamental Right and stood as a separate ground of judicial review.

Bulankulama V Secretary Ministry of Industrial Development[27]
Executive power is not an exemption when it comes to Fundamental Rights. Article 12 (1) guarantees the equality before law and the equal protection of the law. For the purposes of appeals now under consideration, the "protection of the law" would include the right to notice and to be heard. Administrative actions and judgments contrary to the "public trust" doctrine and or violation of Fundamental Rights and abuse of power is therefore void and voidable. The link between writ jurisdiction and Fundamental Rights are also apparent in this case.

As a result of cross fertilization between Administrative Law and Fundamental Rights a constitutional supremacy has been created. Though Fundamental Rights are written in the constitution, when it is referred as a law resource, it gives the due respect to the constitution. This automatically creates the constitutional supremacy. But on the other hand, Fundamental Rights and International Human Rights are supposed to play an enhanced role in future. At the same time the judges are considering International Human Rights standards to implement the constitution and statutes. This process is likely to continue and a larger body of jurisprudence from the Human Rights Committee under the first optional protocol to the ICCPR is likely to integrate international norms even more closely into Sri Lankan legal system. This is an indication that Sri Lanka is advancing towards a monism system. Consideration of International Law and Municipal Law will help to form one integrated system that could be applied in any state.

In the case of *Centre for Policy Alternatives V Dayananda Dissanayaka, Commissioner of Elections*[28], Supreme court adopted an interpretation of a statute which said it was 'wholly consistent' with Article 25 of the International Covenant on Civil and Political Rights, which recognized that every citizen shall have the right and opportunity to take part in the conduct

[27] [2000] 3 S.L.R. 243,256-257
[28] ***Centre for Policy Alternatives V Dayananda dissanyaka, Commissioner of election***, supreme court minutes of 27 may 2003

Volume 02, Issue 01
March, 2022
ISSN 2783-8870

of public affairs.

Sanjeewa, Attorney at Law V Sena Suraweera[29], the supreme court referred to the right of 'everyone to the enjoyment of the highest attainable standard of physical and mental health' contained in article 12 of the International Covenant on Economic, Social and Cultural Rights.

Generally, legislation grant the administrative power. Legislation confer power on administrative authorities for specific purposes, sometimes lay down the procedure to be followed in respect of exercise of such power[30]. Constitutional legislations referred to in the constitution and the administrative power derived from constitution also shows the supremacy of constitution. But according to the constitution's sovereignty power of citizens of Sri Lanka, the actual supremacy power goes to the people when referred to the constitution, because the constitution is created by the parliament and parliament is created by the will of the people as per the article 4 of the constitution.

Conclusion

The cross fertilization between Administrative Law and its fragment Fundamental Rights has developed and each of them play an independent role in separate judicial grounds with the advantage of cross-fertilization. Administrative judicial ground of ultra vires, natural justice, public trust doctrine, legitimate expectation, proportionality, illegality, fairness, *locus standi* and all mentioned judicial grounds of Administrative Law are developing and will function as a separate judicial review in future.

Cross fertilization of ideas and concepts is noticed in the past between writs and Fundamental Rights when challenging the discretionary power of public authorities. In applications for writs, Sri Lankan courts are beginning to assert that the exercise of discretionary power by the public authority must conform to the requirements of Article 12 and

[29] [1996] S.L.R. 158
[30] C Talagala, 'The Doctrine of Ultra Vires, and Judicial review of Administrative Action', The Bar association Law Journal, 129

also with the other traditional grounds of review. At the same time the courts have asserted that the constitutional right to equality and equal protection includes the right to natural justice, to reasons, a recognition of legitimate expectations, and the rights against arbitrary and unfair treatment. So, finally the concept of cross-fertilization has considerably enriched Sri Lankan Administrative Law.

As a result of implementation of the Fundamental Rights and the rights gained by the cases and judgments of Administrative Law, we can assume that we have achieved constitutional supremacy. The actual supremacy is held by the people because the constitution reflects the will of people. All above facts prove that there is a cross fertilization between Administrative Law and its fragment Fundamental Rights, and it has broadened the ambit of judicial review and created the way for constitutional supremacy.