

ROYAL INSTITUTE OF COLOMBO LAW JOURNAL:
VOLUME V

2024

Royal Institute of Colombo Law Journal 2024
Volume V

ISSN: 2773 – 7160

Published annually by the Editorial Committee of Royal Institute of Colombo on behalf of the Law Students' Association of the Royal Institute of Colombo (LSARIC) and Royal Institute of Colombo (RIC).

Printed at Design Systems (Pvt) Ltd, No. 93, Maligakanda Road Colombo 10, Sri Lanka.

Journal Cover designed by Ms. Chanmini Perera, edited by Ms. Binuri Weerasinghe.

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ACKNOWLEDGEMENTS

It is with immense pride and honour that we present to you the Fifth Volume of the Royal Institute of Colombo Law Journal. This publication represents the culmination of months of rigorous scholarship, critical discussions, and dedicated collaboration. Although this Law Journal is entirely student-run, it is with the hard work and expertise of many that we have elevated each page and strengthened our shared pursuit of legal insight and innovation.

Thereby, the Editorial Committee of the RIC Law Journal: Volume V wishes to extend its heartfelt gratitude to:

The Honourable Attorney General of Sri Lanka, Mr. Parinda Ranasinghe, PC, for graciously accepting our invitation to grace the occasion of the Launch of RIC Law Journal: Volume V as our distinguished Chief Guest;

Justice Shiranee Tilakawardane and Dr. Aparrajitha Ariyadasa for their valuable Article contribution, which will surely intrigue and enrich many.

Judge W. A. T. Rathnayake and Mr. K. D. C. Kumarage too, for their prudent Article contribution to this Journal;

Our esteemed panellists at the insightful Panel Discussion at the Launch of this Journal, for inspiring students, scholars, and the broader legal community with your experience, insights and advice;

To the authors, who brought this Journal to life through their compelling and insightful articles which will go on to enrich and inspire the minds of the legal community. The knowledge that you share today will contribute towards the encouragement of the legal community at RIC and beyond, and towards the development of legal studies as a whole;

The Senior Review Committee, headed by Mr. Seevali Amitirigala, PC, and comprising of a team of experienced Attorneys-at-Law, for their invaluable expertise and unwavering dedication to this publication. Their insightful guidance and direction were instrumental in refining each article, enabling us to uphold and achieve the highest standards for this journal;

Mr. G.T. Bandara, the Chairman of the Royal Institute of Colombo and Dr. Nirodha Bandara, Academic Director, for supporting and encouraging the efforts of the Editorial Committee;

Ms. Madusha Jayasena, the Chief Academic Coordinator for the LLB Programme, and the academic and administrative staff at RIC for their valuable support and assistance in ensuring the smooth publication of this Journal;

Mr. Amila Siriwardane for conducting a training webinar on perfecting OSCOLA citation, and his continued dedication towards furthering the knowledge of the aspiring legal community at RIC;

The Institute for the Development of Commercial Law and Practice (ICLP), and Dr. Asanga Gunawansa, PC, for their generous financial contributions towards this publication;

Mr. Lalitha Rajapakse and Design Systems (Pvt.) Ltd. for their timely assistance in printing the Law Journal;

Mr. Onel Edirisinghe, President, and the Executive Committee of the Law Students' Association of RIC for their unwavering support;

and last, but definitely not least, to the Editorial Committee of the RIC Law Journal: Volume V, for their unwavering support and dedication that brought this Journal to fruition. Your enthusiasm and cooperation has been our biggest strength throughout the demanding, yet rewarding journey of this Publication.

To all individuals, named and unnamed, whose guidance, assistance, and advice have contributed to the publication of this Journal, we are deeply grateful. Your actions of kindness, words of encouragement, and support has resulted in the successful publication of the Fifth Volume of the RIC Law Journal, and will continue to shape the future of legal thought and scholarship.

NOTE FROM THE EDITOR-IN-CHIEF

*“Never underestimate the power of a small group of committed people to change the world.
In fact, it is the only thing that ever has.” — Margaret Mead*

Legal academia has always been a powerful tool for shaping and advancing the law, providing awareness, and fostering access to legal knowledge. It is indispensable to the practice of law and serves as a platform for critical analysis and meaningful discourse. Naturally, for law students, developing skills in legal writing, research, and analysis is essential to becoming successful advocates, not only to interpret and enforce the law, but also to challenge it where it may be unjust.

On behalf of the Editorial Committee of the Law Students’ Association of the Royal Institute of Colombo (LSARIC), it is with great pride and heartfelt gratitude that I present to you Volume V of the Royal Institute of Colombo Law Journal. This edition is more than just a compilation of articles; it represents the collective dedication, curiosity, and collaboration of the vibrant legal community at the Royal Institute of Colombo, and beyond.

Volume V explores an array of legal disciplines, addressing timeless principles and contemporary challenges alike. Notably newer themes include the intersection of law with Artificial Intelligence, the ever-evolving discourse on Equality, as well as the burgeoning landscape of Alternative Dispute Resolution in Sri Lanka. Each contribution, whether it is authored by seasoned professionals, budding graduates, or aspiring law students, offers thoughtful perspectives bound to inspire debate and curiosity.

This Journal is the result of a shared journey; a collaboration fuelled by countless hours of editing and refining. I owe a deep debt of gratitude to our Senior Review Committee, whose guidance and commitment to excellence has made this publication possible. Every word, every space, every full-stop in the Journal in your hands today is a deliberate effort of the Editorial Committee. Incredibly, what once used to be a few words on paper or a Microsoft Word document, is now a printed journal that will be read by a vast populace. It stands as a testament to the diligence, passion and creativity of our Editorial Committee.

Leading this team, once a seemingly daunting task, was made completely enjoyable by the constant support given to me by our Deputy Editor, Ms. Amandha Wanduragala, who I’m indebted to. I’m grateful for the continuous support given to us by the Executive Board of the LSARIC, led by the ever-optimistic Mr. Onel Edirisinghe. Our Chief Academic Coordinator, Ms. Madusha Jayasena, played a pivotal role in steering the organization of this Volume and its launch towards the right direction. I am deeply grateful for all your support.

As you explore these pages, I invite you to engage with the ideas, question the arguments, and let them pique your curiosity. My hope is that this edition not only informs but also inspires you to approach the law with both passion and purpose. We gladly welcome your feedback in order to constantly develop our approach in curating the Journal. Thank you for being a part of this journey. May the RIC Law Journal reach even higher standards in its many years to come!

Ms. Binuri Weerasinghe

Editor-in-Chief

RIC Law Journal: Vol. V

**MESSAGE FROM THE CHAIRMAN OF
ROYAL INSTITUTE OF COLOMBO**

Many congratulations to the Law Students' Association of Royal Institute of Colombo for successfully completing its annual Law Journal 2024. My sincere appreciation goes to the Editorial Committee whose unwavering commitment led to an outcome of this magnitude.

Undoubtedly this annual Law Journal paves the way for the law students to look beyond their legal textbooks and engage in valuable research, actively contributing to the legal profession while enhancing their academic skills. The breadth of topics in Volume V reflects the complexity and evolving nature of today's legal landscape. From traditional topics to contemporary subjects such as Cybersecurity and Digital Rights, Human Rights Law, Intellectual Property, International Humanitarian Law, and Law and Artificial Intelligence, the range of articles offers both depth and relevance, ensuring comprehensive, relatable insights into the legal field.

My heartfelt appreciation goes to the Senior Review Committee who played a pivotal role in reviewing the articles to maintain the highest standards. I would also like to extend my gratitude to the distinguished legal professionals who provided their valuable perspectives in this edition. Furthermore, I commend LSARIC for their unwavering commitment to fostering research skills and scholarly interest among law students, as demonstrated by their dedication to publishing the Law Journal as a key part of their annual agenda.

By supporting projects like the RIC Law Journal, we hope to empower our students to become leaders who actively contribute to the field of law. This journal is not only a publication but a symbol of our students' ability to challenge themselves and engage with the legal profession at a high level, and we look forward to seeing it continue to grow and inspire for years to come.

Mr. G. T. Bandara
Chairman
Royal Institute of Colombo

**MESSAGE FROM THE ACADEMIC DIRECTOR OF
ROYAL INSTITUTE OF COLOMBO**

Heartfelt congratulations to the Editorial Committee of the Law Students' Association of Royal Institute of Colombo on the successful publication of Volume V of the RIC Law Journal!

This annual series of law journals is a testament to the remarkable dedication, hard work, and commitment of the law students at RIC. We are immensely proud of the entire team for their unwavering pursuit of legal scholarship and academic excellence.

This year's Volume brings together a wide array of articles authored by contributors ranging from esteemed lawyers to aspiring law students. This diverse compilation highlights the legal community's commitment to examining numerous legal topics and sharing insights. The collaborative nature of these submissions enriches the intellectual landscape of the profession, making this edition an invaluable resource for anyone with an interest in law.

The cultivation of strong legal research skills is essential for every law student and the efforts by the LSARIC to sustain this interest and making it part of their yearly agenda is a manifestation of the commitment of the Association. The dedication shown by Editorial Committee of LSARIC in organising, editing, and producing this publication each year is commendable and sets a high standard of academic engagement within the student body.

As educators, our goal is to create a platform that encourages our students to push beyond their comfort zones, fostering an environment where legal scholarship and academic initiatives are not just encouraged but celebrated.

Dr. Nirodha Bandara
Academic Director
Royal Institute of Colombo

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SPECIAL CONTRIBUTIONS

A FEMINIST PERSPECTIVE ON THE DEVELOPMENT AND USE OF CYBORG TECHNOLOGY

Justice Shiranee Tilakawardane¹ | Dr. Aparrajitha Ariyadasa

ABSTRACT

The intersection of cyborg technology and feminist perspectives raises complex questions about identity, gender, and societal norms, with significant legal implications. Donna Haraway's "A Cyborg Manifesto" serves as a foundational work in this discourse, challenging traditional notions of gender and identity in the face of technological advancements that blur the lines between human and machine. As cyborg technologies evolve, they present unique legal challenges. The integration of prosthetics and implants into the human body blurs the distinction between personal property and bodily autonomy, complicating the determination of liability in cases of malfunction or unauthorized access. The legal system must adapt to address these ambiguities, ensuring that individuals with cyborg enhancements are granted appropriate rights and protections. Moreover, the development of cyborg technologies must be accompanied by gender-sensitive approaches to prevent the reinforcement of harmful stereotypes and the commodification of women's bodies. Prevailing narratives surrounding cyborgs often reflect and perpetuate existing gender biases, necessitating inclusive practices in research and development to ensure that women's unique experiences and needs are recognized and addressed. Feminist perspectives on cyborgization advocate for a nuanced understanding of gender and identity, embracing multiplicity and rejecting essentialist views. This approach calls for a critical examination of how cyborg technologies can serve as tools for empowerment while also posing ethical and legal challenges that must be navigated to foster a more equitable technological future. As the hybridization of human and machine continues to advance, the international community must reshape the notion of cyborg ethics and its legal implications. This includes establishing clear guidelines for data privacy, liability, and anti-discrimination measures to protect individuals with cyborg enhancements from potential exploitation or marginalization. By addressing these legal concerns through a feminist

¹ Justice Shiranee Tilakawardane is a Former Acting Chief Justice and a Former Justice of the Supreme Court of Sri Lanka. She is presently the Consultant to the Sri Lanka Judges Institute, an International and National Arbitrator and an international accredited Mediator to the Singapore International Mediation Institute. She is also a Judicial Educator in many parts of the world. Literature research completed by Amisha De Alwis.

lens, society can work towards a more inclusive and just technological landscape that embraces the diversity of human experience.

1. INTRODUCTION

At present, technology is used in practically every part of our daily lives, but when intricate processes and technologies are able to integrate with the human body and mind, more significant changes may occur in the near future.

Donna Haraway², in her seminal works on the links between cyborgization and feminism, asked the questions of ‘Where is the boundary between the end of the organic beings and the start of the inorganics? What pollutes the clear divide between animals and humans? Is it still possible to differentiate tangibles from intangibles?’ She brought to light the numerous complexities and contradictions of a contemporary identity such as that presented by the hybrid of machine and human. The earliest evidence of prosthetics is recorded in Ancient Egypt. Researchers discovered a prosthetic big toe made of wood and leather in Cairo, dating from between 950 and 710 BC.³ In the Middle Ages, prostheses of iron were made by armourers for knights who had lost limbs in battles.⁴

The ‘cyborg’ presents itself as the newest example of how the distinction between gender and technology is becoming increasingly blurred in modern society, which begs the question of the social, legal, and ethical implications of the integration of cyborg technology for women.

2. DEFINITIONAL CHALLENGES

Prior to an examination of the feminist perspective of cyborgization and the related challenges faced, an attempt to address the definitional challenges is necessary.

²Donna Haraway, ‘A Cyborg Manifesto: Science Technology, and Socialist-Feminism in the Late Twentieth Century’ (2016) <https://warwick.ac.uk/fac/arts/english/currentstudents/undergraduate/modules/fictionnownarrativemediainthe21stcentury/manifestly_haraway_---_a_cyborg_manifesto_science_technology_and_socialist-feminism_in_the_....pdf> accessed 1 August 2024.

³ University of Manchester, ‘Egyptian Toes Likely to Be the World’s Oldest Prosthetics’ (Egyptian toes likely to be the world’s oldest prosthetics 2 October 2012) <<https://www.manchester.ac.uk/about/news/egyptian-toes-likely-to-be-the-worlds-oldest-prosthetics/>> accessed 12 August 2024.

⁴ Philippe Hernigou, ‘Crutch Art Painting in the Middle Ages as Orthopaedic Heritage (Part II: The Peg Leg, the Bent-Knee Peg and the Beggar)’ (2014) 38 International Orthopaedics 1535 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4071498/>>.

The debate over the cyborgization of the human body is closely linked to the broader conversation surrounding post-humanism and transhumanism. Post-humanism is the study of how to enhance the human body by scientific, technological, or biological advancements without sacrificing the human being's ability to function within their existing biological and symbolic context.⁵ Here, technological intervention is only highlighted to the extent that the concept of the human person may be preserved. However, trans-humanism abandons those uniquely human qualities in favour of post-species forms that could arise as a result of technological advancement in its quest to better and perfect the human condition. Thus, the definition of a cyborg must take into account the goal which the creator of the cyborg was originally striving toward.⁶

Manfred Clynes and Nathan Kline initially proposed the idea of building human-mechanical hybrids in the 1960s, and NASA began more in-depth research into it as a way to support the process of adapting to the challenging circumstances that space travel would inevitably confront.⁷ The terms 'cyborg' and 'organisms' were combined to create the word and, according to Clynes and Kline, the cyborg represents the transhumanist ideal: a human being freed from the strictly mechanical constraints of his physiology and his environment by external intervention.⁸

The primary distinction between a robot and a cyborg is that the former is an automated machine that is non-living, while the latter is an element of organisms. According to certain definitions of the word, people are already cyborgs because of their bodily links to even the most basic technology. This is known as the "biosocial definition." A person with an implanted cardioverter-defibrillator or artificial cardiac pacemaker, for instance, would be regarded as a cyborg because these devices measure the body's voltage potentials, process signals, and can deliver electrical stimuli in order to provide a synthetic feedback mechanism that keeps the user alive.⁹ Cyborg improvements also include implants, particularly cochlear implants, that combine mechanical alteration with any form of feedback response.

⁵C Wolfe, 'What Is Posthumanism?' (2011) accessed 3 August 2024.

⁶ Pablo Martínez Ramil, Haridian Bolaños-Frasquet and Maria Claudia Solarte-Vasquez, 'Cyborgs on the Horizon. Are We Ready? Examining the (A)Legality of Transhumanist Practices within the EU' (2023) <https://www.researchgate.net/publication/369749223_Cyborgs_on_the_horizon_Are_we_ready_Examining_the_alegality_of_transhumanist_practices_within_the_EU> accessed 1 August 2024.

⁷ ME Clynes and NS Kline, 'Cyborgs and Space, in *Astronautics* 1960, N. 5(9), 26-27, 74-76'.

⁸ Ibid

⁹ Richard W Willson, *Parking Management for Smart Growth* (Island Press 2015).

Attempts have been made at classification, such as Kevin Warwick's division of technologies that cause the human body to become cyborgized into the categories of technologies which have been integrated into the human body but not the brain/nervous system, those which have been integrated into the brain/nervous system for therapeutic purposes, those which have been integrated with the brain/nervous system to achieve capabilities not found in the natural state, and those not integrated into the human body at all.¹⁰ Without a doubt, the majority of individuals on the planet wear contact lenses, glasses, artificial teeth, or fake nails. According to FDA estimates, 324,200 persons worldwide have gotten cochlear implants.¹¹ In 2016 the Ear Foundation in the United Kingdom estimated the number of cochlear implant recipients in the world to be about 600,000.¹² An artificial heart¹³, kidney, liver, pancreas, bionic eyes, bionic limbs and many more have become and are in the process of becoming a reality now.

However, based on such descriptions, one may contend that every individual who owns a smartphone qualifies as a cyborg. This is evidenced by Justice John Roberts' statement in the June 2014 US Supreme Court decision in *Riley v California*¹⁴, that "modern cell phones... are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."

A more widely accepted definition covers the use of implants to sustain anatomical, physiological, and informational processes within the human body, as well as to replace lost functions.¹⁵ Thus, devices leading to cyborgization can be divided into technologies external to the body (types of prostheses), implants in the body (pacemakers, cochlear implants) and devices that modify brain activity.¹⁶

¹⁰ Kevin Warwick, 'Homo Technologicus: Threat or Opportunity?' (2016) 1 *Philosophies* 199.

¹¹ Technavio, 'The Number of Cochlear Implants Shipped Worldwide Is Expected to Hit 96,000 by 2020 - Technavio' (Technavio February 2016) <<https://blog.technavio.org/blog/number-cochlear-implants-shipped-worldwide-expected-hit-96000-2020>> accessed 12 August 2024.

¹² The Health Foundation, 'Telemedicine for People with Cochlear Implants in the UK: Empowering Patients to Manage Their Own Hearing Healthcare' (2018).

¹³ T Treasure, MK Davies and A Hollman, 'Artificial Heart' (2006) 92 *Heart* 584 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1860944/>> accessed 13 August 2024.

¹⁴ Justia, 'Riley v. California, 573 U.S. 373 (2014)' (Justia Law 2014) <<https://supreme.justia.com/cases/federal/us/573/373/>> accessed 1 August 2024.

¹⁵ B Surdykowska and S Adamczyk, 'Cyborgs in the Workplace? Some Preliminary Considerations' (2022) <https://ejcls.adapt.it/index.php/ejcls_adapt/article/view/1165> accessed 24 July 2024.

¹⁶ Ibid

Additionally, Donna Haraway in 'A Cyborg Manifesto' defines cyborg technologies as technology which encompasses a range of technological enhancements and integrations with the human body, including prosthetics, implants, and wearable tech.¹⁷

We are on the verge of a post-human revolution now. Maybe it won't be as drastic as proponents of practical immortality and transhumanism think. However, we are talking about a significant extension of life, the implantation of electronic and other components into the human body, and the replacement of a growing proportion of the body's organs and cells with non-biological materials. In the 1950s and 1960s the world (first, the developed countries) witnessed the major technological revolution which continues to this day. One of the developments that will be crucial for the forthcoming stage of the cybernetic revolution is the growth of cyborgization. First, it is a general trend of improving the quality of life and longevity. Second, there is a tendency towards the creation of different self-regulating technologies and systems, which we describe as those that can function without direct human involvement. The convergence of medical, additive, bio- and nanotechnologies, robotics, ICT, and cognitive technologies into a complex self-regulating manufacturing system will be one of the main drivers of the last phase of the Cybernetic Revolution. This complex is referred to as MANBRIC-technologies.¹⁸ This period will be characterised by the breakthrough in medical technologies which will be capable of combining a number of other technologies into a single system of new and innovative technologies. There are reasons why medicine will become the core of the Cybernetic Revolution. Another important self-regulating technology is the brain–computer interface (BCI).

Despite discrepancies in definitions, such technologies all aim to challenge the boundaries between humans and machines, potentially redefining traditional concepts of identity and capability.

¹⁷ Donna Haraway, 'A Cyborg Manifesto: Science Technology, and Socialist-Feminism in the Late Twentieth Century' (2016) <https://warwick.ac.uk/fac/arts/english/currentstudents/undergraduate/modules/fictionnownarrativemediaandtheoryinthe21stcentury/manifestly_haraway_---_a_cyborg_manifesto_science_technology_and_socialist-feminism_in_the_....pdf> accessed 1 August 2024.

¹⁸ Leonid Grinin, Anton Grinin and Andrey Korotayev, 'The MANBRIC-Technologies in the Forthcoming Technological Revolution' 243 <https://link.springer.com/chapter/10.1007/978-3-319-49604-7_13> accessed 10 August 2024..

3. FEMINIST PERSPECTIVES ON THE INTEGRATION OF CYBORG TECHNOLOGIES

Considering the rapid development of cyborg technologies, in order to ensure gender-sensitivity and the inclusion of women in such cyberspaces, it is of utmost importance that a comprehensive examination of feminist perspectives on the matter is undertaken.

Arguably, one of the most influential texts in this regard is 'A Cyborg Manifesto' authored by Donna Haraway.¹⁹ Her novel perspective on cyborg challenges traditional notions of identity, gender and social relations. She uses the cyborg as a metaphor to argue that the boundaries between human and machine, as well as the distinctions between gender and technology, are no longer discernible in modern society.

Haraway describes the cyborg as a hybrid of machine and organism, symbolising the complexities and contradictions of contemporary identity. This hybrid nature allows for a rejection of essentialist views of gender, supporting Haraway's argument that identities are constructed and fragmented rather than fixed. The cyborg embodies the idea that individuals can embrace multiple identities, which aligns with feminist critiques of the traditionally singular notion of "woman". She presents this idea in her critique of traditional feminism, reflected in statements describing how "women more than men somehow sustain daily life, and so have a privileged epistemological position potentially", thus disputing the traditional notion that because women are more involved in activities necessary to maintain day-to-day life, such as caregiving and household management, they have a unique and superior understanding of knowledge and reality. This criticism implies that the connection between women's roles in daily life and their epistemological authority is not as straightforward or inherently superior as some traditional feminists suggest. Traditional feminist views often make sweeping generalisations about men and women, treating them as fundamentally different categories.

In contrast, Haraway's "cyborg theory of wholes and parts" avoids such totalizing explanations. She argues that feminists should move beyond naturalism and essentialism, critiquing the feminist

¹⁹ Donna Haraway, 'A Cyborg Manifesto: Science Technology, and Socialist-Feminism in the Late Twentieth Century' (2016) <https://warwick.ac.uk/fac/arts/english/currentstudents/undergraduate/modules/fictionnownarrativemediaandtheoryinthe21stcentury/manifestly_haraway_----_a_cyborg_manifesto_science_technology_and_socialist-feminism_in_the_....pdf> accessed 1 August 2024.

focus on "identity politics," which she believes tends to victimise those who are excluded. Rather, she embraces such contradictions and complexity, and advocates for a feminist politics that is adaptable and acknowledges the multifaceted nature of identity. This approach encourages a more nuanced understanding of feminist politics that does not seek to unify all women under a single narrative, which Haraway further bolsters by using the concept of the cyborg as a political symbol for feminists.

The cyborg challenges the notion of a unified female identity which has long been perpetuated by traditional feminists, emphasising that gender, race, and class are not inherent but shaped by social and historical contexts. Haraway posits that identities are partial and strategic, reflecting the complexities of lived experiences and the intersections of various forms of oppression. She argues that the cyborg can serve as a political symbol for both feminist and socialist movements, representing a form of resistance against oppressive structures. This challenges the traditional notion of the self as an isolated, autonomous individual and emphasises the importance of interconnectedness and solidarity in shaping identity, and she thus uses the cyborg as a tool of empowerment.

However, a number of alternative views on the intersection of cyborgization and feminism have been presented as well, specifically perspectives which are critical of the current track of cyborg development due to patriarchal and phallocentric domination.

In an article published by the European Journal of Futures Research, titled "Is the post-human a post-woman? Cyborgs, robots, artificial intelligence and the futures of gender: a case study",²⁰ the author challenges the notion of "human" as a universal concept, questioning whether the posthuman condition is a "post-woman" or a "post-man." She argues that the future which has been reflected upon, particularly in the West, is one which is technology-centric and quotes Ziauddin Sardar in that "Technological trends dominate the business of forecasting. The future is little more than the transformation of society by new Western technologies". However, a number of feminist writers have illustrated that only specifically gendered forms of technology are recognised as technology, as noted by Judy Wajcman in that "The very definition of technology, in other words, has a male bias. This emphasis on technologies dominated by men conspires in turn to diminish the

²⁰ Francesca Ferrando, 'Is the Post-Human a Post-Woman? Cyborgs, Robots, Artificial Intelligence and the Futures of Gender: A Case Study' (2014) 2 European Journal of Futures Research <<https://ejournalfuturesresearch.springeropen.com/articles/10.1007/s40309-014-0043-8>> accessed 2 August 2024.

significance of women's technologies, such as horticulture, cooking and childcare".²¹ Another related aspect is the predominance of men in technological fields, though the general definition of "men" is also not all-inclusive. As noted by Eileen B. Leonard, who was quoting postcolonial and critical race theorists, "Since minorities are systematically steered away from technology, it has become a major instrument of elite male domination," reflecting the exclusion of women as well as most minority groups from the field.²² Thus, the necessity of asking the 'woman question',²³ as explained by Katherine Bartlett, in the context of cyborg development is emphasised upon.

Yet another influential perspective is seen in the works of Rosi Braidotti, whose works detail the complexities and diversity of women's experiences in the context of technological advancement. Braidotti asserts that no singular or monolithic definition can explain the experiences of being a woman. Rather, there exists a spectrum of experiences and identities among women, which must be recognised in order to understand how technology impacts different women in different ways.²⁴ While feminism is central to Braidotti's thinking, she integrates it with other critical philosophies, believing that issues related to women are intertwined with broader crises of modernity, such as technological change, ethnic diversity, and environmental concerns.²⁵

In the context of cyborgization, Braidotti's perspective promotes a transnational and transdisciplinary approach that uses "mimetic repetition" to challenge and reshape established philosophical ideas.²⁶ Her main goal is to develop a feminist post-structuralism grounded in nomadic subjectivity, focusing on redefining "the human" in relation to global, technological, and multicultural influences. Braidotti underscores the significance of recognizing sexual difference as a positive element of asymmetry between men and women, arguing that women have unique contributions to make in the realm of cyborgization. She believes this political commitment will persist, even if it diverges from certain post-structuralist viewpoints.

Certain feminist perspectives also challenge the notion that technology is devoid of gender. For instance, Anne Balsamo's book, "Technologies of the Gendered Body: Reading Cyborg Women,"

²¹ Judy Wajcman, *Feminism Confronts Technology* (Penn State Press 1991).

²² EB Leonard, *Women, Technology and the Myth of Progress* (Upper Saddle River 2003).

²³ Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829.

²⁴ Kathleen O'Grady, 'A Conversation with Rosi Braidotti' (Uiowa.edu2024)

<<http://bailiwick.lib.uiowa.edu/wstudies/Braidotti/Braidotti2.html>> accessed 3 August 2024.

²⁵ Ibid

²⁶ Ibid

offers a critical examination of how the human body is gendered within the reality of new technologies.²⁷

In terms of cyborg technology, Balsamo employs a feminist cultural studies approach to examine how the body is represented and shaped by scientific and technological advancements in postmodern society. She contends that, contrary to the notion that technology makes the physical body obsolete, the body remains deeply gendered, with intersections of race, physical ability, and socioeconomic status influencing access to and representation in new biotechnologies.

Balsamo explores various cultural texts and practices to support her arguments. For instance, she analyses female bodybuilding as a challenge to traditional femininity, where muscular physiques defy conventional gender standards. She also investigates the implications of cosmetic surgery and virtual reality technologies, emphasising how these practices are influenced by gender ideologies and contribute to the construction of idealised feminine bodies.

Balsamo further addresses reproductive medicine and public health policies, highlighting how these areas regulate women's bodies and sexuality in gendered and racialized ways. Additionally, she engages with cyberpunk fiction and media, providing close readings of texts like Margaret Atwood's "The Handmaid's Tale" and analysing cyberpunk magazines to uncover how the cyborg body is portrayed and understood within this genre.

4. THE LEGAL IMPLICATIONS OF CYBORGIZATION

The legal implications of cyborgization are becoming increasingly more significant as technology continues to integrate with human biology, raising complex questions about autonomy and rights. One main concern is that, as cyborg technologies evolve, the lines between humans and machines begin to blur, thus necessitating new legal definitions and protections. For instance, in the United States, the legal status of individuals with advanced prosthetics or implants has been addressed through various legislative measures. The Food and Drug Administration (FDA) regulates these devices as medical products, which requires rigorous safety and efficacy testing before they can be marketed²⁸. In South Korea, legislation mirrors that of the U.S., implementing a classification system for medical devices and overseeing their manufacturing under the Disabled Persons Welfare

²⁷ Anne Balsamo, 'Technologies of the Gendered Body' (Dukeupress.edu2019)

<<https://www.dukeupress.edu/technologies-of-the-gendered-body>> accessed 2 August 2024.

²⁸ V Morozov, V Chukreev and D Rizayeva, 'Legal Regulation of Technologically Improved People in the United States and China' (2022) 9 BRICS Law Journal 4.

Act. This framework aims to ensure that individuals with prosthetics receive adequate protection and support.²⁹

However, the law faced several pressing questions in terms of cyborgization which lawmakers must address as technology continues to evolve at a rapid pace. One such question is in terms of discrimination; simply, as enhancements become more prevalent, there is a risk that those who opt out may face discrimination in employment, education, and social settings. Legal frameworks must be established to protect individuals from such biases, ensuring that the choice to remain unenhanced does not lead to social or economic disadvantages.³⁰ This raises questions about the adequacy of existing anti-discrimination laws in addressing the unique challenges posed by cyborgization.

Cyborgization also raises the question of what constitutes bodily autonomy in the context of cyborg technology. The case of Neil Harbisson, who is recognized as the world's first legally acknowledged cyborg, highlights the complex legal implications surrounding bodily autonomy when technology is integrated into the human body.³¹ Harbisson has an antenna implanted in his skull that allows him to perceive colors through sound vibrations, fundamentally altering his sensory experience. This integration raises critical legal questions: Is an attack on such a device considered an infringement of personal property rights, or does it violate an individual's bodily autonomy? The British government has officially sanctioned Harbisson's identity as a cyborg by allowing him to include his antenna in his passport photo, effectively recognizing it as part of his body. This legal acknowledgment complicates the distinction between property and personal autonomy, as it sets a precedent for considering implanted devices as extensions of the individual. Consequently, this distinction is crucial for determining liability and legal protections in cases of damage or unauthorised access to cyborg devices.

The emergence of a new class of individuals with enhanced abilities raises fundamental questions about whether they should be treated as enhanced humans or a distinct category of beings altogether, which could have far-reaching implications for liability and accountability. The advent

²⁹ Ibid

³⁰ Rebecca Crotoft, 'UR Scholarship Repository UR Scholarship Repository "Cyborg Justice" and the Risk of Technological-Legal Lock-in "Cyborg Justice" and the Risk of Technological-Legal Lock-In' (2019) <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2610&context=law-faculty-publications>> accessed 14 August 2024.

³¹ Metal Magazine, 'Neil Harbisson | English' (Metal Magazine) <<https://metalmagazine.eu/en/post/neil-harbisson-the-reality-of-a-cyborg>> accessed 14 August 2024.

of cyborg technologies, particularly those involving significant enhancements, has prompted China to advance its legal framework to address the complex questions surrounding the legal status and rights of cyborgs. As individuals with advanced implants and prosthetics may possess capabilities that exceed those of unenhanced humans, China is focusing on regulating access to neuroprosthetic devices and establishing liability for malfunctions or misuse of these technologies.³² China's proactive approach to developing legal guidelines in this area underscores the pressing need for the legal system to adapt and define the rights and responsibilities of cyborgs. This includes considerations such as access to enhancements, data privacy, and the potential for discrimination against those who choose not to undergo augmentation.

Another issue is seen in how legal liability and restitution in the context of cyborgization face several significant barriers that complicate the recovery process for individuals affected by technological failures or misuse. One major challenge is the ambiguity surrounding the classification of cyborg technologies, which can blur the lines between medical devices and consumer products. This lack of clarity complicates the determination of liability when a malfunction occurs, as existing laws may not adequately address the unique nature of cyborg devices.³³ Additionally, the integration of advanced technologies into the human body raises questions about the extent of personal responsibility versus manufacturer liability. For instance, if a neuroprosthetic device malfunctions, is the manufacturer liable for damages, or does the responsibility lie with the user for how they utilise the technology? Furthermore, the legal frameworks governing data privacy and security are still evolving, which poses additional hurdles for individuals seeking restitution for breaches of privacy that may occur through their cyborg devices.

Overall, as cyborg technologies become more prevalent, the need for clear legal guidelines and protections is paramount. Countries around the world are beginning to address these challenges, but significant work remains to ensure that the rights of cyborg individuals are adequately protected in an increasingly hybrid world. The ongoing evolution of these legal frameworks will be crucial in determining how society navigates the complexities of cyborgization and its legal implications for human identity and rights.

³² V Morozov, V Chukreev and D Rizayeva, 'Legal Regulation of Technologically Improved People in the United States and China' (2022) 9 BRICS Law Journal 4.

³³ Susana Raquel, 'Robot Machines and Civil Liability' 157
<<https://www.cambridge.org/core/books/abs/algorithms-and-law/robot-machines-and-civil-liability/012874F59C7AD1A2ED48C6DD1625B66E>> accessed 20 June 2023.

5. CHALLENGES FACED BY WOMEN IN THE CONTEXT OF CYBORGIZATION

Cyborg technology, which merges human capabilities with mechanical enhancements, presents several disadvantages for women, particularly in how it can create and perpetuate harmful stereotypes and raises significant ethical concerns. This intersection of technology and societal norms can lead to the formation of idealised body images, body dysmorphia, and the reinforcement of traditional beauty standards, all of which disproportionately affect women. Such technologies also raise concerns about the commodification of mental and physical health.

Cyborg technologies can potentially contribute to the creation of an idealised body image that is unattainable for most women. The increasing visibility of enhanced bodies in media and advertising promotes a narrow definition of beauty that emphasises perfection and conformity to societal standards. This idealisation can lead women to develop body dysmorphia, a condition characterised by an obsessive focus on perceived flaws in one's appearance.³⁴ Research indicates that the pursuit of perfection through technology can exacerbate mental health issues as women struggle to reconcile their self-image with these unrealistic standards.³⁵ The pressure to adopt cyborg enhancements to keep up with peers can further entrench these negative feelings, making it difficult for women to appreciate their unique attributes and fostering a toxic environment where self-worth is tied to technological enhancements.

Cyborg technologies can contribute to the objectification of women, reducing them to their physical enhancements rather than recognizing their full humanity. This objectification is often reflected in media portrayals of cyborgs, where women are depicted as hyper-feminine or sexualized figures.³⁶ The focus on enhancing physical attributes through technology can lead to a societal narrative that values women primarily for their looks, reinforcing traditional gender roles and diminishing their agency.

Additionally, if care is not taken to include a spectrum of diverse experiences, cyborg technologies can risk reinforcing traditional beauty standards, particularly the image of the idealised white

³⁴ Khadijah Ateq, Noara Alhusseini and Mohammed Alhaji, 'The Association between Use of Social Media and the Development of Body Dysmorphic Disorder and Attitudes toward Cosmetic Surgeries: A National Survey' <<https://www.frontiersin.org/journals/public-health/articles/10.3389/fpubh.2024.1324092/full>> accessed 4 August 2024.

³⁵ Dharshana Sedera and Sachithra Lokuge, 'Flaws in Flawlessness: Perfectionism as a New Technology Driven Mental Disorder' <<http://arxiv.org/pdf/2010.12032>> accessed 4 August 2024.

³⁶ Nilima Chaudhary, 'Rewriting Femborgian Narratives: Transgression and Subversion of the Female Cyborg in Her and Ex Machina' (2024) 16 Rupkatha Journal on Interdisciplinary Studies in Humanities.

woman. This narrow representation can exclude women of diverse backgrounds, perpetuating a singular narrative of beauty that excludes and devalues other identities.³⁷ The emphasis on enhancing bodies to conform to these standards can lead to a homogenization of beauty ideals, where women feel pressured to adopt specific enhancements that align with societal expectations.³⁸ This not only affects individual self-esteem but also perpetuates systemic inequalities by privileging certain body types and appearances over others.

Additionally, privacy and security concerns become more prominent as cyborg technology continues to develop. The collection of personal health data through apps and wearables can expose vulnerabilities, especially in a digital environment prone to data breaches.³⁹ Women may be particularly affected by these risks, as sensitive information related to reproductive health, mental health, and personal habits could be compromised. Consent and autonomy are also crucial issues in the development and use of cyborg technologies. Women often face complex consent processes that may not fully disclose the implications of using these technologies, such as those seen in apps which track and store information about women's reproductive health.⁴⁰ There is a risk that women might feel pressured to adopt certain technologies without fully understanding the consequences, especially in areas like reproductive health or mental health interventions which can have significant long-term implications.

6. THE IMPORTANCE OF GENDER-SENSITIVITY IN CYBORGIZATION RESEARCH AND DEVELOPMENT

AI and cyborg technology are frequently perceived as neutral and devoid of gender differences, but this perception is misleading. Such systems are created by humans who inherently possess biases, which are then reflected and amplified in the algorithms and data used for training. For example, a study conducted at the University of Reading revealed that the majority of participants viewed cyborgs as neutral or male, with no respondents associating robots with femininity.⁴¹ As a result,

³⁷ Jessica DeFino, 'How White Supremacy and Capitalism Influence Beauty Standards' (Teen Vogue 19 October 2020) <<https://www.teenvogue.com/story/standard-issues-white-supremacy-capitalism-influence-beauty>> accessed 1 August 2024.

³⁸ Ibid

³⁹ Carmel Williams and Sara Davis, 'Enter the Cyborgs: Health and Human Rights in the Digital Age' <<https://www.hhrjournal.org/wp-content/uploads/sites/2469/2020/12/editorial.pdf>> accessed 3 August 2024.

⁴⁰ Ala' Al-Mahameed, Mario Arias-Olivia and Jorge Pelegrin-Borondo, 'Cyborg as a Surgeon: A Theoretical Framework for Cyborg Acceptance in Healthcare Service' <<https://dialnet.unirioja.es/servlet/articulo?codigo=7867227>> accessed 1 August 2024.

⁴¹ Francesca Ferrando, 'Is the Post-Human a Post-Woman? Cyborgs, Robots, Artificial Intelligence and the Futures of Gender: A Case Study' (2014) 2 European Journal of Futures Research

such systems reproduce existing societal inequalities and stereotypes related to gender, ethnicity, and other social categories, perpetuating discriminatory outcomes rather than serving as an objective force in society.

Research indicates that societal perceptions of cyborgs often mirror traditional gender roles.⁴² Male cyborg technology is typically depicted as striving to transcend their physical limitations, embodying ideals of strength and independence. In contrast, female cyborgs are often shown focusing on relational aspects, emphasising emotional connections and collaborative interactions with technology. This distinction highlights that narratives surrounding cyborgs are gendered, reinforcing conventional stereotypes.

Additionally, the data used to train AI models and assist the process of cyborgization often contains biases that lead to unequal and distorted results.⁴³ For example, if the training data reflects 'traditional' gender roles, such systems may reinforce these stereotypes by associating certain professions or skills with specific genders. Consequently, both cyborg technology and AI systems can perpetuate traditional stereotypes and societal inequalities, highlighting the need for critical examination and inclusive practices in their development and deployment.

The call for greater gender sensitivity in Human-Robot Interaction (HRI) research is increasingly recognized as crucial for developing inclusive and effective technologies. Studies, such as those by Yan Wang and James Young, underscore the underrepresentation of women in HRI research, which can lead to oversimplified conclusions about gendered interactions with technology.⁴⁴ By adopting gender-sensitive methodology in such research mechanisms, research done on cyborgization can not only address issues of disproportionate representation but can also enhance the overall user experience, and lead to more rigorous and reliable findings.

<<https://eujournalfuturesresearch.springeropen.com/articles/10.1007/s40309-014-0043-8>> accessed 2 August 2024.

⁴² Nilima Chaudhary, 'Rewriting Femborgian Narratives: Transgression and Subversion of the Female Cyborg in Her and Ex Machina' (2024) 16 Rupkatha Journal on Interdisciplinary Studies in Humanities.

⁴³ 'Gender and AI: Addressing Bias in Artificial Intelligence' (International Women's Day)

<<https://www.internationalwomensday.com/Missions/14458/Gender-and-AI-Addressing-bias-in-artificial-intelligence>> accessed 1 August 2024.

⁴⁴ Anna Pillinger, 'GENDER EQUALITY in ENGINEERING through COMMUNICATION and COMMITMENT (GEECCO) Literature Review: Gender and Robotics' (2019)

<https://www.tuwien.at/fileadmin/Assets/dienstleister/abteilung_genderkompetenz/gender_in_der_Forschung/GEECCO_Results/Additional_resources_and_literature_reviews/GEECCO_WP6_Literature_Review_Gender_and_Robotics.pdf> accessed 29 July 2024.

7. CONCLUDING REMARKS

In conclusion, feminist perspectives on technology and cyborgs highlight the critical need for a gender-sensitive approach in developing such technologies. While cyborgization has the potential to reconstruct the female identity and can be a tool of empowerment, traditional gender norms are often reinforced by current technologies, which can perpetuate stereotypes and overlook women's unique needs. Examining the intersection of technology and gender is vital to ensure that cyborg technology can benefit all segments of society. Adopting a gender-sensitive approach will help address these disparities and ensure that technological advancements are inclusive and equitable, leading to cyborg technologies that effectively serve the diverse needs of all users. A nuanced understanding of gender dynamics is essential.

THE PINNACLE OF INTERNATIONAL CRIMINAL LAW: THE INTERNATIONAL CRIMINAL COURT

Judge W. A. T. Rathnayake | K. D. C. Kumarage

1. THE INTERNATIONAL CRIMINAL COURT

In 1998, a group of countries signed a Treaty with a goal of ending impunity for the most serious of crimes by establishing a permanent International Criminal Tribunal, widely known as the International Criminal Court (hereinafter referred to as the ICC).¹ This development marked a pivotal milestone in the development of the regime of International Criminal Law and, after two decades, the ICC stands as both a testament to this ambition and reflection of the intricate, time-intensive nature of achieving global justice, evoking both support and critic.

The concept of an International Criminal Court was theorised many centuries ago and the existing International Criminal Law emerged in the holding accountable those who are guilty of violation of rules governing military conflicts.² However, it was not until the end of World War 2 that the modern concept of International Criminal Court began to take shape. Nazi Germany's aggressive military campaign and the egregious atrocities it perpetrated compelled the Allied Powers to prioritise the pursuit of accountability as a central post-war aim. This resolve manifested in the form of organised justice, designed to ensure that those responsible for these crimes, whether as orchestrators, perpetrators or accomplices, would face punishment under the rule of law.³

In pursuit of this goal, following the war, the establishment of the International Military Tribunal sitting at Nurember and a similar Tribunal to the Far East, sitting at Tokyo was seen. Prosecutors at Nuremberg who were from the major Allied Powers were responsible for investigating and prosecuting major "War Criminals", responsible for the commission of "Crimes against Peace", "War Crimes", and "Crimes against Humanity".⁴

¹ International Criminal Court (ICC).

² *A Permanent International Criminal Court: A Proposal that Overcame Past Objections* (1995), Vol.23(2), Denver Journal of International Law and Policy, 421.

³ United State Department of State, *Office of the Nuremberg Trials and the Tokyo War Crime Trial 1945-1948, Milestones; 1945-1952*.

⁴ United Nations Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Nuremberg Charter) signed 8 August 1945, Treaty Series, (1951) Vol. 82 280; UN Charter of the International Military Tribunals, Treaty Series, (1951) Vol. 82 286, 288, art 6.

The Tribunal after a lengthy Trial issued its final Judgement in 146, acquitting 3 dependents and sentencing 19 others to Imprisonment and Death.⁵

The Tokyo Tribunal lasting nearly two years found all accused were guilty and sentenced them for imprisonment or death. They were part of a larger post war initiative to advance International Criminal Law. In 1948, the Convention on the Prevention and Punishment of Crimes of Genocide⁶ (commonly known as the Genocide Convention) was adopted marking the first international recognition that genocide, whether committed in time of peace or in time of war, is a crime under international law.⁷

In 1949, the Geneva Convention comprising of 4 detailed Treaties were adopted.⁸ These 4 Treaties called on States to criminalise grave breaches of International Humanitarian Law. It also invited the International Law Commission (hereafter referred to as ILC), a committee of legal experts working to develop and codify International Law, and to examine the possibility of establishing a permanent International Criminal Court,⁹ with a lull for a while in 1990, the ILC's past Nuremberg project was revised following a special session of the United Nations General Assembly focused on International Drug Trafficking Prosecution and a well-received ILC report that went beyond these limited issues. The ILC resumed the task of drafting a comprehensive Statute for an International Criminal Court.¹⁰

During the same time, the International Community took action to punish the perpetrators of atrocities in the former Yugoslavia (ICTY) and Rwanda (ICTR).

In the early nineties, 2 ad hoc Tribunals were created as subsidiary organs of the U.N. Security Council namely, The International Criminal Tribunal for the Former Yugoslavia (hereinafter

⁵ International Military Tribunal (Nuremberg), 'Judgement and Sentence' (1 October 1946), (1947) Vol. 41(1), *American Journal of International Law*, 172/333.

⁶ UN Office of the High Commissioner for Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

⁷ *ibid*, art. 1.

⁸ International Committee of the Red Cross (ICRC), *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949; *Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, Geneva, 12 August 1949; *Convention (III) Relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949.

⁹ UN General Assembly, *Resolution 260(III) on the Prevention and Punishment of the Crime of Genocide* (1948) 177.

¹⁰ Cherif Bassiouni, 'Historical Survey 1919-1998' in M Cherif Bassiouni (ed), *International and Comparative Criminal Law: The Statute of the International Criminal Court: Documentary History* (1991), Vol.2, 17.

referred to as ICTY),¹¹ formed in 1993, and the International Criminal Tribunal for Rwanda (ICTR), formed in 1994.¹² Both these Tribunals operated for more than 20 years and more than 150 individuals were convicted for international crimes committed in the 2 regions.¹³ Despite the time and money spent, the ability of these 2 Tribunals to achieve true peace and reconciliation and difficulties in arresting those indicted by the ICTY,¹⁴ both Tribunals have contributed significantly to the progress of International Criminal Law. Louis Arbour, former Justice of the Supreme Court of Canada, and Chief Prosecutor of the Tribunals described the Tribunal as “a procedural and practical forum for the enforcement of the laws of war”.¹⁵ Some commentators credited the Tribunals’ jurisprudence as “Fundamental in shaping the statute and Jurisprudence of the ICC and enhancing the quality of reading and legitimacy of its Judgements”,¹⁶ in its early years of existence.¹⁷

It took 2 years of negotiations to establish the ICTY and ICTR, which prompted many observers to point to the necessity of a permanent court that would avoid the lengthy process necessary to establish ad hoc Tribunals.¹⁸ In 1994, the ILC submitted a draft statute for International Court to the UN General Assembly and the Preparatory Commission for the establishment and the ICC was founded in 1966.¹⁹

Although jurisdictional issues were for the most complex and most sensitive *Pro Prio Motu* Prosecutor model (a prosecutor who has the power to initiate prosecutions) received considerable support,²⁰ as the conference dragged on without agreement, it was evident the Bureau of the

¹¹ International Criminal Tribunal for the Former Yugoslavia (ICTY), *Resolution 827* (1993).

¹² International Criminal Tribunal for Rwanda (ICTR), *Resolution 955* (1994).

¹³ International Criminal Tribunal for Rwanda (ICTR), *ICTR in Brief: About the ICTR and ICTY, Chief Key Figures of the Cases*.

¹⁴ Elena Cobban, ‘International Courts’ (2006), (153), *Foreign Policy* 22-28.

¹⁵ Louis Arbour, ‘The Prosecution of International Crimes: Prospects and Pitfalls’ (1999), 1 *Washington University Journal of Law and Policy*, 18.

¹⁶ Michael J Matheson and David Scheffer, ‘The Creation of the Tribunals’ (2006) 110(2) *American Journal of International Law*, 190.

¹⁷ Christopher Greenwood, ‘What the ICC Can Learn from the Jurisprudence of Other Tribunals’ (2017), 58, *Harvard International Law Journal*, 71.

¹⁸ Melissa K. Marler, ‘International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute’ (1999), 49, *Duke Law Journal*, 829.

¹⁹ UN International Law Commission, *Draft Statute for the International Criminal Court* (1994, revised 2004).

²⁰ Philippe Kirsch and John T Holmes, ‘The Rome Conference for the International Criminal Court: The Negotiating Process’ (1999) 93(1) *American Journal of International Law* 8.

Committee of the whole decided to prepare the final package and their package was adopted by a majority of its members.²¹

The United States of America (USA) voted against the Rome Statute along with China, Iraq, Israel, Libya, Qatar, and Yemen. But they signed it in December 2000 the last day it was opened for signatures. The US again retracted in May 2002, as John Bolton, under Secretary of State, sent a letter to the UN stating that the US did not intend to be a party to the Rome Statute, thus renouncing any obligation under the Treaty.²² In 2002, Canada ratified the Rome Statute after the enactment of the Crimes against Humanity, and War Crimes Act,²³ to carry out its obligations under the Rome Statute. Thus, it is clear that the signatory process of the Statute has been contentious since its inception.

2. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court came into force on 1st July 2002 with the entry of the Rome Statute. The Rome Statute is accompanied by the primary legal texts of the ICC, the regulators of the court, Rules of Procedure and Evidence and the Elements of Crime.²⁴

The courts have jurisdiction over persons solely responsible committing in the Rome Statute and others who may be indirectly responsible, such as Military Commanders, political leaders, or other superiors.²⁵ The court's jurisdiction is limited to offences committed after the entry in to force of Rome Statute.²⁶

An ICC investigation may be initiated based on referral from either the U.N. Security Council pursuant to chapter 7 of UN Charter or a state party to the Rome Statute.²⁷ The Office of the Prosecutor (OTP) may also initiate investigations independently, or *proprio motu* subject to courts subject to court's authorization.²⁸ For state or prosecutor-initiated investigations, Article 12

²¹ The Bureau of the Committee of the Whole was chaired by Philippe Kirsch.

²² John Bolton, then U.S. Under Secretary of State for Arms Control and International Security, letter to UN Secretary-General Kofi Annan, News Release (2002).

²³ Crimes Against Humanity and War Crimes Act, SC 2000, c 24.

²⁴ International Criminal Court, *Regulations of the Court* (2019); International Criminal Court, *Elements of Crimes* (2013).

²⁵ International Criminal Court, *Rome Statute of the International Criminal Court*, art. 25, 27-28.

²⁶ *Ibid* art. 11.

²⁷ An ICC investigation may be initiated when the Security Council determines that there has been a breach of international peace and security. See UN Charter of the United Nations and Statute of the International Court of Justice (1994) art. 39, 9.

²⁸ Rome Statute of the ICC, art. 15.

restricted ICC's Jurisdiction to crimes committed by a national of a state party, except where relevant non-state party accepts the Jurisdiction of the Courts.

The ICC is a court of last resort and based on the principle of Complementarity, it may not pursue cases which are or were subjects of credible investigations or prosecuting by a state with jurisdiction over the offence. Under Article 17 of the Rome Statute cases that are or have been a subject of a national investigation or/and prosecutions by the ICC are inadmissible, unless the State in question is unwilling or, unable genuinely to carry out the investigations or prosecutions.²⁹ This *deference* to the National Courts extends to cases where States exercise extra Territorial Jurisdiction for the crimes committed within ICC's Jurisdiction. For example, as allowed in Canada's Crimes against Humanity and War Crimes Act.³⁰

3. CRIMES UNDER THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION

The ICC has jurisdiction over "most serious crimes of concern to the International Community", namely for core crimes; The crime of Genocide, Crimes against Humanity, War Crimes and Crimes of Aggression.³¹ Crimes of Aggression was included in the list as a Crime under the Court's Jurisdiction, as a last-minute compromise during the Rome Conference. But the Exercise of Jurisdiction was deferred until amendments to the Rome Statute were made to define the crime and set conditions on the Court's Jurisdiction. In June 2010, ICC's Assembly of State Parties (ASP) adopted these amendments.³²

Amendments came into force on 17-07-2018 following the ratification by more than 30 State Parties to the Rome Statute.³³ Canada has not ratified the amendments limiting ICC's Jurisdiction over Crimes of Aggression committed on Canadian Territory or Canadian Nationals.³⁴ Rome Statute sets out each crime under its Jurisdiction and establishes the conditions for the Individual

²⁹ *ibid*, art. 17(1)(a).

³⁰ Crimes Against Humanity and War Crimes Act, SC 2000, c 24.

³¹ International Criminal Court, *Rome Statute of the International Criminal Court* (art. 5)(1998)

³² *ibid* footnote 1, and Clause Kerb, Editorial Comment on the Activation of ICC's Jurisdiction over the Crimes of Aggression, *Journal of International Criminal Justice*, Vol. 16, March 2018.

³³ UN, *Amendments on the Crime of Aggression to the Rome Statute of the ICC* (2013); *Crimes of Aggression: Amendments and Ratification, Treaty Series*; International Criminal Court, *A.S.P/16/Resolution 5, Activation of Crimes of Aggression* (2017).

³⁴ ICC Jurisdiction for Crimes of Aggression involving States which have not ratified the 2010 amendments is limited to cases referred to the Court by the UN Security Council.

Responsibility of accused persons. Article 09 of Rome Statute authorises ASP to adopt and subsequently amend the ICC's Elements of Crimes (EOC) to assist in the interpretation and application of the Statute.³⁵ Under Article 21 EOC has equal status to the Rome Statute as the Primary Legal Source for the Court.³⁶ EOC elaborates on the Provisions of the Rome Statute and establishes the elements required for each specific type of crime. For example, Genocide by killing members of a group under Article 6(A), for other Crimes against Humanity of Torture under Article 7(1)(F).

3.1 Genocide

Often referred to as “Crimes of Crimes” after the Nuremberg Trials,³⁷ genocide was first defined in International Law in 1948 Genocide Convention, Article 06 of the Rome Statute adopts the definition of Genocide as originally set out in Article 02 of the Genocide Convention; in the Convention, Genocide means any of the following acts committed with intent to destroy, in whole or in part a National, Ethnic, Racial or Religious group, as such; (a) Killing members of the group, (b) Causing serious bodily harm or mental harm to members of the groups, (c) Deliberately inflicting on the group condition of life calculated to bring about its physical destruction to whole or in part, (d) Enforcing measure intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.³⁸

The definition of genocide creates a dual intent requirement namely, the general criminal intent to commit the act in question, and a specific intent of committing the act in pursuit of the goal of destroying a defined group, in whole or in part.³⁹

EOC adds a conceptual element to the definition, requiring that the act take place within “manifest pattern of similar conduct or conduct that could itself effect such destruction”.⁴⁰ The ICC pre-trial

³⁵ International Criminal Court, *Elements of Crimes* (2013) 251, 1K.B. 39.

³⁶ Rome Statute of the ICC, art. 21(1).

³⁷ Cornell Law School, ‘Genocide’ *WEX Legal Dictionary* <<https://www.law.cornell.edu/wex/genocide>> accessed 16 August 2024.

³⁸ Rome Statute of the ICC, art. 6.

³⁹ International Criminal Court, *Situation in Darfur, Sudan; The Prosecutor v Omar al-Bashir* (2009), Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar al-Bashir, Pre-Trial Chamber I, ICC-02/05-01/09.

⁴⁰ See *Elements of Crimes* (2013) 251 K.B. 39, art. 6(4).

chamber has interpreted this contextual requirement as meaning a threat to the group in question must be “concrete and real”.⁴¹

3.2 Crimes against Humanity

The concept of Crimes against Humanity has existed in International Law for at least a century, and its articulation in Article 7 of the Rome Statute has been described as both codification and advancement of the concept under Customary International Law.⁴²

Article 7(1) enumerates 11 underlined crimes, including Murder, Enslavement, and Torture, which may constitute as Crimes against Humanity. Under this Article, Crimes against Humanity require that the crimes be committed in a specific context as part of the widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(2) defines such an attack as cause of conduct involving a multiple commission of the underline crimes listed in Article 7(1), a committed pursuant or in furtherance of a State or organisation policy. According to the EOC, an attack need not be a military attack and that under exceptional circumstances the policy requirement may be fulfilled by a deliberate failure to take action, rather than actively encouraging or promoting the attack.⁴³ In cases of genocide, the targeted population need not be members of a defined group. Unlike War Crimes, there is no requirement that the crime take place within the context of an Armed Conflict.

3.3 War Crimes

Under Article 8 of the Rome Statute, war crimes incorporate international crimes found in other international instruments, most notably the Geneva Convention as well as crimes which had not been previously codified in International Law,⁴⁴ Article 8(2)(a) of the Rome Statute criminalises acts committed against Persons and Properties protected by the Geneva Convention including the sick and wounded prisoners of War and Civilians; Article 8(2)(b) criminalises the other serious

⁴¹ International Criminal Court, *Situation in Darfur, Sudan*, supra n 30.

⁴² Kai Ambos, ‘Crimes Against Humanity and the International Criminal Court’ in Leila Sadat (ed), *Forging a Convention for Crimes Against Humanity* (2011).

⁴³ International Criminal Court, *Elements of Crimes* (2013) 241 K.B. 39. .

⁴⁴ International Committee of the Red Cross, *Advisory Service on International Humanitarian Law, Comparative Table* (October 2008) 1992 K.B. 21.

violations of Laws and Customs applicable in International Armed Conflicts⁴⁵ of Article 3 common to all four Geneva Conventions.

Article 8(2)(e) criminalises other serious violations of Laws and Customs applicable in that context.⁴⁶ Crimes relating to Non-International Conflicts are subject to an intensity threshold⁴⁷ under Articles 8(2)(d) and 8(2)(f) which excludes situations of “Internal Disturbances and Tensions” from the Court’s Jurisdiction.

Two Articles 8(2)(b)(xxii) and 8(2)(e)(vi) of Rome Statute became the first Instrument to list Forms of Sexual Violences such as Rape, Sexual Slavery, Exposed Prostitutions, Forced Pregnancy and enforced Sterilisation, as distinct Types of War Crimes.⁴⁸ The Rome Statute for the first time established an ecological War Crime under Article 8(2)(b)(iv) for attacks foreseeing Long Term and serious damage to the Natural Environment Crimes to be War Crimes they must be committed in the context of and be associated with an armed conflict.⁴⁹

The ASP passed amendments to Article 9 in 2010, 2017 and 2019 adding crimes to Non-International Conflicts that already existed for International Conflicts and establishing new crimes for the use of certain types of weapons like the Crimes of Aggression.

These amendments are in force of parties that have ratified them.⁵⁰

3.4 Crimes of Aggression

In 2018 the ICC became the first International Tribunal since Nuremberg Tribunal where the lead charge was Crimes against Peace to have jurisdiction over the Crimes of Aggression.⁵¹ Article 8 bis (1) of the Rome Statute limits the application of Crimes of Aggression to persons, in a position effectively to exercise control over a state or persons who have power to direct a political or military action of the state. This Provision criminalizes any use of force against another state which would

⁴⁵ Rome Statute of the ICC, art. 8(2)(B).

⁴⁶ International Committee of the Red Cross, *Persons Protected under International Humanitarian Law* (2008).

⁴⁷ International Committee of the Red Cross, *Convention (I) for the Amelioration of the Condition of Wounded and Sick Armed Forces in the Field*, Geneva, 1949; Commentary (2016) - Art, *Conflicts of Non-International Character: Treaties of State Parties*, International Humanitarian Law Database.

⁴⁸ International Criminal Court, Office of the Prosecutor, *Policy Paper on Gender-Based Crimes* (2014) 601 K.B. 44, 15.

⁴⁹ International Criminal Court, *supra* n 47, art. 8.

⁵⁰ ICC Rome Statute of the ICC Article 121(5) and ICC, ASP Rome Statute amendments.

⁵¹ Alex Whiting, Crimes of aggression Activated at the IC Court. Does it matter? Just security, 19 Dec. 2017 page 09.

constitute a manifest violation of the Charter of the United Nations, including those acts contained in article 8 bis (2).

4. JUDGES AND COURT ADMINISTRATION UNDER ICC

Administration of ICC is performed by three Judges comprising the President and two Vice Presidents elected by and from a Pool of 18 sitting Judges over a three-year renewable Term. These three Judges are responsible for the general administration of the Court except for the Office of the Prosecutor (OTP). A Judge is elected by the Association of State Parties (ASP) and a Judge so elected by the ASP to a non-renewable nine (9) year term.

The Registry is the primary administrative body of the ICC, which perform the other non-judicial aspects of the administration of the Court. Funding for the ICC's operations is raised through contributions assessed to its members based on the scale of assessment used by the United Nations (UN). Additional funds can be raised through Voluntary Contributions by the members of the UN.⁵²

4.1 Office of the Prosecutor (OTP)

Article 42 of the Rome Statute establishes the Office of the Prosecutor (OTP) as a separate and independent organ of the ICC. The ICC Prosecutor and Deputy Prosecutor are elected by the ASP of the ICC for a non-renewable Term of nine years.

Operated as an Independent body the OTP, the Rome Statute limits the Independence in Practice by providing a number of means to the State and the UN Security Council (UNSC) and the other Organs of the ICC by which they can check the Prosecutor's Powers.⁵³ This balance between Independence and Accountability in the Powers given to the prosecutor is clearly evident in the exercise of its Pro Prio motu investigative authority.

Article 15 empowers the prosecutor to initiate and investigate but with significant limitations. To initiate an investigation without UN Security Council or State Party referral, the Prosecutor first must apply for authorisation from the Pre-Trial Chamber by demonstrating "that there is a reasonable basis to proceed and that the case appears to fall within the jurisdiction of the Court."⁵⁴

⁵² ICC Rome Statute of the International Criminal Court, article 115-117.

⁵³ Jan Wouterz, Stan Verhoeven and Bruno Demeyere. The International Criminal Court's office of the Prosecutor; Navigating between Independence and Accountability? Working Paper, Institute of International Law, K. U. Leuven Faculty of Law, University of Leuven, July 2006.

⁵⁴ ICC Rome Statute of Criminal Court article 15(3) and 15(4).

If the investigation is authorised, notification must be sent to state parties and to any other state that might normally have jurisdiction to the offence. States may then request that the prosecutor refer the investigation based on complementarity, to a pre-existing National Investigation. The Prosecutor shall abide by this request unless the Pre-Trial chamber agrees that the investigation may continue⁵⁵ and the article 16 of the Rome Statute, investigations or prosecutions may also be deferred for a period of one year at the direction of the U.N. Security Council (UNSC). Such deferral power is renewable and theoretically would result in indefinite postponement of ICC Proceedings. To the present, deferral power has not been used.⁵⁶

Prior to the opening of an investigation the OTP conducts preliminary examination of the situations referred to it, or on which it has received information suggesting that a crime within the ICC's jurisdiction has been committed. The opening of preliminary examination is generally made public with the OTP providing periodic updates.

The Preliminary Examinations encourage states to investigate and prosecute offences referred to as positive complementarity and potentially sound and early warning to prevent situations from escalating where the commission of crimes may be ongoing.⁵⁷

A Prosecutor may refuse to pursue state or Security Council's referrals if they determine that there is no reasonable basis to proceed. In such cases, the referring party may ask the Pre-Trial Chamber to review the decision, and the court may ask the Prosecutor to reconsider.⁵⁸ If the Prosecutor decides not to proceed the court has no statutory authority to force an investigation. However, if the Prosecutor decides not to proceed; where considering the gravity of the crime and the interests of the victims, there are substantial reasons to believe that an investigation would not serve the interests of justice.⁵⁹ In such a situation, the matter must be referred to the Pre-Trial chamber and majority must confirm not to proceed. If the decision is rejected the Prosecutor must consider continuing investigations or Prosecution.⁶⁰

⁵⁵ *ibid* art. 18

⁵⁶ See Security Council's Report in Hindsight: The Security Council and International Criminal Courts, August 2018 Monthly Forecast 30-7-2018

⁵⁷ I.C.C., O.T.P. on Preliminary Examination Nov. 2018, para 104

⁵⁸ I.C.C., Rome Statute of International Criminal Court, art. 53

⁵⁹ *ibid* art. 53(1)(c)

⁶⁰ I.C.C., Rules of Procedure and evidence 2019, Rule 110

4.2 The Chambers of the Court

The Pre-Trial Chamber which usually consists of 3 judges⁶¹ has been described as the court's Gate Keepers with significant powers to influence which cases are investigated, how these investigations are conducted, and which investigations resulted in Trials. The Pre-Trial Chamber authorizes Prosecutor to initiate investigations.⁶² Besides challenges to the jurisdiction for the court or the admissibility of a case during the investigative stage⁶³ and reviews the Prosecutor's decisions not to pursue a case referred to the OTP.⁶⁴

The Pre-Trial Chamber also has some responsibility during the investigation. It has the authority to issue orders and warrants as part of the investigative process, including to protect victims and witnesses and to preserve evidence to ensure the rights of the defence to facilitate investigations.⁶⁵

The Pre-Trial Chamber can issue arrest warrants and summons on suspects based on applications made by the prosecutor, where it finds that there are reasonable grounds to believe that a crime has been committed.⁶⁶ Once an accused is taken into custody, the Pre-Trial Chamber is also responsible in ensuring the rights of the accused including the determination whether they will be released pending trial.⁶⁷

Before a case goes to trial, a Pre-trial Chamber must confirm the charges brought by the OTP. At a Confirmation Hearing, the prosecutor must establish substantial grounds to believe that the accused has committed the crime (in question). If the accused in present may charge the evidence presented by the prosecutor and present his own evidence. Based on the evidence present, the chamber may confirm or decline to conform any of the charges presented and may also adjourn proceedings to request the prosecutor to provide further evidence or to amend the charges.⁶⁸

⁶¹ Jocelyn Courtney and C. Kaoutzanis, Protective gate keepers; The Jurisprudence of the I.C.C.'s Pre-Trial Chambers, *Chicago Journal of International Law*, Volume 15, No. 2, Winter 2015 page 520

⁶² I.C.C. Rome Statute of International Crime Court. Art. 15(4)

⁶³ *ibid* art. 18(2) and 19(6)

⁶⁴ *ibid* art. 53(3)

⁶⁵ *ibid* art. 57

⁶⁶ *ibid* art. 58

⁶⁷ *ibid* art. 60

⁶⁸ *ibid* art. 61

4.3 Trial and Appeal Chamber

Once the charges have been framed, cases are heard by the Trial Chamber comprising 3 judges. The prosecutor must convince the judges that the accused is guilty beyond reasonable doubt.⁶⁹ A convicted accused may be sentenced up to 30 years imprisonment. In extreme circumstances, punishment may be extended to life imprisonment and may also include a reparation order for victims.

The Appeal Chamber can hear appeals from both the Pre-trial and Trial Chamber. The Appeal Chamber comprising 5 judges has the power to reverse or amend to lower-level decisions, including reparations and sentencing orders or order a new trial. Appeals could be lodged against the decisions of the Trial Chamber on the ground of procedural error, error of facts, or on law, and for a convicted person on any other ground that may affect the fairness or reliability of the proceedings or decision. A sentencing may be appealed on the grounds of disproportion between the crime and the sentence.⁷⁰ To reverse or alter the outcome of another chamber, the Appeal Chamber must find that proceedings were unfair, or the decision or sentence materially affected by error of fact or law or procedural error.⁷¹

5. VICTIM ASSISTANCE AND PARTICIPATION

The mechanism within the ICC and under the Rome Statute that supports victims of crime and grants them the right to participate in proceedings and claim reparations marked a first in international criminal law.⁷²

Under Article 68(3) of the Rome Statute, victims are allowed to participate in ICC proceedings in which their personal interests are affected. While it does not give victims some rights as the prosecutor or defends as, this provision has been interpreted by the court to allow victims or their representatives to make statements, present evidence of victims and question witnesses.⁷³ In cases

⁶⁹ *ibid* art. 66

⁷⁰ *ibid* art. 81 and 82

⁷¹ *Ibid* art. 82

⁷² The Trust Fund for Victims, 'Our goals' <<https://www.trustfundforvictims.org/index.php/en/about/strategic-goals>>

⁷³ See also C. Van Wingaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (Volume 44, Case Western Reserve Journal of International Law, 2011) 488

where hundreds of victims may be registered to participate, the court may order that a single common legal representative may be appointed.⁷⁴

A Trust Fund for Victims was established separately from ICC for the benefit of victims of crime within the ICC's jurisdiction.⁷⁵ Funding for the Trust Fund comes from state party contributions and from reparation order.⁷⁶

Since 2018, two investigations have been opened based on referrals from groups of state parties regarding the situation in Venezuela in September 2018 and a situation in Ukraine in March 2022 to the ICC prosecutor.⁷⁷

6. THE CHALLENGES TO THE INTERNATIONAL CRIMINAL COURT (ICC)

Having functioned for more than 2 decades the ICC has become an established feature of the International Legal System. Despite weaknesses in its record the court has demonstrated its ability to investigate and try perpetrators in International Crimes, and it continues to consolidate and expand jurisprudence in International Criminal Law through the decisions of all 3 chambers.

To the Present ICC investigation and trials have focused disproportionately on Africa. This has led to a criticism of the ICC, including suggestions that the court is racist and acting as a Imperial Tool to subjugate Africa, its personal bias against Africa has prompted calls for the withdrawal of African countries from the Rome Statute and not to cooperate with their Courts' investigations and trials. The African Union has also taken steps to establish a Regional Criminal Court to try cases that would otherwise be within the ICC's jurisdiction.

7. ICC AND THE DEVELOPED WORLD

The position of the USA centring the ICC has been problematic during its commencement; they signed the Rome Statute in December 2000 under President Bill Clinton and renounced any obligation under it in May 2002 under President G. W. Bush. The possibility of the US Military being the subject of any ICC investigation or trial was a significant concern for the US Government. In May 2002 August the U.S. government passed the American Service Members Protection Act

⁷⁴ UN General Assembly, 'Report of the ICC' (2023), 4

⁷⁵ ICC, Rome Statute of ICC, art. 79

⁷⁶ (n 72)

⁷⁷ See ICC, Burundi; and ICC, Republic of the Philippines

(ASPA) which restricted U.S. cooperation with the ICC and sought to prevent US Military Personnel from being taken into ICC custody.

The U.S. Government began negotiating bilateral immunity agreements with around the world in apparent accordance with Article 98(2) of the Rome Statute. States that signed these agreements promised not to surrender U.S. citizens on their territory to the ICC.

Under President Barack Obama U.S. Government's position towards ICC. was released. U.S. support for the U.N. Security Council's unanimous resolution to refer the situation of Libya to the ICC in 2011 was a crucial step.

Cooperation between the U.S. and ICC regressed significantly under President Donald Trump. The ICC's decision to open an investigation into the situations in Afghanistan and the state of Palestine aggravated the situation. The U.S. objected to the investigation of U.S. personnel's actions in Afghanistan and in the Court's recognition of the Palestine statehood for the purpose of the Rome Statute and its investigations into the actions of Israel- a close U.S. ally which is not a state party to the Rome Statute.

However, Biden's Administration reconfirmed to the U.S. Opposition to the investigations in Afghanistan and Palestine territories and the court's assertion of jurisdiction over U.S. and Israel. Personnel

Karim A. Khan became the Chief Prosecutor of ICC in 2021. He confronted a Political Firestorm by applying warrants for Israel's Prime Minister B. Netanyahu, and Defence Minister Yoav Gallant, as well as three leaders of Hamas alleging that he has reasonable grounds to believe they are responsible for crimes against Humanity and War Crimes including Israel's case using "starvation as a weapon of the war" by submitting reports prepared by his office to the ICC Judges. He applied for a warrant against Russian President V Putin for war crimes alleged to have committed during the invasion of Ukraine too.

8. CONCLUSION

With more than 20 years of experience, the ICC has become an established, but a controversial part of the international system. With whatever shortcomings the Court has proven to be a worthy successor to the International Tribunal which preceded it and as an indispensable organ of a permanent International Criminal Justice System. However, ICC entering its 3rd decade of existence is facing significant challenges. The continuation of the bizarre atrocities which

motivated its creation is the biggest challenge. As the Court's development continues and it looks to reform, the purpose of which it was created has not been fulfilled yet.

A RECIPE FOR DISCONTENT?

COPYRIGHT AUTHORSHIP AND THE PUBLIS SILVA CASE

Amrit Rajapakse¹

ABSTRACT

The recent Supreme Court judgment in the case concerning the copyright in Sri Lankan celebrity chef Publis Silva's first literary foray highlights some of the tensions in the approach of courts to disputes regarding authorship. This article analyses the judgments of the Commercial High Court and the Supreme Court, which had reached opposite views on the authorship of the book. A comparative analysis with the UK, USA and India is carried out to demonstrate the approach of other courts when faced with similar disputes. The article advocates a middle path that recognizes contributions of ideas, suggestions, and information, and not merely contributions to the actual form of expression.

1. INTRODUCTION

The recent Supreme Court judgment² concerning the copyright in Sri Lankan celebrity chef Deshabandu Dr. T. Publis Silva's first literary foray, “ගල්කිස්ස හෝටලයේ පඩිලිස් සිල්වාගේ හෙළ රටාවට ඉඩුම් පිහුම්,”³ became something of a cause célèbre in the media. The remarkable rags-to-riches life story of Chef Publis, as he is known to the public, gave the facts of the case a particular interest that piqued the public's curiosity. From a legal standpoint, the case is important for its treatment of disputed questions of authorship and ownership in copyright law. The focus of this article is on the authorship aspect.

The case is also marked by several peculiar aspects, notably the fact that Publis himself was not a party to the case, nor was he called as a witness by either party at the trial. It is proposed, therefore, to provide a brief background to the litigation, and thereafter analyse the judgments of the Commercial High Court and Supreme Court. A comparison will be made with selected jurisprudence of the UK, USA, and India. The final section concludes.

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² *Sarasavi Publishers (Pvt) Limited v. Samaranayake* (SC (CHC) Appeal No.60/2013, SC Minutes dated 17.05.2023). Hereafter sometimes referred to as the “Publis Silva case.”

³ The book is in the Sinhala language. The title may be roughly translated as “Local cuisine of Publis Silva of Mount Lavinia Hotel.”

2. BACKGROUND TO THE LITIGATION

Chef Publis was born in a village called Gammaddegoda near Rathgama in the Southern Province of Sri Lanka, the second in a family of five children.⁴ His father was a labourer, and his mother was a travelling vegetable seller. He was not keen on studies and dropped out of school after grade five, preferring to help his mother with her trade. Forced to fend for himself from a young age, he did a series of arduous jobs such as hauling fishing nets, plucking coconuts and selling fruits on public transport, before a relation helped him gain employment as a labourer in the kitchen of the Mount Lavinia Hotel. The main task assigned to him was to haul coal in a hand cart from a shed to the hotel kitchen.

After two years of enduring this physically arduous task, Publis was promoted to chef's assistant in the hotel. This was the foundation for his interest in cookery, and he took every opportunity he could to learn the craft. His dedication and perseverance, and undoubted talent, would see him promoted to chef, then to management, and ultimately to executive chef and director of culinary affairs of Mount Lavinia Hotel. His passion was exploring native Sri Lankan cuisine, of which he became perhaps the leading public exponent in this country at a time (the 1980s) when there was not much interest in this area.

Chef Publis was already well known to the Sri Lankan public when, in 2003, Sarasavi Publishers published a book titled “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඬුම්”. The book describes Chef Publis's life story and interest in the culinary arts, food habits of ancient Sri Lankans, food and nutrition, methods of food preparation and hygienic food practices. The remainder of the book, which accounts for its major part, comprises of recipes, including recipes contributed by the public. There are also a number of drawings and photographs throughout the book. The book is written in the first person, and thus appears as part autobiography and part cookery treatise. Interestingly for a book written in the first person, no author's name appears on the front cover of the book, nor within the book.

The front cover of the book consists of the title of the book and a photograph of Chef Publis against the backdrop of the Mount Lavinia Hotel. The third page contains the title, the words “සංස්කරණය - ධර්මා එස් සමරනායක” (Editor – Dharma S. Samaranayake) in the middle of the page and the

⁴ The account in this paragraph and the next is drawn from the subject book.

name of Sarasavi Publishers at the bottom. The fourth page contains the edition information (first edition) and date (March 2005), ISBN number and copyright notice “© පබ්ලිස් සිල්වා” (copyright Publis Silva). It also mentions the names of the computer typesetter, cover designer and the printer. The next three pages contain the “සංස්කාරකගේ සටහන” (Editor’s note) penned by Dharma S. Samaranayake, followed by an acknowledgement page by “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වා” (Publis Silva of Mount Lavinia Hotel).

The back cover of the book contains a short biography of Chef Publis written in the third person. The back inner cover gives a short description of the book, also in the third person. It describes the book as the very first comprehensive book on the culinary arts to be published in Sri Lanka, and also as “the first book of Chef Publis Silva.” The book is dedicated to Mr. Sanath Ukwatte, Chairman of the Mount Lavinia Hotel and to the reading public who know good taste.

3. THE LITIGATION IN THE COMMERCIAL HIGH COURT

The sixth edition of the book was published in November 2007 by Sarasavi Publishers. On 30th July 2008 Ms. Dharma S. Samaranayake filed action in the Commercial High Court against Sarasavi Publishers based on sections 22 and 205 of the Intellectual Property Act, No. 36 of 2003.⁵ She described herself in her plaint as a well-known media personality. She said that she interviewed Chef Publis in 1996 for a series of articles published in a women’s magazine and played a key role in building his public profile. She said that she had for some time been gathering information with a view to compiling a book on Sri Lankan cookery and that Chef Publis helped her by trying out some of the recipes.

Samaranayake further said in her plaint that in around April 2003 she began working in earnest on the book and that in view of Chef Publis’s fame at the time she agreed with him to have his name included in the title of the book. However, she said that the book had been written and compiled entirely by her, based on interviews with Chef Publis as well as others. As such, she alleged that she was the sole author of the book as well as the owner of the copyright in it. Samaranayake further said that she approached Sarasavi Publishers, who had already published several of her previous books, who agreed to publish the book. Samaranayake said she gave Sarasavi her license to publish

⁵ Hereafter referred to as the “Intellectual Property Act.”

the first edition and received an advance payment of Rs. 25,000 on account of royalty. She however said that she did not have a written agreement with Sarasavi.

Samaranayake said that she received no further payment or communication from Sarasavi after the first edition was published. She said she recently became aware that Sarasavi had published five further editions without her license, which had been limited to the first edition only. She claimed a declaration that she is the author and owner of copyright of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”, a declaration that Sarasavi had infringed her economic rights in the book, an order for Sarasavi to furnish information as to the number of copies sold and the prices at which they were sold, payment of royalties, statutory damages, injunction and interim relief.

The defendant, Sarasavi in their pleadings denied the plaintiff’s assertion that she is the author of the work. According to Sarasavi, the book was the creation of Publis Silva, and this was confirmed by the copyright notice. Sarasavi further pleaded that they entered into an agreement with Publis to publish the book and attached a copy of the agreement. They further said that the sum of Rs. 25,000 which they paid to Samaranayake was paid on behalf of the author on his instructions, as the editorial payment due to her from the author. They also produced an affidavit from Publis where Publis stated that he was the author of the book and that he had employed Samaranayake to edit the book for payment. Sarasavi further stated that they had so far published seven editions of the book of 2000 copies each and had paid all royalties to the author of the book as per their agreement. Sarasavi sought dismissal of the plaintiff’s action with costs.

4. TRIAL AND JUDGMENT OF THE COMMERCIAL HIGH COURT

At the trial, Samaranayake and one Wijetunga gave evidence for the plaintiff’s case. The managing director of Sarasavi Publishers, Premasiri, and a former employee of Sarasavi, Almeida gave evidence on behalf of the defendant. Both parties also produced several documents in evidence. As mentioned at the beginning, neither party summoned Publis as a witness.

The judgment of the Commercial High Court was delivered on 17.05.2013 in favour of the plaintiff, Samaranayake.⁶ The judgment is notable for two reasons. Firstly, it is by E. A. G. R. Amarasekara

⁶ [2013] HC (Civil) 27/2008/IP (Colombo, 17 May 2013).

HCI (as His Lordship then was), who was a very experienced intellectual property judge. Secondly, Amarasekara HCI had presided over the entire trial from beginning to end and had seen and heard all the witnesses who gave evidence in the case. This is relatively rare in this country, where it is common for trial judges to change several times over the course of a trial, which typically spans several years.

The principal matters at issue at the trial, and which occupy the judgment of the Commercial High Court, concern the authorship and ownership of the copyright in the work. Samaranyake had given evidence that she had authored the book and that she had not been commissioned by Publi. In contrast, Sarasavi relied on the affidavit given by Publi after the institution of the action, referred to earlier. The trial judge held that the affidavit had little weight since the veracity thereof had not been tested by summoning its maker for cross-examination at the trial. In particular, the trial judge held that if there had been a commission agreement between Publi and the plaintiff, the persons who would know this best would be the parties to such agreement. However, while the plaintiff had rejected this position in cross-examination, the defendant had not called Publi to face cross-examination. The trial judge accordingly drew an adverse inference from the defendant's failure to call Publi as a witness.

The judge referred to sec. 14 of the Intellectual Property Act on the question of copyright ownership and held that since neither party asserted that the work was one of joint authorship or a collective work, and since the work was not an audio-visual work, it had to be treated as a work of sole authorship. In terms of section 14(1), the first owner of the copyright was the work's author, unless the work had been created in the course of employment or pursuant to a commission, in which case the copyright would belong to the employer or person who commissioned the work, subject to contrary agreement. He then referred to the definition of "author" in section 5 and the presumption of authorship in section 15 of the Act. The judge observed that no one's name was indicated as the author in the book itself.

One of the notable features of the case was that both parties agreed that the book had been **written** by Samaranyake. However, it was the defendant's position that Samaranyake had been employed or commissioned to do so by Publi. In addition, it was the Defendant's position that Publi had given Samaranyake the ideas and information for the book, which Samaranyake had written down. The judge rejected the first argument for the reason mentioned previously, namely the defendant's failure to call Publi as a witness. The second argument was rejected on the basis of

the oft-cited aphorism that copyright protects the expression of ideas, and not the ideas themselves.⁷ Therefore the judge held that contributing ideas or information did not qualify for authorship. Furthermore, the evidence revealed that the contents of the fourth chapter of the book had been provided by the plaintiff's witness Wijetunga and not by Publis.

The judge held further that there was a good commercial reason Publis's name was included in the book's title, namely the reputation or "cachet" attached to his name in the public sphere, which would help to sell the book. The reference to the book being Publis Silva's first book and similar references should be seen also in this light. On the copyright notice which mentioned Publis as the copyright holder, the judge held that the notice was not a legal requirement and moreover appeared to have been added by the defendant publisher and not by the plaintiff. The judge further held that any inference given rise to by the copyright notice had been rebutted by the evidence in the case, which established otherwise. However, the judge held that the plaintiff was not the author or copyright owner of the photographs in the book. In conclusion, the judge held that the plaintiff had proved her case on a balance of probabilities, while the defendant had failed to prove that Publis was either the author or joint author of the book or that the plaintiff had written the book for a payment, in circumstances where the copyright would belong to Publis.

5. THE APPEAL TO THE SUPREME COURT

Aggrieved by the judgment of the Commercial High Court, Sarasavi appealed to the Supreme Court. The appeal was argued, and the Supreme Court delivered its judgment on 17.05.2023 allowing the appeal and setting aside the judgment of the Commercial High Court and dismissing the plaintiff's action.⁸

Murdu Fernando PC, J (with whose judgment Surasena, J and Nawaz, J agreed) began by briefly outlining the copyright regime in Sri Lanka. She then carried out a detailed analysis of the book. Based on this analysis, she held that *prima facie* the Plaintiff was the editor of the work, and the copyright owner was Publis Silva. This finding was reinforced by the Editor's note penned by the plaintiff, where the plaintiff had described Publis as the "true owner" of the book. Similarly, Publis,

⁷ Section 8 of the Intellectual Property Act provides that copyright protection shall not extend to "any **idea**, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work" (emphasis added).

⁸ See n. 1, *supra*.

in his appreciations, had thanked the plaintiff as “the person who pointed me to placing a book such as this” in the readers’ hands. Fernando, J also relied on the invitation to the book’s launch, which read “Publis Silva launches his book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිටුම්” and the fact that Publis had autographed copies of the book at the book launch, as further evidence supporting the *prima facie* position.

Departing from the view of the trial judge, Fernando, J held that it was the plaintiff’s responsibility to have made Publis Siva a party to the action, or at least to have called him as a witness to prove the agreement she alleged to have had with him to use his name in the title of the book. According to Fernando, J, this was all the more important because the relief sought by the plaintiff would result in depriving Publis of his copyright, and the royalties he had enjoyed until then, without affording him a hearing, which ran counter to the rule of law. Fernando, J cited a number of cases on the importance of necessary parties being before court before coming to a finding on copyright ownership. She held that Publis, who was acknowledged as the copyright holder in the copyright notice, was a necessary party to the case and the plaintiff had failed to make him a party. She held further that the plaintiff had failed to negate the inference of copyright ownership arising from the copyright notice by calling Publis as a witness, and therefore had failed to prove her case on a balance of probabilities.

Regarding the plaintiff’s status as “editor” of the work, Fernando J held,

“The mere fact of providing assistance in an abstract level as an editor or compiler, in my view will not entitle a person or a party to claim creativity of a ‘work’ and more so, the ownership of copyright of the said ‘work’.”⁹

Fernando, J held further that the plaintiff had admitted that she wrote the words under the direction of Publis Silva. Citing sections 14(3) and 14(4) of the Intellectual Property Act, she held that when someone creates a work under the direction of another, the person who directs is the owner of the copyright. In the present case, the evidence established that the plaintiff had only edited the work, which was created under the direction and guidance of Publis Silva. Thus, in terms of the law, the economic rights should vest with the holder of the copyright, Publis Silva, as acknowledged by the

⁹ HC (Civil) 27/2008/IP (n. 6) 21.

copyright notice. Fernando, J holds further that “author” and “editor” are two different concepts and the role of “editor” cannot be compared with the role of “author.”

6. ANALYSIS OF THE JUDGMENTS OF THE COMMERCIAL HIGH COURT AND SUPREME COURT

The focus of this article is on the approach of the Commercial High Court and Supreme Court to the question of authorship. Section 5 of the Intellectual Property Act defines “author” to mean “the physical person who has created the work.” In the Publis Silva case, it was not disputed that the work was *physically written* by the plaintiff, Samaranayake. However, it was also evident that there was a close collaboration between the plaintiff and Publis, whether he was the person who “directed” the plaintiff’s writing or was the contributor of many of the “ideas” and “facts” incorporated in the book.

In the above scenario, it is useful to see authorship along a range of possible outcomes. At one extreme is the “mere amanuensis” well-known in copyright law. An example is A, a secretary who takes down, word for word, comma for comma, a letter dictated by their employer, B. In this example, even though A was responsible for physically writing the letter, the author, or person who “created” the letter, is B.¹⁰ At the other end is a person who contributed a mere “idea” that was incorporated into a work by another. An example of this is seen in the old case of *Kenrick v. Lawrence*.¹¹ In that case, J conceived of an idea for instructing illiterate voters how to vote, by printing a representation of a hand holding a pencil in the act of completing a cross within a square. J could not draw, so he instructed B, an artist, to execute the drawing under his direction. Wills, J held that J was not the author of the drawing:

“I do not see how a gentleman who is incapable of drawing even such a very simple picture as a rough sketch of the human hand, and who did not, in fact, set pencil to paper in the matter, can be called the author of the drawing. He suggested the subject, and made such limited suggestions as to the treatment as the subject admitted of; but it seems to me that in an Act

¹⁰ [1938] Ch 106, 109.

¹¹ [1890] L.R. 25 Q.B.D. 99.

*which gives copyright to drawings the author must mean a person who has at least some substantial share in putting the touches on to paper.”*¹²

The same is the case for works written by ghost writers. In *Donoghue v. Allied Newspapers Ltd*,¹³ a newspaper had published a series of articles titled “Steve Donoghue’s Racing Secrets” containing the reminiscences of the plaintiff, Steve Donoghue, who was a famous jockey. The articles had been entirely written by a journalist, F, based on interviews conducted with the plaintiff. In addition to providing the information and stories for the articles, the plaintiff had gone through the manuscripts prepared by F and suggested certain corrections. Farwell, J held that the author of the articles was F. He held:

*“In the present case, apart altogether from what one may call merely the embellishments, which were undoubtedly supplied wholly by Mr. Felstead, the ideas of all these stories, and, in fact, the stories themselves, were supplied by the plaintiff; but, in my judgment, upon the evidence, it is plain that the particular form of language by which those stories were conveyed was the language of Mr. Felstead and not that of the plaintiff.”*¹⁴

However, between these two extremes is a range of situations where both the person who “put the pen to the paper” and the person who provided the ideas or instructions that were included in the work,¹⁵ have been responsible for the form of the creative expression. This is the status of **joint authorship**, which recognizes that there may be two or more “authors” of a single work. Section 5 of the Intellectual Property Act defines a “work of joint authorship” to mean “a work to the creation of which two or more **authors** have contributed, provided the work does not qualify as a collective work” (emphasis added).

¹² At 106. Many more examples can be found in the case law. To give one more, in *Tate v. Thomas* [1921] 1 Ch. 503 it was held that a person who had suggested the title, some incidents, a few catch lines or words and the scenic effects for a play was not entitled to be treated as a joint author of the dramatic work. It was held that his contributions to the matter capable of being printed and published were too insignificant and negligible to qualify as an original contribution.

¹³ *Supra*, n. 10.

¹⁴ The trial judge in the *Publis Silva* case followed a somewhat similar proposition advanced in P. Narayanan’s *Intellectual Property Law* treatise: “Where a person provides the material to another for writing a book and the latter (ghost writer) writes the book on the basis of the material supplied then the latter person becomes the owner of the copyright in the book.” (Citation not provided.) It is respectfully submitted that this quotation goes too far as a matter of Sri Lankan law in attributing copyright ownership (as opposed to authorship) to the ghost writer. As often is the case, if the ghost writer had been commissioned to write the work the copyright ownership would belong to the person who commissioned the work.

¹⁵ For simplicity it is assumed that two persons are involved in creating a work. Of course, it could be more.

For example, in *Cala Homes v. Alfred McAlpine Homes*,¹⁶ D, the design director in a group of companies engaged in designing and building houses, outsourced the drawing of their architectural plans to a firm of technical draughtsmen. Although D did not physically draw any of the plans, he gave the draughtsmen very detailed instructions as to what the drawings should look like and checked the drawings to see if his instructions had been interpreted correctly. It was held that D was a joint author of the plans. This case can be distinguished from *Kenrick v. Lawrence* and *Tate v. Thomas* because D's contribution satisfied the test of originality, which is a basic requirement for copyright.

It should be noted that even a person who writes down, word for word, the words spoken by another could be considered to be an "author" if they exercised sufficient skill, labour, and judgment so as to make an original contribution. For example, in the old case of *Walter v. Lane*,¹⁷ the Earl of Rosebery, a politician, made a number of public speeches, at which reporters were present. The reporters made notes in shorthand, transcribed them, corrected, revised, and punctuated them, all of which involved substantial effort, skill, and time, and published them in newspapers as verbatim reports of the speeches. The House of Lords held that the reporters were the "authors" and copyright owners of their reports, even though the words reported were somebody else's.

While the trial judge was dismissive of the contribution made by Publis to the creative process, the Supreme Court took the opposite view in dismissing the role played by the plaintiff, effectively treating her as a mere amanuensis. It is submitted with great respect that this result was not warranted by the evidence, which had established that the plaintiff was responsible for clothing the ideas and facts provided by Publis in the form of the expression in the book. Based on the case law referred to above, the plaintiff had clearly contributed independent skill, labour, and judgment, which would at least qualify her to be a joint author of the work. Neither the trial judge nor Supreme Court seriously considered joint authorship, perhaps because the disputing parties advanced their cases on "all or nothing" terms – both asserting exclusive authorship.

¹⁶ [1995] F.S.R. 818.

¹⁷ [1900] A.C. 539. At the time of this case originality was not a requirement for copyright.

Interestingly, it appears that even courts elsewhere have displayed a preference to resolve authorship disputes in favour of sole authorship rather than joint authorship. Writing in 2006 mainly with reference to the UK, Zemer states:

*“Joint authorship of authorial and artistic commodities is a principle which many consider ‘fraught with problems. In particular, the vague formulation of the conditions for joint authorship creates absurd situations in which, although two or more individuals contribute to the creation of a product meriting joint entitlement, copyright ‘refuses to acknowledge the existence of “joint copyright,” or does so grudgingly.”*¹⁸

Zemer cites the case of *Robin Ray v. Classic FM*¹⁹ as an example. That case concerned the copyright in a catalogue of over 50,000 items of classical music and in five documents containing proposals based on which the tracks had been categorized in that catalogue. The documents and catalogue had been compiled by the plaintiff, who was an expert in classical music, over five years. The defendant had made various suggestions and had contributed various ideas, thoughts and material which had been used by the plaintiff. Lightman, J dismissed the defendant’s claim to joint authorship of the documents and catalogue, holding that *“A joint author must participate in the writing and share responsibility for the form of expression in the literary work.”*²⁰

Zemer criticizes this approach to the assessment of contribution as “arbitrary and subjective” and argues for a different approach to contributions that merit joint authorship from what is required for sole authorship:

*“When two or more collaborators decide to join efforts in furtherance of a preconcerted joint design, they knowingly participate in a process that would yield results only if their efforts are combined together; the test for significant contribution should be interpreted in light of the shared responsibility collaborators hold for the resulted type of the expression, whether by virtue of pushing pen on paper or adding other mental labour in the guise of ideas, concepts, and relevant substantial suggestions.”*²¹

¹⁸ Lior Zemer, *Contribution and collaboration in joint authorship: too many misconceptions* [2006], 1(4) J. Intell. Prop. L & Prac. 283-292 at 283 (citations omitted).

¹⁹ [1998] FSR 622.

²⁰ At 636.

²¹ Zemer, *op.cit.*, p. 291.

LaFrance, writing in 2022, echoes a similar sentiment about US courts:

*“In recent decades, creative collaborators have found it increasingly difficult to be recognized as joint authors under federal copyright law. Rather than adhering strictly to the language of the statute defining a ‘joint work,’ key decisions in influential circuits have engrafted additional requirements which are difficult to satisfy even when the claimant has made a significant creative contribution to the finished work. As a result of the courts’ imposition of this narrowing gloss on the statutory standards, collaborators with meritorious claims can be denied a share of the copyright in a valuable work, losing out on significant economic rewards.”*²²

An example of this restrictive approach is the decision of the US Court of Appeals for the Second Circuit in *Childress v. Taylor*²³ That case concerned a dispute over the authorship of a play about the legendary Black comedienne Jackie “Moms” Mabley. The idea for the play had come from T, who had also contributed facts and details about “Moms” Mabley’s life and had suggested some general scenes, jokes, and characters in the play. The play was written by C, who was responsible for the actual structure of the play and the dialogue. The District Court entered summary judgment that C was the sole author of the play. The Second Circuit affirmed, holding that there was no evidence C ever intended T to be a joint author of the play. The Copyright Act did not require such an intention as a condition for joint authorship, and the court justified its approach with the example of a writer and an editor:

*“For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work ... **What distinguishes the writer-editor relationship and the writer-researcher relationship from the***

²² Mary LaFrance, *Apportioning Authorship* [2022], 71 University of Kansas Law Review, 209-250 at 209.

²³ 945 F.2d 500 (2d Cir. 1991).

true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.²⁴ (Emphasis added)

It is thus seen that both the courts in the UK and USA tend to prefer sole authorship over joint authorship. They also resolve sole authorship in favour of the person who was responsible for the form of words used or actual expression, discounting the contributions of those who provided the ideas, instructions and information used in the work. Interestingly, the Delhi High Court had charted a different path in the leading case of *Najma Heptulla v. Orient Longman Ltd. and ors.*²⁵ This was an interlocutory application and involved the authorship of the book “India Wins Freedom.” The book contained an account of the Indian freedom struggle from the perspective of Maulana Abdul Kalam Azad, who was a famous Indian freedom fighter and statesman. The book had been written by one K based on discussions with Maulana Azad over a period of two years. Maulana Azad had expressed his thoughts to K in Urdu, which K had converted into English in writing the book. Maulana Azad also went through each chapter in draft with K and made many amendments, additions, alterations, and omissions. He similarly went through the final draft of the manuscript. B. N. Kirpal, J (as he then was) refused to follow the *Donoghue* case²⁶ and other authorities which would have given primacy to the writer, and held:

*“A literary work consists of matter or material or subject which is expressed in a language and is written down. Both the subject matter and the language are important. It is difficult to comprehend, or to accept, that when two people agree to produce a work where one provides the material, on his own, and the other expresses the same in a language which is presentable to the public then the entire credit for such an undertaking or literary work should go to the person who has transcribed the thoughts of another. To me it appears that if there is intellectual contribution by two or more persons pursuant to a reconvered joint design, to the composition of a literary work then those persons have to be regarded as joint authors.”*²⁷

²⁴ *Id.* at 507. Fernando, J echoed a similar sentiment about editors – see no. 9, *supra*, and the text thereto. However, what matters for authorship is not the label of “editor” but what was actually contributed by that person. In the Publis Silva case, the plaintiff’s contribution went far beyond that of a mere “editor” as in the above quotation.

²⁵ AIR 1989 Delhi 63, 1988 (2) ARBLR 302 Delhi, 1989 (1) Crimes 597, 36 (1988) DLT 31, 1988 (15) DRJ 223.

²⁶ N. 10, *supra*.

²⁷ At para. 27.

On the facts, Kirpal, J found that the book was the result of an “active and close intellectual collaboration and cooperation” between Maulana Azad and K. Furthermore, he found that K was “more than a mere scribe of the thoughts of Maulana Azad.” Accordingly, he concluded that they were both joint authors.

7. CONCLUSION

It is submitted that when two or more persons have collaborated to create a work, the courts should adopt a flexible approach to the question of authorship which gives due regard to each collaborator’s contribution. Contributions such as detailed ideas, information and suggestions should not, it is submitted, be automatically excluded from this inquiry. A middle path, as seen in the *Cala Homes* and *Najma Heptulla* cases, would better align with the copyright system’s aim of fostering creativity, as well as with the expectations of society.

A CRITICAL REVIEW OF THE PERSONAL DATA PROTECTION ACT NO 09. OF 2022

Rashmin Tirimanne De Silva

ABSTRACT

In the contemporary digital landscape, data protection has become a critical issue, with personal data recognized as a valuable asset for businesses and a significant concern for individuals. This article provides a critical review of global data protection legislation, focusing on the Sri Lanka Personal Data Protection Act No. 09 of 2022 (PDPA). By comparing and contrasting different jurisdictions, the review elucidates the strengths and weaknesses of various legislative frameworks and offers practical guidance for adopting effective data protection measures. The European Union's General Data Protection Regulation (GDPR) is highlighted as the gold standard, influencing global practices with its comprehensive and stringent requirements. In contrast, the United States' sectoral approach results in a fragmented regulatory landscape. The article also examines data protection frameworks in Asia and Africa, noting the diverse legal and regulatory environments. The Sri Lankan PDPA is analyzed for its alignment with international standards, granting extensive rights to data subjects and imposing stringent obligations on data controllers and processors. The review identifies challenges faced by emerging economies in implementing data protection laws, such as limited resources and technological infrastructure, and provides recommendations for overcoming these hurdles. This comprehensive analysis aims to contribute to the ongoing discourse on data protection and provide valuable insights for policymakers, businesses, and individuals.

1. INTRODUCTION

Data protection has emerged as a critical issue in the contemporary digital landscape, where personal data is increasingly recognized as a valuable asset for businesses and a significant concern for individuals. The exponential growth of data generation, coupled with the rising incidences of data breaches and misuse of personal information, has necessitated the formulation of robust data protection laws globally. This article aims to provide a critical review of global data protection legislation, with a particular focus on the Sri Lanka Personal Data Protection Act No. 09 of 2022 (PDPA). By comparing and contrasting different jurisdictions, this review seeks to elucidate the strengths and weaknesses of various legislative frameworks and offer practical guidance for adopting effective data protection measures.

The European Union's General Data Protection Regulation (GDPR) is often regarded as the gold standard in data protection legislation. Enacted in 2016, the GDPR introduced comprehensive regulations that significantly impacted global data protection practices. Its extraterritorial scope and stringent requirements for data controllers and processors have set a high benchmark for other jurisdictions.¹ In contrast, the United States adopts a sectoral approach to data protection, with federal and state laws addressing specific industries and types of data. Notable examples include the California Consumer Privacy Act (CCPA)² and the Health Insurance Portability and Accountability Act (HIPAA).³

In Asia, data protection frameworks vary widely, reflecting the region's diverse legal and regulatory landscapes. Singapore's Personal Data Protection Act (PDPA)⁴ and India's Digital Personal Data Protection Act, 2023 No. 22 of 2023 exemplify the region's efforts to enhance data protection.⁵ Similarly, African countries are increasingly adopting data protection laws, with South Africa's Protection of Personal Information Act (POPIA)⁶ and Kenya's Data Protection Act⁷ being prominent examples.

The Sri Lanka Personal Data Protection Act No. 09 of 2022 represents a significant milestone in the country's legislative efforts to safeguard personal data.⁸ The PDPA aims to regulate the processing of personal data, ensure the rights of data subjects, and establish a Data Protection Authority to oversee compliance and enforcement. This article will critically examine the key provisions of the PDPA, compare it with global data protection frameworks, and provide practical guidance for organizations to navigate the complexities of data protection compliance.

¹ European Union. (2018), General Data Protection Regulation (GDPR), GDPR <<https://gdpr.eu/>> accessed 21 October 2024.

² California Consumer Privacy Act (CCPA) (2018), CCPA <<https://oag.ca.gov/privacy/ccpa>> accessed 21 October 2024.

³ Health Insurance Portability and Accountability Act (HIPAA). (1996), HIPAA <<https://www.hhs.gov/hipaa/index.html>> accessed 21 October 2024.

⁴ Singapore Personal Data Protection Act. (2012), Singapore PDPA <<https://www.pdpc.gov.sg/Overview-of-PDPA/The-Legislation>> accessed 21 October 2024.

⁵ Ministry of Law and Justice (Legislative Department), The Digital Personal Protection Act (No.22 of 2023), <<https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf>> accessed 21 October 2024.

⁶ South Africa Protection of Personal Information Act. (2013), POPIA <<https://popia.co.za/>> accessed 21 October 2024.

⁷ Kenya Data Protection Act. (2019), Kenya Data Protection <<https://www.odpc.go.ke/>> accessed 21 October 2024.

⁸ Sri Lanka Personal Data Protection Act. (2022), Sri Lanka Parliament <<https://parliament.lk/uploads/acts/gbills/english/6242.pdf>> accessed 21 October 2024.

By analyzing the legislative frameworks of different jurisdictions, this review will highlight the commonalities and divergences in global data protection practices. It will also identify the strengths and weaknesses of the Sri Lanka PDPA in comparison to other laws, such as the GDPR and CCPA. Furthermore, the article will offer practical recommendations for adopting data protection measures, ensuring compliance, and enhancing data security. Through this comprehensive analysis, the article aims to contribute to the ongoing discourse on data protection and provide valuable insights for policymakers, businesses, and individuals.

2. GLOBAL OVERVIEW OF DATA PROTECTION LEGISLATION

2.1 EU - General Data Protection Regulation (GDPR)

The General Data Protection Regulation (GDPR), enacted by the European Union in 2016, is widely regarded as the most comprehensive and stringent data protection framework globally. The GDPR's primary objective is to enhance the protection of personal data and ensure the privacy rights of individuals within the EU. It introduces several key principles, including lawfulness, fairness, and transparency in data processing, data minimization, and purpose limitation (European Union, 2018).⁹ One of the GDPR's most significant features is its extraterritorial scope, which mandates that any organization processing the personal data of individuals in the EU, regardless of its location, must comply with the regulation. This has had a profound impact on global data protection practices, compelling multinational corporations to adopt GDPR-compliant measures.

The GDPR also imposes stringent requirements on data controllers and processors, including the need to obtain explicit consent from data subjects, implement robust data security measures, and report data breaches within 72 hours. Non-compliance with the GDPR can result in severe penalties, including fines of up to 20 million euros or 4% of the company's global annual turnover, whichever is higher. These provisions have set a high benchmark for data protection legislation worldwide, influencing the development of similar laws in other jurisdictions (European Union, 2018).

2.2 United States: Sectoral Approach

⁹ European Union. (2018). General Data Protection Regulation (GDPR), GDPR <<https://gdpr.eu/>> accessed 21 October 2024.

In contrast to the EU's comprehensive approach, the United States adopts a sectoral approach to data protection, characterized by a patchwork of federal and state laws targeting specific industries and types of data. Notable examples include the Health Insurance Portability and Accountability Act (HIPAA), which governs the privacy and security of health information,¹⁰ and the Children's Online Privacy Protection Act (COPPA), which protects the privacy of children under 13 years of age (Health Insurance Portability and Accountability Act, 1996; Children's Online Privacy Protection Act, 1998).¹¹

One of the most significant state-level data protection laws is the California Consumer Privacy Act (CCPA), enacted in 2018. The CCPA grants California residents several rights concerning their personal data, including the right to know what data is being collected, the right to request the deletion of their data, and the right to opt-out of the sale of their data (California Consumer Privacy Act, 2018).¹² The CCPA has been instrumental in shaping data protection practices in the United States, prompting other states to consider similar legislation.

Despite these efforts, the lack of a unified federal data protection law in the United States has led to inconsistencies and gaps in data protection coverage. This fragmented approach poses challenges for businesses operating across multiple states, as they must navigate a complex regulatory landscape to ensure compliance.

2.3 Asia: Diverse Approaches

Asia presents a diverse landscape of data protection legislation, reflecting the region's varied legal and regulatory environments. Singapore's Personal Data Protection Act (PDPA), enacted in 2012, is one of the most comprehensive data protection laws in the region. The Singapore PDPA establishes a framework for the collection, use, and disclosure of personal data, emphasizing the need for organizations to obtain consent from data subjects and implement data protection policies (Singapore Personal Data Protection Act, 2012).¹³

¹⁰ Health Insurance Portability and Accountability Act (HIPAA). (1996), HIPAA \<<https://www.hhs.gov/hipaa/index.html>> accessed 21 October 2024.

¹¹ Children's Online Privacy Protection Act (COPPA). (1998), COPPA \<<https://www.ftc.gov/enforcement/statutes/childrens-online-privacy-protection-act>> accessed 21 October 2024.

¹² California Consumer Privacy Act (CCPA). (2018), CCPA \<<https://oag.ca.gov/privacy/ccpa>> accessed 21 October 2024.

¹³ Singapore Personal Data Protection Act. (2012), Singapore PDPA \<<https://www.pdpc.gov.sg/Overview-of-PDPA/The-Legislation>> accessed 21 October 2024.

Other Asian countries, such as India, Japan and South Korea, have also enacted data protection laws that align with international standards. However, the level of enforcement and compliance varies, reflecting the region's diverse regulatory landscape.

2.4 Africa: Emerging Frameworks

In Africa, several countries have recently enacted comprehensive data protection laws, signaling a growing recognition of the importance of personal data protection. South Africa's Protection of Personal Information Act (POPIA), enacted in 2013, is one of the most notable examples. POPIA establishes a framework for the lawful processing of personal data, emphasizing the need for accountability, transparency, and data subject rights (South Africa Protection of Personal Information Act, 2013).¹⁴

Kenya's Data Protection Act, enacted in 2019, similarly aims to enhance data protection standards by establishing a data protection authority and outlining the rights and obligations of data subjects and data controllers (Kenya Data Protection Act, 2019).¹⁵ These legislative efforts reflect a broader trend in Africa towards strengthening data protection frameworks and aligning with international standards.

Despite these advancements, challenges remain in the implementation and enforcement of data protection laws in Africa. Limited resources, varying levels of regulatory capacity, and differing cultural attitudes towards privacy pose significant obstacles to achieving comprehensive data protection across the continent.

2.5 Comparative Analysis

The global landscape of data protection legislation reveals significant variations in the approaches adopted by different jurisdictions. The GDPR's comprehensive and stringent framework has set a high standard for data protection, influencing the development of similar laws worldwide. In contrast, the United States' sectoral approach results in a fragmented regulatory landscape, posing challenges for businesses and individuals alike.

Asia's diverse regulatory environment reflects the region's varied legal and cultural contexts, with countries like Singapore and India taking significant steps towards enhancing data protection

¹⁴ South Africa Protection of Personal Information Act. (2013), POPIA <<https://popia.co.za/>> accessed 21 October 2024.

¹⁵ Kenya Data Protection Act. (2019). Kenya Data Protection <<https://www.odpc.go.ke/>> accessed 21 October 2024.

standards. Similarly, Africa's emerging data protection frameworks signal a growing recognition of the importance of personal data protection, despite the challenges in implementation and enforcement.

By comparing and contrasting these different approaches, this article aims to highlight the strengths and weaknesses of various legislative frameworks and provide practical guidance for adopting robust data protection measures.

3. THE SRI LANKAN PERSONAL DATA PROTECTION ACT NO. 09 OF 2022

3.1 Background and Objectives

The Sri Lanka Personal Data Protection Act No. 09 of 2022 (PDPA) marks a significant milestone in the country's legislative efforts to safeguard personal data. Enacted on March 19, 2022, the PDPA aims to regulate the processing of personal data, ensure the rights of data subjects, and establish a data protection authority to oversee compliance and enforcement.¹⁶ The Act was formulated in response to the growing need for a robust legal framework to protect personal data in the digital age, driven by the increasing digitization of services and the proliferation of data-driven technologies.¹⁷ The Act has a staggered implementation timeline with the complete version of the Act coming into effect on 18 March 2025, sans the section on the user of personal data to disseminate solicited messages. The Data Protection Authority of Sri Lanka has published several draft guidelines and rules seeking public feedback on the same so as to bolster the regulatory framework pertaining to the protection of personal data under the PDPA.

The primary objectives of the PDPA are to enhance consumer trust, facilitate the growth and innovation of the digital economy, and ensure interoperability with international data protection frameworks.¹⁸ By aligning with global standards such as the GDPR, the PDPA seeks to create a conducive environment for cross-border data flows and international cooperation in data protection

¹⁶ Sri Lanka Personal Data Protection Act. (2022), Sri Lanka Parliament <<https://parliament.lk/uploads/acts/gbills/english/6242.pdf>> accessed 21 October 2024.

¹⁷ ICTA. (2022). Personal Data Protection Act Updates, ICTA <<https://www.icta.lk/icta-assets/uploads/2022/08/Article-Personal-Data-Protection-Act-Updates-April-2022-1.pdf>> accessed 21 October 2024.

¹⁸ Data Protection Authority. (2022). Home, DPA website <<https://www.dpa.gov.lk/>> accessed 21 October 2024.

enforcement.¹⁹ The Act also aims to balance the interests of businesses and individuals, ensuring transparency and accountability in data processing activities.

3.2 Key Provisions

The PDPA introduces several key provisions designed to protect the personal data of individuals and ensure compliance by data controllers and processors. These provisions include:

1. **Data Subject Rights:** The PDPA grants data subjects several rights concerning their personal data, including the right to access, rectify, and erase their data, as well as the right to object to data processing and request review of automated decision-making activities. These rights are intended to empower individuals and give them greater control over their personal information.
2. **Obligations of Data Controllers and Processors:** The Act imposes stringent obligations on data controllers and processors to ensure the lawful and transparent processing of personal data. These obligations include obtaining explicit consent from data subjects, implementing appropriate technical and organizational measures to safeguard data, and maintaining records of data processing activities. Data controllers and processors are also required to conduct data protection impact assessments for high-risk processing activities and report data breaches to the Data Protection Authority within a prescribed period to be governed by regulations.
3. **Data Protection Authority:** The PDPA establishes the Data Protection Authority (DPA) as the regulatory body responsible for overseeing compliance with the Act and enforcing its provisions. The DPA is tasked with monitoring data processing activities, investigating complaints, and imposing penalties for non-compliance. The Authority also plays a crucial role in raising awareness about data protection and providing guidance to organizations on best practices.
4. **Cross-Border Data Transfers:** The PDPA sets out specific requirements for the transfer of personal data outside Sri Lanka. Data controllers and processors must ensure that the recipient country provides an adequate level of data protection or implement appropriate safeguards, such as standard contractual clauses, to protect the data during transfer. These provisions aim to facilitate international data flows while ensuring the protection of personal data.

¹⁹ European Union. (2018). General Data Protection Regulation (GDPR), GDPR <<https://gdpr.eu/>> accessed 21 October 2024.

3.3 Strengths and Weaknesses

The Sri Lanka PDPA has several strengths that align it with international best practices in data protection. One of its key strengths is the comprehensive set of rights it grants to data subjects, which are similar to those provided under the GDPR. This empowers individuals and enhances their control over personal data. Additionally, the establishment of the Data Protection Authority ensures effective oversight and enforcement of the Act's provisions, promoting accountability and compliance among data controllers and processors.

However, the PDPA may also pose certain challenges in implementation. One of these would be the need for investment and Privacy Enhancing Technologies and tools to effectively respond to data subject rights such as a data discovery tool to uncover all personal data being processed of a particular data subject that wishes to raise a Right of Erasure. This is strikingly so for small and medium-sized enterprises. Providing support to organizations on how to meet these requirements is essential to facilitate compliance.

3.4 Comparative Analysis

When compared to other global data protection frameworks, the Sri Lanka PDPA shares several similarities with the GDPR, particularly in terms of the rights granted to data subjects and the obligations imposed on data controllers and processors. However, there are also notable differences. For instance, the GDPR provides the right of data portability which gives the data subject the *right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided*. In contrast, the PDPA does not provide such a right to data subjects.

The United States' sectoral approach to data protection, characterized by a patchwork of federal and state laws, differs significantly from the comprehensive framework of the PDPA. While the CCPA grants California residents several rights concerning their personal data, it does not provide the same level of protection or impose the same stringent requirements as the PDPA. Similarly, the data protection laws in Asia and Africa vary widely, reflecting the diverse legal and regulatory landscapes of these regions.

4. DATA PROTECTION CHALLENGES IN EMERGING ECONOMIES

Emerging economies face unique challenges in implementing and enforcing data protection laws. These challenges stem from a variety of factors, including limited resources, varying levels of

technological advancement, and differing cultural attitudes towards privacy. This section explores the specific obstacles that emerging economies encounter in the realm of data protection, compares these challenges with those faced by more developed jurisdictions, and provides practical recommendations for overcoming these hurdles. By examining the experiences of countries such as India, Kenya, and Brazil, this analysis aims to shed light on the complexities of data protection in emerging markets and offer insights for policymakers and organizations striving to enhance data privacy and security.

4.1 Limited Resources and Capacity

One of the primary challenges faced by emerging economies in implementing data protection laws is the limited availability of resources and capacity. Establishing and maintaining a robust data protection framework requires significant financial investment, skilled personnel, and technological infrastructure. Many emerging economies struggle to allocate sufficient resources to their data protection authorities (DPAs), which hampers their ability to effectively oversee compliance and enforce regulations.²⁰

For instance, in Kenya, the Data Protection Act of 2019 established the Office of the Data Protection Commissioner (ODPC) to oversee data protection compliance. However, the ODPC has faced challenges related to funding and staffing, which have impacted its ability to carry out its mandate effectively.²¹

4.2 Technological Advancements and Infrastructure

The level of technological advancement and infrastructure in emerging economies varies widely, which poses significant challenges for data protection. In many cases, the technological infrastructure necessary to support robust data protection measures is underdeveloped or lacking. This includes secure data storage facilities, advanced encryption technologies, and reliable internet connectivity.²²

²⁰ Emerging Data Privacy Laws and Regulations Around the World, <<https://digitalprivacy.ieee.org/publications/topics/emerging-data-privacy-laws-and-regulations-around-the-world>> accessed 21 October 2024.

²¹ Data Protection: A Global Challenge - Ecosystem Insights, <<https://blog.ecosystem.io/data-protection-a-global-challenge/>> accessed 21 October 2024.

²² Ethical Dilemmas and Privacy Issues in Emerging Technologies: A ... – MDPI, <<https://www.mdpi.com/1424-8220/23/3/1151>> accessed 21 October 2024.

For example, in several African countries, the lack of reliable internet connectivity and advanced technological infrastructure has hindered the implementation of effective data protection measures.²³ This contrasts with more developed jurisdictions, where advanced technological infrastructure supports comprehensive data protection frameworks. Addressing these technological gaps is crucial for emerging economies to enhance their data protection capabilities and ensure the security of personal data.

4.3 Cultural Attitudes Towards Privacy

Cultural attitudes towards privacy and data protection can significantly influence the effectiveness of data protection laws in emerging economies. In some cultures, there may be a lower awareness of privacy rights and a greater acceptance of data sharing practices, which can impact the enforcement of data protection regulations. Raising awareness about the importance of data protection and educating individuals about their privacy rights is essential to foster a culture of data privacy.

For instance, in India, cultural attitudes towards privacy have evolved significantly in recent years, driven by high-profile data breaches and increased public awareness of data protection issues. However, ongoing efforts are needed to further educate the public and promote a culture of data privacy. Similarly, in Kenya, public awareness campaigns and educational initiatives have been launched to inform individuals about their data protection rights and the importance of safeguarding personal data.

4.4 Legal and Regulatory Frameworks

The development and implementation of comprehensive legal and regulatory frameworks for data protection pose significant challenges for emerging economies. Crafting legislation that balances the protection of personal data with the need to support economic growth and innovation requires careful consideration and expertise. Additionally, aligning national data protection laws with international standards and best practices is crucial to facilitate cross-border data flows and international cooperation.

²³ OECD iLibrary | Emerging technologies that pose the main challenges for, <https://www.oecd-ilibrary.org/science-and-technology/emerging-technologies-that-pose-the-main-challenges-for-privacy-and-personal-data-protection-2019_2730db4d-en>_accessed 21 October 2024.

In Brazil, the General Data Protection Law (LGPD) was enacted in 2018 to regulate the processing of personal data and align with international standards such as the GDPR. The LGPD represents a significant step forward in data protection for Brazil, but challenges remain in ensuring effective enforcement and compliance. Similarly, in India, the Digital Personal Data Protection Act of 2023 aims to create a comprehensive legal framework for data protection, but its implementation will require addressing various legal and regulatory challenges.

4.5 Enforcement and Compliance

Enforcing data protection laws and ensuring compliance is a significant challenge for emerging economies. Limited resources, capacity constraints, and varying levels of technological advancement can hinder the ability of DPAs to effectively monitor and enforce compliance. Additionally, the lack of awareness and understanding of data protection regulations among businesses and individuals can impact compliance efforts.

For example, in Kenya, the ODPC has faced challenges in enforcing the Data Protection Act due to limited resources and capacity. Providing clear guidance and support to organizations, particularly small and medium-sized enterprises, is essential to facilitate compliance and promote a culture of data protection.

4.6 Recommendations for Overcoming Challenges

To address the challenges faced by emerging economies in implementing and enforcing data protection laws, several recommendations can be made:

1. **Capacity Building and Resource Allocation:** Governments should prioritize capacity building and allocate sufficient resources to support the functions of DPAs. This includes providing funding for staffing, training, and technological infrastructure to enhance the capabilities of DPAs²⁴.
2. **Technological Advancements:** Investing in technological infrastructure is crucial to support robust data protection measures. Governments should promote the development of secure data storage facilities, advanced encryption technologies, and reliable internet connectivity.

²⁴ Michael Pisa and Ugonma Nwankwo 'Are Current Models of Data Protection Fit for Purpose? Understanding the Consequences for Economic Development Roundtable Summary' (CGD Brief, 2021) <<https://www.cgdev.org/publication/are-current-models-data-protection-fit-purpose-understanding-consequences-economic>> accessed 1 November 2024.

3. **Public Awareness and Education:** Raising public awareness about the importance of data protection and educating individuals about their privacy rights is essential to foster a culture of data privacy. Public awareness campaigns, educational initiatives, and collaboration with civil society organizations can help achieve this goal.

4. **Legal and Regulatory Alignment:** Aligning national data protection laws with international standards and best practices is crucial to facilitate cross-border data flows and international cooperation. Governments should engage with international organizations and participate in global data protection forums to stay updated on best practices and emerging trends.

5. **Clear Guidance and Support for Businesses:** Providing clear guidance and support to businesses, particularly small and medium-sized enterprises, is essential to facilitate compliance with data protection regulations. Governments and DPAs should develop practical resources, such as compliance toolkits and training programs, to assist organizations in understanding and meeting their obligations.

5. PRACTICAL GUIDANCE ON ADOPTING DATA PROTECTION MEASURES IN A SRI LANKAN CONTEXT

Moving from a more universalist approach of emerging economies, this article will now focus on the Sri Lankan PDPA. To ensure compliance with the PDPA and other data protection regulations, organizations should adopt a comprehensive approach to data protection. This includes implementing robust data security measures, conducting regular data protection impact assessments, and providing training and awareness programs for employees. Organizations should also establish clear policies and procedures for handling data subject requests and reporting data breaches. By adopting these measures, organizations can enhance their data protection practices and build trust with consumers. Moreover, this is set out as a legal obligation in the Act by Article 12 which requires Controllers to *implement internal controls and procedures, (referred to as the “Data Protection Management Programme”*.

5.1 Compliance Strategies

Ensuring compliance with the Sri Lanka Personal Data Protection Act No. 09 of 2022 (PDPA) and other relevant data protection regulations requires a comprehensive and systematic approach. Organizations should begin by conducting a thorough assessment of their current data processing activities to identify areas of non-compliance and potential risks. This assessment should include a detailed inventory of all personal data collected, processed, and stored by the organization, as well as an evaluation of the legal basis for each processing activity.

One of the key steps in achieving compliance is the implementation of robust data protection policies and procedures. These policies should outline the organization's commitment to data protection, define the roles and responsibilities of employees, and establish clear guidelines for data processing activities. Organizations should also appoint a Data Protection Officer (DPO) to oversee compliance efforts and serve as the primary point of contact for data protection matters.

Regular training and awareness programs are essential to ensure that employees understand their obligations under the PDPA and are equipped to handle personal data responsibly. These programs should cover key topics such as data subject rights, data breach response procedures, and best practices for data security. Additionally, organizations should establish mechanisms for monitoring and auditing compliance, including regular reviews of data protection policies and procedures, and conducting internal audits to identify and address potential issues.

5.2 Data Security Measures

Implementing robust data security measures is crucial to protect personal data from unauthorized access, disclosure, alteration, and destruction. Organizations should adopt a multi-layered approach to data security, incorporating both technical and organizational measures. Technical measures may include encryption, anonymization, access controls, and network security protocols, while organizational measures may involve employee training, incident response planning, and regular security assessments.

Encryption is a fundamental data security measure that ensures personal data is protected both in transit and at rest. By encrypting data, organizations can prevent unauthorized access even if the data is intercepted or accessed by malicious actors. Access controls are another critical measure, ensuring that only authorized personnel have access to personal data based on their roles and responsibilities. Implementing strong authentication mechanisms, such as multi-factor authentication, can further enhance access control measures.

Regular security assessments and vulnerability testing are essential to identify and address potential weaknesses in the organization's data security infrastructure. These assessments should include penetration testing, vulnerability scans, and security audits to ensure that security measures are effective and up-to-date. Organizations should also establish incident response plans to quickly and effectively respond to data breaches and other security incidents. These plans should outline the steps to be taken in the event of a breach, including notification procedures, containment measures, and remediation efforts.

5.3 Cross-Border Data Transfers

The PDPA sets out specific requirements for the transfer of personal data outside Sri Lanka, aiming to ensure that personal data remains protected even when transferred to jurisdictions with different data protection standards. Organizations must ensure that the recipient country provides an adequate level of data protection or implement appropriate safeguards to protect the data during transfer.

One of the key safeguards for cross-border data transfers is the use of binding corporate rules (BCRs)²⁵ or standard contractual clauses (SCCs).²⁶ BCRs are internal policies adopted by multinational organizations to ensure that personal data transferred within the group is protected in accordance with the PDPA. SCCs, on the other hand, are contractual agreements between the data exporter and data importer that impose data protection obligations on the importer. These safeguards provide a legal basis for cross-border data transfers and help ensure compliance with the PDPA.

Organizations should also consider the use of data transfer impact assessments (DTIAs)²⁷ to evaluate the risks associated with cross-border data transfers and implement additional measures to mitigate these risks. DTIAs should assess factors such as the legal and regulatory environment of the recipient country, the nature of the data being transferred, and the potential impact on data subjects. By conducting DTIAs, organizations can make informed decisions about cross-border data transfers and ensure that personal data remains protected.

6. THE FUTURE OF DATA PROTECTION

The future of data protection is poised to be shaped by evolving legal frameworks and technological advancements. The General Data Protection Regulation (GDPR) has set a global benchmark, emphasizing transparency, security, and individual rights.²⁸ Emerging technologies such as artificial intelligence (AI) and the Internet of Things (IoT) present new challenges and opportunities

²⁵ Binding Corporate Rules. (2022), BCR website <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/binding-corporate-rules-bcr_en> accessed 21 October 2024.

²⁶ Standard Contractual Clauses. (2022), SCC website <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en> accessed 21 October 2024.

²⁷ Data Transfer Impact Assessments. (2022), DTIA website <<https://www.dataprotection.ie/en/dpc-guidance/data-transfer-impact-assessments>> accessed 21 October 2024.

²⁸ Mesarčík, M., & Hamulák, O. (2024). General Data Protection Regulation: Current Challenges and Future Directions, SpringerLink <https://link.springer.com/chapter/10.1007/978-3-031-56045-3_9> accessed 21 October 2024.

for data protection. AI's ability to process vast amounts of data necessitates robust safeguards to prevent misuse and ensure compliance with data protection principles.²⁹

Technological advancements are driving the development of more sophisticated data protection mechanisms. Blockchain technology, for instance, offers decentralized and immutable data storage solutions, enhancing security and transparency. Additionally, privacy-enhancing technologies (PETs) such as homomorphic encryption and differential privacy are gaining traction, enabling data analysis while preserving privacy.³⁰

Future data protection laws are likely to focus on harmonizing regulations across jurisdictions to address the global nature of data flows. The need for international cooperation and standardized enforcement mechanisms is paramount to effectively manage cross-border data transfers. Furthermore, the integration of ethical considerations into data protection frameworks will be crucial to address the societal impacts of data-driven technologies.³¹

7. CONCLUSION

The enactment of the Sri Lanka Personal Data Protection Act No. 09 of 2022 (PDPA) signifies a pivotal moment in the country's legislative landscape, reflecting a growing recognition of the importance of personal data protection in the digital age. This critical review has provided an in-depth analysis of the PDPA, comparing it with other prominent data protection frameworks such as the European Union's General Data Protection Regulation (GDPR), the United States' sectoral approach, and emerging frameworks in Asia and Africa. By examining these different legislative approaches, the review has highlighted the strengths and weaknesses of various data protection regimes and offered practical guidance for organizations to enhance their data protection practices.

The PDPA's comprehensive framework, which includes granting extensive rights to data subjects and imposing stringent obligations on data controllers and processors, aligns closely with international best practices. This alignment not only enhances the protection of personal data within Sri Lanka but also facilitates international data transfers and cooperation in data protection enforcement. The establishment of the Data Protection Authority (DPA) is a crucial step towards

²⁹ UK reform of data protection: key changes and their implications, <[Oxford Academic](https://academic.oup.com/idpl/article/8/4/289/5299551), <https://academic.oup.com/idpl/article/8/4/289/5299551>> accessed 21 October 2024.

³⁰ Digital technologies: tensions in privacy and data, SpringerLink <https://link.springer.com/chapter/10.1007/978-3-031-56045-3_9> accessed 21 October 2024.

³¹ UK reform of data protection: key changes and their implications, <<https://academic.oup.com/ijlit/article-abstract/30/3/269/6881599>> accessed 21 October 2024.

ensuring effective oversight and enforcement of the Act's provisions, promoting accountability and compliance among organizations.

Comparatively, the PDPA stands out for its comprehensive nature and alignment with international standards, particularly when contrasted with the sectoral approach of the United States and the diverse regulatory landscapes of Asia and Africa. The GDPR's extraterritorial scope and stringent requirements have set a high benchmark, influencing the development of data protection laws worldwide, including the PDPA. The sectoral approach in the United States, while effective in certain industries, lacks the uniformity and comprehensiveness of the GDPR and PDPA, leading to inconsistencies and gaps in data protection coverage.

In Asia, countries like Singapore and India are making significant strides in enhancing data protection standards, with frameworks that reflect their unique legal and regulatory environments. Similarly, African countries are increasingly adopting comprehensive data protection laws, signaling a growing recognition of the importance of personal data protection. The comparative analysis underscores the need for a balanced approach that considers the specific legal, cultural, and economic contexts of each jurisdiction while striving for alignment with international best practices.

Moreover, emerging economies face unique challenges in implementing and enforcing data protection laws, including limited resources, varying levels of technological advancement, and differing cultural attitudes towards privacy. By addressing these challenges through capacity building, technological investments, public awareness initiatives, legal and regulatory alignment, and clear guidance for businesses, emerging economies can enhance their data protection capabilities and ensure the security of personal data. The experiences of countries such as India, Kenya, and Brazil provide valuable insights for policymakers and organizations striving to navigate the complexities of data protection in emerging markets. Through continuous efforts to address these challenges and promote a culture of data privacy, emerging economies can contribute to the broader goal of safeguarding personal data in the digital age.

To ensure robust data protection, organizations must adopt a comprehensive approach that includes implementing data protection policies and procedures, conducting regular training and awareness programs, and adopting technical and organizational security measures. By doing so, they can enhance their data protection practices, build trust with consumers, and ensure compliance with the PDPA and other relevant regulations. Additionally, organizations must be proactive in addressing the challenges associated with cross-border data transfers, conducting data transfer impact assessments, and implementing appropriate safeguards to protect personal data.

As a prospective outlook the future of data protection will be characterized by a dynamic interplay between legal regulations and technological innovations, necessitating continuous adaptation to safeguard individual privacy in an increasingly digital world.

ANTI-COMPETITION LAW REGIME IN SRI LANKA **AND ITS ENFORCEMENT**

*Shalini Weeraratne*¹⁸⁰

ABSTRACT

Fundamentally, healthy competition in a market is a variable which can boost the economic situation as it provides an equal stage for the market players to conduct their trading activities. However, there can be instances where one or more market players may misuse the rights and entitlements given to them under free trade in order to reap unjust benefits. As such, there shall be policies to regulate the anti-competitive practices inter alia prohibition of cartels, abuse of dominant position and merger control which might occur during the course of trade.

The Competition law policy of a state is formulated in order to complement the economic welfare of such a state. This understanding has resulted in many developed nations to adopt strict laws to regulate competition. In Sri Lankan context, even though presently, the Competition is regulated through Consumer Affairs Authority Act No. 9 of 2003, it does not provide a comprehensive coverage to prevent anti-competitive practices in order to promote competition and protect the consumer.

In this backdrop, this paper delves into current laws implemented to regulate anti-competitive practices including but not limited to prohibition of cartels, abuse of dominance and merger control in Sri Lanka and its enforcing procedure. Further, the paper intends to analyze the lacunas in the current competition regime in Sri Lanka and propose recommendations for a better competition policy.

1. INTRODUCTION

The Organization for Economic Co-operation and Development (OECD) states that the term “Competition” in a business environment refers to a situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective,

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e.g., profits, sales and/or market share.¹⁸¹ Competition exists where there is a free play of market forces where there is a large number of buyers and sellers for a particular kind of product and there is no barrier for anyone to enter and exit from the market for that product. In this context, possibility that violations can occur against the rights of the involving parties are high, therefore, it is pivotal that the entitlements of the buyers as well as the sellers are preserved and well protected. The law of Competition plays a vital role in regulating fair competition among businesses. It does so by promoting fair competition by preventing anti-competitive practices, and safeguarding the interests of consumers and market participants.¹⁸²

By promoting competition within the market, the consumers have access to a wider variety of choices at competitive prices, leading to better quality products and services. It encourages companies to innovate and improve efficiency to gain a competitive edge. This leads to economic growth, as resources are allocated more efficiently, the businesses are incentivized to constantly improve their offerings. As Competition Law supports companies to innovate, it prevents monopolies and market dominance, which can stifle innovation by reducing incentives to innovate and invest in research and development. Further, the Competition law ensures that all businesses, regardless of their size or market power, have a fair chance to compete, which prevents larger companies from using their market dominance to unfairly exclude or disadvantage smaller competitors, promoting a level playing field for businesses of all sizes. As a result of having healthy Competition laws, it prevents abuses of market power and ensures that customers are ultimate beneficiaries of a vibrant and competitive marketplace. Even though, the Competition law does not contain a blueprint for economic development or the establishment of a sustainable free market economy, the number of countries that have adopted Competition Laws since the end of World War II has grown from a handful in the 1940s to more than 20 by the 1970s, and to over 100 since the year 2000.¹⁸³

¹⁸¹ Sagarika, A. 'Competition law and its significance to the consumer (part 1)', (*CAG*, 6 September 2022) <<https://www.cag.org.in/blogs/competition-law-and-its-significance-consumer-part-1>> accessed 18 June 2024.

¹⁸² Emmi Nasution, Henry Siburian, Loso Judijanto and Efend Sujianto, 'The Role of Competition Law in Encouraging Innovation and Competitiveness of Companies in West Java' [2023] 1 WSLH 41-148.

¹⁸³ K.M. Davidson 'Economic development, competition, and competition law' (*CUTS C-CIER*) <https://www.cuts-ccier.org/pdf/Paper_Economic_Development_Competition_and_Competition_Law.pdf> accessed 15 June 2024).

Presently many states including the United States, the European Union, India and Japan have implemented thorough competition policies as a means to promote economic development as those policies set out a “level playing field” for all the market players. Additionally, the Competition Law regimes in the USA under the Sherman Act, Clayton Act and Federal Trade Commission Act of 1914 and Treaty on the Functioning of the European Union (Lisbon Treaty) covers a wider range of anti-competitive practices as well as they provide effective enforceable mechanism.

2. HISTORICAL BACKGROUND TO COMPETITION LAW IN SRI LANKA

Upon liberalization of the market economy of Sri Lanka in 1977, the Government of Sri Lanka moved forward with the aim to facilitate the country to reap the maximum benefits of globalization.¹⁸⁴ Nonetheless, at this juncture, almost all the Governments that came into power in Sri Lanka have focused more on generating revenue through state monopolization than looking at the customer welfare. These economic policies of those Governments have resulted in short term Governments and ineffective policies to regulate competition within the free market economies.

During early days of market liberalization, Sri Lanka did not have a comprehensive Competition Law Regime. The very first legislation which introduced the concept of Competition law in Sri Lanka is the Fair Trading Commission Act No. 1 of 1987 (FTC Act) which dealt with the control of monopolies and mergers and prevention of anticompetitive practices.¹⁸⁵ It is also important to emphasize the fact that the FTC Act was implemented 10 years after market liberalization in 1977 and the irony is, only after a decade the Sri Lankan government felt the necessity to implement legislation regarding control of the competition of the market and welfare of the consumers.

Sections 12, 13 and 14 of the FTC Act covered provisions against anti-competitive practices, abuse of dominance position and merger control, respectively. Section 15 of the FTC Act however, allowed anti-competitive practices, monopoly and mergers if it's not against the “public interest”. In order to validate that the agreement is not against the public interest the following requirements need to be fulfilled;

¹⁸⁴ ‘Economic phases- Towards an Open Economy (1977-2005)’ (*Ministry of Finance, Economic Stabilization & National Policies*) <[https://www.treasury.gov.lk/web/economic-phases/section/towards%20an%20open%20economy%20\(1977-2005\)](https://www.treasury.gov.lk/web/economic-phases/section/towards%20an%20open%20economy%20(1977-2005))> accessed 21 June 2024.

¹⁸⁵ Dianarthy Suthakar ‘Beyond ‘More Economics-Based Approach’: A Legal Perspective on Competition in Sri Lanka’ [2018], 11 KDU-IRC 22-26.

Section 15 (1)(a) of FTC reads as,

- (i) maintaining and promoting effective competition between persons supplying good and services;*
- (ii) promoting the interests of consumers, purchasers and other users of goods and services in respect of the price and quality of such goods and services and the variety of goods and services supplied;*
- (iii) promoting through competition the reduction of costs, the development and use of new techniques and products and facilitating the entry of new competitors into existing markets;*
- (iv) maintaining and promoting balanced distribution of industrial activity and employment; and*
- (v) maintaining and promoting competitive activity in export markets;¹⁸⁶*

In fact, provision of the aforementioned section is similar to Article 101(3) of Treaty on the Functioning of the European Union (TFEU). In the event of an anti-competitive agreement being formed in the interest of the public, Article 101(3) considers exceptions regarding such anti-competitive agreement.

Under and in terms of Section 2 of the FTC Act, the Fair Trading Commission is established as a quasi-judicial body under the Minister of Commerce and Consumer Affairs. However, the FTC Act was criticized for its weaknesses of inability to enforce the provisions of the Act. As an example, in the *Ceylon Oxygen Ltd v Fair Trading Commission*¹⁸⁷ has held that,

“It is clear therefore that ex facie the Commission has acted outside the scope of section 11 in commencing its investigation. If an investigating body commences an inquiry without jurisdiction, whatever decision it may arrive at the conclusion of that investigation, that patent defect of lack of jurisdiction will render the entire investigation improper and unfair.”¹⁸⁸

Section 11 of the FTC Act make provision regarding the jurisdiction of the Commission to conduct investigation, which is as follows;

¹⁸⁶ Consumer Affairs Authority Act, No.9 of 2003, section 15.

¹⁸⁷ (1997) 2 SLR 372.

¹⁸⁸ *ibid.*

“The Commission may either of its own motion or on a complaint or request made to it by any person, carry out an investigation with respect to;

(a) the existence or possible existence of a monopoly situation;

(b) the creation or possible creation of a merger situation;

(c) the prevalence of any anticompetitive practice.”¹⁸⁹

From the inculcation of the aforesaid Section 11, the FTC Act has limited the scope of its investigation arm, such that the Commission can only exercise its powers within the said specific instances. This limitation of the scope has made adverse effects on the traders as well as buyers when seeking for reliefs for injustices occurred during trade related affairs such as predatory pricing, price discriminations, tying and bundling etc. This standing has been illustrated by the *Ceylon Oxygen Ltd v Fair Trading Commission*. Further quoting *Ceylon Oxygen Ltd v Fair Trading Commission*, the Honourable Justice Dr. Ranaraja has held that;

“It is to be noted the Commission may commence an investigation either on its own motion or on a complaint made to it by any person. The order of the respondent specifically states. “By a letter dated 7th February, 1994 Industrial Gases (Pvt) Ltd., complained to the Fair Trading Commission that Ceylon Oxygen Ltd, was resorting to unfair trade practices to their detriment.” Thereafter the respondent for the purpose of investigation focused on, (1) predatory pricing, (2) exclusive dealings, (3) discriminatory rebates or discounts in its pricing policies. In other words, it had commenced its inquiries not on any of the three matters specified in section 11 (a), (b) and more specifically, (c) which deals with the prevalence of any anti-competitive practice.”¹⁹⁰

Therefore, due to the aforesaid reason, the reliability on the FTC Act for anti-competitive practices has been gradually reduced and almost all of the cases that have been filed for “Unfair Competition” have been under the provisions of the Code of Intellectual Property Act No. 52 of 1979 for intellectual property rights infringements and not for anti-competitive acts under the FTC Act.¹⁹¹

¹⁸⁹ Consumer Affairs Authority Act, No.9 of 2003, section 11.

¹⁹⁰ (1997) 2 SLR 372

¹⁹¹ A. Edirimane ‘The need to have an effective Competition Law regime’ (*Legal Landscape*, 3 May 2018) <<https://ajithaa2.wordpress.com/tag/consumer-affairs-authority-sri-lanka/>> accessed 27 June 2024.

In addition to the FTC Act, the Consumer Protection Act 1979, Control of Prices Act 1950 and Public Utilities Commission Act No. 35 of 2002 were other pieces of legislation which has facilitated the protection and promotion of competition in the market in Sri Lanka. In particular, Public Utilities Commission Act No. 35 of 2002 contained detailed provisions on the regulation of anti-competitive position, monopolies, acquisitions, abuses of a dominant position and merger situation in identified utilities industries.¹⁹² However, the applicability of the Public Utilities Commission Act No. 35 of 2002 is restricted only to the Electricity industry, Water service industry and Petroleum industry as specified in its schedule.

Therefore, it is evident from the above that, during this time, the law relating to competition in Sri Lanka was scattered among several legislations and could not be found under one legislation, and the existing laws were not sufficient to cover the issues raised in the field of anti-competitive practices.

3. PRESENT STATUS OF COMPETITION LAW IN SRI LANKA

In the beginning of 2000s, the Government of Sri Lanka decided to implement a unified law to regulate anti-competitive practices and protect the consumers, and as a result, Consumer Affairs Authority Act, No. 9 of 2003 (hereinafter referred to as CAA Act) was passed. The CAA Act repealed the FTC Act, Consumer Protection Act 1979 and Control of Prices Act 1950 and incorporated several sections from each one of them with slight modifications in some instances.¹⁹³

The CAA Act focuses on promotion of competition through consumer welfare. However, the competition law regime under the CAA Act is again very limited in its scope. The basic provisions related to Competition Law as set out in Section 8 of the CAA Act are as follows;

(a) *“the Authority seeks to control and eliminate,*

- Restrictive trade agreements among enterprises;

- Arrangements amongst enterprises with regard to prices;

¹⁹² Dianarthy Suthakar (n 5).

¹⁹³ A. Thureiratnam ‘Competition Regimes in the World- A Civil Society Report’ (*CUTS International*, 2006) <<https://competitionregimes.com/pdf/AsiaPacific/30-Sri%20Lanka.pdf>> accessed 8 November 2024.

- *Abuse of a dominant position with regard to domestic trade or economic development within the market or in a substantial part of the market;*

- *Any restraint of competition adversely affecting domestic or international trade or economic development.”*

(b) investigate or inquire into anti-competitive practices and abuse of a dominant position;

(c) maintain and promote effective competition between persons supplying goods and service;

(g) promote competitive prices in markets where competition is less than effective;¹⁹⁴

Section 8 of the CAA Act bestows the Authority with the power to control and eliminate certain acts related to Competition law, which includes cartels, price fixing and monopoly which was not seen in the previous legislation. Simultaneously, Part III of the CAA Act provides provision for promoting competition and consumer interests, which was not seen in previous statutes related to Competition law. Further, under **Section 34**, the CAA Act defines as to what “anti-competitive practices” mean;

“an anti-competitive practice shall be deemed to prevail, where a person in the course of business, pursues a course of conduct which of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in Sri Lanka or the supply or securing of services in Sri Lanka”.¹⁹⁵

Even though the CAA Act has defined the term anti-competitive practices, it does not stand as a well explanatory definition, which might leave room for contesting the orders issued by the Consumer Affairs Authority. It can also be seen that Section 34 of the CAA Act is a clear duplicate of Section 14 of the FTC Act. As previously discussed, one of the main shortcomings of the FTC Act was the unavailability of a proper definition for anti-competitive practices, which became evident from the judgment of the *Ceylon Oxygen Ltd v Fair Trading Commission*. By introducing

¹⁹⁴ Consumer Affairs Authority Act, No.9 of 2003, section 8.

¹⁹⁵ Consumer Affairs Authority Act, No.9 of 2003, section 34.

the same provisions to the CAA Act, without any further developments or amendments, could lead to the same outcome as the FTC Act.

Further, the CAA Act implements provisions to conduct investigations into anti-competitive practices. Section 34(1) of the CAA Act provides;

“(1) The Authority may either of its own motion or on a complaint or request made to it by any person, any organization of consumers or an association of traders, carry out an investigation with respect to the prevalence of any anti-competitive practice.”¹⁹⁶

Further, Section 34(2) provides that the Authority has to conclude its investigation within 100 days from the date commencement of such investigations. However, the Act does not specify a time period within which such a complaint should be made to the Authority upon the occurrence of the unfair trade activity.

Thereafter, Section 35(2) provides that the Authority has the power of District Court and it acts as a quasi-judicial body by exercising *inter alia* the power to issue notices, administer oaths and affirmations and require production of documents and attendance of witnesses. Section 36 of the CAA Act provides that in the event a person refuses and/or fails to act on the orders of the Authority, such person is deemed to be guilty of an offense of contempt against or in disrespect of the Authority and shall be punishable for such offense by the Court of Appeal.¹⁹⁷

Section 37 furnishes that upon the conclusion of the investigations, the Authority refers the matter by way of an application to the council for the purpose determination. In the event the Authority does not make any application to the council, the party who made the complaint can request the council to call the investigation report from the Authority for the determination of the council under and in terms of Section 38 of the CAA Act.

It is evident from the above facts that the competition law regime of Sri Lanka is limited in its scope and the CAA Act has failed to facilitate crucial areas pertaining to Competition law. The CAA Act provides provision for contempt but does bring forth penalties for conducting anti-competitive practices or unfair trade activities. Most importantly, the legislators have left out the

¹⁹⁶ *ibid.*

¹⁹⁷ Consumer Affairs Authority Act, No.9 of 2003, section 36.

penalties for engaging in such practices, which can be identified as a major lacuna in the competition law regime in Sri Lanka. If anti-competitive practices are not prevented by imposing penalties, more market players will tend to make unjust profits through unfair trade practices while harming the consumer welfare. In such a situation, the purpose of Part III of the CAA Act becomes void. As such, in this scenario, Sri Lanka should implement strong legislations in order to promote healthy competition and consumer welfare.

Another crucial point for the discussion is the power of the Council to make determination on the investigation conducted by the Authority. Section 41 of the CAA Act provides that;

1. Where an application is made to the Council under section 37 or section 38, as the case may be, the Council shall, on being satisfied that;

(a) an anti-competitive practice exists but such anticompetitive practice does not operate or is not likely to operate against public interest, by order made in that behalf, authorize such anti-competitive practice; or

(b) an anti-competitive practice exists and that it operates against public interest, by order made in that behalf, provide for —

(i) the termination of such anti-competitive practice in such manner as may be specified in the order; and

(ii) such other action as the Council may consider necessary for the purpose of remedying or preventing the adverse effects of any anti-competitive practice.¹⁹⁸

Further this Section 41 provides that such a determination should be made within one (01) month of receipt of application by the Authority. However, thus far, the CAA Act has failed to furnish provisions to compensate the aggrieved parties for the damages caused due to anti-competitive practices. Even though Section 41(b)(2) mentions that the Council may consider actions for remedying adverse effects, it is not obligatory for the Council to make such orders, which is undoubtedly a shortcoming of the CAA Act.

¹⁹⁸ Consumer Affairs Authority Act, No.9 of 2003, section 41.

4. LESSONS FROM OTHER JURISDICTIONS

Many countries around the world have implemented stringent competition regulations for consumer welfare and to prevent market distortion through anti-competitive practices. Among those many jurisdictions, anti-competitive legislations imposed by the EU are prominent as competition regimes of other countries are mostly shaped by competition regulations of the EU. In addition, India as a neighboring nation of Sri Lanka also has implemented strong laws to regulate healthy competition. As such, Sri Lanka can use both EU and Indian competition legislations as a model to develop the irregularities and lacunas in the existing competition law regulations in Sri Lanka.

4.1 EU's Treaty on Functions of the European Union and European Commission Merger Regulations

The competition policy of the EU is recognized to be used as a guideline to implement competition law regulations for many other jurisdictions. Further, the competition policy of the EU is governed by the Treaty on Functions of the European Union (TFEU) and Council Regulation (EC) No 139/2004 or know as EU Merger Regulation (EUMR). The implementation of the European Union's competition policy is essentially entrusted to the European Commission by Articles 101 to 109 of the TFEU, under the supervision of the Court of Justice of the European Union and is based on three main aspects: (i) the fight against anti-competitive practices, (ii) merger control, and (iii) state aid control.¹⁹⁹

4.1.1 Prevention of Anti-competitive Agreements

Article 101 of the TFEU provides a comprehensive ban on cartel activities or anti-competitive agreements. It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices.²⁰⁰ One of the important aspects covered by Article 101 is prohibition of price-fixing. Generally, the traders are entitled to determine the prices of each of their products and it may impose unfavorable conditions on the consumer. The provisions of the

¹⁹⁹ 'European Union's competition policy: seeking a balance' (*Groupe d'études géopolitiques*) <<https://geopolitique.eu/en/articles/european-unions-competition-policy-seeking-a-balance-between-perfect-competition-and-the-fostering-of-european-industry/>> accessed 15 July 2024.

²⁰⁰ Article 101, TFEU.

Article 101 further provide to prevent horizontal as well as vertical agreements which distorts the fair-trading practices in the internal markets. Nonetheless, Article 101 facilitates any anti-competitive agreement in the interest of the public.

4.1.2 Prevention of Abuse of Dominance Position

Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits abuse of a dominant position within the internal market or in a substantial part of the internal market.²⁰¹ This Article can be considered as a cornerstone in order for the European Union (EU) to uphold fair competition between undertakings within the internal market.²⁰² “Abuse” in Article 102 is defined as;

- a) *Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- b) *Limiting production, markets or technical development to the prejudice of consumer;*
- c) *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- d) *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*²⁰³

This provision ensures to prevent monopolistic and/or oligopolistic situations within the market, and safeguards a healthy competition between the members of the EU.

The European Commission can impose substantial fines on companies that infringe competition laws of the European Union and such fines can be up to 10% of the company's annual worldwide turnover.²⁰⁴ The Commission calculates fines based on the gravity and duration of the infringement.

²⁰¹ Article 102, TFEU.

²⁰² M Lorenz, *An Introduction to EU Competition Law* (1st edn., Cambridge University Press 2013).

²⁰³ Article 102, TFEU.

²⁰⁴ Lorenz (n 22).

Therefore, it is important to implement such stringent regulations as penalties in order to curtail the power of market abusers.

4.1.3 Merger Control

A merger within the meaning of Article 3(1)(a) EUMR occurs where two or more independent undertakings amalgamate into a new one and cease to exist as separate legal entities.²⁰⁵ Under EUMR, the European Commission is given wide power to investigate concentrations having a Union dimension.²⁰⁶ According to Article 14 EUMR, fines imposed for providing incorrect or misleading information may amount to 1% of the group worldwide turnover in the preceding fiscal year whereas fines for implementing a concentration without prior notification to the European Commission or in breach of conditions attached to a decision can be up to 10% of the group worldwide turnover.²⁰⁷

4.2 Indian Competition Act of 2002

Competition law of India is governed by the Competition Act, 2002, No. 12 of 2003. This comprehensive piece of legislation came into force one year after the implementation of CAA Act of Sri Lanka. It is to be noted that the Competition Act, 2002 is identical to TFEU and EUMR up to certain extent. Further, Competition Commission of India is the enforcing authority established in terms of the Competition Act, 2002 to determine the anti-competitive practices under the Act.

4.2.1 Prohibition of Anti-competitive Agreements

Section 3 of the Competition Act, 2002 prohibits three types of agreements, namely, general agreements, horizontal agreement and vertical agreements, if those agreements have an “appreciable adverse effect on competition within India”²⁰⁸. It had been noted that the scope of Section 3 is broad enough to prevent the stakeholders from entering into anti-competitive

²⁰⁵ Jurisdictional Notice, para. 9.

²⁰⁶ Lorenz (n 22) 251.

²⁰⁷ *ibid.*

²⁰⁸ Competition Act, 2002, No. 12 of 2003, section 4.

agreements such as price-fixing, fixing trade conditions to limit production and investment, collusive bidding and collective boycotting.

4.2.2 Abuse of Dominant Position:

Section 4 of the Competition Act, 2002 prohibits abuse of the dominant market position by enterprises. Through this section anti-competitive practices such as predatory pricing, discriminatory pricing and unfair trade practices are prevented.

4.2.3 Regulations of Combinations

Sections 5 and 6 of the Competition Act regulate mergers and acquisitions to prevent mergers that may significantly distort competition. Companies must notify the Competition Commission of India about proposed mergers and acquisitions.

Sections 19 to 24 of the Competition Act provides the framework for the investigation complaints against anti-competitive practices. The Act also provides separate sections on the manner in which investigations required to be conducted regarding certain agreements, dominant position of enterprise and merger control. Further Competition Commission of India has the power to issue interim orders against acts taking place outside India but having an effect on competition in India.²⁰⁹

The Competition Act, 2002 has a comprehensive chapter on penalties. The Competition Commission of India also has the authority to impose penalties on companies involved in anti-competitive practices. The penalties can be up to 10% of the average turnover of the company for the preceding three financial years. In addition, Section 53 of the said Act empowers consumers to seek compensation for harm suffered due to anti-competitive practices.

Further, the Indian legislator have taken steps to amend the Competition Act, 2002 in order to strengthen its provisions and to align with international practices. Therefore, the Indian Competition Act can be considered as a well comprehensive piece of legislation, harmonized with modern requirements, which can be used as a model to develop competition legislation in Sri Lanka.

²⁰⁹ Competition Act, 2002, No. 12 of 2003, section 32.

5. CONCLUSION

As Hoekman and Holmes (1999) suggest, Competition Laws have a very important role to play to promote a competitive environment in developing countries.²¹⁰ As discussed in the previous topic, in Sri Lanka, the competition policy and legislations are still at their infancy and the current CAA Act is not comprehensive enough to cover the anti-competitive practices in the market. Most importantly, the Act itself does not provide an effective enforcement mechanism against anti-competitive practices. Thus, in order to cover up the lacunas in the existing Competition law, further amendments are required to strengthen the scope as well as the implementation of the law to deal with matters relating to anti-competition. In particular, it needs to be amended to reflect mergers and acquisitions which are a fundamental pillar of Competition Law and to provide better protection against abuse of dominance and anticompetitive practices in the country. Certain institutional changes need to be made to improve the efficiency of the competition authority. There is a widespread lack of understanding about the nature and extent of anti-competitive practices and the role of the Consumer Affairs Authority, the competition agency in addressing such practices. Given the situation, it is crucial to enhance public awareness regarding what constitutes anti-competitive practices, the resulting harm of such practices and effective ways to address them. The CAA Act shall address issues which the consumers and companies as well as the Authority itself may have to encounter while dealing with the modern market economy.²¹¹ Even though the inclusion of the provisions to investigate any anti-competitive practice in general may somewhat fill this vacuum, the State must soon introduce legislation in respect of unfair monopolies and cartels to effectively implement its competition policy as the absence of these provisions could leave room to contest the orders of the authority.²¹² In modeling a new Competition law policy, Sri Lanka can make use of the provisions provided under the TFEU, EUMR and Competition Act, 2002.

While it may pose challenges, the benefits for the economy will make it a worthwhile endeavor. Especially considering the current context of the economy where privatizations have come into

²¹⁰ Bernard Hoekman & Peter Holmes, 'Competition policy, developing countries, and the World Trade Organization' [1999] 1 Policy Research Working Paper.

²¹¹ Gamunu Chandrasekara 'Anti-Competitive Practices & Competition Law of Sri Lanka – A Call for Reform' [2019] 10 The Junior Bar Law Journal 8.

²¹² *ibid.*

force and such privatizations can only be fair and successful in an equitable manner where there is a strong Competition law policy and proper enforcement in the country.

ANTI-SUIT INJUNCTIONS AND DIFFERENCES IN PERSPECTIVE: CHICKENS TALKING TO A DUCK?

Harish Balakrishnan¹ | Iranthi Walgama²

ABSTRACT

To date, the Supreme Court of Sri Lanka has not had occasion to consider whether our courts have the power to grant anti-suit injunctions, and whether they would be acceptable in principle. It is true that this remedy has existed for centuries in common law legal systems, and can be a rather effective tool. Nonetheless, civil law legal systems oppose it, generally viewing it as interfering with the sovereignty and adjudicatory functions of a foreign court, positing that it is incompatible with the notion of comity. This divergence in views can be traced back to fundamental differences as to which values should give way. Should these questions be raised before our Supreme Court, it would be faced with a choice: being a mixed legal system, should Sri Lanka pick the path traversed by common lawyers, or by civil lawyers? If the choice is to not reject anti-suit injunctions altogether, but to accept them, the question then becomes: *how* should they operate in our legal system? In other words, does the approach adopted by a particular common law jurisdiction lend itself as attractive to Sri Lanka, or should Sri Lanka chart its own course? If the answer is the latter, then it may well be worthwhile considering whether clear rules regarding the choice of law ought to be adopted in what are popularly known as non-contractual anti-suit injunction cases. In any event, Sri Lankan jurisprudence stands to benefit from a thorough consideration by our Supreme Court, of all these matters.

1. INTRODUCTION: BACKGROUND AND STATUS QUO

An anti-suit injunction is “an order of the court requiring the injunction defendant not to commence, or to cease to pursue, or not to advance particular claims within, or to take steps to terminate or suspend, court or arbitration proceedings in a foreign country, or court proceedings elsewhere in the court’s own territorial jurisdiction.”³ These may be granted on an interlocutory or final basis.⁴

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³ T Raphael, *The Anti-Suit Injunction* (OUP 2019) [1.05].

⁴ Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) [12-078].

Anti-suit injunctions have “deep roots in English common law and equity,”⁵ and are “closely linked to the rise of equity and its struggle with the courts of common law.”⁶ Said to have been developed in the 15th century, anti-suit injunctions were “granted by the Chancellor to stop a party bringing an action in the courts of common law in situations in which this was considered to be against good conscience.”⁷ Hartley remarks that, once the Court of Chancery had established that it had power to issue such injunctions against other English Courts, “it was only a small extension of this power to start issuing them against foreign courts.”⁸

Raphael points out⁹ that, in today’s context, in England, anti-suit injunctions are granted mainly in two types of cases: (i) contractual injunctions, where foreign proceedings are in breach of a contractual forum selection clause; and (ii) alternative forum cases, where the foreign proceedings overlap with matters that are being, or can be, litigated in England, especially if the foreign proceedings are considered to be vexatious and oppressive. In addition to these, there are other less common types of cases, too. For example, anti-suit injunctions may be issued to “restrain a judgment debtor from taking steps overseas which are designed to undermine the conclusiveness of an English judgment or its enforcement.”¹⁰

In other common law legal systems, too, anti-suit injunctions are approached with “similar principles in mind,”¹¹ and this is perhaps not surprising, seeing as they have a shared heritage with England.

Any practitioner from these jurisdictions would attest to the power of anti-suit injunctions as a “practical tool.”¹² Raphael puts it thus: “In the game of ‘multi-dimensional chess’ that international litigation can become, the anti-suit injunction can be a dramatic way of reducing the number of pieces on the board, and shaping the moves that can be taken.”¹³ Briggs states that, “as an antidote to jurisdictional shenanigans, its usefulness is second to none.”¹⁴ This might in fact even be the

⁵ Raphael (n 1) [1.11].

⁶ TC Hartley, ‘Comity and the Use of Antisuit Injunctions in International Litigation’ (1987) AmJCompL 487, 489.

⁷ Hartley (n 4) 489.

⁸ *ibid* 490.

⁹ Raphael (n 1) [1.09].

¹⁰ *Masri v. Consolidated Contractors International Co SAL (No. 3)* [2008] EWCA Civ 625, as cited by Collins (n 2) [12-081].

¹¹ Raphael (n 1) [1.12].

¹² *ibid* [1.02].

¹³ *ibid*.

¹⁴ A Briggs, ‘Anti-Suit Injunctions and Utopian Ideals’ (2004) 120 LQR 529, 530.

“only effective tool for achieving practical justice.”¹⁵

Despite their history and track record for effectiveness, the remedy of anti-suit injunctions remains “controversial and contested,”¹⁶ and was “an alien and often unwelcome idea to many civil lawyers,” garnering “hostile reactions.”¹⁷ Briggs has remarked that, “it is well known that many continental lawyers have a peculiar hostility to the anti-suit injunction.”¹⁸

This fundamental opposition from the civil law world to the legitimacy of anti-suit injunctions boils down to two arguments:¹⁹ (i) it is the court before which proceedings are brought, which applies its own national law and policy, that ought to decide on whether such proceedings are properly brought before it, and this is a matter of sovereignty; and (ii) it is an illegitimate interference with the adjudicatory jurisdiction of one court, for another court to decide whether or not that adjudicatory jurisdiction can be invoked.

These are not novel problems. From the earliest days, “it has been obvious ... that it is a remedy with the potential to cause conflict with other legal systems.”²⁰ In fact, in *Bushby v. Munday*,²¹ in 1821, the contention was that “it would be a violation of the principles of international law to stay [proceedings in Scotland] by the injunction of this court.”

Sir John Leach VC, however, held that, “where parties Defendants are resident in England, and brought by subpoena here, this Court has full authority to act upon them personally with respect to the subject of the suit, as the ends of justice require; and with that view, to order them to take, or to omit to take, any steps or proceedings in any other Court of Justice, whether in this country, or a foreign country.”²² This idea that the anti-suit injunction does not in any way address the foreign court, but only the party, i.e., the *in personam* nature of the injunction means that there is no interference with the foreign court, may well be the first step of the common law world’s defence of anti-suit injunctions, but it is nonetheless rather flimsy. The approach taken in *Bushby v. Munday*

¹⁵ Raphael (n 1) [1.02].

¹⁶ *ibid* [1.01].

¹⁷ *ibid* [1.17].

¹⁸ Briggs, ‘Utopian Ideals’ (n 12) 530.

¹⁹ The Oberlandesgericht Düsseldorf in *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320 at [14], [16] and [17], as cited by Raphael (n 1) [1.40].

²⁰ *ibid* [1.31].

²¹ (1821) 56 ER 908.

²² *Bushby* (n 19) 913.

has been viewed as “parochial”²³ and as “sophistry,”²⁴ and there is now “growing acceptance”²⁵ that the anti-suit injunction does indeed *indirectly* interfere with the foreign court.

Briggs puts it this way: “If the foreign court has been seised with proceedings, the idea that it is not interfered with when a court orders an anti-suit injunction is simply not credible ... foreign courts have been quick to say that they feel interfered with, and are not mollified by the English court issuing professions of respect and saying that they are not interfering ... in the few reported cases in which a foreign court has issued an anti-suit injunction aimed at a party who is bringing proceedings in the English courts, the English judge has been spectacularly cross about it. A good example is *General Star International Indemnity Ltd. v. Stirling Cooke Brown Reinsurance Brokers* [2003] EWHC 3: if anyone had dared to say to the judge that the injunction was not aimed at him personally and was not meant to interfere with the proceedings, it is not clear that this would not have lowered the temperature. An injunction which deals with the right of the party enjoined to continue proceedings is, as it seems to me, a direct and unacceptable breach of the principle of comity which insists on non-interference.”²⁶

So, why, then, are anti-suit injunctions still in use in common law legal systems? In short, they can be a “vital tool for achieving practical justice,”²⁷ and can serve as an “immediate and effective remedy.”²⁸ Raphael puts this in context, from the perspective of a practitioner: “[t]he experienced litigator will know that it can be extremely difficult to conduct litigation in unfamiliar jurisdictions, and that even parties with strong claims, when faced with harassment on other fronts, can lose the will to fight.”²⁹ He goes on to state that, “the anti-suit injunction is the only remedy capable of dealing with the situation where a well-funded party, convinced of the weakness of his prospects in the natural forum of the dispute, commences litigation in a multiplicity of other courts or arbitration tribunals. Requiring the injunction claimant to contest those claims in every single other court will be disproportionately burdensome.”³⁰

The case of *Hin-Pro International Logistics Limited v. Compania Sud Americana De Vapores SA*

²³ *Amchem Products v. British Colombia (Workers Compensation Board)* [1993] 1 SCR (Can SC) 897, 912.

²⁴ Hartley (n 4) 506.

²⁵ Raphael (n 1) [1.33].

²⁶ A Briggs, ‘Ch III: Comity in the Law of Jurisdiction to Adjudicate,’ in *Principle of Comity in Private International Law (Recueil des Cours, Hague Academy of International Law, 2012)* 125-126.

²⁷ Raphael (n 1) [1.35].

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Raphael (n 1) [1.36].

(CSAV)³¹ demonstrates the extent of the effectiveness (and intrusiveness) of the remedy and ancillary orders made in support of it: an anti-suit injunction was issued to restrain the continuation of foreign proceedings; this was accompanied by a Mareva injunction, freezing the worldwide assets of Hin-Pro in aid of the anti-suit injunction; an order of imprisonment for three months was issued against the director of Hin-Pro for committing contempt of court, by participating in a mediation session and a preliminary hearing in the Wuhan Maritime Court; and, in addition to these, damages were ordered, “covering both the costs incurred in the foreign proceedings and the compensation that CSAV was ordered by the foreign courts to pay Hin-Pro.”³²

Despite such effectiveness, the remedy does not come without problems.

If the courts of countries A and B are those that grant anti-suit injunctions, and the court of A is likely to grant one, then there is nothing preventing the court of B from pre-empting this by granting an anti-anti-suit injunction. Or, for that matter, there is nothing preventing the court of A from going a step further, and granting an anti-anti-anti-suit injunction. There is the possibility of such an “escalating arms race”³³ as seen from the renowned *Laker Airways* cases, litigated on both sides of the Atlantic.³⁴

And, as set out above, since civil law legal systems generally view anti-suit injunctions as interfering with sovereignty and the adjudicatory function of their courts, civil law courts might not allow for anti-suit injunctions to operate within their legal systems; the other side of the coin is, of course, that they would not issue anti-suit injunctions themselves.³⁵

2. DOCTRINAL DIVIDE BETWEEN THE COMMON AND CIVIL LAW WORLDS

Having so taken stock of the differing approaches in the common and civil law worlds, it might now be useful, in this analysis of the possible routes that Sri Lankan jurisprudence could take, to consider the doctrinal divide separating common and civil law. This may prove illustrative, especially since no inspiration or guidance is forthcoming from South Africa, a fellow mixed legal system: “in South Africa ... anti-suit injunctions have not yet been granted, and it is unclear whether

³¹ [2015] EWCA Civ 401.

³² FWH Chan, ‘Anti-Suit Injunctions and the Doctrine of Comity’ (2016) 79(2) MLR 341, 342.

³³ Raphael (n 1) [1.37].

³⁴ See, generally, Hartley (n 4).

³⁵ See, generally, the discussion of continental jurisprudence by Raphael (n 1) [1.22] and fn 38.

they would be acceptable in principle.”³⁶

This debate is captured by Raphael in the following manner:

*“The conflict ... derives from irreconcilably different assumptions as to the role of a legal system, and the values to which it should give primacy. The ‘civil law’ arguments based on sovereignty and jurisdiction ... give priority to public judicial authority rather than private justice. The dominant consideration is not where a dispute should justly be resolved, but the doctrinal principle that the receiving court’s authority to determine what litigation may be brought before it should be unquestioned by foreign courts. Compared to this principle of sovereignty, the private rights and obligations of the parties, and the practical consequences of upholding the principle, are of relatively little importance.”*³⁷

*In contrast, at the heart of the common law concept of civil justice is the imperative that a just resolution must be achieved for a private dispute. In relation to conflicts of jurisdiction, the question of principal importance, as a matter of justice, is where a dispute should be resolved in order to do practical justice between the parties, and in accordance with their private law rights. Public law considerations of the sovereignty of foreign courts, and relations between courts, encapsulated in the concept of comity, are second-order constraints, to be deployed sparingly where they conflict with private justice. This conception of the function of courts and of justice naturally leads to a personal logic being applied to anti-suit injunctions, not merely as a matter of formality, but as a substantive reflection of the court’s underlying concept of justice.”*³⁸

This gulf between perspectives might prove too wide to bridge, and it has been remarked that “conflicts as deeply rooted as this are not susceptible to resolution by argument.”³⁹ Briggs, whose following words inspired the title of this article, puts it across rather colourfully: “As the homely Chinese saying has it, the dialogue is like chickens talking to a duck; and if it is, it is pointless to say that one approach is right and the other is wrong.”⁴⁰

³⁶ Raphael (n 1) [1.16].

³⁷ *ibid* [1.42].

³⁸ *ibid* [1.43].

³⁹ *ibid* [1.44].

⁴⁰ A Briggs, ‘The Impact of Recent Judgments of the European Court on English Procedural Law and Practice’ Part II (2005) 124 *Zeitschrift für Schweizerisches Recht Revue de droit Suisse* 231.

Another, “more subtle”⁴¹ line of challenge against anti-suit injunctions has also been put forward, which Raphael describes thus:

*“In many cases, the arguments that can be put before the originating court in support of an injunction, or parallels to them, can be put before the receiving court, on an application to stay proceedings before it. If an argument can only be advanced with force before the originating court, that will usually be because of a difference of national law and policy between the two states. Consequently, two questions must be asked: where the same points or parallels to them can be made abroad, what is the need, or what gives the right, for the originating court to intervene? And where the same points cannot be made abroad, what gives the originating court the right to intervene (the need being obvious)? It could be argued that, if those questions are treated with sufficient seriousness, then it will be apparent that anti-suit injunctions should not be granted as a matter of comity, save perhaps in very limited circumstances, because the indirect interference with the foreign court is not justified by any need or right that can be identified. This argument has the attraction of flexibility, because it admits of the possibility that the originating court might have the need and right to intervene.”*⁴²

It is perhaps because of such concerns that the English courts have gone on to hold that, to justify intervening, a difference in view is not enough, but “something more” is required,⁴³ and that as a matter of comity, the English court must have “sufficient interest” in the matter.⁴⁴

3. APPLICATION OF THE REMEDY

So, how has the real-life application of the remedy in panned out in common law courts, and in particular in England?

In cases involving clear contractual rights, the application has been comparatively straightforward, as the anti-suit injunction is designed to enforce personal obligations of the injunction defendant: although this does indirectly affect the sovereignty or the adjudicatory function of a foreign court, this is but a consequence of the personal obligation that the injunction defendant itself has

⁴¹ Raphael (n 1) [1.50].

⁴² *ibid* [1.51].

⁴³ *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak* [1987] AC 871 (PC) 895.

⁴⁴ *Airbus Industrie v. Patel* [1999] 1 AC 119 (HL) 138.

assumed;⁴⁵ therefore, the court has a *right* to intervene. In such matters, even the French courts have accepted the validity of foreign contractual anti-suit injunctions.⁴⁶

Issues do arise, however, if the contractual clause is not so clear, or if the foreign jurisdiction in question might consider the clause invalid by reason of a mandatory rule of its public policy.

In cases where anti-suit injunctions are sought on the basis that the foreign proceeding is vexatious and oppressive, there is no express or implied *right* envisioned by the parties to warrant intervention, and so “the argument that the originating court has a right to intervene necessarily starts from a weaker foundation.”⁴⁷ Here, Lord Goff’s pronouncements,⁴⁸ and that of Hoffmann J (as he then was), that there has to be some good reason that the decision to halt the litigation should be taken “here rather than there,”⁴⁹ come into play.

It is thus seen that matters of comity *are* taken into account by the English courts. However, it is felt in some quarters that although English courts seem to attach “high importance”⁵⁰ to the term comity, “which partly explains why they so often repeat their ‘ritual incantation’ that great caution is required before an anti-suit injunction is granted,”⁵¹ they still “continue to litter their judgments with suggestions they are taking the notion of comity into account, only often to press ahead, apply the *lex fori*, and grant the injunction despite having made (or perhaps because they have made) these confessions.”⁵²

4. A FORK IN THE ROAD: CHOICES AWAITING OUR SUPREME COURT

So, then, it becomes clear that there is a fork in the road, and should this question regarding the approach that Sri Lanka is to adopt on anti-suit injunctions make its way up to the Supreme Court, the authors are of the respectful opinion that the above may be matters to be considered, especially in light of the absence of explicit guidance from the Supreme Court on these matters so far.

⁴⁵ Raphael (n 1) [1.47] and [1.53].

⁴⁶ The French Cour de Cassation in *Zone Brands International v. In Beverage International* Cass Civ 1 (14 October 2009) Nos 08-16.369 and 08-16.549, as cited by Raphael (n 1) [1.47].

⁴⁷ *ibid* [1.60].

⁴⁸ *Société Nationale Industrielle Aérospatiale* (n 41) and *Airbus Industrie* (n 42).

⁴⁹ *Barclays Bank v. Homan* [1993] BCLC 680, 687.

⁵⁰ *Turner v. Grovit* [2001] UKHL 65 [28], as cited by C Sim, ‘Choice of Law and Anti-Suit Injunctions: Relocating Comity’ (2013) 62 ICLQ 703, 713.

⁵¹ Sim (n 48) 713.

⁵² *ibid*.

Certainly, there seems to be nothing in the Judicature Act⁵³ or any other law or rule that explicitly precludes the granting of, or the entertainment of, anti-suit injunctions. However, although this might appear to be just a single step for our jurisprudence to take, it is suggested that this is not a step to be taken lightly. Our jurisprudence would stand to benefit from a thorough analysis by the highest court in the land, of these matters.

There has not been a “root-and-branch challenge”⁵⁴ to the legitimacy of the remedy in England since *Bushby v. Munday*,⁵⁵ and the “the question of whether the anti-suit injunction is *inherently* irreconcilable with comity has not been given a fresh examination in modern times.”⁵⁶ This alone, in the respectful opinion of the authors, is not reason enough to import the remedy into Sri Lankan jurisprudence lock, stock and barrel, because to do so, would be to accept it warts and all. On the contrary, it is precisely because our jurisprudence stands ‘untainted’ from precedent on this question, that the authors recommend that Sri Lanka approach this question with a fresh mind.

5. IF ANTI-SUIT INJUNCTIONS ARE TO BE ACCEPTED IN SRI LANKAN JURISPRUDENCE, HOW SHOULD THEY OPERATE?

Should our Supreme Court decide that anti-suit injunctions are indeed not repugnant to our mixed legal heritage and choose to traverse down the path of common law legal systems, there are further matters that arise for consideration.

That is, a decision may have to be made as to which particular common law jurisdiction’s approach to anti-suit injunctions seems most attractive to Sri Lanka. Although, as set out above, in jurisdictions other than England, too, anti-suit injunctions are approached with “*similar* principles in mind,”⁵⁷ the approaches are not the *same*. To illustrate this point further, the following examples should suffice: (i) the Supreme Court of Canada has broadly accepted the same principles as England, but makes a more direct assessment of whether the jurisdictional rules of the foreign court in question correspond to the Canadian principle of *forum conveniens*, and assesses whether the applicant has demonstrated that a stay or termination of the foreign proceedings have been sought

⁵³ No. 2 of 1978, as amended.

⁵⁴ Raphael (n 1) [1.32].

⁵⁵ *ibid.*

⁵⁶ *ibid* [1.33].

⁵⁷ *ibid* [1.12].

in the foreign court, and that it has not met with success in such an application;⁵⁸ (ii) the High Court of Australia, on the other hand, has adopted a narrower definition, that “foreign proceedings are to be regarded as vexatious or oppressive only if there is nothing which can be gained by them over and above what may be gained in local proceedings.”⁵⁹

Of course, Sri Lanka may choose not to adopt any particular common law jurisdiction’s exact formulation, and may well put its own spin on things. In doing so, it may be worthwhile to consider whether, as suggested by a few authors,⁶⁰ clear rules regarding choice of law ought to be developed in non-contractual anti-suit cases, instead of simply applying the *lex fori* without any consideration of foreign law. In the respectful opinion of the authors, this requires careful consideration, and so the final part of this article would be devoted to an analysis of the same.

6. SHOULD CHOICE OF LAW TRANSPLANT COMITY?

The fundamental objective of private international law is to ensure that the most appropriate legal framework is applied when addressing a specific legal question, thereby necessitating a thorough choice of law analysis. However, this principle of choice of law appears to be overlooked in the context of issuing anti-suit injunctions, and it is only the *lex fori* that is considered in the issuance of these injunctions.

While there is an unavoidable choice of law consideration in the realm of contractual anti-suit injunctions, manifested through exclusive jurisdiction clauses or arbitration clauses,⁶¹ this same analytical framework is not consistently applied to non-contractual anti-suit injunctions.⁶² Proponents of the principle of comity, which underpins the issuance of anti-suit injunctions, often resist the incorporation of a choice of law analysis,⁶³ yet there remains a lack of compelling justification for the exclusion of such analysis.

Indeed, employing a choice of law consideration could serve as a catalyst for enhancing the principle of comity, as applying the most appropriate legal framework would represent the highest

⁵⁸ See generally, *Amchem* (n 21) and S Armstrong, ‘Comity and the Anti-Suit Injunction: Developments Since *Amchem*’ 2023 3-2 Canadian Journal of Commercial Arbitration 167.

⁵⁹ *CSR Limited v. Cigna Insurance Australia Limited* (1997) 189 CLR 345, 393.

⁶⁰ Here, Sim’s article titled ‘Choice of Law and Anti-Suit Injunctions: Relocating Comity’ (n 48) deserves special mention.

⁶¹ For example, see generally *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ 638.

⁶² For example, see generally *Star Reefers Pool Inc v. JFC Group Co Ltd* [2012] EWCA Civ 14.

⁶³ Kerwin, ‘A Choice of Law Approach for International Antisuit Injunctions’ (2003) 81 TexasLRev 927, 935.

form of comity that a court could extend, when issuing an anti-suit injunction.

7. THE RATIONALE FOR THE APPLICATION OF CHOICE OF LAW RULES OVER THAT OF THE *LEX FORI* IN PURSUANCE OF COMITY

The issue of choice of law forms a foundational building block and is often considered to be the lifeblood of private international law. While the significance of choice of law has been extensively analysed in various legal contexts, a lacuna exists regarding its application in the specific domain of anti-suit injunctions.

It is essential to clarify that the discourse surrounding the application of choice of law rules in the context of anti-suit injunctions in this article specifically pertains to the *judicial* exercise of choice of law, rather than any determinations made by the parties involved. This distinction is particularly relevant in scenarios involving contractual anti-suit injunctions, where parties may negotiate and stipulate governing laws within a contract, in which situation the court would be mandated based on the clause to apply the said law in issuing an anti-suit injunction.⁶⁴ Whereas in this regard, that is of non-contractual anti-suit injunctions, courts would engage in a choice of law analysis not at the behest of the parties, but rather as mandated by the applicable principles of private international law.⁶⁵

When considering the application of choice of law over a simplistic application of the *lex fori*, it is seen that the interplay between choice of law and principles of comity can be conceptualised as interrelated constructs, i.e., as two sides of the same coin. This approach collectively advances the objectives of the conflict of laws, ensuring that the most appropriate legal framework is applied to the circumstances at hand in granting an anti-suit injunction, thereby legitimising the concept of comity. When evaluating the application of comity through a choice of law analysis, it is essential to recognise that this principle in fact moves to facilitates a more accommodating stance toward the application of foreign law, rather than merely serving as a basis for granting or denying an anti-suit injunction based solely on the *lex fori*.⁶⁶ Moreover, a thorough choice of law analysis should not be construed as mere deference to the sovereignty of the involved jurisdictions; instead, it is in fact the notion of comity that can substantiate such an analysis.⁶⁷ This approach allows courts to go

⁶⁴ A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) [2.20].

⁶⁵ Sim (n 48) 717.

⁶⁶ D McClean and K Beevers, *Morris: The Conflict of Laws* (7th edn, Sweet & Maxwell 2009) [21-008], as cited by Sim (n 48) 718.

⁶⁷ Sim (n 48) 720.

beyond simply considering the merits of a case and deciding on whether to issue an anti-suit injunction, and to adequately examine the underlying legal issues at play.⁶⁸ Thus, the deployment of a choice of law analysis serves as a critical framework for engaging with comity and understanding the interplay between domestic and foreign legal systems in granting an anti-suit injunction, thereby promoting judicial cooperation and respect across borders.

A choice of law analysis also serves as a more cogent framework for analysing the issuance of anti-suit injunctions than the nebulous concept of comity through the *lex fori*, which remains ambiguous and undefined.⁶⁹ The application of choice of law principles by courts can be characterised as a dispassionate and rigorous adherence to legal standards, as opposed to the subjective considerations that often accompany comity-based determinations, which may be influenced by the merits of the underlying case. Brainerd Currie articulates that choice of law is “an empty and bloodless thing” that would reflect a state’s indifference to the litigation’s outcome.⁷⁰ This perspective underscores the notion that the exercise of a choice of law analysis strips courts of the discretionary power associated with comity, rendering the application of legal principles strictly “apolitical.”⁷¹ Consequently, this approach minimises the risk of undermining litigants’ legitimate expectations by courts simply choosing to adhere to the *lex fori*.⁷² Currie further posits that this methodology embodies a “mild, tentative, and self-denying policy,” ensuring that the decision to grant an anti-suit injunction is not contingent upon the forum in which the case is presented.⁷³ Thus, the reliance on choice of law fosters a more predictable legal environment, free from the complexities and uncertainties that often accompany comity considerations.

In fact, relocating comity within the framework of the choice of law analysis is not an unheard-of concept. For example, recent trends indicate a growing reliance on foreign law in matters concerning the act of state doctrine, accompanied by a notable decline in the application of comity, particularly in England.⁷⁴ Scholars have argued that prior rulings involving the act of state doctrine, in which English courts predominantly adhered to the *lex fori*, might yield similar outcomes today, even if subjected to a contemporary choice of law analysis.⁷⁵ The beginning of this trend in the

⁶⁸ *ibid* 719.

⁶⁹ Sim (n 48) 714-716.

⁷⁰ Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963) 52, as cited by Sim (n 48) 719.

⁷¹ Sim (n 48) 719.

⁷² *McKain v. RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 23, 50.

⁷³ Currie, *Selected Essays* (n 68) 52-53, as cited by Sim (n 48) 719.

⁷⁴ R Garnett, ‘Foreign States in Australian Courts’ (2005) 29 MULR 704, 717-18.

⁷⁵ J Fawcett, J Carruthers and Sir Peter North, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 118.

anti-suit injunction context is seen in the case of *Airbus Industrie GIE v. Patel*,⁷⁶ which Briggs argues marks the beginning of a trend where courts grapple with choice of law issues when deciding whether to grant an anti-suit injunction.⁷⁷ In this case, the respondents were deemed to have acted incorrectly by initiating proceedings in Texas, as their actions would have been considered wrong under Indian law. However, when the matter came before the English courts, the *lex fori* would have led to the conclusion that the respondents could rightfully sue in Texas without infringing English law. Despite this, the English courts decided to issue an anti-suit injunction, determining that this was the appropriate remedy based on the respondents' actions being wrong under Indian law. This case highlights the courts' increasing consideration of choice of law principles when deciding whether to grant anti-suit injunctions, rather than solely relying on the *lex fori*. It could be said that the House of Lords' ruling in this case⁷⁸ has been influential in contributing to the development of thought in this area.

8. ARGUMENTS AGAINST THE USE OF A CHOICE OF LAW ANALYSIS IN GRANTING ANTI-SUIT INJUNCTIONS

Proponents of the current methodology regarding the issuance of anti-suit injunctions pursuant to the *lex fori* expressed as an exercise of comity, may argue that incorporating the choice of law analysis into the discourse would further complicate an already intricate situation and potentially jeopardise the future viability of anti-suit injunctions.

A key reason for the reluctance to apply choice of law principles to anti-suit injunctions may stem from a historical bias against the integration of choice of law with equitable doctrines.⁷⁹ This historical context has led to the frequent oversight of choice of law considerations in such applications. Proponents of traditional equity assert that the invocation of the court's equitable jurisdiction inherently excludes the application of choice of law.⁸⁰ Conversely, some legal scholars contend that equitable doctrines should indeed undergo a choice of law analysis, with the equitable principles of the forum being applicable only when the forum's choice of law rules designate the

⁷⁶ *Airbus Industrie* (n 42) 134-137.

⁷⁷ A Briggs, 'Anti-Suit Injunctions: A Pause for Thought' [1997] LMCLQ 90, as cited by Sim (n 48) 720.

⁷⁸ *Airbus Industrie* (n 42).

⁷⁹ Sim (n 48) 720.

⁸⁰ For example, see *Paramasivam v. Flynn* (1998) 90 FCR 489 (Full Crt) 503 and Sim (n 48) 720-721.

lex fori as the *lex causae*.⁸¹

Moreover, beyond the aforementioned issues related to equity, which are presently evolving,⁸² scholars have identified additional complexities that suggest that implementing a choice of law analysis is more challenging in practice than in theory. These complexities highlight the need for a comprehensive examination of the interplay between equitable principles and choice of law in the context of anti-suit injunctions.

Firstly, there exists a significant likelihood that the parties involved may not raise or plead a choice of law issue before a court in a matter pertaining to the issuance of an anti-suit injunction.⁸³ Given that the initiation of such an application falls within the control of the parties, a court's ability to intervene is limited if the parties choose not to engage with this aspect. Consequently, this situation would likely revert to the established practice of determining whether an anti-suit injunction should be granted, based on the *lex fori*.⁸⁴ Although a court could theoretically reject the *lex fori* being applied as a presumption, mandating that parties plead the applicable law for the issuance of an anti-suit injunction, as done by some courts in Canada and Australia,⁸⁵ this approach could present itself as a double-edged sword. This attempt of "smoking out"⁸⁶ a party's resistance to foreign law might inadvertently induce it to plead foreign law, where it may otherwise have chosen not to do so, particularly when ascertaining such law proves to be difficult, cumbersome, and time-consuming.⁸⁷ Thus, authors have recommended that the better approach would be to mandate a test, which requires for the parties to expend "reasonable efforts" in ascertaining the most applicable law, as opposed to potentially penalising a party for the failure of pleading the choice of law.⁸⁸ In New South Wales, Australia, amendments have been made to the Supreme Court Rules to allow for the referral of legal matters to foreign courts for resolution. Additionally, specific memoranda have been established with the courts of New York and Singapore to facilitate this process.⁸⁹ It has therefore been suggested that it is imperative that parties are afforded the opportunity to plead and substantiate foreign law where such law is pertinent to their cases; the failure of certain litigants to

⁸¹ TM Yeo, *Choice of Law for Equitable Doctrines* (OUP 2004), as cited by R Garnett, *Substance and Procedure in Private International Law* (OUP 2012) [4.62].

⁸² Collins (n 2) [34-084]-[34-085].

⁸³ Sim (n 48) 722.

⁸⁴ *Parker v. TUI UK Ltd* [2009] EWCA Civ 1261 [22]-[23].

⁸⁵ *Damberg v. Damberg* (2001) 52 NSWLR 492, 522; *The Ship 'Mercury Bell' v. Amosin* (1986) 27 DLR (4th) 641, 650-652, both as cited by Sim (n 48) 722.

⁸⁶ Sim (n 48) 722.

⁸⁷ DF Cavers, *The Choice-of-Law Process* (University of Michigan Press 1965) 273, as cited by Sim (n 48) 722.

⁸⁸ Sim (n 48) 722.

⁸⁹ Supreme Court Act 1970 (NSW) section 125; Uniform Civil Procedure Rules 2005 (NSW) rr. 6.42-6.45.

adequately present a case for or against a foreign law should not result in an overarching denial of this opportunity for all litigants, as each case should be evaluated on its individual merits and surrounding circumstances.⁹⁰

Secondly, when a matter is presented before a court of first instance, to be mandated to engage in a detailed choice of law analysis at this stage, during which the proceedings may still be *ex parte*, could place “unreasonable demands” upon the trial judge.⁹¹ However, the counter-argument runs thus: “if the appearance of foreign law is not so inconvenient as to preclude the pleading and proof of foreign law in relation to contractual anti-suit injunctions, or indeed to any other case, [such procedural barriers] would seem to impose an unjustifiably different standard for non- contractual anti-suit injunctions. Allowing flimsy procedural barriers to compromise uniformity of outcome is to be discouraged.”⁹²

Finally, where a party is applying for an anti-suit injunction, it would plead its cause of action on as many grounds as possible in order to advance the claim on the most advantageous basis, and this would in turn create the possibility for a variety of options as to the applicable law, in deciding whether the anti-suit injunction is to be issued.⁹³ This strategic approach serves to advance the claim on the most favourable basis, thereby creating a spectrum of options regarding the applicable law in determining the issuance of the anti-suit injunction.⁹⁴ Consequently, the party seeking such an anti-suit injunction is afforded the opportunity to explore various legal frameworks in its pleadings, which may lead to a complex interplay of laws. This multiplicity of legal considerations underscores the potential for the applicant to engage in a nuanced choice-of-law analysis, effectively allowing for multiple opportunities to secure a favourable legal outcome.⁹⁵ However, this complexity may render the prevailing practice of relying solely on the *lex fori* more appealing, as it simplifies the decision-making process for the court. Yet, it is essential to recognise that the challenges associated with the application of multiple legal standards are not confined to anti-suit injunctions alone. The potential for varied legal applications based on diverse grounds is a pervasive issue across all legal domains where choice of law is a relevant consideration, and thus this reality necessitates careful navigation by practitioners to ensure that the complexities inherent

⁹⁰ Sim (n 48) 722.

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ *Coupland v. Arabian Gulf Oil Co* [1983] 1 WLR 1136 (CA) 1153.

⁹⁴ A Briggs, ‘Choice of Choice of Law’ [2003] LMCLQ 12, 15.

⁹⁵ *ibid.*

in such cases are adequately addressed, and not that the possible application of a foreign law is simply evaded on this basis.

9. SHOULD CHOICE OF LAW INDEED TRANSPLANT COMITY?

The principal impediment to expanding the application of choice of law to non-contractual anti-suit injunctions lies in the reluctance of restricting the application of the *lex fori*, particularly when there is a potential for foreign law to be favoured over it. In addition to this reluctance and the emerging nature of the relationship between choice of law and equitable doctrines,⁹⁶ one rationale for the lack of choice of law in the non-contractual context is the inability to limit the grounds upon which courts may intervene to safeguard their processes and issue an anti-suit injunction as a form of ancillary relief.⁹⁷

Sim concludes that, “[t]he attempts to promote comity by applying the *lex fori*, while paying lip service to comity, have done the anti-suit injunction more harm than good.”⁹⁸

Thus, in the respectful opinion of the authors, careful consideration by the Supreme Court is necessitated, of whether the *lex fori* is to be applied as the default option in matters of non-contractual anti-suit injunctions, or whether it is instead more preferable to engage in a choice of law analysis.

10. CONCLUSION

It is the respectful opinion of the authors that the question of whether anti-suit injunctions are repugnant to our mixed legal heritage or whether they would indeed find a suitable place in Sri Lankan jurisprudence, would make its way to the Supreme Court sooner rather than later, in light of the increasing frequency of cross-border disputes confronting our courts. When this happens, there is much for the Supreme Court to consider, and our jurisprudence would stand to benefit from a thorough and detailed analysis by the Supreme Court of these matters.

⁹⁶ Yeo, *Choice of Law for Equitable Doctrines* (n 79), as cited by Garnett, *Substance and Procedure* (n 79) [4.62].

⁹⁷ Sim (n 48) 726.

⁹⁸ *ibid.*

ADMINISTRATIVE LAW

BALANCING JUDICIAL INTEGRITY AND FREEDOM OF EXPRESSION: AN ANALYSIS ON CONTEMPT OF COURT AND THE RULE OF SUB-JUDICE IN SRI LANKA

Omandee Samaratunge | Nisal Deelaka Pathiraja

ABSTRACT

The delicate equilibrium between judicial integrity and freedom of expression is a cornerstone of democratic societies, ensuring that justice is administered impartially while safeguarding the fundamental right to speak freely. In Sri Lanka, this balance is navigated through the application of the laws on contempt of court and the sub-judice rule, which collectively aim to protect the authority and impartiality of the judiciary while also respecting the public's right to engage in open discourse. Contempt of court in Sri Lanka encompasses actions that may impede or interfere with the administration of justice, such as publishing material that could prejudice a fair trial or unduly criticising the judiciary in a manner that undermines public confidence. The sub-judice rule further restricts comments on pending judicial proceedings, maintaining the sanctity of the legal process and the presumption of innocence until proven guilty. However, these legal provisions must be carefully calibrated to not unduly stifle public debate and the scrutiny of the judicial process, which are essential for the transparency and accountability of the legal system. This Article acknowledges that the challenge is to ensure that the judiciary's need to function without external pressures is harmoniously aligned with the citizenry's right to critique and analyse the workings of the legal system, a task that necessitates constant vigilance and an in-depth comprehension of the interplay between legal constraints and civil liberties. This Article will formulate the existing legal framework in Sri Lanka that strives to uphold this balance, recognising that both judicial integrity and freedom of expression are pivotal to the health of democracy and the rule of law.

1. INTRODUCTION

The notions of Contempt of Court and Sub-Judice are critical in maintaining the sanctity and authority of the judiciary, ensuring that proceedings are conducted without undue influence or prejudice. Contempt of Court encompasses actions that disrespect or disregard the authority, dignity, or administration of judicial proceedings. This can manifest as conduct that obstructs or interferes with the due process of justice, including acts within the courtroom (in facie curiae) or outside it (ex facie curiae). Sub-Judice, on the other hand, refers to matters that are under judicial consideration and therefore prohibited from public debate outside the courtroom, particularly by

the media, to avoid prejudicing on-going matters. The cornerstone of the legal system is judicial integrity, which guarantees the fair, unbiased, and competent administration of justice. The public's trust in the courts and the rule of law are upheld by this premise. The public's view of the judiciary's impartiality and independence can be impacted by acts of contempt of court or violations of the Sub-Judice rule, which can compromise judicial integrity. In Sri Lanka, this balance is navigated through the legal frameworks governing contempt of court and the rule of sub-judice. In analysing the Sri Lankan context, it is essential to consider the historical and cultural nuances that shape its legal system.

In Sri Lanka, while the power to punish for contempt of court is vested in the Supreme Court and the Court of Appeal as per Article 105(3) of the Constitution, and the specific offence of contempt has been codified in statutory law recently on Contempt of Court Act No.8 of 2024. This means that the judiciary relies on its inherent power to ensure compliance with its orders and maintain public confidence in the legal system. The judiciary must maintain its integrity, ensuring that justice is administered without bias or influence. At the same time, the media and public must retain the ability to discuss and critique legal matters, contributing to a transparent and informed society. The challenge lies in finding a middle ground where the courts are respected, and the people's voice is heard. This article recognises that the main arguments surrounding contempt of court and sub-judice in Sri Lanka revolve around the need for clear definitions and fair application of these legal concepts to ensure the integrity of the judiciary and the balance of democratic freedoms. The ongoing debates and legal cases in the country reflect the evolving nature of these concepts and their critical role in the legal system.

This article aims to explore the intricacies of this equilibrium, examining case law, statutory provisions, and comparative international standards to provide a comprehensive overview of how Sri Lanka upholds these two pivotal aspects of a functioning democracy.

2. EXAMINING THE NOTIONS OF CONTEMPT OF COURT AND SUB -JUDICE

The sub-judice rule and the concept of contempt of court are fundamental to ensuring the integrity of court proceedings. Contempt of court pertains to actions that show disrespect towards the court or its proceedings, which can hinder the administration of justice. In contrast, the sub-judice rule limits public discussions about ongoing legal cases to avoid influencing jurors, witnesses, or the case's outcome. These legal mechanisms have historically developed to strike a balance between ensuring justice and protecting freedom of expression. In the UK, for example, the Contempt of Court Act 1981 sets out the boundaries for lawful commentary on active legal proceedings,

highlighting the priority of a fair trial over unrestricted public discourse.¹ The evolution of these doctrines has been shaped by several factors, such as advancements in media technology, public interest with high-profile cases, and shifting standards of judicial transparency. As society advances, the law adapts to uphold the right to a fair trial while simultaneously honouring the public's right to information. This intricate balance must exist in spheres that are democratic because the rule of law is an essential component of government.²

Jurisdiction in contempt should be exercised only where there is an actual prejudice that can be interpreted as major disruption with the administration of justice. To determine whether a news report or statement given during court proceedings constitutes contempt, is to question whether the publication or statement was meant to undermine the fairness of the hearing. In the case of *Read and Huggonson*, Lord Hardwick categorised contempt into three distinct groups: scandalising the court, abusing parties involved in cases before the court, and prejudicing the mankind against individuals before the case is heard.³ In *R v Gray*, Lord Russell, Chief Justice of England, established a straightforward overview of contempt law. This section has been frequently cited and supported in subsequent decisions, and it continues to be regarded as useful and valid law.⁴

Any act done or writing published calculated to bring a Court, or a Judge of the Court into contempt, or to lower and his authority is a contempt of Court. Further, any act done, or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of Courts, is a contempt of Court. The former class belongs to the category which Lord Hardwick characterised as “scandalizing a Court or a Judge.” That description of that class of contempt is to be taken subject to one and an important qualification. Both judges and courts are subject to criticism, and no court could or would consider it contempt of court if a valid argument or expostulation was made against a judicial action on the grounds that it was against the law or the public interest. In these situations, the law should not be astute enough to criticise anything negatively that is written with such an aim, but it is important to keep in mind that in this scenario, press freedom is equal to, if not less than, that of all Queen subjects.⁵

¹ Article 19, ‘Background Paper on Freedom of Expression and Contempt of Court’ (2000)

<<https://www.article19.org/data/files/pdfs/publications/foe-and-contempt-of-court.pdf>> accessed 31 July 2024.

² Harvard Law Review, ‘Developments in the Law: The Law of Media’ (2007) 120 Harvard Law Review 990 <<https://www.jstor.org/stable/40041997>> accessed 31 July 2024.

³ *Read and Huggonson (The St. James's Evening Post Case)*[1742] 26 ER 683.

⁴ *R v Gray* [1900] 2 QB 36 (DC).

⁵ *ibid.*

The court must be satisfied on the following three criteria before an individual can be held in contempt for publishing information in newspapers: first, that the publication was clearly intended or likely to prejudice a case currently before the court; second, that the publication occurred with awareness of the pending case or with knowledge that the case was imminent; and third, that the publication significantly interfered with the due course of justice or was likely to create substantial prejudice in the public's mind.

Several cases have already defined the offence of contempt of court. In *Reginald Perera v. The King*, Lord Radcliffe recognised that the offence must involve an act or writing designed to bring a court or judge into disrepute, challenge their authority, or obstruct the due course of justice and lawful court process.⁶ Similarly, in the *St. James Evening Post* case, Lord Hardwicke, identified three types of contempt. Firstly, contempt is scandalising the Court itself. Secondly, in abusing parties who are concerned in causes here. Thirdly, in prejudicing mankind against persons before the cause is heard.⁷

Lord Cross of Chelsea, in *Attorney-General v. Times Newspapers*, stated that interfering with the administration of justice is defined as contempt of court, and it is regrettable that the crime is still recognised by a word that implies to the contemporary mind that it is fundamentally an insult to the court's dignity. These days, many individuals are biased in favour of the accused criminal simply because the crime has a term that makes them sympathetic to anyone who challenges established authority. Yet, everyone in the country, regardless of political affiliation, should be concerned about preserving the proper administration of justice.⁸

The law of contempt is primarily concerned with interfering with the administration of justice. According to Lord Diplock, criminal contempt of court might take many different forms, but they all have one thing in common: they all include meddling with the proper administration of justice, either specifically in a certain case or more broadly as an ongoing procedure. Contempt of court is the act of disobeying justice itself, not the particular court or judge enforcing it.⁹

Contempt laws justify restrictions on freedom of expression on the basis of the need to administer justice, by sanctioning comments on pending judicial proceedings, by forcing individuals to

⁶ *Arthur Reginald Perera v The King* [1951] UKPC 6.

⁷ *The St. James Evening Post Case: Roach v Garvan (or Hall)* [1742] 26 ER 683.

⁸ *Attorney General v Times Newspapers Ltd* [1973] 2 All ER 54.

⁹ CJ Miller, 'The Sunday Times Case' (1974) 37 The Modern Law Review 96
<<https://www.jstor.org/stable/1094721>> accessed 31 July 2024.

disclose sources of information and by restricting criticism of judges and courts. There is a significant tension between freedom of expression and the administration of justice because of the high public interest in maintaining and protecting both principles. The publication of facts in a pending judicial proceeding which could have the effect of influencing the decision of the presiding judicial officer is not permitted. The pending judicial proceedings are said to be sub-judice.¹⁰

In *S v. Hartmann*, the appellants, who were attorneys appearing for clients suspected of sabotage, conducted a press conference that addressed their clients' alleged torture while detained. They were charged with contempt of court for issuing this statement while legal procedures were ongoing. The magistrate judge found them guilty and imposed a fine, stating that they should have anticipated the possibility that their statement could disrupt the administration of justice.¹¹

It is evident that when judicial proceedings are ongoing, publications are restricted, commentary should be limited, and only fair reporting is permitted. It is also important to note that not every remark on pending cases is considered contempt; only that which obstructs the administration of justice applies. Every person has the right to a fair trial, and any publication that impacts the court's ability to find the truth, such as influencing witnesses can put the outcome of the trial at risk.¹²

Public interest must also be considered in matters of contempt of court. For example, if a newspaper publishes information or an image of a wanted person linked to a crime, it may serve the public interest by alerting the community of potential threats. This rationale supports the practice of broadcasting information and images of wanted individuals on television programs.¹³

2.1 When are Judicial Proceedings Regarded Sub-Judice?

From the moment criminal proceedings are commenced, it is regarded as pending, such as at the time of arrest, the issuing of summons, or a notice to appear; the case is considered sub-judice from that point ahead even though the trial has not yet begun. In *Afrikaanse Pers-Publikasies (Edms)*

¹⁰ *ibid.*

¹¹ *S v Hartmann* [1975] 3 SA 532.

¹² Article 19, 'Global Campaign for Free Expression, Submission on Contempt of Court in Sri Lanka: Recommendations for Codification' (2003) <<https://www.article19.org/data/files/pdfs/analysis/sri-lanka.contempt.03.pdf>> accessed 31 July 2024.

¹³ Tim Crook, 'Media Contempt and Reporting Crime' UK Media Law Pocketbook Second Edition (*Routledge*, 2022) <<https://ukmedialawpocketbook.com/2022/05/04/blog-post-title-2/>> accessed 31 July 2024.

Beperk v. Mbeki, the court ruled that if an individual is arrested for interrogation rather than as part of formally initiated processes leading to a trial, those proceedings are not regarded as pending.¹⁴

Civil proceedings are deemed pending once they are commenced by serving a summons, even if the summons does not need to be issued immediately. Civil and criminal processes end when the final court of appellate issues its judgement, the deadline for submitting an appeal expires, or an appeal is lodged. Even if the permission to appeal has been granted, the media should be given reasonable liberty in reporting on a judgement. Without this, the media is unable to give comments, leaving the public in unawareness about the outcome of court proceedings for a lengthy period of time.

Instances which could amount to contempt of court are: the publication of information relating to an accused, prior to the completion of his trial, for example details of his past criminal record before it has been proved in court, or any alleged confession by an accused; the publication of information pertaining to an accused or litigant, such as comments regarding personal character; or the publication of any matter which an accused or litigant intends to use in court; publication of any comment or statement of fact which decides an issue before the court, or refutes any evidence given in court; the publication of a photograph of an accused where his identity is in issue; the publication of information prior to completion of the trial, such as comment on the merits of a pending case; publication of evidence which a person intends giving, and which he later gives in evidence; the publication of the contents of documents filed with the registrar of the clerk of the court before they have been used, referred to or dealt with by the court, or anticipating the outcome of a trial; calling upon a judge to refuse to apply the law or carry out his duty; and the publication of information which could influence the court's finding such as the publication of a threat or the fact that secret tender or payment of money into court has been made.¹⁵

The standards for contempt of court that is related to impeding the course of justice is not whether the words used really affected the judge hearing the case, but if the statement or document in question tries to prejudice or interfere with the administration of justice in an ongoing action.¹⁶

John Dugard criticises the prevailing contempt of court test, arguing that it fails to take into account judges' judicial training and background, as well as the likelihood that comments on pending

¹⁴ *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers* [1971] ZASCA 76.

¹⁵ Article 19 (n 12).

¹⁶ *ibid.*

proceedings will sway the judiciary. He goes on to say that prejudiced comments and statements can result in punishment. He also points out that English law sets apart jury trials, where contempt powers are typically meant to be applied, and non-jury proceedings and that the new test laid down by the English courts that “the words must constitute a real risk as opposed to a remote possibility of prejudice, in order to amount to contempt of court,” is worthy of consideration by our courts.¹⁷

Further, this test was considered in *S v. Harber*, where the Appellate Division found no compelling cause for deviating from the “tendency test,” which determines whether the statement or document in question tends to prejudice or interfere with the administration of justice in an ongoing proceeding.¹⁸

3. CONTEMPT OF COURT AND SUB-JUDICE IN SRI LANKA

Section 792 onwards of Civil Procedure Code defines the Summary Procedure to be used in contempt cases. Chapter 65 of Civil Procedure Code enables the District Court to penalise offenders for contempt of court utilising this short process. Sections 18 and 55 of the Judicature Act No. 2 of 1978 strengthen the jurisdiction of the original courts.

A hearing date will be scheduled for the charge, during which the court will determine whether the accused admits to the validity of the accusation. The court must then record all evidence, including the judge’s remarks on the accused’s conduct at the time the alleged contempt occurred. If the defendant is found guilty, the court will issue a conviction statement that explains why the judgement was made and describes the essential facts about the accused’s conduct and statements that constituted contempt of court.

3.1 Commenting on Ongoing Legal Proceedings

In common law jurisdictions, one of the most essential roles of contempt of court legislation is to enforce the sub-judice rule, which provides that no one shall interfere with pending judicial

¹⁷ Edwin Cameron, ‘Dugard’s Moral Critique of Apartheid Judges: Lessons for Today’ (Conference in honour of John Dugard, University of the Witwatersrand, 2010)
<https://www.academia.edu/29724815/Dugards_moral_critique_of_apartheid_judges_lessons_for_today_notes_and_comments> accessed 31 July 2024.

¹⁸ *S v Harber and Another* [1988] ZASCA 34.

procedures. Typically, this is used to prevent the publication of information that may jeopardise a fair trial, which is commonly referred to informally as avoiding “trial by media.”¹⁹

Potential violations of the sub-judice rule include publishing material that threatens or pressures a party involved in the proceedings, discouraging them from attending court; disseminating inadmissible evidence, which could bias a jury, such as disclosing the accused’s prior convictions that are irrelevant to the current case; or making premature judgements about the case, such as declaring the accused guilty before the trial concludes.²⁰

In the case of *The Rule on Armand de Souza*, the Respondent, who worked as the editor of the Ceylon Morning Leader, was charged with contempt of court for publishing an editorial that mocked an ongoing trial and interfered with the administration of justice. It was stated that the editorial contained inaccurate and invented facts, notably on the Judge’s behaviour, which was depicted as intimidating the jurors. The court eventually convicted the editor of said charges.²¹

In the case of *The Rule on H.A.J. Hulugalle*, the editor of the Ceylon Daily News faced contempt of court charges over specific paragraphs in an article headlined “Justice on Holiday.” This article criticised the judiciary, claiming that the Supreme Court and the District Court of Colombo were closed for two weeks, most likely for the Race Meet in Colombo, and that this break was a special privilege for those two courts while other courts and legal departments continued to operate. It also stated that these public servants had created delays in the administration of justice by taking unauthorised vacations, and that the judges were dishonest, blaming the backlog of work on their apparent addiction to sports rather than a devotion to their duties.²²

Historically, the doctrine of sub-judice has been used in Sri Lanka to limit media freedom in reporting and commenting on ongoing court cases, often restricting legitimate public interest and discussion, as well as hindering views about Parliament.²³ A famous incident is the kidnapping and murder of journalist Richard de Zoysa, whose corpse was recovered on the beach near Moratuwa in late 1989. Even after the magisterial proceedings had concluded, legislative debates regarding

¹⁹ Article 19 (n 12).

²⁰ Zoe Rillstone, ‘Media Coverage of Criminal Trials: Sub Judice Contempt, Freedom of Expression and the Right to a Fair Trial’ (2016) Victoria University of Wellington <<https://ir.wgtn.ac.nz/handle/123456789/19918>> accessed 31 July 2024.

²¹ *In the Matter of Armand de Souza, editor of the Ceylon Morning Leader* [1914] 18 NLR 41.

²² *In the Matter of a Rule under Section 51 of the Courts Ordinance on H. A. J. Hulugalle, editor of the Ceylon Daily News* [1939] 39 NLR 294.

²³ Freedom House, ‘Freedom of the Press 2011 - Sri Lanka’ (*Refworld*, 17 October 2011) <<https://www.refworld.org/reference/annualreport/freehou/2011/en/82723>> accessed 31 July 2024.

the event were barred under the sub-judice rule, as the police officers suspected of involvement filed civil suits for damages against De Zoysa's mother.²⁴

Dayawathie and Peiris v. Dr. S. D. M. Fernando and Others is an acknowledged case that illustrates the execution of these laws where it dealt with disobeying to a court order.²⁵ Another noteworthy case is *Kim Hee Jung v. Don Bandumali Jayasinghe*, which entailed the filing of false statements to the Supreme Court and highlighted the gravity of contempt proceedings.²⁶ The sub-judice rule limits remarks on ongoing judicial cases in order to prevent prejudice in the administration of justice. Although the sub-judice concept is not formally established in Sri Lankan law, it is a principle upheld by courts to ensure the integrity of the judicial system. In addition, the Sri Lankan Parliament has passed legislation addressing contempt of court, with the goal of striking a balance between maintaining justice and protecting freedom of expression. These laws and cases collectively serve as the foundation for the legal foundations that protect the judiciary's respect and authority in Sri Lanka.

3.2 Criticising Judges

Contrary to the sub-judice rule, which only applies to pending legal procedures, this type of contempt of court can be used at any time. Its overarching goal is to avoid the deterioration of public trust in the administration of justice. Traditionally, it has been used in situations involving "scurrilous abuse" of a judge or court, allegations of prejudice or partiality against a judge or court, or charges that a judge or court was influenced by external factors. The idea of "scandalising the court" is founded in English common law, as are other kinds of common law contempt of court. The major reason for this form of contempt statute is to maintain public trust in the court system.

In *R v. Almon*, Sir John Wilmot commented:

"Criticism of judges excites in the minds of the people a general dissatisfaction with all judicial determinations and indisposes their minds to obey them; and whenever men's allegiances to the laws is so fundamentally shaken, it is the most fatal and most dangerous

²⁴ Laksiri Fernando, 'Richard De Zoysa: 'A Life Brutally Taken Away 31 Years Ago'' (*Colombo Telegraph*, 25 March 2021) <<https://www.colombotelegraph.com/index.php/richard-de-zoysa-a-life-brutally-taken-away-31-years-ago/>> accessed 31 July 2024.

²⁵ *Dayawathie and Peiris v Dr. S. D. M. Fernando and Others* [1988] 2 SLR 314.

²⁶ *Jung Kim and Another v Jayasinghe* [2021] 3 SLR 91.

obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever.”²⁷

The case of *Chokolingo v. AF of Trinidad and Tobago* explained the logic, holding that “Scandalizing the court” is a convenient way of describing a publication which, although it does not relate to any specific judge, is a scurrilous attack on the judiciary as whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.²⁸

In *ex parte Fernandez*, Erie, C.J. noted:

"There are many ways of obstructing the Court; Endeavours are not wanting either to disturb the Judge or to influence the jury, or to keep back or pervert the testimony of witnesses, or by other methods, according to the emergency of the occasion, to obstruct the course of justice. These powers are given to the Judges to keep the course of justice free; powers of great importance to society, for by the exercise of them law and order prevail; those who are interested in wrong are shown that the law is irresistible. It is this obstruction which is called in law contempt, and it has nothing to do with the personal feelings of the Judge, and no Judge would allow his personal feelings to have any weight in the matter. According to my experience, the personal feelings of the Judges have never had the slightest influence in the exercise of those powers entrusted to them for the purpose of supporting the dignity of their important office; and so far as my observation goes, they have been exercised for the good of the people.”²⁹

This perspective shows an outdated and inaccurate understanding of the role of judges in society. There are many cases that show judges, like all individuals, are flawed and capable of bias. The idea that people can objectively assess criticism directed at themselves assumes an almost unrealistic level of intellectual objectivity, which history and common sense do not support.³⁰

²⁷ *R v Almon* (1765) 94 ER 97.

²⁸ *Chokolingo v AF of Trinidad and Tobago* [1981] 1 All ER 244 248.

²⁹ *Ex Parte Fernandez* (1951) 122 Tex Crim 641, 57 SW2d 578.

³⁰ Ari Niki-Tobi, ‘The Role of Judges in Eliminating Implicit Bias and Discrimination, for Diversity and Inclusion in New York State Courts: A Judicial Dilemma’ (2023) 14 International Journal for Court Administration 5.

4. ANALYSIS ON CONTEMPT AS A RESTRICTION ON FREEDOM OF EXPRESSION

Maintaining a fair trial is undoubtedly a rightful objective, but the legitimacy of safeguarding judicial authority is dependent on whether failure to do so will lead citizens to lose trust in the courts as final arbiters of disputes. It is irrelevant whether the public view the courts positively; what matters is if unfavourable perspectives are so strong that individuals are hesitant or lack confidence in approaching the courts to address their issues. In such instances, a delicate balance must be found between freedom of expression and the legitimate goal of preserving judicial authority. Any limits must be justified in a democratic society.

In *Sunday Times v. United Kingdom*, heard by the European Court of Human Rights, a UK court imposed an injunction prohibiting a magazine from publicising a company's responsibility for thalidomide-related birth defects while civil settlement negotiations were underway. The European Court ruled that, while interference with free expression was "prescribed by law" and served a "legitimate aim" to maintain the judiciary's authority, it was not "necessary in a democratic society." The Court rejected the Government's claim that the legislation, as executed, struck a reasonable balance between the public interest in freedom of expression and the public interest in fair administration of justice. It reasoned that the public's right to know about the case was not overridden by the pressing necessity to preserve the administration of justice.³¹

4.1 The Role of Media and Contempt of Court in Sri Lanka

Article 15(2) of the Sri Lankan Constitution states that the exercise and operation the freedom of speech and expression including publication shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence. Article 170 defines "law" as any Act of Parliament or legislation passed by any legislative previous to the Constitution's commencement, including an Order in Council.

The Supreme Court ruled in *Hewamanne v. Manik de Silva* that in the absence of legislation addressing contempt of court as outlined in Article 15(2) on contempt of court, the English common law of contempt applies in Sri Lanka by virtue of Article 16(1) which provides that all written law

³¹ *Sunday Times v. United Kingdom*, App No 6538/74, [1979-80] 2 EHRR 245.

and unwritten law existing at the time of the commencement of the Constitution would be valid and operative notwithstanding any inconsistency with fundamental rights. As a result, the practice of scandalising the court as a form of contempt has been discontinued. According to Section 33(1) of the Crime and Courts Act 2013, “scandalising the judiciary” is no longer considered a form of contempt under English common law. Thus, relying on this approach in Sri Lanka is no longer justifiable.³²

Aluwihare J, with Priyantha Jayawardena J and Dehideniya J concurring, noted in *Kurukulasuriya and Jayasekara v. Sri Lanka Rupavahini Corporation* that the petitioner did not discuss anything that would substantially interfere with the judicial proceedings of a particular criminal case or criticise the court. This was in response to the state-owned Sri Lanka Rupavahini Corporation’s claim that a live telecast of a panel discussion was abruptly stopped because one of the panellists brought up issues that were involved in a fundamental rights application that was pending before the Supreme Court. Instead, he merely mentioned the actual circumstances surrounding the imprisonment of a journalist who was detained for publishing two articles that exposed violations of the Prevention of Terrorism Act. The petitioner’s claim that the comment would not significantly affect the case’s result or public opinion led the Court to determine that finding the petitioner in contempt would be deemed as an overreaction.³³

Applications of fundamental rights focus on how the law is applied, and judges usually have immunity from information in the public world that can be construed as prejudiced. Consequently, there was barely a problem with sub-judice, even though the primary subject of the program broadcasting regulations was the petitioner’s appeal for fundamental rights.³⁴

In the case of *Re Garumunige Tilakaratne*, the respondents argued that their cautious approach to ending the program was justified by the court’s decision. In one instance, it was determined that a news reporter had committed contempt of court by causing the publishing of a politician’s speech that was reported to have prejudiced an election petition. The Supreme Court, recognising that contempt of court is a special criminal with an ambiguous definition, declined to punish the reporter. According to Article 14(1)(a) of the Constitution, the Court recognised that the offense included exceptional interference with the fundamental right to freedom of speech and expression.

³² *Hewamanne v Manik de Silva & Another* [1983] 1 SLR 1.

³³ SC-FR-Application No.556/2008 and SC-FR-Application No.557/2008.

³⁴ Giorgio Resta, ‘Trying Cases in the Media: A Comparative Overview’ (2008) 71 Law and Contemporary Problems 31.

The respondent had obligations as a reporter, but the Court found that he did not intend the implications of his acts and that his contribution to the publication was minimal.³⁵

Aluwihare J emphasised that the limitations attached to Article 14(1)(a) could not be uniform and should vary based on the type of media involved, whether print, radio, or television. This is due to the fact that editors and writers in print media are afforded more freedom and control over their work than their counterparts in live television production or broadcasting. Therefore, the Court's reasoning in *Re Garumunige Tilakaratne*, which held the reporter liable, could not be applied to the current case since it involved a live television program where panellists were invited to share their views in real-time.³⁶

The learned Judge stated that the idea of sub-judice is a legal protection, and media institutions should not exploit it as a pretext to undermine constitutionally granted of individuals' right to expression and speech.

5. RECENT DEVELOPMENTS TO THE LAW OF CONTEMPT OF COURT IN SRI LANKA

Numerous high-profile cases have influenced recent changes to Sri Lanka's contempt of court laws. A noteworthy case was that of S.B. Dissanayake, who was sentenced to two years in prison for calling the court "shameful" during a public assembly held outside of court procedures.³⁷ Ranjan Ramanayake also faced a four-year imprisonment term for alluding to judicial corruption, as well as the loss of civil rights, which barred him from voting for seven years.³⁸

These cases have highlighted the issue of excessive punishment in contempt proceedings, which has been condemned for breaking international law and the Sri Lankan Constitution. After examining Fernando and Dissanayake's correspondence, the United Nations Human Rights Committee determined that these punishments were disproportionate and constituted wrongful imprisonment under international law. This perspective emphasises the urgent need for a legislative

³⁵ *Re Garumunige Tilakaratne* [1991] 1 SLR 134.

³⁶ *ibid.*

³⁷ *Dissanayake v Sri Lanka*, U.N. Doc. A/63/40, Vol. II, at 109 (HRC 2008).

³⁸ Ranjith Padmasiri, 'Conviction for Contempt of Court Cause for Ranjan's Expulsion from Parliament' (*The Sunday Times*, 2021) < <https://www.sundaytimes.lk/210411/news/conviction-for-contempt-of-court-cause-for-ranjans-expulsion-from-parliament-ca-439777.html> > accessed 10 August 2024.

framework that guarantees fair trials and maintains the rule of law, spurring talks about legal reform and the introduction of new laws in Parliament.³⁹

5.1 Contempt of Court Act No. 8 Of 2024

The Contempt of Court Act, No. 8 of 2024, is a recent legal development in Sri Lanka designed to standardise and clarify the procedures and penalties for contempt across various judicial and quasi-judicial bodies, including courts, tribunals, and other institutions. This Act is significant as it provides a comprehensive framework for addressing both civil and criminal contempt, detailing the specific actions that constitute contempt and the defences available to those accused.⁴⁰

A key feature of this legislation is its effort to balance the authority of the judiciary with individual rights. Section 6 of the Act empowers the Supreme Court and the Court of Appeal to punish contempt committed within their presence or elsewhere. Additionally, Section 7 grants Courts of First Instance the authority to punish contempt that occurs in their presence or during proceedings. The Act successfully establishes procedures for addressing contempt that occurs in the presence of the Supreme Court or the Court of Appeal through Sections 8 and 9. Section 11 outlines the jurisdiction and procedure for Courts of First Instance to handle contempt matters.⁴¹

However, the Act has ignited considerable debate regarding its potential for abuse. Critics argue that some provisions are vaguely defined, which could lead to arbitrary applications of contempt. This concern is particularly relevant to the role of the Attorney General in prosecuting contempt cases, as outlined in Sections 9(1)(b), 9(4), 10(1)(b), and 10(4). There are fears that these broad and undefined powers could be misused to stifle criticism of the judiciary or to target individuals unfairly.⁴²

Furthermore, Section 15 states that “The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other written law. Accordingly, in the event of any

³⁹ *Dissanayake* (n 37).

⁴⁰ Basil Fernando, “‘Is Contempt of Court Unlike Any Other Crime?’ (Asian Human Rights Commission, 29 July 2023) <<http://www.humanrights.asia/news/ahrc-news/AHRC-ART-007-2023/>> accessed 31 July 2024.

⁴¹ *ibid.*

⁴² Aruna Unawatuna, ‘In the Country Where a Judge Who Changed the Evidence so That an Accused Could Be Jailed for Life Is Still Serving, the Law of Contempt of Court That Remands Lawyers Who Support the Legal Issues in the Court Must Be Corrected’ (*Lankaweb*, 26 March 2024) <<https://www.lankaweb.com/news/items/2024/03/26/a-judge-who-changed-evidence-so-that-an-accused-could-be-jailed-for-life-is-still-hearing-the-case-the-law-of-contempt-of-court-that-remands-lawyers-who-speak-the-law-in-court-must-be-corrected-amme/>> accessed 31 July 2024.

inconsistency between the provisions of this Act and such other law, the provisions of this Act shall prevail.” This implies that the Act’s provisions will take precedence over Article 105(3) and other relevant sections of the Constitution.⁴³ Regarding the concept of sub-judice, Section 3(1)(b) states that anyone who acts or omits to act with the intent to interfere with or cause grave prejudice to the judicial process in relation to any ongoing matter commits contempt of court.

Overall, while the Contempt of Court Act No. 8 of 2024 aims to reinforce the integrity of the judiciary, it also underscores the delicate balance between judicial authority and individual rights, raising important questions about legal clarity and the potential for abuse.

6. **CONCLUSION**

There exists a significant dispute between freedom of expression and the administration of justice, which stems from the great public interest in safeguarding both concepts. Contemporary society, both as a unified entity and as individual communities, is progressively moving toward a consensus that emphasises greater autonomy, rights, and dignity for individuals. This article posits that healthy and constructive criticism is essential for the advancement of democracy. In this context, it is crucial to prioritise the dignity of the court, but not in a manner that is unyielding or indiscriminate.

The debate is not simply a matter of opposing freedom of speech and contempt of court; rather, it revolves around the fact that the right to free expression is subject to reasonable restrictions, of which contempt of court is one. Additionally, to foster public trust in the administration of justice, it is imperative to establish a framework that addresses disputes expeditiously while also ensuring the victim’s right to appeal.

The Contempt of Court Act of 2024 underscores the intricate balance between freedom of expression and the administration of justice. It acknowledges the public’s interest in both principles and reflects a broader societal shift towards enhancing individual autonomy, rights, and dignity. The Act recognises the necessity of constructive criticism for democratic development while simultaneously highlighting the importance of respecting the authority of the courts, though not to the extent that it suppresses vital public discourse.

Thus, the issue is not a simple conflict between freedom of speech and contempt of court; instead, it involves the implementation of reasonable restrictions where appropriate. To maintain public

⁴³ *ibid.*

trust in the justice system, the Act advocates for a framework that resolves disputes swiftly while ensuring that affected parties retain their right to appeal. As this Act was enacted in February 2024, new developments arising from its implementation are yet to be observed and evaluated at the time of writing this article.

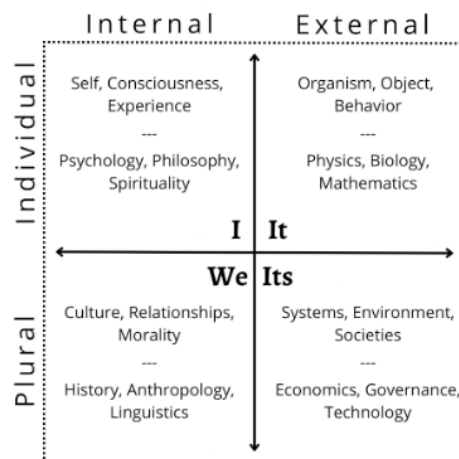
ALTERNATIVE DISPUTE RESOLUTION

DECISION MAKING IN ARBITRATION: THE FOUR QUADRANTS OF KNOWLEDGE

Naika Gooneratne

ABSTRACT

Arbitral decision-making, whether by a party selecting arbitration or an arbitrator weighing up the arguments of counsels representing the parties, is not conducted in a vacuum, rather, it is an evaluation that is connected to the four quadrants of knowledge framework set out by Ken Wilber (internal individual, external individual, internal collective and external collective). Such an evaluation is neither affixed to the context within which a party resides, nor is associated with the ascriptive characteristics such as race, sex, age, class at birth, religion, ethnicity, species, and residence. The core of any decision-making stems from the premise of being a human being who is influenced by a fundamental metric of seeking justice built upon the four quadrants of knowledge. Parties are often guided by heuristics i.e. quick decision making in the absence of time to logically analyse a decision, that is arguably guided by the four quadrants of knowledge, or simply, by way of weighing four metrics: Money, time, control and freedom. Conversely, arbitrator's decision making, whilst involving the ability to slowly deliberate in a logical manner (formalist model), may also turn to their intuition to reach judgements (realist model). This argument is applicable when analysing the Sri Lanka Context, as well as the global context, by virtue of it being applicable to the fundamental and inescapable tendency of a human being in the capacity of a party or arbitrator. The concluding remark is that as a whole, neither factor takes more precedent than the other but rather they are too analysed as a whole whilst being applied on a case-by-case basis being weighed equally.



1. INTRODUCTION

Robert Coulson, President of the American Arbitration Association stated: “Most studies of arbitration are devoted to discussions about the applicable law or the various procedural rules. It seems far more important to try to analyse how and why arbitrators make up their minds.”¹ In terms of context, while litigation constitutes a mainstream form of justice in Sri Lanka, arbitration is a rising avenue of justice, pursuant to Sri Lanka becoming a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. The thesis of this article is to prove that the four-quadrant framework set out by Ken Wilber is applicable to predict the trend of people pursuing arbitration in Sri Lanka as well as its importance for analysis of the effectiveness of arbitration in Sri Lanka.

Prior to setting out to prove this thesis, there are three lenses through which this article should be read. First, there is a general preference for alternative dispute resolution in comparison to litigation globally. The surveys done by the Queen Mary University of London showcases that arbitration is a preferred method of dispute resolution for cross-border dispute resolution,² as, for instance, in the United Kingdom, the Ministry of Justice noted a backlog of 67,573 cases recorded in the Crown Court,³ while in the Indian Supreme Court by the end of 2023, there were 80,439 pending cases.⁴ Similarly, in Sri Lanka, the Justice Ministry’s 2023 Performance Report highlights that by the end of 2023, the largest number of pending cases was in the Magistrates’ Courts with 805,502 cases and 259,763 cases in the District Courts had 259,763, whereas in total, there was a total of 1,122,113 case backlog adding a sharp notable increase from the 713,527 pending cases in 2015.⁵ Thus, the rationale of case backlogging prompting a rise in arbitration to save time and money is a line of analysis that could be similarly applicable to the Sri Lankan context, but the trends may not be sporadic due to the lack of a tradition of preferring arbitration.

¹ R. Coulson, ‘The Decision-Making Process in Arbitration’, *Arbitration Journal*, 45 (1990), 37.

² 2021 International Arbitration Survey: Adapting arbitration to a changing world (White and Case, 2021) <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 21 July 2024.

³ ‘Court Case Backlog Worse Now than Before £477 Million Investment to Curb Delays, New Report Reveals’ (Byline Times, 2024) <<https://bylinetimes.com/2024/05/24/court-case-backlog-worse-now-than-before-477-million-investment-to-curb-delays-new-report-reveals/>> accessed 01 July 2024.

⁴ ‘80,221 cases pending in the Supreme Court in January 2024 - Supreme Court Observer’ (Supreme Court Observer, 2024) <www.scobserver.in/journal/80221-cases-pending-in-the-supreme-court-in-january-2024/> accessed 2 July 2024.

⁵ Waravita P, ‘Backlog of Cases in Sri Lanka: Only 19 Judges per Million People’ (The Morning, 2024) <<https://www.themorning.lk/articles/gizCBAAdgzpdXJKfQIZjS>> accessed 24 July 2024.

Second, irrespective of the outlets to achieve justice, as human beings, there is an intrinsic desire for freedom and control. Hugo Grotius proclaims that liberty is the “...*the power that we have over ourselves*,”⁶ and Article 2(d) of the UNCITRAL Model Law provides: “*where a provision of this Law . . . leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.*” Third, human beings are normative creatures and thus, it is crucial to not limit the axis to solely materialistic metrics. John Gardner (2007) ascribes the characteristic of rationality to human beings as well as the capacity to respond to reason including norms that guide their actions.⁷ Similarly, Neil MacCormick (2007) extends this analysis by highlighting that human beings are “...*through-and-through norm-users*...”⁸

Accordingly, money and time are often anchors that hold back parties from opting into mainstream litigation, and thereby prompting in an opt in for arbitration as arbitration may be chosen for efficiency, cost-effectiveness and privacy.⁹ For instance, under a civil law context, consumers’ satisfaction is inextricably linked to companies’ financial performance and profitability.¹⁰ Similarly, with the consideration of arbitration as an ‘alternative’ dispute resolution mechanism, control and freedom, are additional oars that parties use to sail the river of justice. However, cumulatively, with the possibility of additional metrics being conceivable, for the purposes of this article, the metrics of cost, time, control and freedom largely influence the choice of arbitration for parties. Despite this being on an international scale, that scale can similarly be utilized to evaluate the desire for arbitration in the Sri Lankan context. Therefore, this article will discuss justice as a fundamental metric for arbitration inclusive of the four-quadrant analysis **(1)**, as the premise, and then analyse, the application of the metrics of money **(2)**, time **(3)**, control **(4)**, and freedom **(5)** followed by a conclusion of how the premise in connection with the weightage given to the metrics can be used to argue that parties and arbitrators will always be playing a weighing game that extends beyond material considerations.

⁶ Grotius, H., ‘On the Law of War and Peace: Including the Law of Nature and of Nations’ (1814) 12.

⁷ Gardner, J., ‘Nearly Natural Law’ (The American Journal of Jurisprudence, 2007).

⁸ MacCormick N., ‘Institutions of Law’ (Oxford University Press, 2007).

⁹ ‘Arbitration vs. Litigation: Making the Right Choice’ (LexisNexis, 2023)

¹⁰ www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/arbitration-vs-litigation?srsId=AfmBOoqP91OJuXWxcU8PZeHXPthX6DrQ_uTWiKfTYBPgH4s39fFy_A6P accessed 17 July 2024.

¹⁰ Luo, X. and Homburg, C., “Satisfaction, complaint, and the stock value gap”, (Journal of Marketing, 2008) Vol. 72 No. 4, pp. 29-43.

2. JUSTICE AS A FUNDAMENTAL METRIC IN ARBITRATION: THE INCLUSION OF THE FOUR QUADRANTS ANALYSIS

Ken Wilber set out to frame the domains of human existence and knowledge utilizing four quadrants: Internal Individual (internal thoughts, feelings, moods and logic i.e. internal life), External Individual (human's internal reaction being a product of external events), Internal Collective (intangible aspects such as language, culture, value systems and worldviews) and External Collective (collective references the exterior of any social aspect of human interactions including forces of production and techno-economic modes).¹¹ While all of these quadrants may not be wholly applicable to every aspect of arbitration, including the choice of arbitration and the evaluation of arguments by arbitrators, it provides a compass when navigating the various factors that influence parties in choosing arbitration. In this vein, it is necessary to evaluate whether the four quadrants, links to the pursuit of justice.

2.1 Do the Four Quadrants link to justice when pursuing arbitration?

The claim being made is that the choice of arbitration is not a one-size-fits-all decision and hence, is largely influenced by the combination of the internal and external individual: The internal individual captures our thoughts, feelings, moods and logic, whilst the external individual refers to our internal world being influenced by our external experiences.¹²

The sub-claim for this is that, in Sri Lanka, the emergence of arbitration was not a singular event but rather a historical development that thereby constitutes an external collective (i.e. societal factors such as history) that explains the build-up of the internal individual (i.e. thought process) via its relation to the external individual (i.e. behaviour). In Sri Lanka, the Arbitration Act No. 11 of 1995, which was the first arbitration statute in South Asia to be based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration,¹³ facilitated the conduct of arbitral proceedings and recognition as well as enforcement of foreign

¹¹ 'Ken Wilber Fundamentals: The Four Quadrants For Newbies' (Deep Psychology - Inner Transformation, 2022) <<https://deep-psychology.com/ken-wilber-four-quadrants/>> accessed 23 July 2024.

¹² 'The Four Quadrants: A Map of All Knowledge - The Living Philosophy' (The Living Philosophy) <www.thelivingphilosophy.com/the-four-quadrants-ken-wilber/#:~:text=The%20first%20quadrant%20Q1%20in,is%20the%20external%20and%20collective> accessed 19 July 2024.

¹³ Rodrigo A., De Alwis R., De Silva A. and Amirthanayagam D. M. 'Sri Lanka's evolution as a safe seat for international arbitration' (Global Arbitration Review, 2023) <<https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2024/article/sri-lankas-evolution-safe-seat-international-arbitration#footnote-020>> accessed on 25 July 2024

and domestic arbitral awards. It repealed Arbitration Ordinance No. 15 of 1856 as well as the provisions of the Civil Procedure Code, which, until then, constituted statutory arbitral law in Sri Lanka. However, this development of arbitration could be accredited to a rich historical backdrop: "...Sri Lanka by virtue of its central location in the East-West trade route became a trade entry port. The early contacts with different trading nations helped the early Sri Lankans to develop a social structure with a conciliatory judicial system."¹⁴ Building on this, following the colonization of Sri Lanka by the British in 1796, and Sri Lanka being fully colonized by the British in 1815, it resulted in the affixation of English Law into the Sri Lankan legal system: "Henceforth Arbitration in English law may be defined as a private mechanism for the resolution of disputes which takes place in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable at law."¹⁵ Therefore, at present, the state of arbitration, and its evolution would rely on its colonial foundation juxtaposed with the advent of contemporary efforts by the now, independent Sri Lankan legal system to develop Sri Lankan arbitration.

Hence, the next sub-claim, when analysing the Sri Lankan context, is to assess whether it is necessary to construe the overall framework of arbitration i.e. whether it acts as a means of expediting the parties' road to justice. When philosophers discuss justice, it is often connected to social-political perspectives, and thus, the pursuit of justice isn't limited to a philosophical vacuum but is rather grounded in material reality as well as its interaction with the normative mind-set of an individual. Hence, for a judge, the source of law in their minds is based on his morals, ethics, culture, class and caste, which, would be considered equity,¹⁶ which is an additional faucet that judges could turn to as a corrective to the generality of law.¹⁷ However, some clients hold value for the opportunity to set legal precedents through litigation, which develops legal principles that could arguably contribute as a reason to pursue arbitration. Hence, in this veneer, justice could be sought via the avenue of arbitration, in comparison to litigation, given that the New York Convention allows arbitral awards to be enforced in more than 150 contracting states, thereby providing a strong basis for enforcement.¹⁸

¹⁴ Kanag-Isvaran K & Wijeratne S S, 'Arbitration Law in Sri Lanka' (ICLP, 2011) 2.

¹⁵ Brown H., Mariott A., 'ADR Principles & Practices' (Sweet & Maxwell, 1999, 2nd Ed) 49.

¹⁶ Professor Jean-Denis Bredin wrote the following in *Etudes offertes a` Berthold Goldman*, in 1982.

¹⁷ Aristotle, both in *Nichomachean Ethics* and *Eudemian Ethics*.

¹⁸ 'Why is arbitration so popular in cross-border disputes?' (Womble Bond Dickinson, 2023)

<www.womblebond Dickinson.com/uk/insights/articles-and-briefings/why-arbitration-so-popular-cross-border-disputes> accessed 25 July 2024.

Therefore, when evaluating the above material, it is noteworthy that even if there is no specific anchor of prompting a choice in arbitration, in general, what is highlighted and will be highlighted, is that the considerations of the internal individual, external individual, internal collective and external collective are relevant as it provides a map of knowledge to assess the incentives that guide both parties and arbitrators during the course of arbitration. For this, it will be submitted that arbitrators are thereby intrinsically guardians of justice.

2.2 Arbitrators are intrinsically guardians of justice

The claim being made is that despite the expertise of arbitrators being catered toward the dispute, their decision-making would align with the notion of upholding justice due to the inability to limit themselves to purely practical and logical analysis.

The role of an arbitrator links to the expressions such as ‘Ministry of Justice’ and ‘the public service of justice,’ that references the resolution of a legal dispute between two or more parties by concluding the rights and obligations of the parties.¹⁹ Hence, to apply legal norms, an arbitrator is required to “...get as near as reasonably possible to an understanding of what actually happened between the litigants...”²⁰ However, in this process, the four quadrants become relevant as heuristics play an indispensable component in the psychological thought process of an individual. Heuristics simply reference a ‘rule of thumb’ followed in the absence of time and capacity to conduct an exhaustive logical and empirical analysis.²¹ While arbitrators do have a certain portion of time to resolve the dispute, as arbitrators are human beings, their minds would function anatomically, and thus, despite legal training, fundamental reality cannot be altered.²² Hence, an arbitrator would have both an intuitive and deliberative component i.e. two minds,²³ which could also be viewed as ‘System 1’ (the fast, automatic, high capacity, low effort, and intuitive mode) and ‘System 2’ (the slow, deliberate, limited capacity, and high-effort mode).²⁴ Similarly, judging has been traditionally sub-divided into a ‘formalist’ model pursuant to which it is believed that judges apply the law to the facts in a logical and deliberative way, and the ‘realist’ model pursuant

¹⁹ Mayer, P. ‘Must Justice be a Goal for the Arbitrator?’ (Arbitration International, 2021).

²⁰ *ibid.*

²¹ ‘Heuristic Definition | Law Insider’ (Law Insider) <www.lawinsider.com/dictionary/heuristic> accessed 26 July 2024.

²² Sussman, E. (2023) ‘Arbitrator Decision-Making: Heuristics and Other Unconscious Influences’, in S. Kröll, A.K. Bjorklund, and F. Ferrari (eds.) Cambridge Compendium of International Commercial and Investment Arbitration. Cambridge: Cambridge University Press, pp. 1425–1461.

²³ K. Frankish and J. St. B. T. Evans, ‘The Duality of Mind: An Historical Perspective’, in J. St. B. T. Evans and K. Frankish (eds.), In Two Minds: Dual Processes and Beyond (Oxford University Press, 2009).

²⁴ Kahneman, Thinking Fast and Slow (2011), 19–105.

to which it is believed that judges follow their intuition to reach their judgment and later rationalize their judgment with reasoning.²⁵

Therefore, given the similarity between judicial decision-making in mainstream litigation and arbitrator's decision making in arbitrations, it can be argued that these considerations influence arbitrators, irrespective of the specific reasons that prompted their selection.²⁶ Hence, by way of extension, when judges seek justice, arguably, that could also extend to arbitrators, when weighing the arguments made by the counsels in an arbitration. Thus, the four quadrants of knowledge, in reality, sets out a map to charter the uncertain waters of human incentives, which is useful when judging the incentives of parties and arbitrators, for instance, in Sri Lanka. For this, the metrics that are useful in adjudging this would include money, cost, control and freedom, as these are integral elements that influence arbitrations.

3. METRIC OF MONEY IN ARBITRATION

The claim is that the metric of money ought to be given weightage as it interacts with the choice of arbitration and the arbitral process. The premise for this claim can be visually depicted by Nachman of Breslov, who stated that arbitration is "... justice blended with charity",²⁷ and is heightened in Sri Lanka considering, in 2023, the economy contracted by 2.3%.²⁸ Globally, money is a fundamental metric in the contemporary era following the onslaught of the Covid-19 pandemic and the rising Ukraine-Russia war, that has generally impacted the global market which included the purchasing power of people. Hence, arbitration is arguably a viable means of escaping the delays of mainstream legislation, but thereby requires considering whether arbitration does in fact save time.

²⁵ Guthrie C., et al., 'Blinking on the Bench: How Judges Decide Cases' (Cornell Law Review, 2007).

²⁶ Drahozal, 'A Behavioural Analysis of Private Judging' (2004), 105; see also D. Wittman, 'Arbitration in the Shadow of a Jury Trial: Comparing Arbitrator and Jury Verdicts', Dispute Resolution Journal, 58 (2003) (finding that monetary outcomes did not differ significantly between arbitrators and juries in automobile accident cases).

²⁷ Nachman of Breslov (AZQuotes) <https://www.azquotes.com/quote/1258997#google_vignette> accessed 24 July 2024.

²⁸ World Bank Group, 'Sri Lanka Development Update 2024' (World Bank, 1 April 2024) <www.worldbank.org/en/country/srilanka/publication/sri-lanka-development-update-2024> accessed 23 July 2024.

3.1 Arbitration: Time-efficient Alternative Dispute Resolution mechanism

The sub-claim is that the party's internal individual, reflects the external collective that is the rise in contemporary litigation cost induced by several events. Under arbitration, for instance, in 2015, the International Chamber of Commerce (ICC) published its Commission Report on Decisions on Costs in International Arbitration: The Report examined the costs incurred in more than 200 arbitral awards delivered in 2012 and found that on average: 83% related to party costs, including fees and expenses related to lawyers, witnesses and experts; 15% related to the Tribunal's fees; and 2% related to the ICC's cost to administer the proceedings (i.e. institutional costs). At present, the cost of ICC Arbitrations, involve a first advance on administrative expenses of US\$5,000, payable by the claimant when it files the "Request for Arbitration."²⁹ However, parties often opt for arbitration as it tends to be less expensive than litigation because it typically involves fewer procedural hurdles and streamlined processes.³⁰ Therefore, the advent of saving time ensures that arbitration would be deemed as a viable alternative dispute resolution mechanism.

3.2 Arbitration: notions of justice could be circumvented in favour of monetary considerations

The sub-claim is that conceptual considerations of public interest litigation,³¹ may often be undermined in the realm of arbitration. Costs of the arbitrations would be influenced depending on the locality, as a party with financial circumstances would prefer an arbitration being held in a financially viable location, but this would not be of concern for a large corporation.³² Hence, the financial capacity of various stakeholders often defines the capacity of justice that arbitration can fulfil, but such would similarly include the difference in thought processes within the internal individual as arbitration is tactfully, a viable alternative for richer stakeholders but a gamble for stakeholders with less money. For instance, whilst not specifically relevant to arbitration as it

²⁹ 'Costs and Payment - ICC - International Chamber of Commerce' (ICC - International Chamber of Commerce) <<https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/costs-and-payment/>> accessed 25 July 2024.

³⁰ 'Arbitration vs. Litigation: Making the Right Choice' (Community) <www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/arbitration-vs-litigation?srsltid=AfmBOoqP91OJuXWxcU8PZeHXPthX6DrQ_uTWiKtTYBPgH4s39fFy_A6P> accessed 26 July 2024.

³¹ <https://www.cpalanka.org/wp-content/uploads/2023/04/Salient-Aspects-of-Public-Interest-Litigation-Jurisprudence-in-Sri-Lanka-Book-Online-Version.pdf>.

³² Wijayatikale, Y.J.W, 'Arbitration Clauses and Impartiality and Independence of Arbitrators,' (LawNet, 2016) < <https://www.lawnet.gov.lk/arbitration-clauses-and-impartiality-and-independence-of-arbitrators/>> accessed on 10 July 2024.

relates to criminal matters, under a criminal justice context, Taibbi and Crabapple criticised the United States justice system poverty gap for fostering ‘legal schizophrenia’ which is harsh on the poor and lenient on the rich.³³ The latter analysis is relevant to highlight that money can often be used as a metric to determine the presence or absence of justice. Under a civil law context, for instance, consumers’ satisfaction is inextricably linked to companies’ financial performance and profitability.³⁴ This is the rationale behind victims’ rights being elevated and recognised as human rights and entrenched in legislation³⁵ to act as a ‘counter-weight’ to the rights of an accused person.³⁶ Even lawmakers facing budget rationing have little interest in opposing arbitration as an alternative method of dispute resolution because litigation costs money to the public treasury.³⁷ Therefore, when evaluating whether justice can be sought by less powerful stakeholders under arbitration, it is necessary to consider the metric of cost, but this is often adjudged based on the duration of the arbitration.

4. METRIC OF TIME IN ARBITRATION

The claim is that time is a crucial metric that parties consider when evaluating whether to pursue justice via arbitration. The premise of this claim can be linked to Martin Luther King Jr., using the phrase: "justice too long delayed is justice denied". For this, it will be argued that arbitration is chosen despite the advent of justice via litigation given the capacity to save time.

4.1 Arbitration is chosen in place of litigation despite the advent of justice through litigation

The sub-claim is that parties often seek arbitration considering a greater weightage being provided to time that is not obtainable under the mainstream of litigation. This is noteworthy as it highlights that despite the capacity of parties to pursue justice in matters relating to a contractual dispute, through the standard court procedure, for instance, they may opt for arbitration instead. The Queen Mary University of London (QMUL) International Arbitration Survey 2021 evidenced that, in

³³ Taibbi M. and Crabapple M., ‘The Divide: American Injustice in the Age of the Wealth Gap; (Spiegel & Grave, 2014).

³⁴ Luo, X. and Homburg, C., “Satisfaction, complaint, and the stock value gap”, (Journal of Marketing, Vol. 72 No. 4, 2008) 29-43.

³⁵ Ss. 4, 13, 14 Victims’ Charter Act 2006.

³⁶ Connell M., ‘Victims’ Rights are Too Often Overlooked as Human Rights’ (Paper presented at the Human Rights Consultation, Parliament House, Canberra, 1 July 2009).

³⁷ Arkin H., ‘Dispute Resolution A Comparative Analysis under Differing Legal Systems,’ (ROCKY. MTN. MIN. L. INST. 11, 1995).

addition to cost, time was perennially acknowledged as the biggest concerns for arbitration users. Thus, arbitration acts as a “...contractual remedy designed to expedite informal dispute resolution.”³⁸

For instance, the capacity of parties to consolidate issues, under Sri Lankan arbitrations, involving several disputes and parties, including them into one proceeding is cost-effective and time saving. Section 35(1) Arbitration Act No. 11 of 1995 stated: “(1) Where applications filed in court to enforce an award and to set aside an award are pending, the court shall consolidate the applications.” However, there is flexibility in terms of calculating the time for a proceeding under arbitration considering that Section 44 Arbitration Act No. 11 of 1995 states: “In calculating the period of prescription for the purpose of any action, the period that elapsed between the commencement of an arbitration and its completion or termination as the case may be, shall be excluded.” Nevertheless, within this time frame, there are mechanisms that have been employed to ensure smooth functioning as there are time limits imposed: Section 10(3) Arbitration Act No. 11 of 1995 requires that a party must challenge the impartiality or lack of independence of arbitrators before the arbitral tribunal within 30 days of becoming aware of such circumstance; Section 27(1) Arbitration Act No. 11 of 1995 parties have 14 days upon receiving the award, to correct and interpret an award.

Therefore, arbitration involves practical mechanisms through which time can be efficiently utilized, whereby, there is no requirement to outsource control to a domestic court. However, this thereby raises the question whether the consideration would be similarly relevant to arbitral institutions.

4.2 Arbitral Institutions foster a greater sense of time saving that affirms justice

The sub-claim is that despite the control of arbitral institutions over the arbitral process, this does not result in delay, but rather, such institutions have frameworks to ensure efficient usage of time.

In 2017, in the London Court of International Arbitration (LCIA)’s updated LCIA Report Facts and Figures – Costs and Duration covering all cases administered by the LCIA between 1 January 2013 and 31 December 2016, the median total duration of LCIA arbitrations remained 16 months, whereas the mean duration of arbitration was 20 months.³⁹ The Stockholm Chamber of Commerce

³⁸ State v. Conn. Emps. Union Indep., 440 A.2d 229, 230 (Conn. 1981).

³⁹ Lcia, ‘LCIA Releases Updated Costs and Duration Analysis’ (LCIA, 2017) <<https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx>> accessed 15 July 2024.

(SCC) statistics for 2020, for instance, showed a shortened time from referral to the SCC until the issuance of the final award as compared to previous years. For awards rendered under the SCC Arbitration Rules, 40% were rendered within 6 months from referral to the tribunal, and another 42% were rendered within 12 months, which is less time in comparison to 2019 (27% within 6 months and 50% within 12 months).⁴⁰ The SCC statistics for 2021 show that 19% of the awards rendered under the SCC Arbitration Rules in 2021 were rendered within 6 months from when the case was referred to the arbitrator or tribunal, whereas another 56% of the awards were rendered between 6 to 12 months from the date of referral.⁴¹ Further, on 22 June 2021, Hong Kong International Arbitration Centre (HKIAC) released an updated report covering all HKIAC cases in which a final award or decision was issued between 1 November 2013 and 31 May 2021, including arbitrations which were not withdrawn, settled or terminated prior to the final award: The overall findings show that the median duration of HKIAC arbitration was 13 months, whereas the mean duration was 16.9 months.⁴² In the International Centre for Dispute Resolution (ICDR) Time and Cost, Considering the Impact of Settling International Arbitrations Report, the ICDR indicated that the mean duration of arbitration for all ICDR tribunals was 15.4 months, whereas the median duration was 13.1 months.⁴³ In addition, according to the ICC statistics for 2020, the average duration of proceedings in cases that reached a final award in 2020 was 26 months calculated on the basis of all said cases, including those where the proceedings were suspended by the parties for any length of time: The median duration of proceedings at the ICC was 22 months, according to the ICC Report.⁴⁴

Therefore, when considering the advent of arbitral institutions as an external collective with which the internal individual interacts with, it is possible to argue that with the readily available statistics on websites and with the advent of globalized information, parties would opt for arbitrations being expedited by arbitral institutions. Similarly, this would apply to the Sri Lanka National Arbitral

⁴⁰ Leading Boutique International Arbitration Law Firm • Aceris Law LLC <www.acerislaw.com/wp-content/uploads/2022/08/sccinstitute.com-SCC-RELEASES-STATISTICS-FOR-2020.pdf> accessed 16 July 2024.

⁴¹ *ibid.*

⁴² 'HKIAC Releases Average Costs and Duration Report | HKIAC' (HKIAC | Hong Kong International Arbitration Centre, 2021) <www.hkiac.org/news/hkiac-releases-average-costs-and-duration-report> accessed 21 July 2024.

⁴³ (n-40).

⁴⁴ 'ICC Dispute Resolution Statistics: 2020 - ICC - International Chamber of Commerce' (ICC - International Chamber of Commerce, 2021) <<https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/>> accessed 23 July 2024.

Centre, established in 1985,⁴⁵ as well as the Institute for the Development of Commercial Law and Practice (ICLP) which was set up on 15th March 1996.⁴⁶

5. METRIC OF CONTROL IN ARBITRATION

The claim is that the metric of control is a foundational aspect that parties consider when selecting arbitration, but it isn't desired to the extent that arbitration would have foregone simply due the loss of a degree of control. Arbitration enables parties to have a sense of control over the dispute and exercise some of the factors in their Circle of Control.⁴⁷

5.1 Ad-Hoc Arbitration: a source of greater control desire by parties?

The sub-claim is that ad-hoc arbitrations may provide control, but arguably parties don't cite this as their sole focus. Article II of the New York Convention 1958 requires the presence an agreement in writing of the parties submitting to arbitration. The Singapore Court of Appeal, in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2013]⁴⁸ highlighted: "[a]n arbitral award binds the parties to the arbitration because the parties have consented to be bound by the consequences of agreeing to arbitrate their dispute. Their consent is evinced in the arbitration agreement." This provision is consent according to the US Supreme Court in *Volt Information Sciences v Leland Stanford, Jr. University* [1989], which results in the parties having the capacity to structure their arbitration agreement. In Sri Lankan arbitrations, it is the parties that decide the number of arbitrations,⁴⁹ as well as the procedure for appointing such arbitrators.⁵⁰ Hence, the nuance is that the presence of the consent pre-requisite, doesn't equate to the notion that parties intrinsically prefer ad-hoc arbitration void of the control of arbitral institutions but rather that parties must be provided the capacity to decide the way they structure, resolving their dispute. However, this links to John

⁴⁵ 'SLNAC | About Us' (SLNAC | Home)

<[⁴⁶ ICLP Arbitration Centre. Institute for the Development of Commercial Law and Practice. \(n.d.\).](http://www.slnarbcentre.com/about-us#:~:text=The%20Sri%20Lanka%20National%20Arbitration,commercial%20arbitration%20in%20Sri%20Lanka.> accessed 21 July 2024.</p>
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<[⁴⁷ "International Arbitration and the Circle of Control - In-House Community" \(In-House Community\)](http://www.iclp.lk/> accessed 25 July 2024.</p>
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<[⁴⁸ 226 SGCA 57.](https://www.inhousecommunity.com/article/international-arbitration-and-the-circle-of-control/#:~:text=Arbitration%20enables%20parties%20to%20have,in%20their%20Circle%20of%20Control> accessed 20 July 2024.</p>
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⁴⁹ S 6(1), Arbitration Act No. 11 of 1995.

⁵⁰ S 7(1) Arbitration Act No. 11 of 1995.

Gardner's (2012) claim that morality has over human beings, which is that morality is "inescapable"⁵¹ and as per Robert Alexy (2002), is the "... (Utterly real) game of law."⁵²

Thus, under an ad-hoc arbitration, both parties and arbitrators may independently determine the procedure void of influence from arbitral institutions.⁵³ However, this should be measured against Grotius's input: "For he who has received the promise, in some measure takes and holds the person that has made the engagement. A meaning not ill expressed by Ovid in the second book of his *Metamorphoses*, where the promisor says to him, to whom he had promised, "My word has become yours."⁵⁴ Hence, control is only beneficial in so far as this promise is carried out, thereby suggesting that should an arbitral institution enable affirming this promise better, then, it is likely that control isn't the sole metric that parties prefer. In this vein, parties may opt for either ad-hoc arbitration that arguably increases the control parties have over the proceedings or opt for institutional arbitration that outsources a degree of control. Therefore, this provides insights into the internal individual of the parties when considering the choice of the type of arbitration as it analyses the weighing that parties would consider, prior to choosing their preferred type of arbitration.

5.2 Do parties lose control when pursuing justice under an arbitral institute?

The sub-claim is that parties do not lose control when submitting a dispute to an arbitral institution. An arbitral organization is "... neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator."⁵⁵ Article IV(1)(a) 1961 European Arbitration Convention provides that if the parties have submitted their dispute to an arbitral institution "the arbitration proceedings shall be held in conformity with the rules of the said institution." Arguably, there are practical benefits, as an award rendered by an institution may have more credibility in the international community and in courts, and as per Lew, Mistellis and Kröll,⁵⁶ based on the concept of expertise arbitrage, there is assistance provided in resolving complex technical difficulties. Further, there is administrative assistance from the institution: Appointment of arbitrators in a timely manner, ensures that the arbitration proceeds in a reasonable manner,

⁵¹ John Gardner, 'Law as a Leap of Faith' (2012).

⁵² Robert Alexy, *The Argument from Injustice* (2002).

⁵³ Ad hoc arbitration | practical law

<[https://uk.practicallaw.thomsonreuters.com/5-107-6360?contextData=\(sc.Default\)%2F&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-107-6360?contextData=(sc.Default)%2F&transitionType=Default&firstPage=true)> accessed 20 July 2024.

⁵⁴ (n-6).

⁵⁵ S. 1(2) UNIF. ARBITRATION ACT (amended 2000), 7 U.L.A. 11 (2009).

⁵⁶ Moses, L.M, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 3rd Edn, 2017) 5.

ensuring that the parties pay fees and expenses in a timely manner and provides administrative assistance in the event of procedural conflicts.⁵⁷ Therefore, parties' disputes are simply expedited and resolved to a greater extent, which arguably conforms with the intrinsic desire of the parties when they select the arbitral institution that thereby fosters the capacity to pursue justice.

6. METRIC OF FREEDOM IN ARBITRATION

The claim is that parties do not desire freedom to the extent they can't achieve a just outcome. A policy opposing arbitral litigation sends a forceful systemic message that parties should deliberate before committing disputes to arbitration because renegade parties will not be allowed to perforate arbitral autonomy.⁵⁸ Gaillard and Savage explained: "In most modern international arbitration statutes, the primacy of the agreement of the parties is the fundamental principle underlying the whole of the arbitral proceedings, and especially the constitution of the arbitral tribunal." In this vein, arguably, when prioritising freedom, parties may opt for ad-hoc arbitrations which guarantee more freedom considering that it is the parties themselves who decide the procedure. Under ad-hoc arbitrations, Redfern and Hunter⁵⁹ explained that parties sometimes write a complete set of procedural rules to govern the proceedings, and a subsequently appointed Tribunal is bound by the agreed procedural framework. Once parties choose arbitration, the obligated parties are required to forego the right to litigate disputes identified within the arbitration agreement.⁶⁰

Despite this, statistically, the trajectory of ad-hoc arbitrations is inconsistent, which can be analysed in comparison to the prominence of use of arbitral institutions. James Clanchy, 'Arbitration statistics 2022: ad hoc strengthens as institutions recede' highlighted that the ICC arbitration caseload was 853 in 2021, but it decreased to 710 in 2022; SIAC arbitration caseload was 469 in 2021, but it decreased to 357 in 2022; and HKIAC arbitration caseload was 277 but increased to 344 in 2022. Therefore, it highlights that as a whole, there is a decently positive trend of cases being filed to arbitral institutions despite the advent that ad-hoc arbitrations maximise freedom when pursuing justice.

⁵⁷ (n-56) 10.

⁵⁸ Ali Khan, L. 'Arbitral Autonomy' (Louisiana Law Review, 2013)

<<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6432&context=lalrev#:~:text=The%20autonomy%20paradigm%20postulates%20that,absence%20of%20an%20arbitration%20agreement>> accessed 22 July 2024.

⁵⁹ (n-56).

⁶⁰ (n-56).

7. CONCLUSION

In conclusion, under Yin and Yang, originating from Chinese philosophy, all things exist as ‘inseparable and contradictory opposites.’ Similarly, the metrics of money, time, control and freedom are arguably inseparable parts in the evaluation of choosing arbitration by a party irrespective of ascriptive variations between countries, which includes Sri Lanka. In essence, it can also be analogized to the scales of lady justice, which is tipped in favour of one side, influenced by considering that one metric may be favoured over another depending on the context. However, irrespective of the metric, the pursuit is a just outcome for the problem before the party.

In Sri Lanka, the Sri Lanka National Arbitration Centre, established and incorporated in the year 1985, handles administration of arbitrations for the resolution of commercial disputes, with around 20 arbitration sittings per week, and on a monthly basis the arbitration hearings total to a near 100.⁶¹ The CCC-ICLP International ADR Center similarly handles arbitral matters. However, the immense backlog of cases noted above arguably could not be simply dispensed considering that Sri Lankan courts have at times adopted a suspicious, if not hawkish, attitude towards arbitration,⁶² which is a similar position upheld by citizens. Therefore, under the premise expressed by the four quadrants of knowledge, a map that sets out the metrics of influence enables chartering the pre-requisites for promoting arbitration. Even if not arbitration, it serves as a source of epistemological access to knowledge for both arbitrators and parties on the benefits of considering alternative dispute resolution, which could be contextualised into Sri Lanka.

⁶¹ Information Release (Sri Lanka National Arbitration Centre)
<<https://www.slnarbcentre.com/pdf/INFORMATION%20RELEASE-JULY%202019.pdf>> accessed 25 July 2024

⁶² (n-13)

THE EVOLUTION AND MODERNIZATION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN SRI LANKA

Gayana Jayasinghe | Pramitha Perera | Nimesh Ruchiranga

ABSTRACT

Alternative Dispute Resolution (ADR) in Sri Lanka has deep historical roots, influenced by religious philosophies and community-based practices. This article explores the evolution of ADR from ancient village councils, where religious priests and elders mediated disputes, to contemporary formal structures such as mediation, conciliation, and arbitration. It highlights the advantages of ADR, including flexibility, confidentiality, cost savings, informality, reduced antagonism, and time efficiency, while addressing the challenges faced in mediation and conciliation processes. In this Article the legal framework and institutional support for ADR in Sri Lanka, such as the Mediation Boards Act and Arbitration Act will be discussed. The article concludes that ADR remains a vital and effective mechanism for dispute resolution, emphasizing the importance of continued education and adherence to best practices to fully realize its potential while touching upon the modern trends in the ADR arena.

1. INTRODUCTION

Alternative dispute resolution (ADR) in Sri Lanka has a long-standing tradition, deeply embedded in the country's history and cultural heritage, with its origins traceable to ancient practices.¹ These practices were heavily influenced by religious philosophies and principles of justice. Historically, villagers would participate in a mediation process by presenting their disputes to the chief Buddhist priest of the local temple.² The esteemed religious leader, drawing upon his extensive knowledge of religious teachings and natural law, would offer guidance and facilitate a resolution. Additionally, the village elders played a crucial role in dispute resolution, where they would

¹ See generally, K. N. O. Dharmadasa, *Language, Religion, and Ethnic Assertiveness: The Growth of Sinhalese Nationalism in Sri Lanka* (University of Michigan Press 1992).

² Nadja Alexander, 'From Communities To Corporations: The Growth of Mediation In Sri Lanka' (Mediate.com, 12 August 2002) <https://www.mediate.com/articles/alexanderN2.cfm> accessed 30 September 2024.

oversee discussions and employ their wisdom and experience to help parties to reach amicable settlements.³

In these early forms of ADR, the emphasis was on harmony, reconciliation, and community cohesion. The engagement of religious priests and village elders meant that the settlement process was not only fair and unbiased, but also firmly based in the community's moral and ethical framework. This historical setting highlights the long-lasting impact of ancient dispute resolution techniques on modern approaches to conflict resolution in Sri Lanka. The way that international arbitration norms and traditional community mediation techniques have been combined represents the development of alternative dispute resolution in Sri Lanka. In fact, the UNCITRAL Model Law on International Commercial Arbitration, which offers a consistent legal framework for the just and effective resolution of disputes through arbitration, had a significant influence on Sri Lanka's present Arbitration Act No. 11 of 1995.⁴ Similarly International groups like the Asia Foundation also contributed significantly to the development of infrastructure and training programs necessary for the success of Sri Lanka's community mediation initiatives.⁵ In order to provide accessible justice, the Mediation Boards Act (1988) combines foreign community-based dispute resolution models with traditional mediation techniques used in Sri Lanka.⁶

In ancient Sri Lanka, the "Gamsabhawa" was an important institution for ADR. This body functioned in the ancient Sinhalese Kingdom and later the Kandyan Kingdom. The Gamsabhawa was made up of the village's leading and most experienced men.⁷ These councils were often held in central areas, such as an ambalama (a traditional village rest house for travellers) or under a large, shady tree. The Gamsabhawa's principal duty was to adjudicate a wide range of civil and criminal cases, including boundary disputes, debts, petty crimes, and interpersonal conflicts. The council's approach to conflict resolution prioritized amicable agreements over punitive actions. Resolutions frequently included restitution, recompense, or admonishment rather than harsh punishment.⁸

³ L. H. M. P. Jayawardena, *Religion and the Survival of Tradition: Buddhism in Modern Sri Lanka* (Oxford University Press 2003).

⁴ Arbitration Act No. 11 of 1995 (Sri Lanka).

⁵ Ramani Jayasundere and Craig Valters, *Women's Experience of Local Justice: Community Mediation in Sri Lanka* (Justice and Security Research and Asia Foundation, 2014).

⁶ Sepalika Welikala, 'Community Mediation as a Hybrid Practice: The Case of Mediation Boards in Sri Lanka' (2016) *Asian Journal of Law and Society*, published online by Cambridge University Press, 7 July 2016 <https://doi.org/10.1017/als.2016.18> accessed 30 September 2024.

⁷ Le Mesurier CJR and Panabokke TB, *Niti-Nighanduva (The Vocabulary of Law)* (Government Printer 1880).

⁸ H. L. Seneviratne, *The Work of Kings: The New Buddhism in Sri Lanka* (University of Chicago Press 1999).

This system highlights the voluntary nature of ADR in ancient Sri Lanka, where the onus was on the disputing parties to resolve their conflicts. The Gamsabhawa served as a facilitative body, guiding the parties towards mutually agreeable solutions. The emphasis on reconciliation and community-based decision-making reflects the intrinsic values of restorative justice embedded in the Sri Lankan culture. Further, this method of dispute resolution underscores the principles of ADR, focusing on restoring harmony within the community and maintaining social cohesion. This ancient ADR framework fostered peace, harmony, and economic growth at the village level, enhancing social stability.⁹ Thus, alternative mechanisms for dispute resolution are not novel concepts in Sri Lanka; they have been an integral part of the country's dispute resolution landscape for many years. In contemporary terms, ADR encompasses any formal or informal procedure through which parties resolve disputes outside the realm of litigation.

2. ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

2.1.Flexibility

One of the paramount benefits of ADR are its ability to resolve disputes quickly, affordably, and with flexibility in terms of the forums and methods that are most suited for each situation. The involved parties are endowed with the autonomy to appoint arbitrators and mediators who are not only seasoned professionals but also possess specialized knowledge and proficiency directly relevant to the specific issues at hand. This strategic selection process ensures that the appointed neutrals have a comprehensive understanding of the complex intricacies involved in the dispute, enabling them to address these nuances with precision and insight. Furthermore, ADR procedures can be meticulously customized to align with the distinct characteristics of each case. This bespoke approach significantly enhances both the efficiency and the effectiveness of the resolution process, thereby streamlining the path to a satisfactory and equitable outcome for all parties involved. The ability to adapt procedures to the specific demands of a dispute underscores ADR's superiority in handling sophisticated legal matters compared to conventional litigation.¹⁰

⁹ S. Hettige, *Buddhism, Politics, and the Limits of Law* (Cambridge University Press 2017).

¹⁰ E. Brunet, C. B. Craver, and E. F. Stipanowich, *Alternative Dispute Resolution: The Advocate's Perspective* (4th edn, LexisNexis 2006) 2.

2.2. Confidentiality

Unlike traditional court litigation, the ADR systems maintain rigorous privacy and confidentiality standards. This attribute is especially essential in economic disputes and when public scrutiny could considerably harm the company reputations of the parties involved. By maintaining confidentiality, ADR protects sensitive material and organizational reputational interests. Maintaining such confidentiality is crucial for protecting proprietary data, trade secrets, and other critical corporate information from public disclosure, minimizing potential reputational harm and establishing a more secure and controlled dispute resolution environment.¹¹

2.3. Cost-Saving

ADR typically expedites the resolution process, resulting in considerable cost savings compared to drawn-out court litigation. Court proceedings often entail extended legal processes and significant financial burdens, particularly if the case advances through several appellate stages. By contrast, ADR mechanisms such as mediation and arbitration can streamline the dispute resolution process, thereby minimizing legal fees and associated expenses. This efficiency in ADR not only alleviates the financial strain on the parties involved but also reduces the consumption of judicial resources. Consequently, ADR offers a pragmatic and cost-effective alternative to the traditional litigation pathway, providing a more efficient means of settling disputes.¹²

2.4. Informality

The informal aspect of ADR proceedings distinguishes them from regular court settings, which have rigid procedural standards. The lack of stringent formalities allows for a more cooperative and quick resolution procedure. As a result, the parties concerned are more likely to establish mutually acceptable solutions. The flexibility of ADR enables for creative problem-solving and individualized conclusions that are frequently more agreeable to both parties than the outcomes of traditional litigation. This amiable approach not only protects relationships, but also lessens the adversarial stress that is commonly connected with court issues.¹³

¹¹ S. J. Ware, *Principles of Alternative Dispute Resolution* (3rd edn, West Academic 2013) 92.

¹² T. D. M. Asher and L. M. Rathburn, *Cost Efficiency in ADR* (LexisNexis 2008) 102.

¹³ E. Brunet and C. B. Craver, *Informal Procedures in ADR* (2nd edn, Aspen Publishers 2001) 33.

2.5. Reduced antagonism

The inherent non-confrontational and cooperative characteristics of ADR reduce the likelihood of animosity and help to maintain professional or personal relationships. This is especially vital in conflicts where maintaining ongoing relationships is of paramount importance. ADR methods foster a more amicable resolution process, which minimizes the potential for contentiousness and preserves the integrity of long-term associations, whether in business or social contexts.¹⁴

2.6. Time-efficient

Traditional litigation involves lengthy stages, including pleadings, discovery, and pre-trial motions, which can take months and years. ADR offers a much swifter resolution process, avoiding the extensive delays inherent in the judicial system. Furthermore, since ADR decisions are typically final and binding, the need for prolonged appeals is minimized.¹⁵

ADR encompasses a range of mechanisms designed to resolve disputes outside the traditional courtroom setting. Among the most prevalent ADR techniques are mediation, conciliation, and arbitration. Each of these methods presents distinct benefits, positioning ADR as a compelling alternative to conventional judicial proceedings. Mediation involves a neutral third party facilitating negotiation between disputing parties, aiming for a mutually agreeable resolution. Conciliation, while similar to mediation, often includes more proactive involvement from the conciliator in suggesting solutions. Arbitration, on the other hand, entails a binding decision from an arbitrator or panel, based on the presented evidence. These ADR processes offer efficiency, confidentiality, and flexibility, making them an increasingly favourable option for dispute resolution compared to the often lengthy and formal litigation route.

3. MEDIATION

Mediation represents a process wherein a neutral intermediary, termed as a mediator, facilitates a dialogue between disputing parties to help them arrive at a negotiated settlement. Unlike litigation, the mediator lacks the authority to impose a resolution, instead aiming to foster an amicable agreement. This process provides the parties an opportunity to articulate their issues, resolve misunderstandings, and find mutually acceptable solutions. Unlike a judge, the mediator does not

¹⁴ R. J. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books 2011) 67.

¹⁵ J. S. Behrendt and L. A. Kern, *The Lengthy Nature of Litigation* (6th edn, Thomson Reuters 2013) 92.

adjudicate the matter or determine who is right or wrong; rather, the mediator acts as a facilitator of improved communication, guiding the parties toward an informed and well-considered resolution.

3.1. Functions of the Mediator

The mediator bears the responsibility of reassuring the parties about their choice of mediation as an effective alternative to litigation. It is incumbent upon the mediator to elucidate the mediation process and cultivate a sense of confidence in the parties regarding the potential success of mediation. The mediator encourages both parties to recognize and comprehend each other's concerns, which is pivotal for achieving an amicable resolution.¹⁶ Impartiality and neutrality are fundamental attributes of an effective mediator. These qualities must be consistently demonstrated through the mediator's conduct at every phase of the process of the mediation. An adept mediator will deconstruct the dispute into manageable segments, urging the parties to resolve simpler issues first, thereby creating momentum for addressing more complex matters at a later stage. Private meetings with each party, known as caucuses, can be instrumental in reducing tensions and fostering a conducive environment for settlement. Once a resolution is reached, the parties can formalize their agreement. This agreement is upheld not through external enforcement or coercion but through the voluntary commitment of the parties, as the solution has been self-derived rather than imposed by a third party.¹⁷

3.2. Positive Aspects of Mediation

In litigation or arbitration, judicial authorities dictate the outcomes of disputes, whereas in mediation, the disputing parties retain control over the decisions affecting them. This distinction is significant as parties are generally more inclined to adhere to solutions they have crafted themselves rather than those decreed by a judge following a trial. Judicial determinations often necessitate further legal proceedings for enforcement, such as executing a decree, and there remains the possibility of appeals to higher courts by the dissatisfied party. Mediation, by contrast, offers a greater sense of finality, with solutions being consensual and voluntarily accepted.¹⁸

¹⁶ L. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (2nd edn, Penguin Books 2011) 45.

¹⁷ J. S. Murray, A. S. Rau, and E. F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers* (4th edn, Foundation Press 2006) 215.

¹⁸ Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International 2009) 45.

Unlike litigation, which can exacerbate tensions and strain relationships, mediation tends to preserve and even enhance relationships. This aspect is particularly crucial in scenarios such as divorced couples who need to co-parent or parties involved in long-term commercial transactions seeking to resolve minor disputes amicably. Successful mediation results in higher satisfaction levels among parties, increasing their likelihood of compliance with the agreements reached.¹⁹

Another significant advantage of mediation is the improvement of communication between parties. Many disputes stem from poor communication, and mediation addresses not only the immediate conflict but also broader issues affecting the parties. This process fosters a better understanding of underlying concerns, thereby enhancing future interactions and relations between the parties.²⁰ By integrating legal principles and terminology, this comprehensive explanation underscores the role of mediation as a valuable and effective alternative dispute resolution mechanism within the legal framework.

3.3. Challenges in the Mediation Process

The mediation process often faces significant hurdles, primarily when parties are not forthcoming with the truth. Truthfulness is fundamental in establishing trust between the parties involved. If a party engages in intentional deception, the mediation process is likely to fail. Deceptive communications foster mistrust and parties may mislead each other through actions, inactions, or even silence. Additionally, mediation may falter if the parties are unable or unwilling to understand and consider each other's perspectives.

Mediation fundamentally revolves around the principle of compromise. However, certain disputes resist compromise, particularly in instances where one party is entirely at fault. In such scenarios, a compromise may prove ineffective, especially when the relationship between the parties has irretrievably broken down.

3.4. Mediation in Sri Lanka

The Mediation Boards Act, No. 72 of 1988, provides statutory recognition to mediation in Sri Lanka. This Act establishes the legal framework for Mediation Boards, which are tasked with

¹⁹ J. Folberg, D. Golann, and T. J. Stipanowich, *Resolving Disputes: Theory, Practice, and Law* (3rd edn, Aspen Publishers 2016) 134.

²⁰ Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International 2009) 97.

facilitating amicable settlements between disputants by all lawful means.²¹ Their objective is to address and remove the root causes of grievances, with the consent of the parties involved, to prevent recurrence of disputes or offences.²²

Further institutionalization of mediation is achieved through the Commercial Mediation Centre of Sri Lanka Act, No. 44 of 2000 (as amended by Act No. 37 of 2005). This Act led to the establishment of the Commercial Mediation Centre of Sri Lanka (CMCSL), which promotes mediation and conciliation as methods for resolving commercial disputes. The CMCSL is engaged in mediating and conciliating commercial conflicts and operates under a code of conduct for mediators to ensure ethical standards and procedural integrity.²³

The Employment Mediation Services Centre (EMSC), a private mediation entity, also plays a crucial role in the mediation landscape of Sri Lanka. The EMSC has developed its own guidelines for conducting mediation sessions and employs trained personnel to serve as mediators, ensuring professionalism and adherence to best practices.

Mediation serves as a facilitative process aimed at enabling parties in conflict to reach an agreement and resolve their disputes. It offers a swift and straightforward mechanism for dispute resolution, wherein the decisions are made by the disputing parties themselves. The efficacy of mediation hinges on the willingness of the parties to resolve their issues collaboratively. Compared to other dispute resolution methods, mediation is typically more effective, flexible, cost-efficient, and yields higher satisfaction among the parties than litigation.

4. CONCILIATION

Through the voluntary and confidential process of conciliation, an impartial third party known as a conciliator assists disputing parties in reaching a mutually agreeable resolution.²⁴ Unlike arbitration or litigation, conciliation is non-adjudicative, meaning the conciliator does not impose a judgment on the parties; instead, the conciliator facilitates communication, helps the parties identify issues, and works with them to reach a mutually agreeable resolution.²⁵

²¹ Mediation Boards Act, No. 72 of 1988, s 4 (Sri Lanka).

²² *ibid*, s 6.

²³ Commercial Mediation Centre of Sri Lanka Act, No. 44 of 2000 (Sri Lanka).

²⁴ Henry Brown and Arthur Marriott, *ADR Principles and Practice* (3rd edn, Sweet & Maxwell 2011) 137.

²⁵ Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018) 265.

Key components of conciliation include voluntariness; participants can leave the process at any time and participate voluntarily, confidentiality; conciliation discussions are typically private and encourage open communication, flexibility; the process can be altered to suit the needs of the parties, party autonomy; the parties retain control over the outcome because the conciliator does not make legally binding decisions and emphasis on interests; conciliation prioritizes understanding underlying interests over adopting rigid legal positions.

4.1. The Conciliation Process

The conciliation process typically involves several stages, though the exact steps may vary. Through a mutual agreement or a contract clause, one or both parties initiate the process of conciliation. The next step is the appointment of a conciliator, who may be chosen cooperatively by the parties or by an official body. The conciliator then conducts an introductory meeting during which the parameters are set and the process is explained. During the information collection phase, each party presents their perspectives and any pertinent supporting evidence. After that, the conciliator facilitates talks in both public and private caucuses. Parties investigate choices and potential resolutions with the conciliator's assistance. Next comes the negotiation with the goal of coming to a mutually acceptable resolution. If a successful agreement is formalized at the end of the process, the parties may choose to pursue alternative dispute resolution techniques. If not, the procedure ends.

4.2. Advantages of Conciliation

As opposed to traditional litigation and other forms of alternative dispute resolution, conciliation has a number of advantages. Usually, it is less expensive than going to court, with associated costs and legal fees being lower²⁶. The process can resolve disputes more quickly than litigation because it can be finished more quickly. The collaborative nature of conciliation can support the upkeep of the parties' interpersonal or professional ties. The process's ingenuity and flexibility allow parties to consider creative solutions that may not be available through judicial rulings. The private nature of conciliation protects people's reputations and personal data. Finally, the parties may experience less emotional strain and tension during the dispute settlement process due to the laid-back and less aggressive atmosphere of conciliation.

²⁶ Karl Mackie and others, *The ADR Practice Guide: Commercial Dispute Resolution* (3rd edn, Tottel Publishing 2007) 48.

4.3. Limitations and Challenges

Conciliation has a number of disadvantages in spite of its benefits. Conciliation agreements may not be instantly enforceable without further legal action, in contrast to court orders or arbitration awards²⁷. Conciliation may not be sufficient to protect the interests of the weaker party when there is a large power differential between the parties. Conciliation is dependent on collaboration between the parties and is mostly dependent on their willingness to negotiate in good faith. Furthermore, conciliation's results don't help create precedents, which reduce its precedential significance in the larger judicial system.

4.4. Application in Various Legal Contexts

Conciliation has found application in diverse legal areas. In commercial disputes, conciliation clauses are frequently seen in contracts as a means of settling disagreements²⁸. Family law often utilizes conciliation in divorce and child custody cases to encourage amicable solutions²⁹. Workplace conflicts are effectively addressed through conciliation, helping to maintain employment relationships³⁰. On the international stage, conciliation plays a role in resolving disputes between states and in international commercial arbitration³¹. Additionally, many jurisdictions encourage conciliation for efficiently resolving consumer complaints, making it a versatile tool across various legal contexts.

4.5. Conciliation in Sri Lanka

Particularly in labor and business contexts, conciliation has grown in popularity in Sri Lanka as a successful alternative dispute resolution technique. Through a number of statutes, such as the Industrial Disputes Act and the Commercial Mediation Center of Sri Lanka Act, our legal structure encourages conciliation. Whereas the Commercial Mediation Center provides mediation for business issues, the Ministry of Labor runs a specialized conciliation service for industrial disputes. Before pursuing litigation, parties are frequently encouraged by Sri Lankan courts to try

²⁷ Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International 2009) 301.

²⁸ Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (3rd edn, Kluwer Law International 2015) 45.

²⁹ Lisa Parkinson, *Family Mediation: Appropriate Dispute Resolution in a New Family Justice System* (3rd edn, Family Law 2014) 82.

³⁰ David Lewis and Malcolm Sargeant, *Employment Law: The Essentials* (15th edn, Kogan Page 2019) 203.

³¹ J G Merrills, *International Dispute Settlement* (6th edn, Cambridge University Press 2017) 88.

conciliation. The procedure is appreciated for its quickness, economy, and capacity to maintain partnerships. Notwithstanding, certain obstacles persist, including insufficient public knowledge and the want for additional skilled mediators to accommodate the increasing demand from various industries.

4.6. Statutory Framework and Institutional Support

Legislation supporting and governing conciliation has been passed in many countries. For instance, the Civil Procedure Rules of the United Kingdom promote the application of ADR techniques, such as conciliation³². Similarly, model legislation on international commercial conciliation has been created by the United Nations Commission on International Trade Law (UNCITRAL), offering a framework for resolving disputes across international borders³³. Conciliator training and conciliation services are provided by numerous institutions across the globe. These groups are essential in encouraging the application of conciliation and upholding practitioners' professional standards.

Conciliation represents a valuable addition to the spectrum of dispute resolution methods available to individuals and organizations. Because of its focus on party autonomy, adaptability, and cooperative problem-solving, it is a desirable alternative for those looking to settle disputes quickly and amicably. Conciliation is an effective alternative to traditional litigation, while not being appropriate for all disputes. This is demonstrated by its increasing acceptance and incorporation into legal systems across the globe.

Conciliation is expected to become more crucial to the settlement of disputes as the legal system changes. Its adaptability to changing circumstances and capacity to provide results that are satisfying to all parties concerned make it a viable strategy for resolving disputes in various contexts. However, continued research, refinement of best practices, and education of legal professionals and the public will be essential to fully realize the potential of conciliation as an alternative dispute resolution method.

³² Civil Procedure Rules 1998, r 1.4(2)(e).

³³ UNCITRAL Model Law on International Commercial Conciliation (2002).

5. ARBITRATION

Arbitration is a process in which parties to a dispute agree to submit their disagreement to a neutral third party, known as an arbitrator, who delivers a decision that is binding on both parties.³⁴ This agreement to arbitrate can be embedded as an arbitration clause within a contract or exist as a separate agreement altogether. It is well-established in law that an arbitration clause, even when part of a broader contract, is treated as an independent and separate agreement. This clause can survive the termination of the primary contract, ensuring that the law governing arbitration applies to the arbitration agreement specifically, which can differ from the law governing the main contract.³⁵

Another crucial feature of an arbitration agreement is detailing how parties and the arbitrator should manage the dispute.³⁶ Often, arbitration agreements specify the governing law for the parties' rights and obligations, which the arbitrator must apply. Certain arbitration agreements include a 'Scott v. Avery' clause, which mandates that obtaining an arbitration award is a condition precedent to enforcing any contractual rights.³⁷ This clause, named after the seminal case of Scott v. Avery, means that unless both parties consent to court proceedings, the dispute must go to arbitration. If a dispute is referred to arbitration under a Scott v. Avery clause and an award is made, the winning party cannot later challenge the arbitrator's jurisdiction to enforce the award. Such clauses create an obligation to arbitrate, establishing a condition precedent to any legal action.

In Sri Lanka, the legal framework for arbitration has evolved significantly. Before the Arbitration Act No. 11 of 1995, arbitration was governed by the Civil Procedure Code and the Arbitration Ordinance No. 15 of 1866. The 1995 Act was introduced to modernize arbitration law, replacing outdated legislation and aligning Sri Lankan law with international standards, especially due to its obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. This Convention mandates contracting states to recognize and enforce arbitral awards made in other states, and Sri Lanka's High Court of Colombo enforces such awards domestically, while awards made in Sri Lanka are recognized in other contracting states.³⁸

³⁴ R. Merkin and L. Flannery, *Arbitration Act 1996* (6th edn, Informa Law from Routledge 2014) 1.

³⁵ *iona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2007] 4 All ER 951.

³⁶ N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 210.

³⁷ *Scott v Avery* (1856) 5 HL Cas 811, 10 ER 1121.

³⁸ S. Wickremasinghe, *The Law of Arbitration in Sri Lanka* (Stamford Lake 2010) 45.

An "Arbitration Agreement" under the Act is an agreement to arbitrate all or certain disputes that arise between parties concerning a defined legal relationship, contractual or otherwise. The Act recognizes arbitration agreements either as a clause within a contract or as a separate agreement.³⁹

Any dispute that is not contrary to public policy and can be determined by arbitration is referable. Part III of the Act addresses the composition of the arbitral tribunal, including the number, appointment, and removal of arbitrators, and grounds for challenging their appointment. Part IV outlines the tribunal's jurisdiction, allowing it to examine the arbitration agreement and terms of appointment to determine its jurisdiction. Importantly, the principle of severability means the arbitration clause is treated separately from the main contract in jurisdictional matters.⁴⁰

Sections 15 to 24 guide the conduct of arbitration proceedings, while Part VI covers awards. Under Section 26, an arbitral award is final and binding.⁴¹ Applications related to awards are governed by Part VI, with Section 32(1) outlining grounds for setting aside an award. Section 33 addresses the recognition and enforcement of foreign arbitral awards, and Section 34(1) specifies exhaustive grounds for refusal of recognition or enforcement. When applications to enforce or set aside an award are pending, courts must consolidate them. If an application to set aside an award under Section 32 is denied, no objections to enforcement on Section 34 grounds are permitted. Decisions of the High Court are final and conclusive, except for appeals to the Supreme Court on legal questions, as per Section 37(1), provided leave to appeal is granted and not waived by prior agreement.

Successful arbitration as an ADR method requires a consensual agreement and a supportive legal framework, including finality of awards, enforcement mechanisms, recognition of foreign awards, and party autonomy.⁴² The ICLP Arbitration Centre in Sri Lanka exemplifies such a framework, providing rules, preventing delays, and offering support services for arbitration proceedings, operating under international standards through cooperation with the Arbitration Institute of the Stockholm Chamber of Commerce.

Developments in information and communication technology (ICT) have also influenced arbitration. Online Dispute Resolution (ODR) has emerged, offering effective alternatives to

³⁹ Arbitration Act No. 11 of 1995, s 2(1) (Sri Lanka).

⁴⁰ *ibid*, s 2(3).

⁴¹ Arbitration Act No. 11 of 1995, ss 15-24, pt VI (Sri Lanka).

⁴² J. Lew, L. Mistelis, and S. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 320.

traditional methods by overcoming jurisdictional and cost-related challenges. ODR utilizes online methods such as email and video conferencing, facilitating multi-party discussions and providing cost-effective, efficient dispute resolution without requiring physical presence.⁴³

Despite the benefits, ODR's adoption in Sri Lanka is slow due to the impersonal nature of online proceedings and a lack of technological proficiency. However, ADR, including arbitration and mediation, is gaining momentum as a preferable alternative to litigation, which is time-consuming and costly. ADR reduces court workloads, allowing judges to focus on more complex cases. The primary hesitation towards ADR is the potential increase in time and cost if ADR fails, necessitating litigation. Nonetheless, recent initiatives in mediation and arbitration demonstrate growing acceptance and utilization of ADR in Sri Lanka.

6. ARTIFICIAL INTELLIGENCE IN ADR CONTEXT

Artificial intelligence (AI) has emerged as a prominent trend across various sectors, notably within the realm of ADR. The integration of AI in legal and ADR environments is becoming progressively prevalent, with its applications ranging from predictive analytics in case outcomes to facilitating online dispute resolution platforms. As AI technologies continue to evolve, their influence and utilization within the legal and ADR fields are anticipated to expand significantly, potentially transforming traditional practices and enhancing efficiency in dispute resolution processes.

The primary function of AI in analyzing information has evolved significantly with the advent of more effective generative AI systems, making AI increasingly pertinent to legal and dispute resolution processes. The analytical capabilities of AI are pivotal to Alternative Dispute Resolution (ADR), and the enhanced efficiency brought by automation is a key factor. Acknowledging AI's contribution to ADR involves exploring the numerous applications of this technology within the field. The American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR) has emphasized the AI's impact on ADR and has articulated several guiding principles to integrate AI into the dispute resolution framework effectively;⁴⁴

6.1. Principles fundamental to ADR AI

⁴³ S. Strong, *Research and Practice in International Commercial Arbitration: Sources and Strategies* (Oxford University Press 2009) 199.

⁴⁴ American Arbitration Association, "Principles Supporting the Use of AI in Alternative Dispute Resolution" [2023] The American Arbitration Association®-International Centre for Dispute Resolution.

Competence: To effectively incorporate artificial intelligence into alternative dispute resolution (ADR) mechanisms, it is imperative for legal professionals, including arbitrators and mediators, to become proficient in AI technology. They must thoroughly understand the associated risks, benefits, practical applications, and ethical implications. Given the rapid advancement of AI technologies, maintaining high standards is crucial; thus, it is essential to avoid shortcuts that could undermine the integrity and quality of ADR processes. Continuous professional development and frequent reassessment of one's knowledge and skills are necessary to stay abreast of technological advancements and ensure the competent use of AI in legal contexts.

Confidentiality: Safeguarding sensitive information is critical in Alternative Dispute Resolution (ADR). The use of artificial intelligence must not jeopardize this essential concept. It is critical to safeguard against unauthorized access, data breaches, and the exploitation of sensitive information. This is especially critical when working with enormous datasets, opaque machine learning methods, and unclear data management procedures. Ensuring data security and confidentiality necessitates stringent protections and great attention to detail, preserving the integrity of both the ADR process and the legal norms that govern data protection.

Advocacy: In the legal profession, advocates leveraging AI tools should prioritize precision, efficiency, and transparency. They must ensure that AI applications serve their clients' best interests while maintaining the integrity of the legal system. Furthermore, legal practitioners must support the proper use of AI technologies, seeing it as a critical component of effective advocacy. This strategy not only improves the delivery of legal services but also strengthens public trust in the legal system. Advocates must diligently align AI use with ethical standards and legal concepts, ensuring that the incorporation of such advanced tools contributes favourably to the pursuit of justice and the rule of law.

Impartiality: Arbitrators and mediators must conduct unbiased scrutiny when reviewing AI-generated data, ensuring that they do not become unduly reliant on technology or the outputs offered by a single party or vendor. They must uphold their commitment to maintain objectivity and fairness in the dispute resolution process by meticulously analyzing the authenticity and trustworthiness of AI-generated information in order to avoid bias and ensure equitable outcomes for all parties.

Independence: It is imperative for ADR practitioners to avoid relying exclusively on AI-generated outcomes. They must carefully scrutinize and assess every facts, using their individual knowledge, extensive experience, and strong professional judgment. ADR practitioners are ultimately

responsible and accountable for the final output of their work. As a result, while AI is a powerful tool, practitioners must verify that its use is consistent with the highest standards of professional behavior and legal wisdom. This requires a careful balance of technology improvements with the ethical and legal requirements inherent in their function, maintaining the integrity and dependability of the conflict settlement process.

Process Improvement: Harness artificial intelligence as a pivotal instrument to augment the accessibility, efficiency, and impartiality of ADR processes. Strive tirelessly to advance the administration and implementation of ADR services while also refining the relevant legal frameworks through the innovative use of AI technologies. Prioritize integrating cutting-edge AI solutions to speed operations, ensure equitable outcomes, and improve the overall effectiveness of ADR mechanisms.

Further, the proliferation of ADR mechanisms, coupled with the advent of the internet and the rapid advancement of digital technologies, gave rise to a novel landscape in which traditional dispute resolution processes were essential but frequently inaccessible. In the realm of e-commerce, the logistical challenges of convening physical meetings for dispute resolution were often prohibitive. Consequently, innovative tools and methodologies were developed to bridge this gap. Digital analogs of negotiation, mediation, and arbitration emerged, progressively becoming more sophisticated in tandem with technological advancements and evolving societal attitudes towards the use of online platforms. These emergent processes, revolutionized the field by providing efficient, accessible, and cost-effective means for resolving disputes in a virtual environment. This paradigm shift not only addressed the unique demands of e-commerce but also expanded the horizons of legal practice, ensuring that the principles of justice and fairness could be upheld in the digital age.

BRIDGING BORDERS WITH INTERNATIONAL COMMERCIAL MEDIATION: THE SRI LANKAN PERSPECTIVE

Amaani Miskin

ABSTRACT

The advent of the Singapore Convention on Mediation has given rise to unexplored facets of international commercial mediation as a form of dispute resolution. This article focusses on commercial mediation in a generalised perspective, the background to mediation in Sri Lanka, commercial mediation in Sri Lanka, and the Singapore Convention on Mediation and its setting. It reviews the newly introduced Sri Lankan Mediation Act, provides an in-depth analysis of the Mediation Act and conducts a comparative analysis of the implementation and enforcement procedures in different jurisdictions including Sri Lanka, Belarus, Saudi Arabia, Kazakhstan, Japan and Nigeria. The article concludes with insights and recommendations to improve the effectiveness of enforcing international mediated settlement agreements and to enhance cooperation between various states by promoting international commercial mediation in Sri Lanka.

1. INTRODUCTION

Situated in the middle of the Indian Ocean, Sri Lanka reveals a strong history in foreign trade; a trade hub where trade routes from the East as well as the West converged. After the Industrial Revolution and the Second World War, the importance of trade routes shifted with the development of Western economies. However, this trajectory changed again during the last two decades with the shift of the economic nucleus from the West to the East due to the development of Eastern countries. Despite this shift, Sri Lanka has failed to live up to its potential. Sri Lanka's significance as a hub has diminished over time due to reasons that include the shifting of trade routes, economic and political instability within the country, limitations in infrastructure and the emergence of other economies as regional hubs. Nevertheless, Sri Lanka continues to work towards regaining its position as a trade hub, as the economic giants shift from the West to the East, with economies such as India and China resurface as strong market systems.¹

¹ M.K. Jayawardena, 'Sri Lanka's External Trade Relations,' *60th Anniversary Commemorative Volume of the Central Bank of Sri Lanka: 1950 – 2010* (2011), 133.

In the year 2023, Sri Lanka has engaged in exports worth USD 11.9 billion and imports worth USD 16.8 billion.² Indeed, it brings about a negative trade balance of USD 4.9 billion.³ However, this appears to be a slight decrease in the deficit as compared to the balance last year; perhaps an indication that international trade in Sri Lanka is poised to advance in the near future.

With the development of international trade, it is inevitable for disputes to arise when transactions and agreements are made; and when disputes emerge, the need for resolution arises. The concept of Alternative Dispute Resolution, or ADR, is something that is not uncommon, and thereby encompasses the ADR methods of mediation, arbitration, conciliation and negotiation.

Mediation is a voluntary process “whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements.”⁴ In a commercial context, this would mean that the “two or more parties” would be businesses or commercial entities, and the mediator as the neutral third party would facilitate discussions between the business entities in a manner such that there is communication and understanding between the parties to explore their interests and options while assisting them in reaching a mutually agreeable resolution.

The principles of mediation mainly revolve around voluntariness, confidentiality, neutrality, self-determination, flexibility and focus on the underlying interests of the parties. Simply, this means that the businesses as parties, would have party autonomy as they are given the liberty to voluntarily participate in the process giving them sufficient control over it including the ability to mutually agree and select a mediator who would facilitate the process in an impartial manner, explore solutions that would best suit the needs and interests of the parties and subsequently agree upon them, all while maintaining the confidential nature of the process to ensure that information that is sensitive to the parties is not disseminated.

² ‘External Sector Performance – December 2023’ (*Central Bank of Sri Lanka*, 31 January 2024) <https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/press/pr/press_20240131_external_sector_performance_2023_december_e.pdf> accessed 6 August 2024.

³ *ibid.*

⁴ ‘Guidance for Effective Mediation’ (*United Nations*, 2012) <https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf> accessed 6 August 2024.

2. COMMERCIAL MEDIATION AND PREFERENCE OF MEDIATION OVER LITIGATION

More often than not, it is believed that mediation is sought after in instances of family disputes, workplace conflicts, community disputes; or simply put, when the relationship between the parties is at a personal level as opposed to being on a professional one. However, one seems to forget that even commercial disputes and cross-border conflicts could be resolved through mediation. In a commercial context, litigation is said to be the best solution in protecting intellectual property, as the power the courts hold may be the only manner in which such protection could be obtained.⁵ Furthermore, business entities opt for litigation as it follows precedent, allowing parties to reinforce their arguments and making the outcome more predictable.⁶

However, in contemporary society, the use of mediation in such settings appears to be gaining more traction. Mediation is becoming a preferred method of dispute resolution in the marketplace setting due to a growing number of reasons: cost effectiveness, time efficiency, confidentiality, reduced stress, preservation of relationships and control over the resolution to name a few.⁷ As per the statistics compiled by the Singapore Mediation Centre (SMC),⁸ 499 cases were brought in for mediation in 2016, the highest number of cases filed since its inception in 1997; this was a 72% increase from 2015.⁹ The number of cases brought in has only increased with time as more than 4000 disputes were referred to the SMC as at 30th November 2018, out of which about 70% were successfully mediated.¹⁰

Mediation is a preferred method of dispute resolution as it is less confrontational and promotes collaboration and open communication between the parties. It creates a much more favourable

⁵ 'Advantages And Disadvantages Of Litigation: A Quick Guide' (*Robertsons Solicitors*, 14 February 2022) <<https://robsols.co.uk/advantages-and-disadvantages-of-litigation-a-quick-guide/>> accessed 13 July 2024.

⁶ *ibid.*

⁷ Constantin-Adi Givvila and Tareq Numan Mohamed, 'Mediation vs Litigation: The Advantages of Settling Out of Court' (*Kluwer Mediation Blog*, 14 June 2023) <<https://mediationblog.kluwerarbitration.com/2023/06/14/mediation-vs-litigation-the-advantages-of-settling-out-of-court/>> accessed 13 July 2024.

⁸ The Singapore Mediation Centre (SMC) was incorporated on 8 August 1997 with the aim of streamlining dispute resolution in Singapore by pioneering the mediation movement. It is an institution dedicated to facilitate amicable dispute resolution at a domestic level.

⁹ 'The Singapore Dispute Resolution Institutions – What and Why (Part 1 of 4)' (*Singapore International Dispute Resolution Academy*, 5 March 2017) <<https://sidra.smu.edu.sg/singapore-dispute-resolution-institutions-what-and-why-part-1-4>> accessed 30 September 2024.

¹⁰ Dorcas Quek Anderson and Sabiha Shiraz, 'About Singapore Law: Overview (Ch.03 Mediation)' (*Singapore Law Watch*, 30 December 2018) <<https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation>> accessed 30 September 2024.

environment for sensitive matters to be discussed. Litigation is likely to create a strain or completely annihilate the relationship between the parties.¹¹ In most cases, professional, business relationships also have a personal side to it, i.e. a friendship, partnership or a familial relationship. As such, by opting for mediation, not only is the dispute that concerns the business relationship addressed, but it goes a step further to strengthen the personal relationship that the parties share.

Perhaps not the best example of a successful commercial mediation, but a good example of how even market leaders may opt for mediation is the case of *Samsung Electronics Co., Ltd., et al. v. Apple Inc.*,¹² one that concerned damages for patent violations of Apple products.¹³ A failed negotiation due to the parties' refusal to cooperate, and hence later went to trial for the second time. The key takeaway here is that even giants in the industry resort to mediation when it seems to be the most beneficial way in which a commercial dispute can be resolved.

3. MEDIATION IN SRI LANKA

3.1 Historical background

Sri Lanka is said to have a “strong tradition of consensus-based dispute resolution.”¹⁴ However, as a form of dispute resolution, mediation has not been consistent throughout the years. At times, it was prevalent, and at other times it was not used at all. During the time of the pre-colonial kings of Ceylon (Sri Lanka), a governing body called “gamsabawa” (village council),¹⁵ which operated in 425 BC,¹⁶ was where the locals proceeded to with the hopes of resolving disputes that materialised within their community. At the time, the parties would gather under a tree or visit the village temple (where the Head Priest would head the proceedings) to amicably resolve their disputes. These

¹¹ Givvila and Mohamed (n 7).

¹² 580 US 53 (2016).

¹³ ‘Top Negotiation Case Studies in Business: Apple and Dispute Resolution in the Courts’ (*Harvard Law School Daily Blog*, 30 April 2024) <<https://www.pon.harvard.edu/daily/business-negotiations/top-business-negotiations-of-2013-apple-versus-samsung/>> accessed 14 July 2024.

¹⁴ Nadja Alexander, ‘From communities to corporations: The growth of mediation in Sri Lanka’ (2001) 4(1) ADR Bulletin 1, 1.

¹⁵ ‘A Guide to Community Mediation Programme and Mediation Boards of Sri Lanka’ (*Ministry of Justice Law Reform and National Integration*, 2003)

<http://mediation.gov.lk/static/media/publications/en/Community_Mediation_Programme_-_2003.pdf> accessed 6 August 2024.

¹⁶ *ibid.*

gamsabas continued to exist during the colonial periods, however, they ceased to exist during the British era.¹⁷

With foreign rulers having established their presence in Sri Lanka, more modern and formal methods of dispute resolution were introduced and implemented. This gradually developed into an adversarial system based on English common law.¹⁸ As a result, this brought about the downfall of community mediation. Rural courts were prevalent as a platform for dispute resolution in 1856.¹⁹ However, progressively the need for amicable dispute resolution arose and a reintroduction of “amicable settlement of disputes” took place through Conciliation Boards through the Conciliation Board Act 1958.²⁰

A rather formal mechanism of dispute resolution was brought into place by the Community Mediation Boards Act No. 72 of 1988;²¹ mediation was recognised as a dispute resolution mechanism by this Act. As such, mediation boards were introduced from 1990 – in prominent Divisional Secretariat Divisions situated in the districts of Colombo, Puttalam, Kandy, Kegalle, Galle and Matara – to 2014, with the latest being located in the Mullaitivu district.²² 329 Community Mediation Boards currently operate with approximately 8500 mediators.²³

Other laws providing for mediation in Sri Lanka include the Workmen’s Compensation Ordinance (No. 19 of 1934) which led to the introduction of the Industrial Disputes Act (No.43 of 1950) and the Paddy Lands Act (No. 1 of 1958). What is important to note here is that this vast development of mediation in Sri Lanka is mainly concerned with community-based mediation. Commercial mediation was integrated into the system significantly later.

3.2 Commercial mediation in Sri Lanka

The Legal and Judicial Reform Project in Colombo in the year 2000 is said to be the catalyst in introducing commercial mediation in Sri Lanka. It was imperative that the support of the business community is procured in this regard in order to develop mediation in the private commercial

¹⁷ Mohamed Munas and others, ‘Community Mediation: Resolution of the People, by the People for the People’ (2018) Centre for Poverty Analysis 29/2018, 13 < <https://www.cepa.lk/wp-content/uploads/2020/08/Community-Mediation-Study-2-WPS-29-2018.pdf> > accessed 6 August 2024.

¹⁸ Alexander (n 14).

¹⁹ Ministry of Justice Law Reform and National Integration (n 15).

²⁰ *ibid.*

²¹ Munas (n 17).

²² *ibid.*

²³ *ibid.*

sector,²⁴ and the response to this was rather positive. Since the inception of the proposition to develop commercial mediation in Sri Lanka, the unsatisfactory manner in which commercial disputes were handled led to the introduction of the Commercial Mediation Centre of Sri Lanka (CMC), which was established by the Commercial Mediation Centre of Sri Lanka Act 2000. The Act provides for the structure, functions and powers of the CMC. Accordingly, Section 3 of the Act addresses the functions of the Centre, the promotion of wider acceptance of mediation for the resolution of commercial disputes and encouragement of parties to use mediation as a means to resolve commercial disputes and conducting of mediation sessions.²⁵

The Act was later amended by the Commercial Mediation Centre of Sri Lanka (Amendment) Act, No. 37 of 2005,²⁶ by which sections 3A, 3B, 3C, 3D and 3F were inserted. These sections deal with the way in which no court action can be instituted without a certificate of non-settlement when the parties have agreed to refer any dispute to mediation by way of this Act,²⁷ how any dispute referred to the Centre would be mediated in terms of the rules of the Centre,²⁸ the privilege of a person making a statement at a mediation session is similar to that of the privilege received by a witness who gives evidence in a court of law,²⁹ the requirements for a valid settlement agreement³⁰ and the provisions in relation to the certificate of non-settlement.³¹ The amended Act is currently operative and what the business community expects of this is for commercial disputes to be resolved amicably in its early stages, an expedited process that is cost effective as opposed to the court system, to portray to the international market that commercial disputes are resolved in a sensible and orderly manner, and that this would subsequently result in both local and foreign investors wanting to invest in both the legal system and economy of Sri Lanka.³²

4. THE SINGAPORE CONVENTION ON MEDIATION

4.1 Origin of the Singapore Convention on Mediation

²⁴ Alexander (n 14) 3.

²⁵ Commercial Mediation Centre of Sri Lanka Act 2000, s 3.

²⁶ Commercial mediation Centre of Sri Lanka (Amendment) Act, No. 37 of 2005.

²⁷ *ibid* s 3A.

²⁸ *ibid* s 3B.

²⁹ *ibid* s 3D.

³⁰ *ibid* s 3E.

³¹ *ibid* s 3F.

³² Alexander (n 14) 2-3.

The Singapore Convention on Mediation was initiated at the 48th session of the UNCITRAL Commission by Working Group II (Dispute Settlement) (WGII) in 2015.³³ The international settlement agreement in this regard, however, was initially concerned with conciliation proceedings and not necessarily mediation. The result of this Convention was concluded at the fifty-first UNCITRAL Commission session, and, upon the suggestion of the UN General Assembly, the Convention was referred to as the “Singapore Convention on Mediation.”³⁴ As of 14th July 2024, the Convention has 57 signatories and 14 parties, the latest being Sri Lanka.

4.2 The Singapore Convention on Mediation

The main objective of the Singapore Convention is to ensure cross border enforcement of international mediated settlement agreements or iMSAs (A cross-border, legally binding agreement reached through mediation facilitated by international frameworks. These become legally binding once signed). The Singapore Convention on Mediation is said to be an equivalent of sorts to the 1958 UN Convention on Enforcement of Foreign Arbitral Awards (New York Convention) on arbitration.³⁵ The Singapore Convention applies to an international agreement that results from mediation and that which is concluded in writing to resolve a commercial dispute.³⁶

4.3 The Sri Lankan Mediation Act on cross border dispute resolution

Cross-border trade is considered to be a cornerstone of the global economy. International trade has inescapably led to cross-border disputes between entities of different countries, or rather, parties from different jurisdictions. For example, if a company operating in a particular country fails to comply with the terms of the contract that entered into with another company established in another country, the latter may sue the former in either one of the jurisdictions that the companies belong to. However, it may not be able to enforce such a judgement when the said judgement is delivered in a particular country and the company in breach is in

³³ ‘Background to the Convention’ (Singapore International Dispute Resolution Academy) <<https://www.singaporeconvention.org/convention/about>> accessed 15 July 2024.

³⁴ *ibid.*

³⁵ Dhara Wijayatilake, ‘Sri Lanka’s Singapore Convention on Mediation Bill: A leap forward in international commercial dispute resolution’ *Sunday Times* (Colombo, 29 October 2023) <<https://www.sundaytimes.lk/231029/sunday-times-2/sri-lankas-singapore-convention-on-mediation-bill-a-leap-forward-in-international-commercial-dispute-resolution-537012.html>> accessed 17 July 2024.

³⁶ United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), art 1(1).

another.³⁷ This calls for a mechanism that would allow for a judgement made in one country to be enforced in another; and for this, the court has to be granted jurisdiction by the law.³⁸

The current Sri Lankan law, as it stands, grants jurisdiction to domestic courts for foreign judgements to be enforced in two ways – a foreign arbitral award in terms of the Arbitration Act No. 11 of 1995 and a judgement by way of the Reciprocal Enforcement of Judgments Ordinance No. 41 of 1921 (REJO).³⁹ Section 33 of the Arbitration Act No. 11 of 1995 provides for a foreign arbitral award recognised and enforced “irrespective of the country in which it was made.”⁴⁰ On the other hand, the REJO allows for the registration and enforcement of a judgement, decree or order made by a foreign court that has been specified.⁴¹

Litigation as a mechanism for resolving cross-border disputes could be quite disadvantageous. It affects the relationship between the parties involved and usually indicates the end of the business relationship. With complex legal procedures and coordination between different jurisdictions, another disadvantage is how time-consuming the process can tend to be.⁴² As a result of litigation being seen as an unviable mechanism, parties to cross-border agreements prefer arbitration over litigation. This is because of the New York Convention on Enforcement of Foreign Arbitral Awards. However, even arbitration is now seen as an expensive and time-consuming option. Therefore, commercial mediation has now become a preference. For commercial mediation to be effective, there should be enforceability. This vacuum has been filled by the Singapore Convention.

As such, a novel approach in Sri Lankan law to enforce foreign judgements is the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation Act, No. 5 of 2024,⁴³ or commonly referred to as the “Mediation Act.” The Mediation Act reflects the

³⁷ Uween Jayasinha, ‘Enforcement of Foreign Judgments in Sri Lanka’ (*Nithya Partners*) <<https://www.nithyapartners.com/journal/enforcement-of-foreign-judgments-in-sri-lanka>> accessed 17 July 2024.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Arbitration Act No. 11 of 1995, s 33.

⁴¹ Reciprocal Enforcement of Judgments Ordinance No. 41 of 1921, s 2(1). The Ordinance originally applied to “judgments obtained in the superior courts of the United Kingdom and of other parts of Her Majesty’s realms and territories.” However, it has now been expanded to include “specified” jurisdictions.

⁴² Reciprocal Enforcement of Judgments Ordinance No. 41 of 1921.

⁴³ Recognition and Enforcement of International Settlement Agreements Resulting from Mediation Act No. 5 of 2024 (Mediation Act 2024).

principles laid out in the Singapore Convention. It is imperative for individuals and organisations that are involved in cross-border trade from Sri Lanka to have an understanding of the scope, application and limitations of the Mediation Act.

5. ANALYSIS OF THE MEDIATION ACT

5.1 Preliminary provisions of the Mediation Act

The Act does not apply to all settlement agreements.⁴⁴ It *only* applies to “international settlement agreements” as defined by Section 2(1) of the Act. For that reason, the settlement agreement between the parties should have been reached by way of mediation, must be international in nature, must relate to a commercial dispute and must be in writing.⁴⁵ Be that as it may, the term “commercial” has not been defined in the Act. Moreover, the Singapore Convention on Mediation does not define “commercial” either, as it was agreed upon by UNCITRAL’s WGII during its deliberations that there was no requirement for such a definition.⁴⁶ However, a footnote to Article 1(1) of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) provides guidance as to what “commercial” means and defines it as matters arising from all relationships of a commercial nature, whether contractual or not.⁴⁷ A settlement agreement is considered to be “international” if at least two parties to the agreement have their “places of business”⁴⁸ in a different State;⁴⁹ or the parties involved have their places of business in a different State from where a significant part of the obligations under the agreement is fulfilled⁵⁰ or the State where the parties to the agreement conduct their business is different from the State most closely connected to the subject matter of the settlement agreement.⁵¹

5.2 Procedure to enforce an International Mediated Settlement Agreement (iMSA)

⁴⁴ *ibid* s 3.

⁴⁵ *ibid* s 2(1).

⁴⁶ Wijayatilake (n 35).

⁴⁷ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018), art 1(1).

⁴⁸ Mediation Act 2024, s 16.

⁴⁹ *ibid* s 4(a).

⁵⁰ *ibid* s 4(b)(i).

⁵¹ *ibid* s 4(b)(ii).

In enforcing an iMSA, it is important to recognise and understand the legal framework and mechanism behind it all. This involves the need for the key steps of the procedure to be highlighted. Section 8 of the Act addresses the requirements that must be satisfied in order for an iMSA to be admissible as evidence as per Section 7 of the Act. It lists out a set of primary documents and supplementary documents (which the courts may request if necessary) to validate that the settlement agreement came into being as a result of mediation.⁵² Additionally, the Act provides for any international settlement agreement to be entered as a decree of the High Court to enforce the agreement⁵³ and such an agreement will be valid, enforceable and the obligations of it will be honoured unless the decree is refused.⁵⁴ The High Court may refuse the application that complies with Section 6 of the Act or any court that allows for an international settlement agreement to be employed as evidence⁵⁵ and may also refuse enforcement if the party to the agreement was of some incapacity, if there are issues relating to the international settlement agreement itself, if there were issues relating to the mediator, where granting of such would be against public policy or if it were a matter that cannot be resolved by mediation as per Sri Lankan law.⁵⁶ This coincides with Article 5 of the Singapore Convention. An application made to the High Court in terms of Section 6 should be made by way of petition of affidavit.⁵⁷ The case shall be heard and disposed of within three months of the application being made.⁵⁸

A decree of the High Court may be set aside if the parties to the iMSA request for such and the parties were absent during the application process.⁵⁹ If there are parallel proceedings before any other court, arbitral tribunal, any other institution having jurisdiction in Sri Lanka or in any other State when a party has made an application in relation to the iMSA in compliance with Section 6, the High Court may adjourn the ongoing proceedings until the parallel proceedings are concluded or may order as security if it seems likely that the parallel proceedings may affect the current proceedings.⁶⁰ When an application is made in line with Section 6 and it is

⁵² *ibid* s 8.

⁵³ *ibid* s 6(1).

⁵⁴ *ibid* s 5.

⁵⁵ *ibid* s 7.

⁵⁶ *ibid* s 9.

⁵⁷ *ibid* s 12.

⁵⁸ *ibid* s 12(5).

⁵⁹ *ibid* s 10.

⁶⁰ *ibid* s 11.

unsubstantiated to refuse an application in terms of Section 9 or to adjourn the proceedings in terms of Section 11, then the High Court will proceed with making a judgement and will enter a final decree.⁶¹

The Mediation Act 2024, even though named such, does not apply to the mediation process itself. It deals with the enforcement of an already mediated international settlement agreement. The Courts do not have the command to deliberate on the settlement agreement, as this matter is one for the parties and the mediator(s). The Courts are only required to either award the decree or refuse it while being in compliance with the Mediation Act 2024.

⁶¹ *ibid* s 15.

6. HYPOTHETICAL APPLICATION OF THE ACT

For illustration purposes, the Mediation Act 2024⁶² will be applied to *Rajithi Agencies v Romav Limited and Unicorns Clearing and Forwarding (Pvt.) Ltd.*⁶³ to depict and analyse the areas that to which the Act would have an impact on.

The appellate decision in *Rajithi Agencies*,⁶⁴ as per the counsel of the second defendant-appellant, concerned two issues. The first being that the High Court judge was wrong in holding that the Commercial High Court had the jurisdiction to hear the case; and the second being that the arbitration clause in the bill of lading allows for the jurisdiction of the court to try the case without reference to arbitration. In this analysis, the latter of the two issues would be dealt with from a mediation perspective, or rather, if the case could be enforced by a mediation agreement.

The first issue deals with the relevant jurisdiction applicable to the case, and this is dependent upon the “place of business” of the two parties. The defendant-appellant’s place of business is within the jurisdiction of the High Court of Colombo, meaning it aligns with Section 4 of the Mediation Act.⁶⁵ The cargo in question being discharged at the Port of Colombo, the bank to which the original documents of the cargo were addressed, and the consignee’s place of business all falls within the ambit of Section 4 qualifying it as an international settlement agreement. Thus, in from a mediation perspective, “place of business” appears to not be a point of contention in enforcing the settlement agreement.

In addressing the second issue, Section 3 of the Arbitration Act No. 11 of 1995 lays down the requirements of an arbitration agreement: the agreement should take the form of an arbitration clause or it should consist of a separate agreement. The question that arises here, as pertinent to the facts of the case, is whether the clause in the Bill of Lading amounted to an agreement by the parties to submit to arbitration any dispute that may arise from the said agreement. Simply, whether the consent of the parties is required for an agreement to arbitrate. As the defendant-appellant failed to object to move court, they failed to address the issue regarding the jurisdiction and hence, consented to arbitrate the matter. From a mediation perspective, the

⁶² *ibid.*

⁶³ [2006] SC/CHC/Appeal/04/2006.

⁶⁴ *ibid.*

⁶⁵ Mediation Act 2024, s 4.

issue here would not be as colossal as it is in the arbitration perspective. In fact, there may be no predicament at all, as the mediation process itself (dealt with separately as the Mediation Act 2024 does not focus on the process) is conducted voluntarily by the parties involved as the parties would have agreed to a mediation procedure when such a clause was initially included in the Bill of Lading, and the Court's role is to enforce such an agreement reached by way of mediation. Hence, when the application is made to the Court,⁶⁶ and there are no grounds to refuse it⁶⁷ or adjourn proceedings,⁶⁸ the Court would proceed with the enforcement of it.

7. COMPARISON WITH OTHER JURISDICTIONS

7.1 Reservations

In recognising an international convention within the domestic legal system, states may want to exclude or modify certain provisions of the convention so that it better suits the legal system of the particular system. This is done by way of a reservation. Article 8 of the Singapore Convention on Mediation discusses reservations which allow countries to exclude certain provisions upon the ratification of the Convention.⁶⁹ The Sri Lankan Mediation Act does not mirror the Singapore Convention on this. However, certain other jurisdictions make provision for this, differentiating themselves from the Sri Lankan Mediation Act. Belarus and Saudi Arabia have made reservations in accordance with Article 8(1)(a) of the Singapore Convention, Japan in accordance with Article 8(1)(b) of the Convention, and Kazakhstan in accordance with both Article 8(1)(a) and Article 8(1)(b) of the Convention. As such, it is ascertained that not all states that have enforced the Singapore Convention on Mediation have made reservations, creating a difference among the domestic Acts that have been amended or introduced to give effect to the Singapore Convention.

7.2 Implementation of legislation

Implementing legislation holds a crucial role in translating the Singapore Convention into laws that could be applied within domestic jurisdiction. The mere ratification of an international treaty such as this is insufficient and it does not become a component of the national legal

⁶⁶ *ibid* s 6.

⁶⁷ *ibid* s 9.

⁶⁸ *ibid* s 11.

⁶⁹ Singapore Convention, art 8.

system unless implemented. As Sri Lanka gives effect to the Singapore Convention by way of the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation (Act No. 5 of 2024), various other countries have adopted different approaches in implementing the Convention. The Convention was not enacted through a separate, distinguished piece of legislation in Belarus; rather the Law on Mediation (of Belarus) was amended in a manner to accommodate the Singapore Convention.⁷⁰ In Japan, the Singapore Convention was adopted by an amendment to Japan's Arbitration Act (Act No. 15 of 2023) and through the Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Act No. 16 of 2023).⁷¹

Similar to that of Belarus, Nigeria has enacted the Singapore Convention through an amendment to an already existing piece of legislation – Section 87 of the Nigerian Arbitration and Mediation Act 2023⁷² – and the Convention applies when the enforcement of an iMSA takes place in a country that is not the Federal Republic of Nigeria.⁷³ The Convention is directly enforceable in the courts of Saudi Arabia by way of the Royal Decree No (96).⁷⁴ It is noteworthy how even though the implementation of legislation is quite crucial in incorporating the Singapore Convention into domestic law, the means by which each of state does so is different.

7.3 Procedure for enforcing International Mediated Settlement Agreements

The procedure to enforce an iMSA involves several key steps. Be that as it may, even though the what is being enforced here is essentially the same as it follows the Singapore Convention, the procedure adopted by each jurisdiction cannot be said to be unreservedly identical to each other.

⁷⁰ 'Belarus' (Singapore International Dispute Resolution Academy)
<<https://www.singaporeconvention.org/jurisdictions/belarus>> accessed 31 July 2024.

⁷¹ 'Japan' (Singapore International Dispute Resolution Academy)
<<https://www.singaporeconvention.org/jurisdictions/japan>> accessed 31 July 2024.

⁷² Arbitration and Mediation Act 2023 (Nigeria), s 87.

⁷³ 'Nigeria' (Singapore International Dispute Resolution Academy)
<<https://www.singaporeconvention.org/jurisdictions/nigeria>> accessed 31 July 2024.

⁷⁴ 'Saudi Arabia' (Singapore International Dispute Resolution Academy)
<<https://www.singaporeconvention.org/jurisdictions/saudi-arabia>> accessed 31 July 2024.

The procedure that the Sri Lankan jurisdiction follows is laid down in the Sri Lankan Mediation Act,⁷⁵ the piece of legislation that gives effect to the Singapore Convention. However, this does not reflect the circumstances with the other jurisdictions. The Convention was enacted by the Law of Mediation in Belarus, however, the procedure for enforcement is laid down in the Economic Procedural Code of the Republic of Belarus.⁷⁶ The documentation requirements by the Sri Lankan Mediation Act are quite similar to that required by Belarus. However, this is not to suggest that there are certain documents that have been specifically mentioned as a requirement by the Belarus legislation that the Sri Lankan legislation does not specifically require for, and vice versa. As per the Economic Procedural Code, a statement must be made for the issuance of the execution of the iMSA. Article 242 of the Code requires a power of attorney to confirm the powers of the representative of the party to sign the statement and a confirmation of the state duty payment,⁷⁷ whereas the Sri Lankan Mediation Act requires a document signed by the mediator(s) to certify that the iMSA was entered into as a result of mediation.⁷⁸ Furthermore, as per Article 242, the court session will take place one month from when the statement is received and the parties' failure to appear at the session will have no impact on the statement, as the statement will be considered regardless. This is where the Sri Lankan Mediation Act differs, as Section 10 of the Mediation Act allows for the application to be set aside if the parties request for such due to their absence during the application process.⁷⁹

The procedure followed by Japan appears to be similar to that of Sri Lanka. As per Article 5(2) of the Japanese Mediation Act,⁸⁰ the parties are required to submit the international settlement agreement and other relevant documents that serve as evidence that the agreement was a result of mediation. Unless the requirements for refusal of enforcement in terms of Article 5(12) of the Japanese Mediation Act are satisfied, the courts must enforce the iMSA.⁸¹ These sections could be said to be the equivalents of Section 8(1) and Section 9 of the Sri Lankan Mediation Act.⁸²

⁷⁵ Mediation Act 2024.

⁷⁶ 'Belarus' (n 70).

⁷⁷ *ibid.*

⁷⁸ Mediation Act 2024, s 8(1)(b).

⁷⁹ *ibid* s 10.

⁸⁰ Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Act No. 16 of 2023) (Japan), art 5(2).

⁸¹ *ibid* art 5(12).

⁸² Mediation Act 2024.

Section 83(1) of the Nigerian Arbitration and Mediation Act 2023 addresses the requirements for reliance in settlement agreements and this mirrors Section 8(1) of the Sri Lankan Mediation Act.⁸³ Section 83(3) of the Nigerian Arbitration and Mediation Act that allows for a request for a translation if it is not in its official language, Section 83(4) that allows the Court to request for any document to ensure that the section that addresses the requirements for reliance in settlement agreements has been met, Section 84 that discusses the grounds to refuse the grant of reliefs and Section 85 that discusses parallel applications or claims, directly correspond with Section 8(4), Section 8(3), Section 9 and Section 11 of the Sri Lankan Mediation Act. As such, the Nigerian Arbitration and Mediation Act is similar to the Sri Lankan Mediation Act in multiple aspects.

By conforming to such core steps laid down by domestic legislation to enforce an iMSA, states are able to create and implement an efficient and well-ordered procedure to ensure the proper functioning of the law in this realm.

8. PROPOSALS TO IMPROVE THE USAGE OF THE ACT

The Mediation Act 2024 is to be enforced on the 26th of August 2024. Nevertheless, upon a close analysis of the Act, certain areas for enhancement of the Act may be identified. This section of the article focuses and outlines an array of proposals for approaches in which the Act could potentially be improved. As previously discussed, as the Act currently stands, it appears to be somewhat open to interpretation as to what exactly the types of agreements and disputes the Act covers, in particular, what the ambit of “commercial” would encompass. The Act fails to define it, even though a separate section for guidance on interpretation of the Act exists.⁸⁴ Hence, a definition or guidelines as to what constitutes “commercial” should be provided within the Act itself as the purpose of the Act is to enforce an iMSA to resolve a commercial dispute.⁸⁵ A defined ambit as to what constitutes “commercial” would help promote mediation in certain sectors, for example construction, manufacturing, retail and wholesale.

⁸³ Arbitration and Mediation Act 2023 (Nigeria), s 83(1).

⁸⁴ Mediation Act 2024, s 16.

⁸⁵ *ibid* s 2(1).

Confidentiality is one of the key principles of a mediation process and must be upheld throughout the process. The Act however, does not explicitly mention confidentiality of the process in enforcing the iMSA. As such, an improvement to the Act would be for confidentiality to be maintained throughout the process would ensure the correlation between the mediation process itself and the enforcement of the agreement reached through mediation. The Mediation Act 2024, from a certain perspective, is a reflection of the Singapore Convention on Mediation. In that respect, the Act does not address online dispute resolution (ODR) methods. Recognising mediated settlements reached through ODR methods and platforms would expand the use of mediation to enforce iMSAs, as recognising the validity of virtual mediation sessions would inevitably lead to the expansion of usage of the Mediation Act 2024. The Mediation Act 2024 allows for electronic signatures.⁸⁶ Therefore, it stands to reason that ODR methods and electronically signed settlement agreements should be given explicit recognition. Since the Mediation Act 2024 is relatively new and has not come into force yet, it would be prudent to create and maintain a centralised system to document mediated settlement agreements and to document the enforcement of such iMSAs. Such a centralised system would allow for mediated settlement agreements to be registered, to maintain a record of such agreements, to prevent replication of enforcement actions, and overall to create a database of mediated settlement agreements that have been enforced.

There may be instances where parties may be hesitant to opt for mediation over litigation or arbitration, and this is mainly because they lack the knowledge and familiarity of mediation has a method of dispute resolution. Therefore, even though the Mediation Act 2024 does not directly deal with the mediation process, it could be used as a tool to encourage parties to choose mediation to resolve disputes. As such, incentives that includes tax benefits, reduced court fees and a streamlined procedure to enforce agreements settled by mediation could be introduced. By promoting incentives through both, national and international legal frameworks, the Mediation Act 2024 could not only be employed in its original capacity – to promote mediation as an alternative to enforce iMSAs – but it could also be used at a national level to promote commercial mediation in disputes between local business entities.

⁸⁶ *ibid* s 16.

The proposals submitted to improve the Act would contribute to its effectiveness and adaptability to meet the more contemporary needs of business entities, investors and stakeholders. Such pre-emptive initiatives are important in maintaining the relevance of the Act and remains an effective and reliable tool in modern commercial disputes.

9. CONCLUSION

Mediation is generally seen as a separate and less formal dispute resolution mechanism as opposed to arbitration, and a separate mechanism altogether as compared to litigation. Mediation is predominantly seen in a community-based perspective in Sri Lanka. Owing to this, the significance it holds in a commercial context is minimal. However, as the advancement of international commercial mediation has been gaining momentum with the emergence of the Singapore Convention on Mediation and with the ratification of the Sri Lankan Mediation Act,⁸⁷ mediation is progressively gaining recognition in a commercial context within Sri Lanka. With the Act's stipulated entry into force on 28th August 2024, this recognition and the resort to mediation for commercial disputes is anticipated to gain further traction.

⁸⁷ *ibid.*

A SYNERGESTIC APPROACH TO INCORPORATING COMMERCIAL MEDIATION INTO THE DISPUTE RESOLUTION LANDSCAPE IN SRI LANKA

Pravin Jayasundere

ABSTRACT

This article explores the evolution and current landscape of mediation as an Alternate Dispute Resolution (ADR) mechanism in Sri Lanka, and contemporary efforts to expand the scope of mediation within the country. This article further discusses the challenges in integrating commercial mediation into the current alternate dispute resolution landscape and achieving broader acceptance of mediation among legal and corporate stakeholders. This article advocates for a holistic and synergistic approach to expanding mediation, positioning mediation alongside litigation, arbitration, and conciliation to create a comprehensive dispute resolution ecosystem in Sri Lanka.

1. INTRODUCTION

ADR comprises several different tools, namely, mediation, arbitration, negotiation and conciliation.

“It is important to focus on what ADR means and what it is that provokes excitement as an efficient alternative. ADR ‘Alternative Dispute Resolution’ is basically a reference to all the ‘other’ processes available for the resolution of disputes other than the adjudicator or litigation process. The basic feature of adjudication/litigation is that it is ‘adversarial’ in nature. Alternatives do not necessarily follow adversarial principles. They are more ‘settlement’ oriented.”¹

Mediation is a non-adjudicatory form of alternative dispute resolution which features a neutral third-party facilitator of a process of dispute resolution. This conversation aims to resolve disputes between parties by reaching an amicable settlement through the mediation process.

¹ Dhara Wijayatilake, ‘Mediation as an effective alternative dispute resolution process’ (Lawnet Ministry of Justice, undated) <<https://www.lawnet.gov.lk/mediation-as-an-effective-alternative-dispute-resolution-process/>> accessed on 04 August 2024.

According to Jayasundere (2023)², mediation is not of one type but takes on many forms relative to the relevant subject matter of a particular case. Facilitative or Interest-based Based Mediation, Evaluative or Directive Mediation, Transactional Mediation, Multi-Party Mediation, Victim Offender Mediation and Restorative Mediation are types of mediation used as effective dispute resolution tools. Mediation is a voluntary process, where parties decide for themselves if they wish to mediate and the outcome of the mediation. The voluntary nature of mediation is one of several key features that make mediation a viable form of alternate dispute resolution.

Another key feature of mediation is confidentiality. Here, proceedings between the parties and the mediators are kept confidential and matters are released outside the mediation once consented to by the parties.

Mediation is a flexible process, where parties are not constrained by rigorous legal and other procedures that must be followed to achieve a desired outcome. The process is such that parties can discuss matters of interest without being burdened by lengthy and formal protocols. While there are key principles and key elements which define the concept, there are no rigid rules except those which are adopted by the disputing parties.³

The mediator carries out a number of different functions during the process, for example: establishing a framework for cooperative decision making, promoting constructive communication, providing appropriate evaluations, empowering the parties, and ensuring a minimum level of process and outcome fairness⁴. The mediator is expected to guide the parties to an amicable settlement but must refrain from guiding the parties to a settlement which favours one party at the detriment of the other. During the mediation process, a mediator must always remain impartial and neutral. The Mediator manages the structured process in such a way that the disputing parties are empowered through that process to identify the real issues and search for solutions.⁵

Finally, the disputants make their own decisions regarding the outcome and enforcement is by the will of the parties.⁶

² Presentation for the Bar Association of Sri Lanka 2023

³ *ibid.*

⁴ Laurence Boulle, Kathleen J. Kelly, "Mediation: Principles, Process, Practice", Buttersworths (1998)

⁵ Dhara Wijayatilake, 'Mediation as an effective alternative dispute resolution process' (Lawnet Ministry of Justice, undated) <<https://www.lawnet.gov.lk/mediation-as-an-effective-alternative-dispute-resolution-process/>> accessed on 04 August 2024 .

⁶ *ibid.*

2. BACKGROUND

In many legal fields, the time-delays brought on by the constant influx of personal and commercial disputes have been an impediment to the administration of justice within the existing legal systems of the country.

In attempting to improve the system what is required is not a mere quantity control effort aimed at avoiding a case load explosion. What is required is also an attempt to improve the quality of justice. This would essentially mean an avoidance of the stress of litigation, a reduction of expense, the elimination of delays, greater accessibility, and better awareness.⁷

The growing need for efficient forms of dispute resolution has spurred conversation where alternate dispute resolution mechanisms such as mediation have been pushed as effective replacements to the litigation process.

In recent times there has been some focus on improving the system by channelling disputes to non-adjudicatory forums for resolution through alternative methods. The current widespread interest in looking at alternative methods of resolving disputes is because of its perceived potential to overcome some of the iniquities of the traditional (adjudicator) system.⁸

However, one ADR mechanism need not function as a standalone mechanism of dispute resolution. Mediation can be used synergistically with the litigation process and other forms of ADR, to provide a symbiotic ecosystem in which disputes may be resolved efficiently.

Commercial Mediation, in particular, is still finding its place in the dispute resolution process in Sri Lanka. Commercial mediation may find its home in supplementing the existing dispute resolution mechanisms existing in Sri Lanka, and not as a standalone replacement to them.

3. THE EVOLUTION OF MEDIATION IN SRI LANKA

While commercial mediation is still finding its home in the dispute resolution landscape in Sri Lanka, mediation as a concept has long been accepted as a form of dispute resolution in the country, especially for interpersonal criminal and civil disputes at community level, specialized disputes such as land disputes, small scale financial disputes and labour related disputes.

⁷ *ibid.*

⁸ *ibid.*

Like many Asian countries, Sri Lanka has a strong tradition of consensus-based dispute resolution, the historical thread of which has from time to time been broken during periods of political upheaval. The practice of mediation in Sri Lanka dates back to the reign of the Ceylon kings, who ruled Sri Lanka prior to colonial settlement. In the former Kingdom of Ceylon, the institution of Gamsabhawa (the village council) had the mandate to maintain peace and harmony at village level by facilitating the amicable settlement of disputes. Similarly, the village temple formed the traditional centre of social life, and the Head Priest of the temple also took an active role in dispute resolution.⁹

Eventually the adversarial legal system based on English common law became the dominant form of formal dispute resolution in Sri Lanka, suppressing traditional mediation processes. It was not until 1958 that a serious attempt was made to reintroduce the concept of the ‘amicable settlement of disputes’ by introducing the Conciliation Boards Act 1958.¹⁰

The Act provided for mandatory community-level resolution of minor disputes by impartial conciliators and aimed to make available to disputants a much more accessible, less expensive, speedy, and participatory dispute management process.¹¹ This Act was repealed, and mediation as a formal practice began in 1988 with the Mediation Boards Act, No. 72. This Act was introduced to provide for the establishment of mediation boards in areas to be specified by the minister; to define the powers and duties of such boards, and to make provision for matters connected therewith.¹²

Mediation Boards are established across the country in 329 administrative divisions with approximately 8,500 functioning as mediators on these Boards. In time, these Boards came to be referred to as “Community Mediation Boards.”¹³ Over 200,000 disputes are referred to community mediation boards annually with a recorded settlement rate of over 60%.

⁹ Nadja Alexander, ‘From Communities To Corporations: The Growth of Mediation In Sri Lanka’ (Mediate.com, 12 August 2002) <<https://mediate.com/from-communities-to-corporations-the-growth-of-mediation-in-sri-lanka/>> accessed on 31 July 2024.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Mediation Boards Act 72 of 1988.

¹³ Dhara Wijayatilake, ‘Mediation in Sri Lanka’ (2023) 9 RBADR 153.

In addition to addressing the issue of lessening the backlog of cases in courts, Mediation Boards aimed to instil some stability in a community by settling conflicts through non-adversarial means that offered greater chances of future peace amongst the parties involved.

The process of a Mediation Board was articulated in the Act to be “*by all lawful means to endeavour to bring the disputing parties to an amicable settlement and to remove, with their consent and wherever practicable, the real cause of grievance between them so as to prevent a recurrence of the dispute or offence...*”.¹⁴ This provision recognized the salient features of interest-based mediation – party autonomy and the non-coercive intervention of the Mediator to identify needs and interests.

3.1 The Mediation Boards Commission

The Mediation Boards Commission was established in 1990 to provide policy guidance, appointment of mediators and overall direction and supervision to Community Mediation Boards. The appointment of the Commission is statutorily provided, and the President of Sri Lanka appoints the Commission according to the provisions of the Mediation Boards Act.¹⁵ Amendment to the Act in 2024.

The process to make appointments to community mediation boards is set out in the 1988 Act. Nominations for appointment may be recommended by persons and bodies that are *not of a political nature*, and by the District Secretary of the area. Those who are selected by the Commission as being suitable to be considered, are required to follow a preliminary training in mediation skills and techniques.¹⁶ This training is provided by a cadre of trained Mediator Training Officers in the Ministry of Justice.

Wijayatilake (2023) states that it was believed that having the right training is an essential requirement for being a mediator and that having qualified candidates would guarantee the calibre of the mediation. This feature aimed to address one of the Conciliation Boards' recognized shortcomings, which was that individuals attempted to mediate disputes without the advantage of any specialized training, expertise, or process understanding. It is also evident that the goal is to

¹⁴ Mediation Boards Act 72 of 1988.

¹⁵ Mediation Boards Act no 72 of 1988 amended by Act no 2 of 2024 section 2.

¹⁶ Mediation Boards Act 72 of 1988.

prevent individuals with political affiliations from serving on these boards, thus fostering trust in their objectivity.

The Schedules to the 1988 Act set out the categories of disputes that must be mandatorily referred to mediation, and also the categories of disputes that cannot be entertained by Mediation Boards.¹⁷

Disputes that must mandatorily be referred to Mediation include civil disputes where the value is below the monetary threshold set out in the Act, unless it gives rise to a cause of action specifically excluded by the Act. The current threshold as at 2024 is Rs. 1,000,000/=.¹⁸ Disputes relating to specifically identified criminal offences punishable under the Penal Code. These are minor offences that are considered suitable for settlement through mediation rather than through prosecutions and punishment in court.

The categories of disputes that are specifically excluded are fifteen actions that are considered unsuitable to be settled through the CMBs. These include matrimonial disputes, disputes relating to trusts, adoption of children, partition of land, testamentary cases, election petitions, breach of fundamental rights, admiralty actions and actions under the Mortgage Act.¹⁹

The disputes that cannot be entertained by a Mediation Board include disputes where one party is the State, where one party is a public officer, and the dispute relates to the recovery of property, money or other dues; or where the Attorney General has initiated proceedings in respect of an offence.²⁰

The principle is that there can be no compromise when the dispute is with the State. It needs to be emphasized that this ouster applies only in respect of Community Mediation Boards.

Where the value of the dispute is above Rs. 1,000,000, parties could submit those disputes for mediation voluntarily, unless the dispute relates to a matter which is specifically excluded. Referrals to Mediation Boards are done by the Police and the courts. No statistics are available to indicate whether any of the applications to these Boards are in respect of disputes valued above the mandatory threshold.²¹

¹⁷ *ibid.*

¹⁸ Mediation Boards Amendment Act No 2 of 2024.

¹⁹ *ibid.*

²⁰ Dhara Wijayatilake, 'Mediation in Sri Lanka' (2023) 9 RBADR 153.

²¹ *ibid.*

In 2022, there was a total of 210,342 disputes pending before the CMBs. Of the total number of disputes that went into the mediation process, 58% were mediated, 42% were not settled because one party did not attend the mediation, and 40% were settled after mediation.²² The positive factor is that over the three decades of operation, mediation boards have recorded an average settlement rate of 69%.

3.2 Mediation (Special Categories of Disputes) Act No 21

In 2003, the Mediation (Special Categories of Disputes) Act No 21 was introduced as a mechanism to reduce the litigation overload from courts in specialized cases where an adversarial approach would result in delays in matters which could otherwise be dealt with more effectively.

As the challenge to reduce the litigation overload grew, it was thought necessary to divert certain identified categories of actions of a higher value away from courts in cases where a non-adversarial approach was perceived to be more appropriate. The result was the enactment of the Mediation (Special Categories of Disputes) Act, No. 21 of 2003 to provide for the establishment of Mediation Panels for the resolution of specified categories of actions by mediators with appropriate qualifications.²³

The Mediation Boards established under the said Act, known as Special Mediation Boards, enabled mediation of specialized subjects and the mediation of disputes between private parties and the State.

Wijayatilake (2023) says one distinctive aspect of this Act is that the Minister is required to prescribe the qualifications that a Mediator must possess, taking into account the nature of the category of disputes that must be mediated. This is in contrast to community mediation boards, where mediators are not required to have any specific educational qualifications. In this way, different requirements could be specified for various types of disputes. What distinguishes the two forums significantly from one another are the prerequisites for mediators.

Panels of mediators were appointed under this Act in 2005 after the Tsunami of 2004 for the resolution of tsunami related disputes, and in 2015, 2018 and 2021 for the resolution of disputes relating to the ownership of lands. The 2015 and 2018 Special Boards were established primarily

²² *ibid.*

²³ *ibid.*

in the Administrative Districts in the North and East and in Anuradhapura to resolve land disputes that resulted due to the North-East conflict. A new gazette notification in January 2022 provided for Special Mediation Boards to be established throughout the country but with a reduced scope.²⁴

3.3 International Alternative Dispute Resolution Centre Sri Lanka

Sri Lanka broached the institutionalising of mediating commercial disputes with the enactment of the Commercial Mediation Centre of Sri Lanka Act No 44 of 2000 and the setting up of the first ever Commercial Mediation Centre in Sri Lanka led by the Ministry of Justice collaborating with the Ceylon Chamber of Commerce (CCC). This initiative however was not successful due to many issues including lack of proper commitment by stakeholders, and the said Act is to be repealed.²⁵

In 2018, a collaborative effort between the CCC and International Centre for Law and Practice (ICLP) saw the establishment of the International Alternative Dispute Resolution Centre, Sri Lanka (IADRC), located in the World Trade Centre in Colombo.

One of the oldest business chambers in the region and the oldest in the nation is the CCC. The ICLP is a non-profit organization that was founded with the objective of advancing commercial law and practice. It has been operating its Arbitration Centre since March 1996.

According to Wijayatilake (2023), at one point, the attempts of the government to create the Commercial Mediation Centre of Sri Lanka and an International Arbitration Centre through public-private partnerships had been unsuccessful in the past. The IADRC was then established as a purely private sector initiative to fill that lacuna and offers arbitration and mediation services for commercial dispute resolution and has its own arbitration and mediation rules.

4. CURRENT LANDSCAPE OF MEDIATION IN SRI LANKA

While community mediation thrives in Sri Lanka, the most notable landmarks in the evolution of mediation in Sri Lanka is the signing of the Singapore Convention on Mediation in 2019, the enactment of The Recognition and Enforcement of International Settlement Agreements resulting from Mediation Act, No. 5 of 2024 adopting the Singapore Convention provisions to local law, and the drafting of the Mediation of Civil and Commercial Disputes Bill. While the Singapore

²⁴ Dhara Wijayatilake, 'Mediation in Sri Lanka' (2023) 9 RBADR 153.

²⁵ 'Cabinet Decisions on 05.12.2022' (news.lk, 06 December 2022) <https://www.news.lk/cabinet-decisions/item/34803-cabinet-decisions-on-05-12-2022> accessed on 2 August 2024.

Convention based law will facilitate recognition of international mediated settlements, the Mediation of Civil and Commercial Disputes Bill when enacted will facilitate space for the expansion of commercial mediation in the country.

Looking at ‘commercial disputes’, the current Mediation (Special Categories of Disputes) Act, No. 21 of 2003 provides for the establishment of Mediation Boards for the resolution of “Financial disputes” (*i.e.*, disputes arising out of a financial business transaction) in six identified administrative districts in the country and land disputes excluding certain causes of actions, in all administrative districts in the country. Land disputes and financial disputes below the value of Rs. one million are required to be mandatorily referred to these Boards, and court jurisdiction is ousted unless mediation fails.²⁶

In addition to this, an important development in Sri Lanka’s mediation landscape is the proposed *Mediation (Civil and Commercial Disputes)* bill was initiated by the Ministry of Justice and is under review by the Attorney General’s Department. The need for statutory recognition of vital principles that apply to the conduct of mediations in the private domain needs to be addressed. According to Wijayatilake (2023), the Bill drafted by the IADRCSL has been submitted to the government and is currently being finalized.²⁷

At present, community mediation has taken several strides forward in facilitating dispute resolution as an effective and large-scale medium. A 2023 Situational Assessment²⁸ highlighted that 65% of the general public is aware of community mediation. This assessment listed reasons for the high degree of community mediation awareness including the mandatory requirement of mediation of a number of disputes before action can be instituted in formal courts, and the speedy and cost-effective nature of dispute resolution by mediation.

The assessment showed that *60% of the general public know how to find a mediator, that they know about the mediation process, and that they know how to resolve a dispute through mediation.*

This assessment further showed that *32% of the general public stated that they were satisfied with ADR mechanisms, 25% were not satisfied with ADR mechanisms, and the 38% expressed a neutral*

²⁶ *ibid.*

²⁷ Dhara Wijayatilake, ‘Mediation in Sri Lanka’ (2023) 9 RBADR 153.

²⁸ USAID (2022) ‘A Situational Assessment of Alternative Dispute Resolution in Sri Lanka’ (unpublished)

view on the effectiveness of ADR mechanisms, which the assessment presented as the general public not having sufficient ADR awareness to take a stance on the matter.

Similar studies on commercial mediation have not been done in Sri Lanka.

4.1 Commercial Mediation in Sri Lanka

As aforementioned, commercial mediation was formally introduced to the legislature of the country through the Commercial Mediation Centre of Sri Lanka Act No. 44 of 2000 which provided for the establishment of the Commercial Mediation Centre of Sri Lanka.

This Act states that the functions of the Centre shall be “*to promote the wider acceptance of mediation and conciliation for the resolution and settlement of commercial disputes; to encourage parties to resolve commercial disputes by mediation and conciliation; and to conduct settlement proceedings using mediation and conciliation*”.²⁹

The business community emphasized the need for more effective dispute resolution for commercial conflicts, and this Act was passed in response. In order to guarantee private sector ownership, the Act stipulated the formation of a Board of Management, with the majority of members coming from four Chambers of Commerce. The Board of Management was assigned the duty of formulating regulations on the application process, the process to be adhered to, the fees to be assessed, and a mediator's code of conduct. The Minister's approval was necessary for these elements.

According to Wijayatilake (2023), the goal was to have government funding paired with private sector ownership. A mismatch between the goal of guaranteeing private sector ownership and autonomy and the incapacity to uphold that ideal in practice is the reason for the Centre's incapacity to keep operating.

In 2006, the Commercial Mediation Centre completely ceased its operations despite several efforts to resurrect it over the years, and as mentioned before, plans are underway to repeal the said Act.

²⁹ *ibid.*

4.2 Merits of Commercial Mediation

Commercial mediation refers specifically to the use of mediation as a voluntary ADR process to resolve disputes in the context of business and commerce.³⁰

Mediation is the less formal and non-binding ADR process (Chau, 1992). Compared to litigation and arbitration, mediation is far less expensive (Boulle & Rycrof, 1998; Stipanowich, 1997). Therefore, it offers cost effective and timely solutions due to its less time-consuming process (Hinchey, 1992).³¹ If the parties are ready, they can take the dispute to mediation as quickly as possible and benefit from attributes such as the ability to resolve disputes quickly and be provided low-cost solutions.

Settlements are reached through the party involvement (Binti Rahmat, 2017). Both parties have the right to check the background, experience, and knowledge of the mediator. Consequently, there is very little chance that the mediator will become prejudiced. (Boulle & Rycrof, 1998). If parties do not agree with the solution provided from mediation, they can ignore the decision and find other means to solve the dispute (Cheung, 1999). Thus, parties have the freedom to accept or reject the solution reached.³²

Furthermore, in mediation, when one party is not satisfied with the mediator's style, attitude or the way mediator handles the process, they even have the freedom to withdraw from the mediation process. The non-binding nature of mediation is another attractive characteristic.³³

Another quality of mediation which defines its flexibility is the ability to make the solution or settlements reached by mediation a 'binding decision' with the presence of lawyers. In this manner, parties would no longer have to squander their time and money on this issue. (Rahmat & Abdul Rahim, 2020). Mediation is popular for its party autonomy, and it can be considered as a form of

³⁰Divanjana Disala Hettiarachchi, Tilanka Wijesinghe and Kavindya Chathuri Perera, "Appropriateness of Commercial Mediation as an Alternative Dispute Resolution Method for Subcontractor Disputes in Sri Lanka" (2023)

<[https://www.researchgate.net/publication/375678677 Appropriateness of Commercial Mediation as an Alternative Dispute Resolution Method for Subcontractor Disputes in Sri Lanka](https://www.researchgate.net/publication/375678677_Appropriateness_of_Commercial_Mediation_as_an_Alternative_Dispute_Resolution_Method_for_Subcontractor_Disputes_in_Sri_Lanka)> accessed on 30 July.

³¹ *ibid.*

³² *ibid.*

³³ *ibid.*

“distributive justice” (Harmon, 2003). The freedom given to disputing parties to determine the mediation procedure can be highlighted as an attribute of commercial mediation.³⁴

Mediation takes place in an informal and non-confrontational environment. Mediation is voluntarily approached. It is used as a dispute resolution method only if parties agreed to it. This means the mediation considers the interests and desires of disputing parties.

The legal rights of the parties are considered as a reference to the mediation process (Taylor & Carn, 2010).³⁵

Mediation is the most appropriate and effective way to achieve amicable settlements. Although mediator has some control over the process, he/she does not decide the outcome (Phillips, 1997). A mediator uses different tactics to bring both parties to a common ground. The mediator only does the role of bridging between disputant parties. To do that, mediators must investigate the dispute and underlying conflicts. Trust between parties is an important factor (Jayalath, 2018).³⁶

Hence the mediator facilitates the parties to discuss the dispute and its underlying conflicts. Generally, fewer formalities, non-hostile nature, amicable settlements voluntary approach to the process and having the opportunity to discuss underlying conflicts can be identified as attributes of commercial mediation.³⁷

Litigation is a public formal process with public viewings available for media scrutiny (Bristow & Vasilopoulos, 1995). However, mediation is a private process which is not available for public viewing or media attention (Boulle & Rycrof, 1998). In mediation, parties are treated with confidentiality and immunity from court proceedings (Rahmat & Abdul Rahim, 2020). Therefore, secured confidentiality can be highlighted as an attribute of commercial mediation. Thus, it is conclusive that, some of the scientific sources have identified attributes, causes, and characteristics of commercial mediation.³⁸

³⁴ *ibid.*

³⁵ Divanjana Disala Hettiarachchi, Tilanka Wijesinghe and Kavindya Chathuri Perera, “Appropriateness of Commercial Mediation as an Alternative Dispute Resolution Method for Subcontractor Disputes in Sri Lanka” (2023) <
[https://www.researchgate.net/publication/375678677 Appropriateness of Commercial Mediation as an Alternative Dispute Resolution Method for Subcontractor Disputes in Sri Lanka](https://www.researchgate.net/publication/375678677_Appropriateness_of_Commercial_Mediation_as_an_Alternative_Dispute_Resolution_Method_for_Subcontractor_Disputes_in_Sri_Lanka)> accessed on 30 July 2024.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

4.3 Significance of The Singapore Convention

In August 2019, Sri Lanka ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation popularly known as the Singapore Convention.³⁹ By enforcing international settlement agreements that arise from mediation within States, the Convention seeks to promote the development of peaceful international economic relations.

The Singapore Convention 2019 provides a uniform, harmonised and an efficient framework for the enforcement of international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute. This Convention is designed to work in tandem with the Model Law on Mediation (Model Law) adopted by the United Nations Commission on International Trade Law (UNCITRAL), to achieve a unified system of enforcement.⁴⁰

This Convention is intended to facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across borders. As such, business community will benefit from mediation as an ADR option to litigation and arbitration in settling cross-border disputes.⁴¹

The Singapore Convention provides a legal blueprint as to how commercial mediation may expand within the dispute resolution landscape in Sri Lanka. However, certain impediments hinder this process greatly.

4.4 Impediments to Accepting Commercial Mediation as an Effective Form of Alternate Dispute Resolution in Sri Lanka

It is pertinent to explore why commercial mediation is not being extensively recognized and accepted in Sri Lanka. Little has been written on this, but the existing literature cites various reasons for this. Introducing commercial mediation as a viable supplementary addition to current dispute resolution mechanisms will ease the burden on ADR actors of having to convince commercial stakeholders to accept mediation as a complete replacement to traditional dispute resolution processes.

³⁹ Singapore International Dispute Resolution Academy, 'Singapore Convention on Mediation' (undated) <<https://www.singaporeconvention.org/>> accessed on 2 August 2024.

⁴⁰ Gajanayaka, Vasantha and Gajanayaka, Sidath, Singapore Convention on Mediation (2020) 'A Blessing in Disguise for Sri Lanka' Hulftsdorp Law Journal 48.

⁴¹ *ibid.*

There are several pieces of evidence from statements in the ‘Situational Assessment of Alternative Dispute Resolution in Sri Lanka’ pointing to the reluctance to accepting commercial mediation as a viable option for commercial dispute resolution. A legal officer in a conglomerate says, “*there hardly seems to be a difference between commercial mediation and the court process in Sri Lanka, so it does not make commercial sense to repeat the process twice over. I would rather go to a more expensive (but highly efficient) venue like Singapore International Arbitration Center (SIAC) or go to court in Sri Lanka*”.⁴²

Another legal officer says, “*We have resolved a few disputes through arbitration. Most of our disputes are resolved through an informal negotiation process. We have not used commercial mediation.*”

There is a low level of awareness on mediation and its applicability in resolving corporate disputes. The corporate sector is generally not satisfied with the current status of commercial mediation in Sri Lanka, and legal officers of conglomerates have low awareness of mediation and those who are aware, are not satisfied with the current status of commercial mediation in Sri Lanka.⁴³

4.5 Legal Power of a Mediated Settlement

One of the key concerns repeatedly expressed is the legal validity of a mediated settlement.

Mediation literature on ‘mediated settlements’ states that a *Settlement Agreement* is where the parties agree to settle, and the parties enter into a “Settlement Agreement” which is signed by the parties and the Mediator. That brings closure to the Mediation.

A *Non-settlement certificate* is where the parties are unable to reach an agreement, the mediator issues a non-settlement certificate. If litigation is pursued thereafter, and the cause of action is one which should have mandatorily been referred for mediation, this certificate is proof of compliance.

On the enforcement of a mediated settlement agreement there are unfounded concerns that a mediated settlement has no legal value unless accepted by a court of law.

According to the current law, in the case of court referred mediations, a decree of court is required to be entered based on the terms of the Settlement Agreement. Where the settlement is reached on

⁴² USAID (2022) ‘A Situational Assessment of Alternative Dispute Resolution in Sri Lanka’ (unpublished)

⁴³ *ibid.*

a reference by a Labour Tribunal, an Order is required to be made by the Tribunal, in terms of the settlement.⁴⁴ This does not extend to disputes directly referred to mediation by parties to the dispute.

However, although there are no specific statutory provisions in the current law for judicial acceptance of a mediated settlement, it is accepted that the parties assume a legal obligation to honour the terms of the settlement which becomes a contract between the parties, and in the event of a violation, it can be treated as a breach of a contractual obligation as under any other agreement.

A common misconception held by the parties to mediated settlements is that the settlement itself is an informal settlement which does not fall within the ambit of the general law of contracts of the land. However, a mediated settlement signed by both parties is no different to any other contract that the parties may otherwise enter into.

Obligations stem in general from promises or sets of promises, actual or implied, between two or more parties, and give rise to actionable personal rights against determinate individuals. These obligations are contractual in their nature. Though the constituent elements of contract have been variously stated, they may be reduced to certain basic essentials. These essentials are,

- a) agreement between the parties;
- b) actual or presumed intention to create a legal obligation;
- c) due observance of prescribed forms or modes of agreement, if any;
- d) legality and possibility of the object of the agreement; and
- e) capacity of parties to contract.

Weeramantry (1965) refers to Anson⁴⁵ and writes on the reduced elements of contract which states that the essential elements are,

- 1) offer and acceptance;

⁴⁴ Dhara Wijayatilake, 'Mediation in Sri Lanka' (2023) 9 RBADR 153.

⁴⁵ C. G. Weeramantry 'The Law of Contracts, Volume I' (Stamford Lake Publishers 1965) 80-82

- 2) form or consideration;
- 3) capacity to contract;
- 4) genuineness of consent; and the
- 5) legality and possibility of object;

and that any definition of contract must necessarily stress the promise which gives it birth and the attribute of enforceability or legal recognition whence it derives its vital force.

In essence, once an agreement between parties confirms consent and satisfies these requirements along with the other requirements needed to be met to create a legally binding contract, whether the contract stems from a mediated settlement or otherwise, does not rob that contract from being a legally enforceable contract.

Therefore, the notion that a mediated settlement once signed by the parties is not enforceable under the law of contract is not accurate, and any settlement signed with due respect given to the law of contract of the land, is enforceable as per the laws relating to the law of contract in Sri Lanka.

The mere fact that a mediated settlement is made in a relatively informal setting, does not mean that the resulting contract is informal in nature. Thus, the point of contention that such a settlement (contract) has to be presented to court, thus resulting in the involvement of the formal courts process, is unfounded.

4.6 Enforceability of a Mediated Settlement

One of the reasons why commercial mediation has not become popular in Sri Lanka is the lack of an effective enforcement mechanism for settlement agreements arising out of mediation. This will be changed when the Mediation of Civil and Commercial Disputes Bill becomes law but even now, this concern is unfounded.

As per the arbitration law, there is a statutory framework to recognise and enforce domestic and international arbitral awards.⁴⁶ Despite the acceptance of a mediated settlement as an enforceable contract or agreement between disputing parties, a similar court led provision should be available for mediation settlement agreements as well, for mediation to be the preferred option for the

⁴⁶ Arbitration Act No. 11 of 1995.

business community, even over arbitration. While a settlement agreement entered into during mediation is similar to a contract and creates a contractual relationship between the parties and makes it possible to enforce the settlement as a binding contract, in the current legal process this could mean that such an action would last a couple of more years in court.

4.7 The Role of the Lawyer in Mediation

Mediation is essentially between disputing parties and a third-party neutral facilitator where lawyers do not 'represent' parties as in the formal courts system. This is an impediment to the acceptance of commercial mediation as an effective form of dispute resolution as there is a consensus that legal practitioners are not important to the mediation process. Legal practitioners are therefore often reluctant to offer commercial mediation as a facet to resolve the dispute between the parties.

However, Jayasundere (2023) states that the role of the lawyer is of great importance to commercial and even community and special mediation. The role of a lawyer in mediation consists of assisting parties by providing practical and legal advice on the process, in providing advice on issues raised and offers made, and in assisting in drafting terms and conditions of settlement as agreed.

Before entering into mediation, lawyers can prepare parties by educating them about the mediation process and their rights and responsibilities. Lawyers can also help parties identify their interests, needs, and objectives, and develop a negotiation strategy that will help them achieve their goals.⁴⁷

Attorneys can also assist parties in gathering pertinent documentation and proof to back up their claims in court, including contracts, emails, and financial records. This can facilitate the mediation process more quickly and raise the likelihood of a favourable resolution.

During the mediation process, attorneys can support parties by outlining their positions and points of contention to the mediator and the other parties. They can also offer advice on the legal matters at stake in the disagreement and assist their clients in responding to the other parties' claims and arguments.

Lawyers can also assist parties in exploring potential settlement options and proposing creative solutions that meet their clients' interests and needs. They can help their clients evaluate the

⁴⁷Thomas Gaultier (2023) 'The role of lawyers in commercial mediation' < <https://thomasgaultier.com/the-role-of-lawyers-in-commercial-mediation/> > accessed on 28 July 2024.

advantages and disadvantages of different settlement options and advise them on the legal and practical implications of each option.⁴⁸

Especially in commercial mediation, after both parties have reached a settlement agreement, lawyers are essential in drafting the agreement and making sure that all of the terms and circumstances are reflected correctly. Additionally, they can counsel their clients on any possible risks or responsibilities as well as the settlement agreement's legal ramifications.

According to Gaultier (2023), *“Lawyers can also help their clients negotiate any outstanding issues or contingencies that may arise as a result of the settlement agreement, such as payment terms or the release of claims. They can work with the other parties and the mediator to ensure that the settlement agreement is comprehensive, clear, and enforceable.”*

Following the conclusion of the mediation procedure, attorneys can help their clients carry out the terms and conditions of the settlement agreement and make sure that everyone abides by them. They can offer their customers legal advice on how to handle disagreements or problems that may come up throughout the implementation process, as well as assistance in navigating these situations.

Attorneys can assist their clients in assessing the mediation's overall effectiveness and pinpointing any lessons that could be applied to similar disputes in the future. They can collaborate with their clients to create plans for averting such conflicts in the future and enhancing their general corporate procedures.

Lawyers play a critical role in commercial mediation by advocating for their clients, providing legal advice and guidance, and assisting in the negotiation and implementation of settlement agreements. By working closely with their clients and the other parties involved in the dispute, lawyers can help ensure that the mediation process is fair, efficient, and successful in resolving the commercial dispute.⁴⁹

4.8 A Catch-22?

A further impediment to the acceptance of commercial mediation as an effective form of dispute resolution is the catch-22 of a lack of faith in commercial mediation resulting in the underutilization

⁴⁸ *ibid.*

⁴⁹ *ibid.*

of commercial mediation as a dispute resolution mechanism. Because there is the lack of faith in commercial mediation shown by commercial stakeholders, mediation is not given an opportunity to show that it is an effective form of dispute resolution. Without this opportunity, commercial mediation is not given a platform to show that it is an efficient form of dispute resolution.

Commercial mediation being applied to relevant and opportune moments in the dispute resolution process may ease this predicament, as the gradual introduction of commercial mediation as a dispute resolution mechanism would show commercial stakeholders the effectiveness and importance of commercial mediation as a dispute resolution tool. Once introduced in this way, commercial stakeholders will be more inclined to incorporate commercial mediation more in the dispute resolution process.

5. CONCLUSION

Mediation is growing globally, and becoming increasingly accepted as a valuable method of dispute resolution. However, the manner in which community-based mediation was originally introduced and gained popularity in Sri Lanka creating its own identity, may not be suitable for commercial mediation in Sri Lanka.

To integrate commercial mediation into the dispute resolution landscape in Sri Lanka, a gradual and gentle approach, such as treating commercial mediation as a supplementary tool, and not a system that is preferred over all other dispute resolution systems such as litigation and arbitration, could be effective. This approach involves introducing commercial mediation as an additional option alongside existing methods like litigation, arbitration, and conciliation. By positioning it as a complementary tool rather than a separate predominant system, sceptical stakeholders may be more receptive to its adoption.

If this approach alone is insufficient, or as an additional measure, contemporary and creative strategies must be employed to embed commercial mediation as an effective and efficient means of dispute resolution. This involved courts mandatorily referring commercial disputes (in part or in full) to mediation prior to initiating formal litigation. These strategies should aim to gain the approval and trust of all stakeholders, including the disputing parties themselves.

It is suggested to not limit the perception of mediation as merely an isolated tool. Instead, it should be integrated into the broader spectrum of dispute resolution methods, working in harmony with litigation, arbitration, and conciliation to provide a comprehensive and flexible framework for resolving conflicts in Sri Lanka.

COMPANY LAW

TRANSFORMING CORPORATE RESPONSIBILITY: THE IMPACT OF THE CS3D DIRECTIVE ON GLOBAL BUSINESS PRACTICES

Aminta Paiva | Esandi Weerasekara*

ABSTRACT

As part of the European Union's Green Deal, one of the areas of European Union (EU) law that has developed most rapidly and profoundly is that relating to corporate sustainability governance. Most recently, the Corporate Sustainability Due Diligence Directive (CS3D) was approved by both the European Parliament and Council of the European Union, thereby officially adopting it. This article provides a comprehensive examination of the scope, overarching requirements, and consequences of non-compliance. Next, it assesses the impact of the CS3D on businesses globally, with a particular focus on supply countries and the challenges they face in adapting to remain competitive. It also evaluates the effectiveness of this new legislation in addressing “greenwashing” and examines whether it empowers companies to transcend mere regulatory compliance and align with an unwritten social license to operate. Finally, the article also identifies the limitations of the CS3D, and the challenges associated with enforcing EU legislation outside the bloc.

1. INTRODUCTION

After nearly two years of negotiations, the CS3D was adopted by the European Commission as a proposal on the 23rd of February 2022¹ and was subsequently approved by the Council of the European Union on the 24th of May 2024.² It is set to bring about a significant transformation in the non-financial reporting landscape. The new EU rules will obligate environmental, social and governance (ESG) reporting on an unprecedented scale and will incorporate a significant number of companies that were previously not subject to mandatory non-financial requirements. This includes public and private non-EU companies that meet certain EU presence thresholds. For small and medium-sized enterprises (SMEs) operating outside the EU, the new Directive will generally increase the influence of multinationals. However, if embraced in the right spirit, it could also present an opportunity to enable responsible investment and business relationships that protect their

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¹ European Commission, ‘Corporate sustainability due diligence’ <https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en> accessed 18 July 2024.

² *ibid* (n 1).

people and the planet. Once the Directive is passed, Member States of the EU will be granted an implementation period of two years to incorporate its contents into national law.

The Directive includes provisions on the consequences for violations of the CS3D's obligations, including civil liability for those companies that cause or contribute to harm by failing to carry out due diligence. By requiring companies to address their impacts on human rights and the environment, the CS3D will respond to a lack of a harmonised legal framework on corporate due diligence obligations across Europe.

ESG represents a framework through which companies can be evaluated in accordance with a comprehensive set of socially beneficial criteria. It constitutes a form of responsible investing for corporations, particularly those of a larger scale, given that they possess the requisite resources to do so. ESG further represents a set of factors utilised to assess the non-financial impact of specific investments and corporations. It is a prevalent practice among such companies, given their tendency to control extensive supply chains that traverse numerous countries. Their actions have the potential to impact the environment, the climate, and the rights of those involved in these global supply chains. In light of the heightened attention on human rights and the environment, it is crucial to ensure that these issues are duly considered. Moreover, some companies may employ the marketing strategy of "greenwashing" to persuade their customers that environmentally conscious practices are being utilised, while their underlying objective is to boost sales. Consequently, the CS3D aims to implement the requisite standards for enhanced responsible conduct on the part of businesses and their supply chains, thereby deterring greenwashing.

The following article will examine the principal concepts and requirements of the recently introduced Directive on Corporate Due Diligence. It will consider the scope of the Directive, the obligations it imposes on businesses, the financial implications of non-compliance and the ways in which it seeks to enhance environmental practices and human rights across global supply chains.

2. THE CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE (CS3D)

2.1 Which companies are in scope of the CS3D?

The Directive applies to companies that are formed in the EU ("EU companies"), as defined in Article 2 of the CS3D, with an average of 1000 employees and a net worldwide turnover of more than EUR 450 million.³ It will cover their activities ranging from the upstream production of goods

³ *ibid* (n 2).

or the provision of services, to the downstream distribution, transport or storage of products. It affects companies in certain economic sectors listed in an Annex to the Directive⁴ and include the textiles, agriculture, forestry, fisheries, and mineral sectors. EU companies with a franchising or licensing business model, where the ultimate parent company is located in the EU, are also covered by the CS3D, provided that in the last financial year royalties amounted to more than EUR 22.5 million or the company— individually or on a consolidated basis as the ultimate parent company of a group— had a worldwide net turnover of more than EUR 80 million.

It is worth noting that CS3D has extra territorial applicability, covering third country companies. i.e. companies established outside the EU (“non-EU companies”) with a net turnover in the EU⁵ of more than EUR 450 million in the financial year preceding the last financial year. There is no minimum threshold for the number of employees for non-EU companies. It also applies to non-EU companies that do not meet this turnover threshold but are the ultimate parent company of a group that does meet the threshold, in the financial year preceding the last financial year. Non-EU companies that meet the criteria for franchising and licensing agreements in the EU with a certain royalty threshold are subjected to the CS3D.

A company that is not directly covered by the Directive should consider whether it is in the chain of activities of another company that is directly covered by the Directive or whether it has a direct business relationship with an in-scope company. If an entity is part of such a chain of activities, then the in-scope entity is responsible for ensuring that the requirements of CS3D are met throughout the supply chain.

2.2 What are the obligations imposed by the CS3D?

i. Due diligence

Given the large number of companies within and outside the EU, they rely on global supply chains, making it difficult to identify and mitigate any risks pertaining to human rights and the environment. Identifying “adverse impacts” will be easier if these companies carry out due diligence, which will result in more environmental and human rights data being available on actors throughout their supply chains, including the operations of their subsidiaries and certain operations of their business partners.

⁴ Corporate Sustainability Due Diligence Directive 2022, Article 2.

⁵ see n 1.

Human rights and environmental “adverse impacts” are defined by reference to existing international human rights and environmental treaties and are further defined by reference to a specific list of rights and prohibitions which are set out in the CS3D.⁶ Adverse human rights impacts include child labour, inadequate workplace health and safety and labour exploitation, as well as land use rights of vulnerable groups. Adverse environmental impacts include the illegal handling and transport of waste, pollution, deforestation and damage to ecosystems. The interpretation of what constitutes an adverse impact will therefore be one of the most sensitive legal issues of the CS3D, as it will determine the type of situations that companies will be required to identify, prevent, mitigate and eliminate.

These negative impacts on people and the environment can occur within a company's own operations, or in the operations of a company's subsidiaries, product supply chain and wider "chain of activities". While the former are relatively easy to identify, the latter are often far removed from the direct operations of a company and can therefore be hidden.

In this context, CS3D proposes a framework that encourages companies to extend their traditional scope of responsibility in a way that respects human rights and the environment. In particular, it seeks to improve corporate accountability and corporate governance practices by integrating them into corporate strategies and extending due diligence policies to direct and indirect business partners throughout the entire value chain (supply chain). The integration of streamlined and standardised due diligence policies, strategies to identify actual and potential adverse impacts, and processes to prevent and mitigate potential adverse impacts in which their supply chain business partners operate, will enable in-scope companies to influence and manage their business relationships with their partners. It is hoped that this influence, rather than being burdensome for business partners, will have a positive impact on meaningful change for people and the planet.

ii. Climate change mitigation

The Directive also focuses specifically on combating climate change, as set out in Article 15. It states that companies must “adopt and put into effect a transition plan for climate change mitigation” to ensure that they are compatible with the transition to a sustainable economy. This effectively imposes two separate obligations on companies. First, companies must adopt a “transition plan for climate change mitigation” (“Climate Transition Plan”). The Climate Transition

⁶ Annex to the Proposal for a Directive on Corporate Sustainability Due Diligence 2022.

Plan must aim to “ensure through best efforts, that the business model and strategy of the company are compatible with” the transition to a sustainable economy that limits global warming to 1.5 °C as per the Paris Agreement.⁷ The CS3D aims to complement EU climate legislation, so the EU’s climate ambitions can be met. The EU’s target is to reduce greenhouse gas emissions by at least 55% by 2030, with the potential for Europe to be climate neutral by 2050.⁸ The CS3D also sets out renewable energy targets for EU Member States (“Member States”) for 2030. Achieving these targets will require widespread changes in the production process throughout the supply chain.

In terms of content, the CS3D requires that the Climate Transition Plan to address whether, or to what extent, climate change is a risk, arising from the company’s operations and whether climate change will be an impact of the company. If climate change has been identified as a material risk of the company, or a material impact of the company’s operations, the company’s Climate Transition Plan must include emission reduction targets, the company’s climate targets, details of transition funding and who is responsible for achieving the transition plan.

Given the extensive use of the phrase “where appropriate”, it is clear that companies have a margin of appreciation in designing their Climate Transition Plan in a way that makes sense for their sector, business, and specific circumstances. However, this discretion will be subject to regulatory oversight and scrutiny (see below).

“The Climate Transition Plan must be updated every 12 months and must include details of the company’s progress towards achieving its targets.”⁹

Companies that report a transition plan fully in line with the sustainability reporting standards adopted under the EU’s Corporate Sustainability Reporting Directive (CSRD) are automatically “deemed to have complied with the obligation” to adopt such a Climate Transition Plan. The CS3D’s climate-related obligation is thus directly linked to the CSRD and provides companies with an incentive to comply with the content requirements of the CSRD’s climate plan provisions. However, the CS3D goes significantly beyond mere disclosure by requiring companies to: (i) adopt a detailed Climate Transition Plan, and (ii) implement the Climate Transition Plan on a best-efforts basis.

⁷ Corporate Sustainability Due Diligence Directive 2022, Article 15.

⁸ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937’ (2022), PL 8.

⁹ Corporate Sustainability Due Diligence Directive 2022, Article 10.

With respect to putting the Climate Transition Plan into effect, Recital 50 explicitly states that this should be "understood as an obligation of means and not of results." It also states that while companies should endeavour to meet the green house gas (GHG) emission reduction targets set out in their plans, there may be special circumstances where companies are unable to meet these targets, provided that it is no longer reasonable to do so. It is evident that, in cases where a company fails to meet the targets set out in its Climate Transition Plan, the question of whether it has truly "made its best efforts" in accordance with its commitment, will be subject to close scrutiny and debate. However, the precise standard to be applied in such cases remains to be established.

iii. Monitoring and Public Communication

Article 10 of the CS3D requires that companies monitor the effectiveness of the measures put in place, so as to enhance due diligence. This requires periodic assessments to be carried out of the policies and measures put in order to address actual and potential adverse impacts. Article 11, on the other hand, requires these companies to report by issuing annual statements indicating how they have implemented due diligence.

2.3 What is the cost of non-compliance?

i. Who supervises compliance with the CS3D?

Article 17 of the CS3D requires Member States to designate one or more supervisory authorities, who will be responsible for ensuring compliance with the obligations set out in the CS3D.¹⁰ The supervisory authorities will be empowered to enforce both the due diligence and climate change obligations. The supervisory authorities will be empowered to require companies to provide additional information and to conduct investigations and inspections to verify compliance. In the event that a supervisory authority identifies non-compliance with the CS3D, a range of measures may be taken to remedy the non-compliance. In addition, the supervisory authority must allow a reasonable period of time for the company concerned to implement the necessary corrective measures.

¹⁰ Corporate Sustainability Due Diligence Directive 2022, Article 17.

ii. What penalties can be imposed?

The Directive provides for any resulting violations or non-compliance to be dealt with through a combination of financial penalties and civil liability.¹¹

Civil Liability

Private enforcement through civil liability will occur to personal operations of the company and its subsidiaries. This is groundbreaking ESG legislation as the CS3D will regulate human rights or environmental abuses by companies in their supply chains and allow individuals affected by such abuses to seek redress through civil proceedings.

The CS3D requires Member States to ensure that a company can be held liable under the CS3D for harm caused to a natural or legal person where:

- (a) The company has intentionally or negligently failed to comply with its obligations to prevent potential adverse human rights and environmental impacts, to remedy actual adverse human rights and environmental impacts, where the human rights standards are intended to protect the natural or legal person.**
- (b) As a result of the violation referred to in a), the “legal interests” of the natural or legal person protected under the applicable national law of a Member State have been harmed.**

There may be differences in the type of damages that can be claimed, as Member States may have different definitions of what constitutes the "legal interest" of a natural or legal person. For example, in some Member States there is no right to claim indirect damages. Member States will therefore differ in the extent to which companies can be held liable.

Companies can still be held liable for damages under the CS3D if they have participated in industry or multi-stakeholder initiatives or have used third-party verification, auditing or contractual clauses to support the implementation of due diligence obligations. This means that companies cannot

¹¹ see n 8 PL 16.

avoid paying damages under the CS3D by outsourcing their human rights and environmental due diligence risk management to third parties.

The CS3D also states that if the damage was caused jointly by the company and its subsidiary, direct or indirect business partners, they are jointly and severally liable. However, it should be noted that the company will not be liable if the negative effects were caused by only one of its business partners present in its chain of activities.

In order to determine whether the company is liable, any direct contribution by the company to the damage in question should be identified. Companies are obliged to comply with any sanctions or remedial measures imposed by the supervisory authorities, provided that they are proportionate¹² and are given a reasonable period of time to comply with the measures in question.

CS3D requires Member States to refer to their national legislation on access to damages, including on standing, injunctive relief, and the beginning and the duration of the limitation period for bringing damages claim (at least 5 years),¹³ as well as on the gathering and preservation of evidence. Member States remain free to adopt stricter national provisions.

Financial Penalties

With regards to financial penalties, they must be based on the company's worldwide net turnover, and the maximum fine cannot exceed 5% of the company's worldwide net turnover in the financial year preceding the fining decision.¹⁴ Member States are free to set their limits higher. For an EU or a non-EU company, that is the ultimate parent company of a group, fines are calculated on the basis of its consolidated turnover. Non-confidential versions of the fining decisions will be published and will remain publicly available for at least five years, also to allow third parties to challenge the company's civil liability as described above. It is hoped that the "naming and shaming" measures will act as a deterrent and force companies to think seriously about their business practices and their impact on human rights and on the environment.¹⁵

¹² *ibid* PL 17.

¹³ ERM Policy Alert, 'Corporate Sustainability Due Diligence Directive (CSDDD)' (2024) PL 8.

¹⁴ 'The Corporate Sustainability Due Diligence Directive (CSDDD): What You Need to Know' (HFW, 4 July 2024) <<https://www.hfw.com/insights/the-corporate-sustainability-due-diligence-directive-csddd-what-you-need-to-know/>> accessed 9 July 2024.

¹⁵ *ibid* (n 13).

3. GREENWASHING AND CS3D

As companies seek to improve their environmental behaviour, not least in order to meet customer and stakeholder expectations, the lack of clear and established rules on how to verify green claims in an officially recognised way has made this undertaking difficult. This has created an ambiguity that has left companies potentially vulnerable to accusations of greenwashing. It is precisely in this context that the CS3D, the CSRD, the EU Taxonomy and other ESG related legislation emerge as powerful allies for companies.

They provide much-needed clarity and guidance for companies on what to say about their overall sustainability performance or about the environmental benefits of specific products. They provide a structured and comprehensive framework that promotes transparency and helps companies communicate their environmental performance accurately. However, it is clear that the CS3D should be read in conjunction with other complimentary EU legislation to achieve holistic ESG reporting.

In terms of promoting human rights and labour standards, the CS3D aligns with the principles of the General Data Protection Regulation (GDPR) and the European Pillar of Social Rights. They all focus on respecting, and the protecting human rights throughout the supply chain and require companies to assess and mitigate human rights risks as described in section 2 above. By complementing existing legislation, the Directive reinforces the EU's commitment to upholding human rights and labour standards in the business sphere.¹⁶

The CS3D also promotes sustainable finance and investment and complements the Sustainable Finance Disclosure Regulations (SFDR) and the EU Taxonomy.¹⁷ The CS3D provides companies with a framework for companies to assess and disclose the ESG risks associated with their operations and supply chains, and complements the EU Taxonomy by encouraging companies to share the environmental performance of their operations and investments. It is hoped that this will enable investors to make more informed decisions based on reliable sustainability information.

¹⁶ Council of Europe, Human Rights Intergovernmental Cooperation, 'Standards and Guidance' <<https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/standards-and-guidance>> accessed 19 July 2024.

¹⁷ European Commission, 'EU Taxonomy for Sustainable Activities' <https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en#eu-taxonomy-navigator> accessed 19 July 2024.

In terms of streamlining reporting and disclosure requirements, the CSRD focuses on how to improve and broaden sustainability reporting, while the CS3D aims to establish an EU-wide standard, compelling both EU and non-EU companies to establish due diligence policies on human rights and environmental issues. Under the CSRD in-scope companies are required to disclose in accordance with the European Sustainability Reporting Standard (ESRS).¹⁸ However, a key question to consider is the content of those disclosures. The answer lies in the CS3D, which sets out the framework for how data should be collected, and risk-based due diligence on human rights, environmental and climate impacts should be reported.

In addition, the CSRD has a set of mandatory ESRSs that includes both general standards and specific ESG standards. However, the CS3D aims to ensure that companies active in the EU internal market contribute to sustainable development and the sustainable transformation of economies and societies. It asks companies to recognise that the success of EU sustainability objectives is related to corporate behaviour and that there is a link to their global value chains, identifying and addressing any potentially negative environmental impacts. In doing so, it establishes a holistic approach to environmental protection and removes opportunities for greenwashing.

By setting out a mandatory framework for all to follow, the CS3D will bring greater comparability to ESG reporting. This will help investors as they will be able to compare, contrast and catch outliers much more easily than before. It will help stakeholders understand how different organisations are addressing the same ESG concerns and use this information in their business decisions. It will reassure customers and investors, who will be able to trust ESG reports with confidence as the new legislation sets a new level of detail for companies to follow.

As the rules on greenwashing become stricter, companies will need to rethink every element of their ESG reporting strategy, from data collection to external communication. As companies prepare for more stringent ESG requirements they will need to invest in building strong reporting processes, investing in ESG expertise and hiring teams focused solely on collecting ESG data and ensuring compliance. As described in section 3, the consequences of non-compliance are severe with business reputations at stake. Companies must therefore ensure that they take the necessary steps to build trust and ensure transparency at all levels.

¹⁸ Corporate Sustainability Reporting Directive 2022, Article 19a.

4. SUPPLY COUNTRIES

While the Directive specifies its relevance to EU companies, it is important to consider how it applies to small and medium-sized enterprises (SMEs) and sellers, operating outside the EU within their respective supply chains, as in the medium term, in-scope companies will also require their suppliers to comply with due diligence obligations. This is because the CS3D holds in-scope companies responsible not only for the actions of their own operations, but also those of their subsidiaries and, where linked to their chain of operations, those of their business partners requiring them to review their business relationships up and down their supply chain.

Supply chains often span across developing countries outside the EU, including countries in South Asia such as Sri Lanka and Bangladesh, countries in South America such as Brazil and Argentina and countries in Africa including Ghana and Nigeria. Accordingly, the Directive can be an opportunity for forward-thinking developing country governments, as those organisations that position themselves clearly and prepare early will benefit from competitive advantages over their rivals. It is an opportunity to put in place policies, new local regulations and laws that meet international standards and promote transparency that will ultimately lead to the protection of their people and the environment. In addition, proactive governments that are open to voluntarily adopting the CS3D principles are likely to attract responsible investment and foster better practices and relationships that could lead to renegotiated supply agreements that encourage in-scope companies to invest in training, technology and social projects that improve the lives of people and the environment in supply countries.

The requirements of CS3D are likely to require in-scope companies to include their social and governance expectations in their supply code of conduct, alongside their environmental expectations. It is also possible that in-scope companies will re-evaluate, re-negotiate and amend any contracts they already have with supply countries, as these expectations will need to be included in supply contracts. Additionally, they will require SMEs to establish a clear reporting process, require their own local managers to monitor suppliers and commission formal, third party audits on a regular basis. In the case of direct suppliers, where no actions lead to a satisfactory outcome, the in-scope company may have to terminate the contract as a last resort. This being a long and tedious process which requires in-scope companies and SMEs to sometimes make drastic changes and requires not only resources but extensive know-how from SMEs in supply countries. In order to reduce the burden on SMEs, the Directive provides for various support measures. For example, where necessary, the cost of compliance with the requirements can be subsidised through

state aid, industry schemes and multi stakeholder initiatives.¹⁹ However, proactive countries and companies will be rewarded as they will be able to attract sustainable development and promote better business practices and relationships.

Companies and non-governmental organisations (NGOs) in developing countries are beginning to understand the importance of sustainable business practices and are introducing various standards²⁰ to ensure that raw materials supplied from such countries, such as tea, coffee, palm oil, etc. are ethically sourced and fairly processed and that fair labour practices are used. Awards have also been given to companies that follow ethical and green practices,²¹ and use of ESG standards is increasing and governments are incorporating them into their trade policies and export regulations. It is therefore important for companies to follow this lead and include sustainable ESG policies into their business plans, not only because it is an evident trend that can be seen in supply countries, but also because it is an opportunity for businesses to promote transparency and gain a competitive advantage, over countries that may not have adopted such standards. If companies have already adopted sustainable practices, they will be seen as more ethical and trustworthy, which will encourage further business opportunities.

It is hoped that if the policies set out in the CS3D are followed, in-scope companies will not be able to take advantage of lower production standards in emerging economies without fully internalising the cost they impose on people, the environment and the climate. As a regulator, the EU lacks the direct means to enforce human rights, environmental protection, and climate change awareness in third countries, so it uses its indirect influence, usually through free trade agreements and sanctions. The CS3D is a new tool for this purpose: European companies are expected to use their contractual relationships with business partners to reach private and public actors in third countries, creating a so-called ‘trickle-down effect’.²² The ultimate objective of the CS3D is to ensure the internalisation of the social and environmental costs throughout the supply chain, and SMEs in supply countries must seek to capitalise on such opportunities.

¹⁹ see n 8 PL 14.

²⁰ ‘Sustainability Standards in Trade: How Can Developing Countries Benefit?’ (UN Trade and Development, 19 December 2023) <<https://unctad.org/news/sustainability-standards-trade-how-can-developing-countries-benefit>> accessed 13 July 2024.

²¹ Alliance Finance, ‘Alliance Finance Wins ‘Green Brand of the Year’ at SLIM Brand Excellence 2023’ <<https://www.alliancefinance.lk/alliance-finance-wins-green-brand-of-the-year-at-slim-brand-excellence-2023/>> accessed 15 July 2024.

²² Corporate Sustainability Due Diligence Directive 2022, Recital 46.

5. SHORTCOMINGS OF THE CS3D

While the Directive will certainly improve the state of due diligence that can be seen by the in-scope companies with regards to the environment and the rights of their workers across their vast supply chains, it is important to note that the CS3D has its shortcomings as well.

i. Limiting applicability of CS3D to companies with a certain number of employees.

One significant issue concerns Article 2 of the Directive proposal, which distinguishes between companies formed under EU legislation and those under third-country legislation based on the number of employees they have. The Directive uses the term 'employees' rather than 'workers',²³ as defined by the Court of Justice, which includes a broader range such as domestic workers and apprentices. However, these individuals may not meet the Directive's criteria for 'employees' and thus do not contribute to the company's employee count. Consequently, companies failing to meet the employee threshold specified in the Directive would fall outside its scope. Critics argue that this approach overly emphasizes company size over the company's actions or conduct.²⁴

ii. Limiting Scope to Companies with a Minimum Net Turnover and Self Reporting

In determining whether companies, including those from third countries, fall under the scope of the Directive, their net turnover plays a crucial role. Non-EU entities often encounter significant hurdles in accessing and calculating this data according to EU standards, compounded by differences in national legislation. To address these challenges, third country companies are encouraged to voluntarily notify their national supervisory authorities about their activities vis-à-vis the Directive. However, ensuring compliance remains problematic due to uncertainties around companies' willingness to self-report and the difficulty in independently verifying their status. Accessing requisite financial data from non-EU databases is typically impractical and expensive, further complicating the process.

iii. Additional Costs on Supply Countries

In the event that a company follows the recommended due diligence procedures set out in the Directive, the resulting processes may lack the necessary details and information.²⁵ Such

²³ Silvia Borelli, 'The Shortcomings of the EU's Corporate Sustainability Due Diligence Proposal in the Information, Communications, and Technology Sector' (2022) PL 11.

²⁴ *ibid* (n 23).

²⁵ *ibid* (n 23) PL 12.

information could include the names of suppliers in global supply chains, details of any changes or renegotiations to contracts, and the manner in which these have been conducted. In addition, new practices implemented by companies and relevant audits conducted should be included. To meet this challenge, it is imperative that governments allocate greater financial resources to national supervisory bodies and ensure the effective dissemination of crucial information. Moreover, such regulations may result in a net welfare loss for supply countries, as increased transaction costs caused by trying to comply with the CS3D, may lead to a reduction in purchases from companies in developing countries. This has already been observed in countries such as Pakistan and Bangladesh following the implementation of the German Supply Chain Act (LkSG), where imports in the textile industry fell by 20%.²⁶

iv. Increased Compliance Cost and Competitive Disadvantages

As compliance costs increase with each additional business partner, the temptation would be to minimise the number of contractual partners. This reduces the number of suppliers, which is the opposite of what multinationals want, as it creates a less resilient supply chain. With fewer partners in their supply chain, investments in third countries will be less diverse, and there is a risk of monopolisation among suppliers, which could make things less efficient. Additionally, the compliance costs for EU companies will make them less competitive in the international market, as their costs will ultimately be passed down to the consumers.

v. Private Enforcement

The CS3D does not address the problems of private law enforcement. The real problems are not with the law itself, but the way it is enforced.²⁷ High costs, lack of legal aid, bans on contingency fees and corruption are some of the reasons why people do not sue in other countries. Long and complex litigation in Europe makes private enforcement difficult. The problem is not a lack of law, but an inadequate environment for private enforcement.

An international forum in the EU is needed to solve these problems. Yet, the Directive does not address this issue. If a company is based in the EU, it can be sued in the EU (Article 4 of the Brussels Ia Regulation). However, foreign subsidiaries or suppliers are also subject to the CS3D

²⁶ Galina Kolev-Schaefer, Adriana Neligan, 'Due Diligence-Effect of Supply Chain regulation: Data-based results on the effects of the German Supply Chain Act' (2024) PL 4.

²⁷ Anne Peters and others, 'Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law' (2020) PL 2.

(see section 2 above). If the CS3D does not want to give an unfair advantage to companies based in the EU, an establishment obligation similar to Art. 23 CS3D with jurisdiction for private enforcement would be important. If the EU does not act, similar to the recent Shell announcement, the CS3D will encourage companies to leave the EU market to avoid prosecution.²⁸

6. CONCLUSION

The adoption of the CS3D by the EU, and the subsequent implementation of similar initiatives by numerous other countries, has resulted in the establishment of explicit sustainability and environmental compliance obligations that extend to, and can be enforced against suppliers. Similarly, if implemented as intended across global supply chains, the CS3D can be seen as a pivotal moment in holding multinational companies accountable for child, slave, and other forms of forced labour, as well as exploitative and unsustainable environmental practices, particularly in supply countries.

The new regulations also eliminate the challenges that companies encounter when attempting to maintain consistency in ESG reporting. By providing a framework for substantiating environmental claims with an officially approved and consistent structure, they make it easier to build trust with investors and customers. Rather than seeing the new regulations as a burden and an additional hurdle to be overcome, companies should seize the opportunity to implement comprehensive and integrated processes that eliminate greenwashing at its source. Those that do so will be well positioned to meet future ESG regulations, strengthen their credibility with consumers, and significantly reduce the risk to their reputations.

²⁸ R Davis and K Makortoff, 'Shell's plan to move HQ to London gets Dutch backlash' (*The Guardian*, 15 November 2021) <<https://www.theguardian.com/business/2021/nov/15/shell-move-hq-tax-netherlands-uk>> accessed 24 July 2024.

COMPANY DIRECTORS' DUTIES IN SRI LANKA: IS IT SUFFICIENT TO ACHIEVE GOOD CORPORATE GOVERNANCE?

Thenuda Imbulagoda

ABSTRACT

This article delves into a central research inquiry revolving around the adequacy of Directors' Duties as stipulated in Sections 187 and 189 of the Companies Act No. 07 of 2007 of Sri Lanka (CASL). It specifically scrutinizes whether the prevailing mechanisms for enforcing and penalizing violations of these sections effectively foster a culture of sound corporate governance. To glean insights, the study extends its purview beyond Sri Lanka and takes inspiration from corporate governance models in foreign jurisdictions like the United Kingdom, New Zealand, and Australia. The overarching objective is to ascertain whether reforms are requisite within the Sri Lankan legal framework.

Further, this paper brings to light specific deficiencies within the CASL's treatment of Directors' Duties. It elucidates that the obligation to act in good faith fails to align with contemporary principles aimed at safeguarding the interests of all stakeholders and notably lacks the incorporation of the proper purpose doctrine. Moreover, the CASL's interpretation of directors' duty of care reveals shortcomings. These include the application of a subjective standard for assessment, the conspicuous absence of the term "diligence" within the section, and the demanding criterion of establishing a substantial threshold of negligence for attributing liability. The article also identifies inadequacies in the mechanisms designed for enforcing breaches of directors' duties.

In conclusion, the article posits that Sri Lanka should contemplate the integration of progressive developments witnessed in the UK, Australia, and New Zealand into its legal framework as a means to rectify the identified issues. Such a course of action holds the potential to elevate standards of good corporate governance in Sri Lanka and reduce the likelihood of future corporate collapses. These proposed reforms carry the promise of harmonizing the nation's corporate governance practices with internationally recognized best practices, ultimately fostering a business environment that is not only more robust but also more ethically responsible.

1. INTRODUCTION

A company primarily comprises of the board of directors and shareholders. The board of directors assumes a pivotal role in the organizational hierarchy, primarily responsible for the oversight of routine operations as well as the formulation of strategic and tactical judgments that steer the company's trajectory. Consequently, directors wield a paramount influence in the corporate echelons.

According to the decision in *Saloman v Salomon & Co Ltd*,¹ a company with its own powers, rights, and obligations is regarded as an artificial person from the perspective of the law.² Although a company is recognized as an autonomous legal entity with legal rights distinct from those of its managers and shareholders, these individuals are still expected to act on its behalf. In other words, while a corporation is an artificial person, it requires human action to execute its legal powers.³

In the realm of corporate dynamics managerial decisions might occasionally deviate from the primary objective of enhancing shareholder wealth. Consequently, the core issue of the agency predicament resides in ensuring that managers remain aligned with the priorities of ownership, rather than advancing their individual concerns. As a strategy to alleviate this agency challenge, the construct of corporate governance has arisen within the contemporary business landscape.⁴

As a result, in order to establish corporate governance, The Companies Act No.7 of 2007 came into force. Prior to 2007, the legal statute which governed the companies was the Companies Act No.17 of 1982 which was developed from the United Kingdom Companies Act of 1948. However, with the emergence of the Companies Act No.7 of 2007 it was regarded as the key statute which governs the basic legal framework in relation to companies in Sri Lanka and it consists of directors' duties and liabilities applicable in Sri Lanka.⁵ These obligations of directors are located within sections 187 to 200 of the CASL. Notably, among these statutory duties, two specific sections explicitly acknowledge vital fiduciary duties. Firstly, section 187 underscores the director's obligation to act

¹ *Saloman v Salomon & Co Ltd* [1986] UKHL 1, [1897] AC 22.

² *ibid.*

³ Helen Anderson, *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (1st ed, Kluwer Law International 2008) p. 48.

⁴ R Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 29.

⁵ Kanganayagam Kanag-Isvaran, Dilshani Wijayawardana, *Company Law* (Unie Arts (Private) Ltd, Colombo, (2014) p.287.

with utmost honesty and in the company's best interests. Secondly, section 189 recognizes the director's duty to exercise skill and diligence in their role.⁶

Even after the new CASL act was enacted, there have been numerous instances in Sri Lanka where company directors violated their duties as directors, causing major companies to fail. Some examples include the collapse of Golden Key,⁷ Pramuka Bank,⁸ Sakvithi Housing and Constructions (Pvt) Ltd fraud,⁹ Hilton Colombo's corporate meltdown, and the bond scam.¹⁰ It is clear from all of the examples above that these major scams are followed by a breach of directors' duty.

As a result, it is believed that it is critical to revise fiduciary duties and associated enforcement mechanisms to ensure the company's directors fully adhere to these requirements. This step is regarded as critical for reducing the likelihood of future company failures.

The most pivotal and frequently violated directorial duties are the "Duty of the Directors to act in good faith and in the best interest of the Company" and the "Standard of Care expected from Directors." Consequently, this article will concentrate on conducting an analysis of these two specific directorial duties. To accomplish that objective, a critical evaluation of the United Kingdom, New Zealand, and Australia has to be done.

2. SECTIONS 187 AND 189 OF THE COMPANIES ACT OF SRI LANKA

Before 2007, The Companies Act No.17 of 1982 was in existence. There were no provisions giving recognition to directors' duties in the 1982 Act, Sri Lankan legal framework was used to govern by the English common law principles and precedents.¹¹ In 2007, The Companies Act No.7 of 2007 was enacted based on the New Zealand Act. It codified the common law principles and recognized

⁶ S Segarajasingham, 'Who is Responsible for the Downfall of Companies: A Critical Study of Sri Lankan Law' [2012] Annual Research Symposium, University of Colombo 111.

⁷ Bandula Sirimana, 'Details of dealings at Golden Key revealed in court', (*The Sunday Times Sri Lanka*, 11th January 2009) < <https://www.sundaytimes.lk/090111/FinancialTimes/ft321.html> > accessed 24 July 2024.

⁸ Prabath Jayakody, 'Financial scandals: Who takes responsibility?', (*The Sunday Times Sri Lanka*, 26th October 2008) < <https://www.sundaytimes.lk/081026/FinancialTimes/ft3038.html> > accessed 24 July 2024.

⁹ Asif Fuard, 'Sakvithi scam: Panic spreads to other towns', (*The Sunday Times Sri Lanka*, 28th September 2008) < https://www.sundaytimes.lk/080928/News/sundaytimesnews_02.html > accessed 24 July 2024.

¹⁰ Sam Samarasinghe and Dushyantha Mendis, 'The Bond Issue Controversy: An Analysis', (*Groundviews*, 26th March 2015) < <https://groundviews.org/2015/03/26/the-bond-issue-controversy-an-analysis/> > accessed 24 July 2024.

¹¹ Kanganayagam Kanag-Isvaran, Dilshani Wijayawardana, *Company Law* (Unie Arts (Private) Ltd, Colombo, (2014) p.425.

them. The Sri Lankan legislative body has formally established these common law duties for directors from section 187 to section 200 of the CASL. Among the array of directors' responsibilities outlined in CASL, two fundamental fiduciary duties stand out. The first, as outlined in section 189, pertains to the duty of directors to exercise skill and care in their role. The second duty expounded in section 187, underscores the obligation of directors to operate in the company's best interests with unwavering good faith.

2.1. Analyzing Directors Duty to Act in Good Faith (Section 187)

Directors' duty to act in good faith is mentioned below according to Section 187 of the CASL:

“A person exercising powers or performing duties as a director of a company shall act in good faith in what that person believes to be in the interest of the company”.

This section outlines a fundamental principle of directorial responsibility in a company. It means that an individual who holds a directorial position within a company must carry out their duties with utmost honesty and sincerity. Their actions and decisions should be motivated by a genuine belief that these actions are in the best interests of the company as a whole.¹²

New Zealand

When examining the New Zealand Companies Act, it becomes evident that Section 131(1) of the NZCA shares similar wording with Section 187 of the CASL.¹³ It is as follows,

“A director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.”

However, in Section 132 of the NZCA, the New Zealand legislature has taken steps to protect the interests of employees by aligning them with the principle of acting in the company's best interests. Additionally, Section 133 of the NZCA recognizes the proper purpose doctrine as part of the broader good faith and best interest principle.

It's crucial to highlight that the CASL lacks provisions akin to New Zealand's Section 133, which safeguards the proper purpose doctrine, and Section 132, which ensures the protection of

¹² Y Wijerathna, S Kunhibava & S Balan, ‘Evaluating the relevancy of Directors’ Duty to exercise powers for a proper purpose: Should Sri Lanka recognize it in statutory form’ (2018) 45 (2).

¹³ *Dawson International Plc v. Coats Patons Plc* (1990) BCLC 560.

employees' interests. As a result, a straightforward interpretation of these NZCA provisions suggests that they have a broader scope compared to their corresponding provisions in Sri Lanka.

Australia

Upon reviewing the Australian Corporations Act of 2001(Cth), it's clear that Section 181 outlines the duty of directors to act in good faith and in the best interests of the company. This section defines this duty as follows:

"A director or other officer of a corporation must exercise their powers and discharge their duties:

- (a) In good faith in the best interest of the corporation, and
- (b) For a proper purpose."

Section 181(a) of the Australian Corporations Act corresponds to Section 187 of the CASL. However, a thorough examination of the CASL reveals that it lacks a provision similar to part (b) of Section 181 of the Australian Act, which specifically addresses the directors' obligation to act for a proper purpose. Consequently, it's evident that the scope of the Australian Corporations Act, particularly concerning the directors' duty of good faith, is broader than the corresponding provision in Sri Lanka.

United Kingdom

Upon a careful examination of the UK Companies Act of 2006 (UKCA), it's evident that it recognizes the directors' duty to act in good faith through Section 172. This section articulates this duty as follows:

"A director of a company must act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to-

- (a) The likely consequences of any decision in the long term,
- (b) The interest of the company's employees,
- (c) The need to foster the company's business relationship with suppliers, customers, and others,
- (d) The impact of the company's operations on the community and the environment,
- (e) The desirability of the company to maintain a reputation for high standards of business conduct, and
- (f) The need to act fairly as between members of the company."

The duty to act in good faith is addressed under Section 172 of the UK Companies Act (UKCA) and Section 187 of the Companies Act of Sri Lanka (CASL). There is, however, a significant distinction. The UKCA goes one step further by providing a specific list of factors that directors must consider while performing their fiduciary duty of good faith. As a result, a straightforward interpretation of these sections reveals that Section 172 of the UKCA covers a broader range of considerations than the more concise Section 187 of the CASL.

However, when it comes to the enforceability of the section 172 of the UKCA, it is crucial to recognize that, while section 172 imposes a duty on directors to consider the interests of various stakeholders, enforcement mechanisms remain largely shareholder-driven. This limitation raises concerns about the practical efficacy of the provision in ensuring that directors genuinely account for the interests of all stakeholders. Therefore, unless legislative reform extends standing to a wider group or provides alternative enforcement avenues, section 172's broader stakeholder consideration may be more aspirational than actionable in practice.

2.1.1. Deficiencies of Duty to Act in Good Faith Under Section 1987 of the SLCA

2.1.1.1. Directors' Duty only towards Shareholders?

Section 187 of the Companies Act of Sri Lanka (CASL) clearly states that a director must act in the best interests of the company. This straightforward interpretation implies that a director's primary duty of good faith is owed exclusively to the company itself.

The fundamental question at hand is whether this duty of directors should encompass the protection of the interests of various stakeholders like creditors, customers, suppliers, and the broader community. The language of Section 187 strongly indicates that directors are primarily obligated to prioritize the interests of shareholders and the pursuit of shareholder wealth maximization when carrying out their duty of good faith.

Compounding this issue, it's important to note that no significant legal rulings or judicial interpretations have provided clarity on the scope of this statutory provision within Sri Lanka. This absence of judicial guidance leaves room for ambiguity regarding whether directors should also consider the interests of stakeholders beyond shareholders in their decision-making processes.

When we examine the stance of the UK on this matter, a basic interpretation of Section 172 of the UK Companies Act (UKCA) indicates that it takes into account the concerns of all stakeholders. This is evident as it outlines six additional factors that directors must take into consideration when they wield their authority. These factors are aligned with the goal of safeguarding the interests of

all parties associated with a specific company, including shareholders, employees, customers, suppliers, creditors, environmental considerations, and the broader community.

Moreover, English courts have offered valuable insights into how to interpret the concept of acting in the "best interest of the company." In the *Gaiman v National Association for Mental Health* case, the court established that this duty extends to taking into account the welfare of both existing and future shareholders.¹⁴ Consequently, according to English law, it is clear that directors are obliged to act in good faith and in the best interest of not only the company's shareholders but also for the interest of all parties involved.

When we examine the legal decisions in New Zealand and Australia, it becomes clear that their judicial interpretations go beyond considering only the interests of shareholders within the "best interest" principle. These jurisdictions have expanded this principle to encompass the interests of creditors as well. This broader perspective has been confirmed in legal cases like *Fisher v. Brink's Global Services Australia Pvt Ltd*¹⁵ and *Re Equiticorp Industries Group Ltd (in liq)*.¹⁶

This comparison underscores that, regarding the matter of whom directors owe a duty of good faith, the legal frameworks in New Zealand and Australia have a broader reach compared to the Sri Lankan law. In essence, they recognize the importance of safeguarding the interests of both shareholders and creditors, whereas the Sri Lankan law still primarily focuses on outdated concept of prioritizing only the interests of shareholders. This can be seen as a significant deficiency that undermines the effectiveness of the duty of good faith for directors in Sri Lanka.

2.1.1.2.Lack of Proper Purpose Doctrine in Sri Lanka

Upon reviewing the Companies Act of Sri Lanka (CASL), it becomes evident that there is no explicit acknowledgment of the proper purpose doctrine being integrated into the directors' duty of good faith within the Sri Lankan legal framework. Also, the concept of 'the proper purpose doctrine' has not received judicial recognition as a constituent of the directors' duty to act in good faith in Sri Lanka.

Proper Purpose Doctrine in the UK

¹⁴ *Gaiman v National Association for Mental Health* [1971] Ch 317, 330.

¹⁵ *Fisher v. Brink's Global Services Australia Pty Ltd* (2005) FCA 1206.

¹⁶ *Re Equiticorp Industries Group Ltd (in liq) (No 3)* (1990) 2 NZCLC 68, 483.

The proper purpose rule is a fundamental equitable principle enshrined in Section 171 of the UK Companies Act (UKCA). It stipulates that, "a director must (a) act in accordance with the company's constitution, and (b) only exercise powers for the purposes for which they are conferred."¹⁷

The foundation of this duty lies in the well-established fiduciary obligation, which requires directors to act exclusively for the 'correct' or legitimate purpose and not for any concealed or improper motives. Consequently, if a director deviates from the proper purpose doctrine, it constitutes a breach of their duty, rendering any exercise of such powers null and void.¹⁸ This duty, known as the proper purpose rule, has found application in various contexts, including scenarios like entering into agreements as seen in the case of *Lee Panavision Ltd v Lee Lighting Ltd*¹⁹ and handling company assets as demonstrated in *Extrasure Travel Insurance Ltd v Scattergood*²⁰. Additionally, a recent decision by the Supreme Court in *Eclairs Group Ltd v JKN Oil Plc*²¹ reaffirms that the proper purpose rule remains applicable across the entire spectrum of directors' powers.

Under traditional common law principles, the proper purpose doctrine and the duty to act bona fide in the best interest of the company were intertwined. In the case of *Re Smith and Fawcett Ltd*,²² it was articulated that directors must act "bona fide in what they consider, and not what a court may consider, is in the interest of the company and not for any collateral purposes."

However, with the enactment of the Companies Act 2006 in the UK, a significant change occurred. The proper purpose doctrine was delineated as a distinct duty (Section 171(6)) separate from the bona fide duty (Section 172). What's noteworthy in the UK Companies Act is that directors cannot escape a breach of Section 171(b) by merely asserting that they acted in good faith and believed it was in the best interest of the company. This principle was reaffirmed in the case of *Lee Panavision Ltd v Lee Lighting Ltd*,²³ where directors were found in violation of the duty of good faith for

¹⁷ The Companies Act 2006 Section 171.

¹⁸ P Davies and S Worthington, Gower and Davies' *Principles of Modern Company Law* (9th ed, Thomson Reuters UK Limited 2012) 526.

¹⁹ [1992] BCLC 22.

²⁰ [2003] 1 BCLC 598.

²¹ [2015] UKSC 71.

²² [1942] Ch 304.

²³ [1992] BCLC 22.

entering into a management agreement that contravened the proper purpose rule, even if they genuinely believed it was in the company's best interest.

Similarly, in the Eclairs Group case, the directors' good faith was not in question, yet they were held liable for breaching the proper purpose doctrine. This underscores that, under the UK Companies Act, the proper purpose rule stands as a distinct and enforceable duty, separate from the general duty of acting in good faith and in the best interest of the company.

Proper Purpose Doctrine in New Zealand

Section 133 of the New Zealand Companies Act (NZCA) explicitly acknowledges that "a director must exercise his powers for a proper purpose," while Section 131 of the NZCA distinctly outlines the directors' duty to act in good faith. This separation of these two duties within the NZCA mirrors the structure found in the UK Companies Act (UKCA). Consequently, the New Zealand proper purpose doctrine carries the same weight and effectiveness as its counterpart in the UK, emphasizing the importance of directors using their powers for legitimate and lawful purposes.

Proper Purpose Doctrine in Australia

The Australian Corporations Act of 2001 also incorporates the proper purpose doctrine, as outlined in Section 181. This section states that a director or officer of a corporation must exercise their powers and fulfill their duties both in good faith for the best interests of the corporation and for a proper purpose. However, unlike the UK and New Zealand, the Australian section combines the duty of good faith and proper purpose, adhering to the older common law position, as seen in *Re Smith and Fawcett Ltd.*²⁴

In all three jurisdictions – the UK, New Zealand, and Australia – a breach of either the duty of good faith or the duty of proper purpose can result in liability for directors. Nonetheless, it is the researcher's belief that separating these duties for clarity and precision can ensure directors adhere to both when acting in their capacity.

The analysis of the UK, New Zealand, and Australia demonstrates that the proper purpose doctrine is an integral part of the duty of good faith, and it plays a crucial role in ensuring that directors act in the best interests of their companies. However, the Companies Act of Sri Lanka (CASL) does

²⁴ [1948] Ch 304.

not incorporate this fiduciary duty of 'proper purpose' anywhere in the Act. Sri Lanka acknowledges only the directors' obligation to adhere to the Act and the company's articles of association (Section 188), along with their duty of good faith (Section 187). Consequently, this absence of recognition of the proper purpose doctrine in Sri Lanka represents a significant deficiency in the regulatory framework governing directors' duties in the country.

2.2. Analyzing Director's Standard of Care (Section 189)

Directors' standard of care is mentioned below according to Section 189 of the CASL:

A person exercising powers or performing duties as a director of a company—

- (a) shall not act in a manner which is reckless or grossly negligent; and
- (b) shall exercise the degree of skill and care that may reasonably be expected of a person of his knowledge and experience.

Section 189 of the CASL establishes the standard of care expected from directors when exercising their powers and performing their duties. It essentially requires directors to avoid reckless or grossly negligent actions and to apply a reasonable degree of skill and care, considering their knowledge and experience. This statutory provision traces its origins back to common law principles where directors could be held liable for negligence in the execution of their duties, emphasizing the need for diligence and competence.

Upon closer examination of Section 189 of the CASL, the researcher has identified several shortcomings within this statutory framework governing directors' duty of care. These deficiencies are thoroughly analyzed as follows:

2.2.1. Subjective Nature of the Directors' Duty of Care

Section 189 of the CASL stipulates that a director must demonstrate a level of skill and care commensurate with their own knowledge and experience. This aspect of the provision aligns with the subjective approach to the duty of care, where the standard is tailored to the specific capabilities and expertise of the individual director.

Initially, the common law established the duty of care and skill in subjective terms, implying that directors were only expected to perform their duties in line with their individual knowledge and experience. This approach was exemplified in the case of *Re City Equitable Fire Insurance*

Company Ltd,²⁵ where Romer J articulated that a director's standard of care should be based on what can reasonably be expected from an individual with their specific expertise and background.²⁶

Upon analyzing section 189 of the CASL, it becomes apparent that Sri Lanka has retained the subjective nature of this duty, akin to the initial common law formulation as seen in the *Re City Equitable* case. Notably, the Sri Lankan statutory provision fails to establish a minimum standard of care expected from directors.

This subjective approach created a situation where directors could potentially benefit from any uncertainties about their competencies, as their performance was judged solely on their individual skill and experience.²⁷ Professor Ross Waite Parsons has even argued that the standard articulated in the *Re City Equitable* case should not be considered a standard at all.

In contrast, the United Kingdom has adopted a more contemporary approach to the duty of care and skill due to the evolving nature of modern business practices. This transformation is exemplified in the case of *Norman v Theodore Goddard*,²⁸ where the court held that a director's standard of care should be assessed based on two key elements:

(a) The care that would be exercised by a reasonably diligent person with the general knowledge, skill, and experience typically expected of someone performing the same functions as the director in question (the objective test).

(b) The care that aligns with the director's personal general knowledge, skill, and experience (the subjective test).

This dual approach, combining objective and subjective elements, reflects a more stringent standard for directors in the UK compared to the traditional subjective approach, recognizing the increasing demands and complexities of modern business environments.

The contemporary approach to assessing the extent of the Directors' duty of care represents a hybrid standard. In other words, it encompasses not only a subjective element but also includes an

²⁵ [1925] Ch 407.

²⁶ G. A. C Sajeewi and S.W.P Mahanamhewa, 'A Comparative analysis of Directors' Duty of Care, Skill and Diligence in Sri Lanka, Australia and UK' (2015 | 01(01) KDU Law Journal, p.81.

²⁷ R.W Parson, 'The Director's Duty of Good Faith ' [1967] 5(1) Melbourne University Law Review, p.396.

²⁸ [1991] BCLC 1028.

objective component as part of the duty of care framework.²⁹ This development, as seen in cases like *Norman v Theodore Goddard*, has been directly incorporated into the UK Companies Act (UKCA), where it can be found verbatim in Section 174 of the UKCA.

Section 174(2)(a) of the UKCA establishes an objective standard, while Section 174(2)(b) establishes a subjective standard. The subjective aspect takes into account the individual director's skill and experience, while the objective element sets a baseline standard of conduct expected from any director. This fusion of subjective and objective criteria highlights that the law in this domain has evolved to a point where it mandates, at the very least, a minimal level of skill and care from every company director.

When we compare Section 174 of the UK Companies Act (UKCA) with Section 189 of the Sri Lankan Companies Act (CASL), a significant distinction becomes apparent. The statutory standard set forth in CASL is exclusively subjective. This means that the expected standard for directors in Sri Lanka varies depending on the knowledge and experience possessed by each specific director. Unlike the UKCA, CASL does not impose a benchmark of what would be expected from a reasonably skilled and professional director. Consequently, this standard in CASL could potentially provide an avenue for directors with limited skills and experience to evade liability.

In essence, Sri Lankan law seems to place the onus on shareholders to bear the consequences if they appoint directors lacking the necessary expertise and skills. A Sri Lankan director who neglects to stay informed about the company's operations can argue that they lack knowledge of the company's affairs when they commit a negligent act or omission.³⁰ This creates a clear escape route for a passive director who relies on others to run the company. Consequently, this standard has a detrimental impact on all the stakeholders of a company.

When we turn our attention to Australia's jurisdiction and its approach to the directors' duty of skill and care, we find that Section 180 of the Corporations Act of 2001 outlines this duty as follows:

"A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise."

²⁹ Adina Ponta and R Catana, 'The Business Judgment Rule and its Reception in European Countries' (2015) 4(7) *The Macrotheme Review*, p. 127.

³⁰ Dr Harsha Cabral, *Companies Act No.07 of 2007 and The Corporate Law of Sri Lanka* (1st edn, 2007).

Australia has transitioned from the original subjective test for the duty of care, which considered an individual director's skills and knowledge, to an objective standard. This objective standard is enshrined both in Common Law (as seen in the *Daniels v. Anderson* case) and in Statute law (Section 180 of the Corporations Act). This shift clearly demonstrates Australia's adoption of an objective approach to assessing the duty of care.³¹

However, it's worth noting that this purely objective standard, as found in Australia, has its limitations. It may not fully accommodate situations where there are expert directors on the board who possess a higher level of skill and care than an average reasonable person. The law should ideally consider and recognize the expertise of these directors when evaluating their liability.

Another noteworthy aspect of the Australian Corporations Act is that this duty extends to cover not only executive directors but also non-executive directors and other officials of the company. Similarly, the Sri Lankan section is broad enough to encompass non-executive directors as well as other officials who wield the powers of a director.

When we shift our focus to New Zealand's jurisdiction and its approach to the duty of skill and care, Section 137 of the Companies Act of 1993 outlines this duty as follows:

"A director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances."

In contrast to Sri Lanka's subjective approach, the New Zealand Act, similar to the Australian Corporations Act, recognizes an objective standard of care. This means that directors in New Zealand are expected to meet the standard of care that a reasonable director would exercise in similar circumstances.

However, it's worth noting that in New Zealand, the degree of care expected may vary depending on the type of director (executive or non-executive) and the specific responsibilities they hold.³² This nuanced approach in New Zealand distinguishes it from the Australian position, where a uniform objective standard is applied regardless of the director's role.

³¹ Sajeevi and Mahanamhewa (n26), p.81.

³² New Zealand Companies Act, Section 137.

Nevertheless, both the Australian and New Zealand positions represent an improvement over the Sri Lankan approach, as they establish at least a minimum standard of skill and care for directors.

2.2.2. The Term "Diligence" is Notably Absent in Section 189.

One notable aspect concerning Section 189 is the absence of the term "diligence" within the provision. In contrast to Section 189 of CASL, sections like Section 174 of the UKCA, Section 137 of the NZCA, and Section 180 of the Australian Corporations Act explicitly include the term "diligence." These sections outline that directors of a company must exercise reasonable care, skill, and diligence. The concept of diligence generally pertains to paying close attention to details and ensuring consistent attendance at board meetings.³³

As established in the case of *Merchant's Fire Office v. Armstrong*, the standard of diligence is determined by comparing it to what individuals with ordinary prudence would exercise when acting in their own best interest. This standard is objective and set at a reasonably high level.³⁴

In Sri Lanka, the absence of the requirement for diligence in Section 189 narrows the scope of the duty of care and skill even further.

3. PROPOSED REFORMS

Given the mentioned facts above, it becomes clear to the researcher that the Directors' Duties as stipulated in Section 187 (Duty of Directors to act in Good Faith and in the interest of the Company) and Section 189 (Directors' standard of care) of the CASL, along with its enforcement mechanisms and penalties, are inadequate for promoting effective corporate governance. Therefore, there is a need for reform, drawing inspiration from the practices in foreign jurisdictions such as the UK, New Zealand, and Australia, with the aim of reducing instances of corporate collapses resulting from breaches of these fiduciary duties.

When Section 187 of the CASL is taken into consideration, directors' duty of good faith and best interest, has not evolved to encompass the modern concept of safeguarding the interests of all stakeholders. Instead, they still reflect the outdated idea of solely preserving the interests of shareholders. Therefore, the researcher recommends amending this provision by drawing

³³ Derek Higgs, 'Review of the Role and Effectiveness of non-executive Directors', Department of Trade and Industry, January 2003, P. 105.

³⁴ *Merchant's Fire Office v Armstrong* (1901) W. N. 163.

inspiration from section 172 of the UK Companies Act (UKCA), which comprehensively addresses directors' duty to act in the best interests of all stakeholders, including employees, customers, suppliers, and the community, rather than focusing solely on shareholders. However, in adopting such an approach, it is crucial to address the limitations observed in the UKCA, particularly the issue of locus standi.

To enhance the effectiveness of such provisions, the amended legislation should include mechanisms that grant a wider range of stakeholders, or possibly a regulatory body, the right to hold directors accountable. By addressing the deficiency of limited standing, the proposed amendments would ensure that directors are genuinely accountable to all affected parties, strengthening corporate governance and fostering a more equitable approach to stakeholder interests.

Furthermore, from the facts mentioned above Sri Lankan director's duty to act in good faith, as defined in the CASL, lacks the inclusion of the proper purpose doctrine. In contrast, other progressive jurisdictions like the UK, Australia, and New Zealand have recognized and integrated the proper purpose doctrine as an essential component of directors' duty to act in good faith. Therefore, it can be suggested that this inclusion of the proper purpose doctrine has strengthened the directors' duty to act in good faith in these jurisdictions.

Regarding Section 189 of the CASL, it is evident that the Sri Lankan statutory formula evaluates directors' duty of care using a subjective approach. This subjective approach fails to establish a minimum standard of care expected from directors. Therefore, corporate good governance in Sri Lanka can be enhanced if a hybrid approach for evaluating the directors' duty of care, aligning with international standards is adopted. In this context, the corresponding provision from the UK can serve as a model for reference.

When analyzing the duty of care provisions in various significant jurisdictions, it's clear that these provisions commonly stipulate that directors must exercise "reasonable care, skill, and diligence." However, Section 189 of the Companies Act in Sri Lanka (CASL) doesn't include the term "diligence." This absence weakens the effectiveness of this provision. Therefore, as a proposed reform, to strengthen and broaden the scope of directors' duty of care, the term "diligence" should be added to Section 189 of the CASL.

4. CONCLUSION

From the above-mentioned facts, one can come to conclusion that the sections 187 and 189 outline the legal obligations and standards expected of directors in Sri Lanka. However, despite the codification of directors' duties in the CASL, Sri Lanka has experienced major corporate collapses due to directors breaching their fiduciary duties. Fiduciary duties are the highest standard of care and loyalty expected of directors towards the company and its shareholders.

The corporate collapses and fraudulent mismanagement cases have underscored the importance of effective legal regulation of directors' duties. This suggests that the current legal framework may not be sufficient to prevent such misconduct.

Therefore, to gain insights and potential solutions to the issues in Sri Lanka, a comparison has been made in this article with the current Sri Lankan legal framework with those of progressive jurisdictions like the UK, Australia, and New Zealand. This comparative analysis clearly showcases gaps or areas for improvement in Sri Lanka's regulatory framework.

The primary objective of the directors' duties regime is to encourage directors to act within their legal authority while exercising due care and safeguarding the interests of all stakeholders. To establish an effective directors' duties regime, it is crucial to have a clearly defined set of duties outlined in statute and an efficient enforcement system to ensure compliance. This not only boosts public trust in investing in companies but also acts as a deterrent for directors who might consider engaging in fraudulent mismanagement of company resources. To achieve these goals, the suggested reforms may be put into practice to reduce mismanagement and fraud stemming from breaches of fundamental fiduciary duties. Ultimately, this will enhance public confidence in Sri Lankan companies and attract both local and foreign investors to invest in Sri Lanka.

TO INFINITY AND BEYOND: NAVIGATING THE LEGAL FRONTIERS OF SPACE TOURISM IN INTERNATIONAL COMPANY LAW

Liyah Perera | Santhush Pinto

ABSTRACT

The term ‘tourism’ is inherently broad and encompasses a wide range of elements. The development of space travel began on 12 April 1961, when Soviet astronaut Yuri Gagarin orbited the Earth aboard Vostok 1. This was followed by the first Moon landing in July 1969 and the subsequent discovery of a significant amount of water ice and water vapour essential for human survival in foreign celestial bodies. This discovery ignited the possibility of humans eventually visiting outer space for recreational purposes and residing there for an extended period, utilising these deposits of water for consumption, conversion into breathable air and even a base to create rocket fuel for subsequent launches.¹ The term ‘space tourism’ has taken on many forms throughout the years.² One such form includes “any commercial activity offering customers a direct or indirect experience with space travel”.³

This piece will highlight the way in which regulating space tourism ensures that economic benefits are available not only to companies that manufacture space shuttles and hotels but also to countries that host these space tourism activities. Improving space tourism has the potential to not only create job opportunities but also to improve revenue streams. Furthermore, space tourism would revolutionise scientific and technological advancements that benefit society as a whole and allow states to thrive economically. As such, this article recognises the need for states to resort to a more robust and sounder legal framework to regulate space tourism, which is crucial for ensuring safety and sustainability. In doing so, this article observes the limited scope of existing regulations concerning space exploration in the context of space tourism. Hence, it is essential to first examine the sovereign or territorial claims of space tourism service providers in outer space, following

¹ Steven Freeland, ‘Fly me to the Moon: How will International Law Cope with Commercial Space Tourism?’ [2010] 11 Melbourne Journal of International Law.

² The activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure (Roger D Launius and Dennis R Jenkins, ‘Is it Finally Time for Space Tourism?’ in *Astropolitics: The International Journal of Space Politics and Policy* (Taylor & Francis 2006) 255).

³ Stephan Hobe and Jürgen Cloppenburg, ‘Towards a New Aerospace Convention? Selected Legal Issues of “Space Tourism”’ (2004) 47 Proceedings of the Colloquium on the Law of Outer Space 377.

which the applicability of international company law will be identified, with emphasis on employee protection, tourist liability, and sustainable construction and waste management.

1. AN OVERVIEW OF THE INTERNATIONAL LAW OF OUTER SPACE

At the outset, the public perception of space travel was limited to purposes of science and discovery. Ever since the launching of the first artificial satellite Sputnik 1 in 1957 to the Moon landing in 1969 and thereafter, the goal of world superpowers was to understand the true nature of space, the availability of resources and any potential possibility for human survival. As such, the concept of space travel for recreational purposes was unprecedented.

Until recently, only an elite clientele was permitted to visit space as tourists. However, with the development of space technology in the 21st century, the idea of a ‘space tourist’ was made somewhat of a reality. In April 2001, a US national Dennis Tito, reportedly paying US \$20,000,000⁴ was allowed to spend six days in the Russian section of the International Space Station (ISS). Mr Tito was granted the six-day mission only after undergoing a period of extensive training at the Russian City Complex. This historic moment was considered the first time where a passenger was able to pay for an opportunity to participate in orbital travel. Initially, due to the grave risks involved with space exploration, NASA exhibited considerable reluctance towards the inclusion of civilians. However, following the successful mission of Dennis Tito, the stance taken by NASA further evolved and developed a level of openness towards the idea of space tourists following the ISS project.⁵

The development of game-changing technology to make long-distance space travel faster and cheaper and to encourage future space missions to asteroids and Mars was observed during the Obama Administration in 2010.⁶ Following the success of SpaceShipOne, pioneer Richard Branson constructed a larger commercial vehicle intending to provide Virgin Galactic passengers with a three-and-a-half-hour journey into space. It was reported that over 7000 enthusiasts, in the heat of the moment, signed on to reserve a US \$200,000 seat on this flight.⁷ As a result, in 2007, the European Aerospace company EADS Astrium divulged its own plans for space tourism flights at

⁴ ‘Profile: Tito the Spaceman’ *BBC News* (United Kingdom, 28 April 2001)

<<http://news.bbc.co.uk/2/hi/science/nature/1297924.stm>> accessed 21 August 2024.

⁵ In September 2001, NASA released its new policy on commercialisation of its manned space activities. This envisaged the opening up of space shuttle flight opportunities, and possibly also crew slots on the ISS, to private-sector personnel: Office for Outer Space Affairs.

⁶ Editorial, ‘A New Space Program’, *International Herald Tribune* (Paris, 10 February 2010) 6.

⁷ See, eg, Eddie Fitzmaurice, ‘Beam Me Up, Richard’, *The Sun-Herald* (Sydney, 24 October 2004) 52.

€200,000 per ticket. Furthermore, due to the expansion of the industry itself, individuals working as space tourism service providers also have the opportunity to partake in this life-changing experience.

Having been identified as a novel phenomenon,⁸ the regulation for controlling the space tourism industry continues to develop and evolve in line with its needs as a dynamic industry. While the law in relation to space tourism has been stagnant and even claimed to be unrealistic,⁹ the potential for its development stands strong. Primacy in this area of law has been given to private and public international law pertaining to jurisdictional issues, however, the concerns about labour disputes, customer liability and the environmental impact remain within the realm of company law.

2. PRIVATE INTERNATIONAL LAW CONCERNS REGARDING SPACE TOURISM

The fundamental issue is determining the precise boundary between space law and air law, due to the absence of a tailor-made law developed exclusively for space tourism.¹⁰ Hence, controversy has arisen throughout the years on the extent to which air law remains applicable. Attempts to identify a boundary to claim sovereignty over a geostationary orbit (GSO)¹¹ located above states' territories were seen within 'The Bogotá Declaration'.¹² Even though the declaration resulted in limited success, the most practical altitude agreed upon for identifying a boundary was set at 100km.¹³ A famous point of contention arrived upon by states is that air law and space law are on two opposite ends of the spectrum. A majority of states, for the purposes of maintaining autonomy place limits or even prohibit access to their airspace for numerous reasons. Such reasons include but are not limited to national security, the safety of its citizens, and economic, political, and environmental reasons. However, these restrictions do not extend to the domain of outer space.

⁸ Frans G von der Dunk, 'The Regulation of Space Tourism' in Erik Cohen and Sam Spector (eds), *Space Tourism: The Elusive Dream* (Emerald Publishing 2019) 177–199.

⁹ Freeland (n 1).

¹⁰ von der Dunk (n 8).

¹¹ A geostationary orbit is a circular orbit around the Earth at approximately 35,786 kilometres above the equator, where a satellite orbits at the same rotational speed as the Earth, making it appear stationary relative to a fixed point on the surface.

¹² On 3 December 1976, eight equatorial states — Brazil, Colombia, Congo, Ecuador, Indonesia, Kenya, Uganda and Zaire (now the Democratic Republic of the Congo) signed the Declaration of the First Meeting of Equatorial Countries ('The Bogotá Declaration'), reprinted in English in as a special feature in (1978) 6 *Journal of Space Law* 193, which recognised that, in the absence of any legally determined upper limit to air space, those segments of the geostationary orbit (located approximately 36,000 kilometres directly above the equator) above their territory constituted part of their respective sovereign territories. This assertion has not been accepted by other states and is not considered to properly reflect international law.

¹³ Frans G von der Dunk, Fabio Tronchetti, *Handbook of space law* (Edward Elgar Publishing 2015).

Furthermore, while air law allows for claims of jurisdiction, the same cannot be said for space law. As per the Outer Space Treaty,¹⁴ ‘outer space ... is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means’.¹⁵ This global treaty solidifies that outer space (including the Moon and other celestial bodies) is not subjected to any sovereign claims as opposed to air law.¹⁶ Hence, it allows states the freedom to conduct activities in outer space without the continuous need to seek permission. Following the launch of Sputnik 1, minimal opposition by states was observed concerning claims that the orbiting trajectory of the above space object encroached on their respective sovereign territories. This is further proof of a shared consensus amongst all states where the fundamental legal character of outer space differs from air space.

Assuming that the requisite technology and several other factors are addressed and the space tourism industry advances to the point where even space hotels are established, these authors recognise that the jurisdiction of the manufacturing companies of such hotels would be limited to the confines of their physical structure. In light of this, it can be somewhat concluded that outer space is recognised as a “communal space” and is not subject to any form of consent by a sovereign state especially when recreational activities are involved. However, the private commercial venture must carry out continuous supervision in line with Article VI of the Outer Space Treaty. This is a further indication of how the principles of international law of outer space depart from the traditional legal rules governing air space.

Hence the Chicago Convention¹⁷ provides that ‘every State has complete and exclusive sovereignty over the air space above its territory’.¹⁸ As a result, Article 28 of the above Convention provides that states should retain full responsibility for the safety of aviation in their national airspace. Thus, in contrast with a space shuttle, a civil and commercial aircraft is bound by this law when entering the air space of another state as opposed to a space shuttle. Given the absence of sovereign jurisdiction in outer space, these authors can draw a link between outer space and international waters, where in both domains, states are forbidden from claiming breaches beyond their respective

¹⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967).

¹⁵ Outer Space Treaty, Article II.

¹⁶ For a detailed discussion of the meaning and implications of Article II of the Outer Space Treaty, see Steven Freeland and Ram Jakhu, ‘Article II’ in Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl (eds), *Cologne Commentary on Space Law, Volume I — Outer Space Treaty* (Carl Heymanns, 2009) 44.

¹⁷ Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (‘Chicago Convention’).

¹⁸ *ibid* Art. 2.

jurisdictional territories. As a method of recourse, when ascertaining matters surrounding international waters where even though *prima facie* no nation holds sovereignty, courts have concluded that laws of the country where the ship is registered would apply.¹⁹ Hence these authors propose a similar method when deciphering which law is applicable for future issues in outer space concerning the space industry, especially orbiting hotels and even space shuttles. However, when recreational areas are located on celestial bodies, these would likely be subjected to their own domestic legal framework, mirroring the governance structures successfully implemented on Earth.

The subsequent concern is determining the legal framework of the law which will govern space hotels and ventures. Writers Boas (2012) and Wallace (1997) recognised three aspects of this argument. The first is that it can be assumed that as the key actors are located somewhere on Earth, standard territorial jurisdictions will be applied even if the activities took place in outer space.²⁰ These “key actors” could be registered companies or individuals. The second aspect recognises that jurisdiction would be based on the nationality of such actors. However, in attempting to exercise jurisdictions based on the nationality of the ‘actors’, the states must also keep in mind the difficulties that arise in identifying one’s nationality. Space tourism necessitates that courts consider multiple jurisdictions as many entities are involved, making such a tedious endeavour a reality. Space tourism also considers various participants, operators, and assets from multiple countries which raises numerous complex jurisdictional questions. The third argument follows the provisions laid down in Article VIII of the Outer Space Treaty and the Registration Convention²¹ where states are entitled to exercise partial jurisdiction over space objects registered by them.

Therefore, these authors can agree that air law and space law are on opposing ends in terms of applicability. Hence, courts cannot rely on a similar legal framework when attempting to make sense of the private international law concerns surrounding space tourism. Furthermore, in relation to the launch of space tourism vehicles from Earth, the applicability of different laws provides several challenges. This could even lead to laws providing an impractical solution as a clear defining point for the ‘boundary’ between airspace and outer space was not agreed on. Even though the Chicago Convention provides a pragmatic solution for determining which law ought to be relied upon, the applicable legal regime would depend solely on where the accident occurs. As a result of

¹⁹ ‘How Does Maritime Law Enforcement Work in International Waters?’ (*Schechter, Shaffer & Harris*, 18 October 2018) <<https://maintenanceandcure.com/maritime-blog/maritime-law-enforcement-in-international-waters/>> accessed 10 June 2024.

²⁰ Gideon Boas, *Public International Law* (Edward Edgar Publishing, 2012) 251–255; R.M.M. Wallace, *International Law* (3rd edn, Sweet & Maxwell 1997) 112–117.

²¹ Convention of Registration of Objects Launched into Outer Space (1975).

this uncertainty, these authors suggest a more comprehensive set of rules derived from the existing space law principles to include and address all private international law concerns in space tourism.

3. COMPANY LAW CONCERNS REGARDING SPACE TOURISM

3.1 The Legal Status of a ‘Space Tourist’

The first company law issue surrounding space tourism is who would amount to a ‘space tourist’. As mentioned above the international law of outer space comprises of five main space treaties.²² However, none of these treaties made a single reference to who amounts to a ‘tourist’ but referred to any personnel of a spacecraft as an ‘astronaut’. Despite the Outer Space Treaty failing to provide a precise definition of who amounts to an astronaut, it merely referred to them as ‘envoys of mankind’.²³ One provision in the above Treaty requires states to render all possible assistance to astronauts in the event of an accident or distress.²⁴ Hence, whether this assistance extends to a space tourist must be questioned. The obligations of an astronaut were further extended in the Rescue Agreement²⁵ where even though the word ‘astronaut’ was specifically used, unlike the Outer Space Treaty, the above agreement also referred to ‘personnel of a spacecraft’.²⁶ Moreover, the Moon Agreement,²⁷ also confirmed that ‘any person’ on the Moon could be construed to amount to an astronaut.²⁸ However, even though the legal status of an astronaut is somewhat settled, the extension of this status to commercial space tourists remains ambiguous. These authors can conclude that a ‘space tourist’ would fall within the framework of ‘personnel of a spacecraft’ and so would be in line with the Rescue Agreement. If this is not the case, these obligations under the above Agreement will only extend to the crew and not paying passengers.

This raises the next issue of whether this title of an astronaut extends to all personnel boarded on the spacecraft and includes staff in addition to paying passengers and the crew. These authors recognise the need for various categories of people to make space travel a success. In early 2002,

²² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (1967), Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968), Convention on International Liability for Damage Caused by Space Objects (1972), Convention on Registration of Objects Launched into Outer Space (1975) and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979).

²³ Outer Space Treaty, Article V.

²⁴ *ibid* Article V.

²⁵ Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968).

²⁶ *ibid* Articles I-IV.

²⁷ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979).

²⁸ *ibid* Art. 10.

the ISS established guidelines on the eligibility of entry on the ISS. This understanding covered both ‘professional astronauts’ as well as ‘spaceflight participants’ (who could be construed as space tourists). The term ‘spaceflight participants’ can be subdivided into crew members, publicists, engineers, filmmakers, teachers, space agencies and even tourists *inter alia*.²⁹ However, unlike the crew members of the ISS, the agreement did not require the participants mentioned above to sign a code of conduct. Despite this, merely including tourists on board space vehicles, would require them to adhere to some basic standards of behaviour and responsibility to ensure safety and order. This indicates the need to establish a minimum standard of care.³⁰

Therefore, the term ‘space tourist’ to this date, raises ambiguity. This could result in future issues surrounding uncertainty on the safety and security of space tourists and space tourism companies. Consequently, space tourists may encounter further difficulties in obtaining appropriate insurance coverage and companies would face challenges in obtaining the necessary licences and approvals for their operations. Hence as mentioned above, these authors suggest the development of a clear legal definition to cater to the needs of all space tourists and further develop their safety and security guidelines. By doing so, it would encourage more space tourists to take part in this life-changing experience. Additionally, these authors suggest a liability and insurance framework to address any incident which may occur due to space tourism.

3.2 Labour

When attempting to consider the degree of labour concerns that arise, one vital recognition is that the level of concern remains consistent with the degree of advancement in the space tourism industry. This article recognises some of the many labour disputes that could arise if space tourism develops to the extent of having space hotels, space exploration and any other recreational activities. Regardless of the development of the industry, the ability to protect the industry’s workers remains a matter relevant to company law. The first point of contention lies with the classification of such workers. Would they be considered to fall within the category of an astronaut or must a lesser, more effective classification be created? The classification of astronauts within

²⁹ The US Congress has passed the Commercial Space Launch Amendments Act of 2004, Pub L No 108-492 118 Stat 3974, which provides for amendments to Commercial Space Launch Act of 1984, 49 USC § 70101 (2004), in order to permit human space flight by private corporations. The legislation distinguishes between the ‘crew’ of a space vehicle, who in the course of their employment ‘perform activities ... directly relating to the launch, re-entry, or other operation of or in a launch vehicle or re-entry vehicle that carries human beings’ and a ‘space flight participant’.

³⁰ Freeland (n 1).

the Rescue Agreement, as mentioned with regard to the classification of space tourists, went so far as to refer to them as ‘personnel of a spacecraft’. The introduction of this generalised definition may even be said to include workers in space tourism developments. Assuming once more that the space tourism industry has reached its peak in terms of development, the law would need to cover a vast degree of employment types, from cleaners to chefs, to managers and tour guides. The key differentiating factor between workers in the space tourism industry and traditional professional astronauts is that the latter provides their services to governments or inter-governmental organisations while the former is for privately owned commercial companies.³¹ Generally, this difference would translate to different procedural mechanisms for combatting worker-related issues. However, the uncertainties and hazards involved with life in space increase the need for strict governmental regulation to limit the exploitation of workers in the space tourism industry.

As the scope for development in space tourism is relatively strong, this is likely to impact the employment rate as well. Concerning direct labour, it is likely that passenger space travel would generate more employment in the form of vehicle operations and maintenance at spaceports and orbiting accommodations. Further, indirect employment opportunities arise within the services rendered to space tourism companies in areas such as staff training, certification and insurance.³² Due to the need for a central governing authority for matters of space and inherently space tourism, the question of applicability in training and certification would be a major concern. These authors recognise that a list of agreed and globally accredited basic training and certifications provided by a central authority be made a common requirement within the space tourism sector, all while sharing best practices and lessons learned among space tourism operators to improve worker safety and well-being continuously. A variety of potential areas of dispute arise concerning the space tourism industry alone, all of which need to be addressed through the laws passed by the central authority for this industry. A major concern is whether or not the standard working hours would apply. Furthermore, there are ethical and social considerations that need to be considered, such as maintaining a work-life balance and sufficient psychological support. Due to workers spending extended time away from their families, policies such as rotation schedules must remain in place to

³¹ Frans G von der Dunk, ‘Space for Tourism? Legal Aspects of Private Spaceflight for Tourist Purposes’ [2006].

³² Patrick Collins and Adriano Autino, ‘What the growth of a space tourism industry could contribute to employment, economic growth, environmental protection, education, culture and world peace’ (2010) 66 *Acta Astronautica*.

address such concerns while providing the necessary counselling services to address the mental health challenges associated with working in isolated and high-stress environments.

As the space tourism industry is still embarking on a ‘learning period’,³³ policies have yet to be extended to workers in a fully-fledged industry, with a variety of labour-intensive recreational activities. However, the concerns for space tourists would apply more significantly to space tourism sector workers as well. The risks associated with increased exposure to cosmic radiation and extended periods in microgravity such as muscle atrophy, bone density loss and other physiological changes are major implications which question the possibility of a labour-oriented space tourism sector. It would be essential for companies engaged in space tourism to address these concerns while maintaining a positive visual representation similar to the tourism services provided on Earth. Although it may be possible to introduce automated processes to limit the risks associated with labour, the tourism industry thrives on human connections. Thus, the provision of automated processes comes at both a significant investment and risk. Therefore, it would be crucial to ensure that comprehensive measures are put in place prior to any further advancement in the space tourism industry.

3.3 Liability and Insurance

Even though in theory, space tourism may seem amusing and invigorating, the 1986 Challenger Disaster,³⁴ and the 2003 Columbia Shuttle disaster,³⁵ are evidence of the hazardous nature of space travel. This gives rise to a need to set down a stringent set of safety regulations for future commercial human space travel. These authors must emphasise that regulating space tourism **cannot** be ignored as the consequences of not doing so could be dire. As the space environment is hazardous, companies must consider all physical, chemical and biological factors that can harm humans as well as equipment. With the increase in the number of human space flights throughout the decades, there is a greater probability an accident may occur. Parallels can be drawn with man’s attempt to explore the depths of the ocean further, exemplified by the tragic 2023 OceanGate incident. This further proves that nothing can ever truly be guaranteed as being ‘completely safe’

³³ J Feldscher, ‘A ‘wild environment’: Uncertain safety rules await space tourists’ (*Politico*, 25 December 2019) <<https://www.politico.com/news/2019/12/25/space-tourists-safety-rules-089681>> accessed 10 July 2024.

³⁴ Nasa Communications, ‘The Crew of the Space Shuttle Challenger STS-51L Mission’ (NASA, 3 February 2003) <<https://www.nasa.gov/history/the-crew-of-the-space-shuttle-challenger-sts-51l-mission/>> accessed 29 June 2024.

³⁵ See, eg, ‘The Columbia space shuttle tragedy’, *The Guardian* (United Kingdom, 2011) <<http://www.guardian.co.uk/gall/0,,888237,00.html>> accessed 29 June 2024.

even though all necessary precautions were taken. Hence, companies must implement proper safety standards and address every foreseeable contingency that may arise. This also entails companies establishing a strict set of rules which mandate training for space tourists until spacecraft are developed to such an extent that space travel is a risk-free endeavour. These authors will assess the legal framework surrounding space tourism operators, including all operation safety, accident liability and insurance coverage by exploring strategies to mitigate the risk in the above industry.

As commercial space travel is still in its infancy, the primary evidence consists of failed launch vehicle attempts. In 2014, the failure of an Antares 130 launch vehicle caused the loss of 29 small satellites on the CRS Orb-3 Cygnus mission.³⁶ Between 1975 to 2017, the average failure rate was 6.1%. However, between the years 2000-2017 despite the development of launch vehicle technology, the average failure rate is yet to improve from 6.1%. This indicates that despite the developments of the 21st century, the current technology still does not ensure complete safety towards its end-users, the general public as opposed to highly trained ‘astronauts’ who go into space as a part of their job description. Hence, the minimum standard must be significantly improved and the rate of failure must be brought down to a minimum. Failing to do so presents a very genuine possibility of the development of a commercial space industry disappearing before it has even begun. Companies and manufacturers of these space hotels and space shuttles must implement more stringent safety precautions as these vehicles are specifically designed to carry civilians as opposed to highly trained individuals. It must be noted that there is an attempt to train potential space tourists by companies such as Axiom Space, which is currently providing training to private astronauts and seeks to send the first fully private spaceflight mission to the ISS.³⁷ Hence, these authors propose that when the construction and operation of a space tourism launch vehicle occur, a risk-proof system of responsibility and liability must be established at an international level as a supplement to each state's domestic law.

The legal framework for regulating space tourism can be explained in no other way than a complex web of international treaties, agreements, conventions, national laws and regulations *inter alia*. However, the legal framework that surrounds international space law is limited in its scope, although non-governmental entities carry out national activities in outer space. At a national level, each nation has laid down its own unique laws and regulations. These laws mainly cover issues

³⁶ W Graham and C Bergin, ‘Orbital’s Antares fails seconds after launch’ (*NASASpaceFlight*, 28 October 2014) <<https://www.nasaspaceflight.com/2014/10/antares-fails-shortly-after-launch/>> accessed 29 June 2024.

³⁷ ‘The Future of Space Tourism’ (*Congressional Research Service Report*, 28 August 2020) <<https://crsreports.congress.gov/product/pdf/R/R46500>> accessed 21 August 2024.

such as licensing requirements for space activities and liability for damages. As the legal framework for space tourism is still in its infancy, certain laws were established specifically for space tourism such as the Commercial Space Launch Amendments Act 2004 in the United States. The primary international treaty for the 20th century for regulating space tourism is the Outer Space Treaty of 1967 which acted as the cornerstone for international space law. It further declared all outer space is free for exploration by all nations while also placing restrictions on the placement of weapons of mass destruction in space. States are also required under the above Treaty to continuously supervise the national activities undertaken by non-governmental entities in outer space. Thus, Article VII of the Outer Space Treaty, along with the detailed liability regime established by the Liability Convention of 1972³⁸ imposes international liability on a 'launching state' for specified damages caused by a space object.³⁹ However, in an instance where specific waivers are absent or where various exceptions of the Liability Convention do not apply, states are required to bear an "international obligation of liability on a joint and several basis".⁴⁰ This can be noted as the primary factor for the increase of national space laws enacted by states. Enacting domestic laws allows states to transfer financial responsibility to private entities and still recover damages for which they will remain internationally liable.

Another significant agreement which addressed space tourism was the Moon Agreement of 1979⁴¹ which laid down principles for the use of the Moon and other celestial bodies for peaceful purposes. Other agreements that addressed the concerns surrounding space tourism include the Rescue Agreement of 1968, the Liability Convention of 1972, the Registration Convention of 1975, and the Space Debris Mitigation Guidelines (2007).⁴² However, it must be noted that 'space tourists' themselves are unable to claim compensation under the Liability Convention. As opposed to highly trained astronauts, as space tourism mainly revolves around civilians, it is likely that a more carefully curated 'exclusion of liability' clause for death and injury will be included as terms and conditions for their services even though domestic law will dictate the extent to which such provisions will be enforceable. However, even though each state's law is unique to its own, these authors propose a uniform international law liability regime as without a sense of uniformity, it

³⁸ Convention on International Liability for Damage Caused by Space Objects 1972, Article I(a).

³⁹ *ibid* Article I(d).

⁴⁰ Freeland (n 1) 17, For an analysis of the terms of the Liability Convention, see Steven Freeland, 'There's a Satellite in My Backyard!: MIR and the Convention on International Liability for Damage Caused by Space Objects' (2001) 24 University of New South Wales Law Journal 462.

⁴¹ (n 26) Article IV.

⁴² Space Debris Mitigation Guidelines of the United Nations Committee on the Peaceful Uses of Outer Space (2007).

would give rise to future issues surrounding uncertainty. This regime should entertain all possible scenarios a passenger may face from the moment of launch to safely returning back to Earth.

A good starting point is for companies and states to consider not only all existing space laws but also the legal framework surrounding the liability of civil airline companies for the death or injury of passengers during commercial air travel. Even though the framing of space tourism laws is somewhat in line with the airline industry, it must be remembered that commercial airline laws are structured specifically to the peculiarities of that industry. However, there still remain several unanswered questions surrounding space tourism. One such question is whether tourism activities in outer space be subjected to absolute liability or whether it should operate under a liability regime based solely on the principles of negligence as followed under international air law.⁴³

When addressing the question of unlimited liability, these authors must note that throughout the years there has been evidence by leading commentators for the establishment of a limited liability regime surrounding space tourism.⁴⁴ Some were of the opinion that by becoming a space tourist voluntarily, these passengers are suggested to have accepted the inherent risks associated with space travel. Despite the considerable progress in space tourism by states, these authors can state with certainty that the current international space rules surrounding state responsibility and liability are, in a word, **‘insufficient’**. This ‘new regime’ must address issues not only concerning passenger liability but even include third-party liability. Currently, there remains only a handful of insurance providers that have extended their services to space tourism. Examples of these companies include Mitsui Sumitomo Insurance,⁴⁵ Allianz Global Corporate & Specialty (AGCS), and AXA XL⁴⁶ *inter alia*. Although the aforementioned companies do not solely provide insurance for space tourism, they demonstrate that humanity is moving a step closer to establishing a risk-free space-oriented insurance market. While the space insurance market has indeed matured due to the developments in space travel, this ‘maturity’ does not (yet) extend to space tourism. Commercial space tourism still requires a well-thought-out risk management analysis from the perspective of operators as well

⁴³ In this regard, it should be noted that Article III of the Liability Convention provides that, if the damage is caused ‘elsewhere than on the surface of the earth’, liability only arises where the damage is due to ‘fault’ by those responsible for the space object causing the damage.

⁴⁴ International Law Association, ‘Final Report on the Review of Space Law Treaties in View of Commercial Space Activities’ (International Law Association’s Seventieth Conference, New Delhi, 3 April 2002) 209.

⁴⁵ K Arauollo, ‘Mitsui Sumitomo announces plans to develop space tourism insurance’ *Insurance Business* (Asia, 20 December 2023) <<https://www.insurancebusinessmag.com/asia/news/breaking-news/mitsui-sumitomo-announces-plans-to-develop-space-tourism-insurance-470809.aspx>> accessed date 3 July 2024.

⁴⁶ AXA XL, ‘Space Insurance’ (AXA XL) <<https://axaxl.com/insurance/products/space-insurance>> accessed 3 July 2024.

as establishing compensation schemes in the event of an accident. Adhering to the aforementioned proposals will slowly but surely increase the number of users (civilians) choosing space tourism.

3.4 Sustainable Construction and Waste Management

It is impossible to consider company law in the 21st century without ensuring that all commercial practices also seek to protect the environment. One of the greatest concerns with regard to tourism in general is the carbon footprint that comes about from recreational activities. Although such activities are key drivers of some economies, the fact that such services are purely based on pleasure means that any harmful waste and emissions are not easily forgiven. As such, the sector must consider ways to mitigate such risks. Due to the high potential to pollute the space tourism industry, the environmental impact must be held as a primary concern. Similar to all modes of transportation, rockets too emit a combination of gases and particles into the atmosphere. In comparison with aeroplanes, rockets emit around 200-300T of CO₂ per launch. In 2022, the National Oceanic and Atmospheric Administration (NOAA) estimated that rockets emitted 1000T of black carbon into the atmosphere annually.⁴⁷ As the extent of the space tourism industry is limitless, it can only be assumed that this number would only increase once space tourism gains momentum.

Regarding the construction of space tourism ventures such as space hotels and other facilities for recreational activities, the only available permanent structure in space as of now, is the ISS.⁴⁸ The current goal of space tourism operators is to facilitate tours to the ISS, which was made public by NASA via a press release in June 2019.⁴⁹ Currently, a variety of companies are attempting to be the first to make a space hotel a possibility. One such company is ABOVE Space Development Corporation, specialised in the design and construction of space tourism hotels, which currently has two projects, the Voyager Station and the Pioneer Station in the works.⁵⁰

As such, the established process is that facilities for space tourism ventures would need to be constructed on Earth in parts, following which they would be gradually built, piece by piece. Should

⁴⁷ R Zisk, 'The Space Industry's Climate Impact: Part 2' (*Payload* 15 December 2023) <<https://payloadspace.com/the-space-industrys-climate-impact-part-2/>>, accessed on 28th July 2024

⁴⁸ Rosanna Sattler, 'Transporting a Legal System for Property Rights: From the Earth to the Stars' (2005) 6 Chicago Journal of International Law 23.

⁴⁹ NASA, 'NASA Opens International Space Station to New Commercial Opportunities, Private Astronauts' (NASA, 7 June 2019) <<https://www.nasa.gov/news-release/nasa-opens-international-space-station-to-new-commercial-opportunities-private-astronauts>> accessed 14 July 2024.

⁵⁰ N Mafi and K McLaughlin, 'A Hotel in Space Could Be Operational in Just Five Years' (*Architectural Digest*, 5 December 2023) <<https://www.architecturaldigest.com/story/worlds-first-hotel-in-space>> accessed 14 July 2024.

such ventures be constructed within planets which are deemed habitable, it is likely that the construction might even take place on the planet. A significant period of time, testing and dedication would be required to identify the most suitable materials to build consumer-friendly facilities which also need to protect space tourists and workers from the risks associated with habitation in space. Nonetheless, such companies must consider the use of sustainable materials such as recycled metals, eco-friendly composites and low-emission concrete as a means of ensuring a reduced environmental impact and improved sustainability of construction projects.

Additionally, the question of what energy sources space tourism facilities would utilise is an important consideration to be made. Currently, the ISS is being powered through the use of solar cells which convert sunlight to electricity. As such, any recreational facilities within orbit have the ability to utilise solar power as well. However, a majority of space tourism ventures would not be found in orbit due to the harmful impact of prolonged radiation exposure and as such, it is essential to consider alternative forms of energy found in different celestial bodies. Scientists have made significant progress in identifying the availability of wind power on planets with significant atmospheric movement such as Mars. However, the effectiveness of such measures would depend on the planet and the investment in research and development for the discovery of new energy resources.

An effective waste management system also remains the cornerstone of a successful space tourism industry. Such service providers must implement a robust waste management strategy with key focus on reducing waste production, reusing materials where possible and recycling remaining waste. Furthermore, while utilising waste segregation systems, circular economy principles must be adopted, where waste products are reintroduced into the production cycle, reducing the need for raw materials and minimising waste. It is vital that all, if not some of these strategies and practices are given statutory or regulatory importance, and strict policing measures are implemented to ensure compliance. Furthermore, transparent waste management practices must be maintained through regular reports on sustainability measures, which are routinely validated by the central authority governing space matters. It is essential that any necessary permits are obtained and proper disposal methods are used throughout the lifetime of the space tourism industry.

4. ADAPTATIONS OF SPACE TOURISM IN SEVERAL COUNTRIES

4.1 The United States (US) Approach

The US taking substantive strides in regulating private spaceflight and space tourism would be a confident assertion, as demonstrated through the classification of all suborbital vehicles uniformly.

This approach thus, eliminated the outer space versus airspace boundary issue. The Commercial Space Act 1998 was amended in an attempt to address liability, indemnification and licencing for reusable launch vehicles (RLVs) as well⁵¹ as allowing US-based companies to obtain experimental permits for test flights. Licences under the 1984/1998 Act included third-party liability for accidents at government launch facilities; however, it is important to note that passenger liability was not initially addressed. The common practice was that spaceflight participants sign an informed consent form acknowledging the risk of ‘**probable accident**’ and “that the United States Government has not certified the launch vehicle as safe for carrying [. . .] space flight participants.”⁵² This informed consent process is seen as temporary and uncertain as it leaves safety standards largely in the hands of profit-oriented private entities. Hence, as the industry approaches maturity, statutory and mandatory regulations for passenger liability and safety certifications will need to be developed to ensure a robust regulatory system for space tourism.

4.2 The European Approach

European nations such as Sweden, England, Scotland and France have developed several space flight projects. Adopting the US model which has since been deemed as an “established approach”, Europe aims to align its space tourism regulations accordingly.

In **Sweden**, efforts in relation to space tourism have centred around the Kiruna launch site. The 1982 Act on Space Activities⁵³ regulates these activities, requiring a licence for operations. However, it does not specifically recognise space tourism, crew licensing or vehicle certification, and only considers international third-party liability, not passenger liability. Similarly, **England and Scotland** initially adhered to the Outer Space Treaty of 1986, requiring licences for space operations. Due to the rising demand for private suborbital flights, the UK introduced the Space Industry Act 2018, emphasising “informed consent” to waive passenger liability. This Act does not include provisions for crew licensing and vehicle certification as well. The current hybrid legal regime is overseen by the UK Civil Aviation Authority, with licensing authority recently transferred from the UK Space Agency.⁵⁴ In **France**, the 2009 national law on Space Operation

⁵¹ TR Hughes and E Rosenberg, 'Space Travel Law (and Politics): The Evolution of the Commercial Space Launch Amendments Act of 2004' (2005) 31 Journal of Space Law 1.

⁵² 51 U.S.C., § 50905(b)(5)(B).

⁵³ von der Dunk (n 8) 14.

⁵⁴ *ibid* 15.

mandates the authorisation to launch or return space objects. This law comprises cross-waiver liability clauses for participants in space operations unless “wilful misconduct”⁵⁵ is involved.

4.3 The Russian Approach

After a decade-long hiatus, Russia is once again relaunching an ambiguous bid to dominate the world’s budding space tourism industry,⁵⁶ aiming to compete with billionaires, the US and China. Russia in its attempt to flaunt its comeback, in 2021, dispatched Japanese billionaire Yusaku Maezawa and his assistant to the ISS as its first launch of tourists in 12 years.⁵⁷ However, as opposed to the past, Russia’s new path to industry dominance is hindered due to various new obstacles. Such obstacles are reminiscent of when the Russian space agency (Roscosmos) was a monopoly that sent cash-flushed individuals to space. However, this monopolistic nature changed when the United States Space Agency (NASA), retired its own shuttle and snatched up every seat the ISS Roscosmos had to offer for the next decade.⁵⁸ Furthermore, Elon Musk’s successful ISS mission with SpaceX, caused NASA to drop Roscosmos. This resulted in a huge financial blow to the Russian Space Agency. Historically, Russia, China and the US were considered the ‘only countries’ capable of manned flights. However, with the emergence of new competitors in the industry, Russia is forced to enhance its efforts and capabilities for the future.

4.4 The Chinese Approach

Being one of the world’s biggest superpowers, it would be a grave mistake to think that China does not have its eyes set on space tourism. Currently, China plans to open its first space station dedicated to tourism purposes, Tiangong before 2032.⁵⁹ One of the major drawbacks recognised within the Chinese market for space tourism services is the lack of demand,⁶⁰ as a result of which this industry has not seen rapid development, as has been seen in some other instances. Nonetheless, China’s growing commitment to space tourism is reflected in its substantial investments in space infrastructure and technology, including the development of reusable

⁵⁵ French Space Operation Act 2008, Art. 19.

⁵⁶ France 24, ‘Russia is ready to ‘fight’ for space tourism supremacy’ (*France 24*, 19 December 2021) <<https://www.france24.com/en/live-news/20211219-russia-ready-to-fight-for-space-tourism-supremacy>> accessed 27 July 2024.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ A Jones, ‘China plans to open its Tiangong space station for tourism within a decade’ (*Space.com*, 22 March 2022) <<https://www.space.com/china-tiangong-space-station-tourism-plans>> accessed 28 July 2024.

⁶⁰ *ibid.*

rockets.⁶¹ As a result, forecasts indicate that China's space tourism industry will be worth \$401 million by 2027.⁶² This is supported through organisations by the Chinese Academy of Sciences which is a chiefly government-run commercial spinoff which is already in the process of developing rockets for space tourism purposes. Chinese space tourism service providers share the same goal as all other nations, which is to attempt to halve the cost of space travel to provide an attractive package for space tourists.

5. CONCLUSION

At the offset, one of the key points to note is that space tourism is still in its infancy in terms of development. As such, these authors propose the creation of a designated body for better-equipped space laws to further streamline the space tourism process. Furthermore, research and development are still lacking in areas such as space debris management, establishing clear safety standards, liability regimes and intellectual property rights inter alia. Finally, there ought to be a delicate balance between innovation in space tourism while also ensuring that robust legal frameworks are in place to protect all stakeholders. By doing so, it would encourage more companies to invest in the above cause. Hence, as the era of space tourism dawns, humanity's journey to the stars is already underway.

⁶¹ Ling Xin, 'China catches up in commercial space: an interview with Ji Wu' (2022) 9 National Science Review.

⁶² L Wan, 'Space tourism by 2024 a growing possibility in China' (*Channel News Asia*, 21 November 2021) <<https://www.channelnewsasia.com/commentary/space-tourism-virgin-galactic-spacex-blue-origin-2319651>> accessed 28 July 2024.

CONFLICT OF LAWS

AN ANALYSIS ON THE CONCEPT OF DOMICILE UNDER PRIVATE INTERNATIONAL LAW

Dinithi Wijayaratne

“By ‘domicile’ we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it.” — Lord Cranworth V-C in Whicker v Hume¹

ABSTRACT

Domicile is an important concept under Private International Law for individuals and legal systems dealing with cross-border matters. The said concept acts as a connecting factor which links a person with a particular legal system. The law identified through such a connection would lead to one's domicile, which in turn would represent his personal law. This process of identifying the personal law applicable to an individual is important in conflict of law matters such as, determining the validity of a marriage, will, legitimacy of children, intestate succession and many more.² This concept holds great significance as it determines which legal rules have authority over the above legal matters, specifically due to the involvement of multiple legal systems. Therefore, this article aims to discuss the definitions and general principles surrounding domicile and individually analyse the three main types of domiciles, ensuring fairness and order is achieved.

1. DEFINITIONS OF DOMICILE

Lex domicilii (Law of Domicile) is the law of the country where a person lives permanently and acts as the governing law by which the rights of persons are determined in private international law disputes within common law countries. Defining domicile is not an easy task as the concept isn't uniform worldwide and is subject to diverse meanings. The Oxford Advance Learners Dictionary defines domicile as: *“The place where somebody lives, especially when it is stated for official or legal purpose.”*³ The Black Law Dictionary defines the concept of domicile as: *“A person's legal home. That place where a man has his true, fixed and permanent home and principal establishment,*

¹ [1858] 7 HLC 124.

² J Fawcett and J Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press, 2008), 159.

³ S. Wehmeier, *Oxford Advanced Learner's Dictionary* (6th edn, Oxford University Press, 2000).

and to which whenever he is absent he has the intention of returning.”⁴ Sir George Jessel in the case of *Doucet v. Geoghegan*⁵ stated that “The term domicile is incapable of definition” and British legal scholar J. H. C. Morris asserted: “Domicile is easier to illustrate than it is to define.”⁶ Therefore, domicile can be identified as a legal concept that describes the country one considers his rights and responsibilities to be rooted in. A place one deems to ‘belong’ to ‘as his centre of gravity,’⁷ thus making it his permanent home.⁸

Lord Cranworth in the case of *Whicker v. Hume*⁹ goes on to emphasise the meaning of domicile to be one’s permanent home. Despite how clear and simple it seems; it can be misleading due to the uncertainty and divergence in its application to particular cases. J. H. C. Morris disagrees with Lord Cranworth on the basis that a person’s domicile may not always be his permanent home. According to Morris: “A person may be domiciled in a country which is not and never has been his home; a person may have two homes but he can only have one domicile.”¹⁰ The essential purpose of domicile is to connect a person with the country in which he has his home permanently or indefinitely. The specific rules, however, do not always, and in many cases cannot, achieve that end simply because some people have no home or no settled home in any particular country.¹¹ In order to better understand the practical restraints surrounding the concept of domicile, one must first identify the general principles related to domicile as well as the different types of domiciles.

2. GENERAL PRINCIPLES OF DOMICILE

6.1

In the late 19th century when international trade and financial transactions expanded rapidly, it resulted in the development of family law and commercial law involving a foreign element. This paved the way to a methodical body of rules on the conflict of laws to come into existence. English courts thereafter developed more sophisticated domicile rules for adjudicating cases involving foreign elements by relying on the writings of jurists such as Story J, A.V. Dicey and Huber.¹² Based off them, English writer Elizabeth Crawford set down the following rules under domicile in

⁴ B. A. Garner, *Black’s Law Dictionary* (8th edn, Thomson West Publishing Co., 2004).

⁵ (1878) 9 Ch. Div. 441.

⁶ J.H.C Morris, *Conflicts of law*, 4th edn 126.

⁷ *Re Flynn* [1968] 1 All ER 49.

⁸ *Whicker* (n 1).

⁹ *ibid.*

¹⁰ *Conflicts of law* (n 6).

¹¹ *Her Majesty’s Stationery Office*, Law Com No. 168 and Scott Law Com No. 107.

¹² Sagar Baral, ‘Evolving Trend of Domicile and Nationality in Private International Law’, 263.

an organised fashion extracting a comprehensible set of principles from case law.¹³ These rules are structured in such a way that a domicile can always be assigned to every person.

2.1 No person can be without a domicile

Lord Westbury in the case of *Udny v. Udny*¹⁴ stated that this rule is a settled principle that cannot be changed under any circumstances. This well-established principle ensures that every individual has a connection to a specific system of law so that their actions can be regulated by it, ensuring that a person does not have two competing laws governing the same matter.¹⁵ An individual has the freedom to change his domicile, however he may not have the freedom to not have a domicile at all. By operation of law, every person is assigned a domicile at the time of birth. A legitimate child is assigned the domicile of the father, an illegitimate child is assigned the domicile of the mother, and a foundling is assigned the domicile of the place where he is found. This assigned domicile remains in effect until the person acquires a new domicile.¹⁶

2.2 No person can have more than one domicile at the same time

A country for the purpose of the conflict of laws is a law district,¹⁷ a territory subject to a separate system of law, which may for political purposes be part of a larger political state.¹⁸ In a federal state where the legislative authority is distributed between central and state legislatures, the law district is generally the state where the *propositus* has established his home.¹⁹ This ensures that a person associates his domicile to a specific set of laws abiding by the principle. Hence, a composite state, such as the United Kingdom, or a federal state such as Australia (New South Wales and Queensland), contains a number of law districts. For example, a person should be domiciled in England, Scotland or Northern Ireland, and not in the United Kingdom as a whole. A resident in the USA, for instance, is not domiciled in the USA, but in one of its states. Dual citizenship is permitted in several countries, yet a person cannot have more than one domicile, even though he may have more than one residence, home or nationality. Therefore, under the concept of domicile, when an individual changes his or her domicile of origin to a domicile of choice, at that point, the

¹³ Elizabeth Crawford, 1998.

¹⁴ *Udny v Udny* (1869) L.R. 1 Sc & Div 441.

¹⁵ Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws*, (5th edn, Oxford University Press, 2016) 318.

¹⁶ W.C. Dundas, *Emigration and its effect upon Nationality and Domicile* (1912).

¹⁷ A. V. Dicey, *Dicey, Morris and Collins, The Conflict of Laws* (15th edn, Sweet & Maxwell Ltd, 2012).

¹⁸ *Clarkson & Hill's Conflict of Laws* (n 15) 318.

¹⁹ *Cheshire, North & Fawcett: Private International Law* (n 2) 64.

applicable law is the domicile of choice and the domicile of origin would remain dormant, ready to step back in as soon as the domicile of choice is lost, thus proving that no person can have more than one domicile at a time.

2.3 An existing domicile is presumed to continue until it is proved that a new domicile has been acquired

There is a presumption that an existing domicile must be maintained, as one's domicile binds him to a particular country, unless and until it can be proved that the person has changed it. The burden of proving a change of domicile lies on those who assert it.²⁰ If the evidence adduced is conflicting or isn't convincing, courts decide in favour of the existing domicile.²¹ Conflicting views have been voiced regarding the level of evidence necessary to rebut the presumption. According to Scarman J, 'proof on a balance of probability' is the standard used in civil procedures and more suitable to prove a change in one's domicile, as opposed to adopting proof beyond reasonable doubt under the criminal procedure.²² However, in the words of Sir Jocelyn Simon P, "*the standard of proof goes beyond a mere balance of probabilities*".²³ This observation is related to cases such as *Winans v. AG*,²⁴ when it seems that the purpose to maintain a domicile of origin is nearly indisputable. Nevertheless, Scarman J emphasised that two aspects are evident; firstly, despite changes, one's domicile of origin would always remain as it is and secondly, obtaining a new domicile is a much serious and complicated matter that cannot be taken lightly. Depending on the type of domicile that is conferred, there are different levels of presumption of continuity. It is weakest when that domicile is one of dependency²⁵ and strongest when domicile is one of origin, for '*its character is more enduring, its hold stronger, and not easily shaken off.*'

2.4 Domicile denotes the connection of a person with a territorial system of law

A person's domicile binds them to a particular territorial legal system, but this does not always mean that the same rules apply to all social classes. When referring to a country's domicile, we presume that the same legal framework is in place throughout that nation.²⁶ However, it is possible that different states may have different rules regarding different matters such as marriage and

²⁰ *Winans v AG* [1904] 41 SLR 872.

²¹ Burgin & Fletcher, *Conflict of law*, 3rd edn 60.

²² *Re Fynn* (No.1) [1968] 1 WLR 103.

²³ *Henderson v Henderson* [1967] 77.

²⁴ (1904) AC 287.

²⁵ *Harrison v Harrison* (1953) 1 WLR 865.

²⁶ *D.P. Joshi v State of Madhya Pradesh* (1955) AIR SC 334.

succession, and that laws pertaining to these topics may not be the same throughout the nation. For example, in India, various rules apply to different groups of individuals depending on their caste, religion, or ethnicity.²⁷ In such a scenario, for the purposes of domicile, any region with its own unique system of laws would be considered a separate nation.²⁸

2.5 Domicile is always ascertained under the *lex fori*.

Under the English common law system, which is adopted by many countries, when addressing a case involving a foreign element, the person's domicile is based on the English notion of domicile²⁹ and not according to the foreign concept. This principle is based on the tenacity of a domicile's character.³⁰ Therefore, for the purpose of English Private International Law, domicile means domicile in 'an English sense.' Accordingly, an English citizen who meets the English requirements may, in the eyes of English law, get a preferred domicile in France, even if he does not meet the French requirements.³¹ While domicile should initially be classified according to English law, if this results in a reference to a country where the law is not territorially based, it is required to adopt that country's personal law criteria in order to determine the applicable law.³² For instance, in determining the essential validity of a marriage, English choice of law rules would normally lead to the parties' domiciliary law.³³

3. CLASSIFICATIONS OF DOMICILE

3.1 Domicile of Origin

The domicile which a person acquires at birth is known as the domicile of origin. The domicile of origin is conferred on the basis of parentage,³⁴ therefore it does not matter where the child is born. Each individual has an established domicile from birth, which is irrevocable by law. The law of domicile is largely a product of common law norms. Under English law, a child's domicile of origin is determined based on whether the child is legitimate or illegitimate. In the case of a legitimate child, the domicile of his/her father governs the child's domicile. In contrast, the domicile of an

²⁷ B.P. Zirinis & E. A. Viole, *Planning for changes of domicile, residence, citizenship, and nationality*, (2012) 18(8), 773-784.

²⁸ Harrison (n 25).

²⁹ *Re Annesley* [1926] Ch 692; *Chandler v Chandler* [2011] EWCA Civ 143.

³⁰ M. Sherwood, *Race, nationality and employment among Lascar seamen* (1991) 17(2) *Journal of Ethnic and Migration Studies*, 229-244.

³¹ Author-Paras Diwan, *Private international Law*, 4th Edn, 187.

³² *Clarkson & Hill's Conflict of Laws* (n 15) 319.

³³ *ibid* 319.

³⁴ *ibid* 320.

illegitimate child is governed by the domicile of his/her mother. Hence, the domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which its parents are residing, or the country to which its father belongs to by race or allegiance or the country of the infant's nationality.³⁵ In the case of *Udny v. Udny*³⁶, Colonel Udny was born in Tuscany and lived in Tuscany as his father was a British consular. Udny's father was domiciled in Scotland. The court ruled that, regardless of the place of birth, as a legitimate child, Udny's domicile of origin is determined by his parent's domicile at the time of his birth, namely his father's domicile Scotland. In this case, the court rejected 'place of birth' as the basis for acquiring a domicile of origin.

A posthumous child is a legitimate child born after his/her father's death. According to English law, such a child's domicile is determined by its mother. The law appears to be different in India, where the posthumous child's domicile would be the country where his father was domiciled at the time of his death.³⁷ An exception to the rule is that a foundling, whose parents are unknown, is considered to be domiciled in the place where he is found or born.³⁸ For example, if a child was found after a tragic disaster not knowing who the child's parents are, that child's domicile of origin would be the place the child was found. This was specified in the case of *Re McKenzie*³⁹ where an illegitimate child whose mother's domicile was unknown, was treated as found in the child's country of birth and therefore having a domicile of origin there. The domicile of origin obtained at birth remains unchanged, unless the child is the subject of an adoption or parental order. The only way a child's domicile can be completely changed is by way of adoption which is another exception to the general rule. The law states that such a child is considered the legal child of the adopting or commissioning parents⁴⁰ when he is adopted, or when a parental order is filed for a surrogate child, and the child's place of origin is presumed to change accordingly.⁴¹ Nevertheless, a person's domicile of origin is of fundamental significance and is retained until it is evident that another domicile has been acquired.

³⁵ A. V. Dicey, *Dicey's Conflict of Laws* (6th edn, Stevens & Sons, 1949) 78.

³⁶ [1869] LR 1 Sc & Div 441; *Henderson v Henderson* [1967] P 77.

³⁷ Indian Succession Act, 1925, s. 7.

³⁸ P. S. J. Smart, *Domicile of Choice and Multiple Residence* (Oxford Journal of Legal Studies, 1990) 572-578.

³⁹ [1951] 51 SRNSW 293.

⁴⁰ Adoption and Children Act 2002, s. 67(1); Human Fertilisation and Embryology Act 2008, s. 54(1).

⁴¹ Dicey, *Morris and Collins, The Conflict of Laws* (n 17) 141.

3.1.1 Issues surrounding domicile of origin

The concept of domicile of origin has often been criticised as being archaic and unsatisfactory.⁴² Firstly, the rule that domicile is dependent on legitimacy ignores the reality that domicile is frequently a prerequisite for legitimacy.⁴³ It doesn't seem possible to ascertain the basis for legitimacy of a child until the child's domicile has been established. Nevertheless, the domicile cannot be established until the question of legitimacy has been settled either. If the child is considered legitimate by the laws of either parent's domicile, that may be the best solution, given the lack of any rational way out of this circular argument. Authority, however, is in favour of implementing the father's domiciliary legislation as of the child's birthdate.⁴⁴ Secondly, there is no longer any rational basis for a legitimate child to inherit the father's domicile over the mother's domicile. This historical justification for this rule was that a woman assumed her husband's domicile as a domicile of dependence after marriage. When this principle was operative, it made sense for the child to inherit the domicile of the father. However, in 1974 the principle of dependency of the wife was abolished with the passing of 'The Domicile and Matrimonial Proceedings Act 1973' (DMPA 1973) (UK) mainly due to its discriminatory character. However, to abolish the basic rule whilst keeping its repercussions makes little to no sense.⁴⁵ Thirdly, when parents are living apart, children take the domicile of the parent they have a home with.⁴⁶ It is illogical to claim that if a married mother and father are living apart at the time of the child's birth and if the child lives with the mother, for the child to immediately take on the father's domicile of origin, which could instead be replaced by a domicile of dependency on the mother.⁴⁷

Finally, if a child is adopted by a same-sex couple,⁴⁸ when the parental order is granted in their favour, or when a child is born to a woman in the same-sex marriage or civil partnership, the child in question is considered to be a legitimate child according to Section 67(2) of the Adoption and Children Act 2002. Moreover, the civil partner or female spouse of the woman giving birth to the child is deemed to be the child's parent under Section 42 of the Human Fertilisation and Embryology Act of 2008 which goes on to state that such a child 'is the legitimate child of the child's parents' under Section 48 (6) of the said statute. However, the prevailing common law rules

⁴² *Clarkson & Hill's Conflict of Laws* (n 15) 320.

⁴³ *ibid* 320.

⁴⁴ *Re Bischoffshein* [1948] Ch 79; *Hashmi v Hashmi* [1972] Fam 36.

⁴⁵ *Clarkson & Hill's Conflict of Laws* (n 15) 321.

⁴⁶ Domicile and Matrimonial Proceedings Act 1973, s. 4(2).

⁴⁷ *ibid*.

⁴⁸ Human Fertilisation and Embryology (parental Orders) Regulations 2010, SI 2010/985, Schedule 1.

fail to provide clear guidance regarding the basis for attributing the correct domicile of origin for the child in such a scenario. For example, if we are to indeed consider a child born into a same-sex marriage to be a legitimate child, under the current rules for determining one's domicile of origin, the domicile should follow that of their father at the time of the child's birth. However, that would not be possible in the case at hand as the child has no 'father'. Therefore, the current law is discriminatory and violates Article 14 of the European Convention on Human Rights as the current common law regulations assume that a legitimate child's parents could never be of the same gender and do not address the issue of how a domicile of origin ought to be decided in such circumstances. In light of these criticisms, there is a compelling argument to make a significant revision to these rules. In the 1980s the Law Commission of England proposed that dependent children should be regarded as domiciled in the country with which they are most closely connected to⁴⁹ and that if the domicile of origin is to be retained, a child's domicile of origin and dependence at birth must coincide.

3.1.2 The Tenacious nature of a domicile of origin

It is theoretically possible for persons to maintain their domicile of origin for several generations even if none of them have lived in such a country for any significant amount of time.⁵⁰ The domicile of origin never truly disappears, even if someone chooses or is forced to take up a new domicile. It simply goes into abeyance and reappears whenever there are intervals between gaining and losing a domicile. This is possible due to the revival and tenacious nature of a domicile of origin. It is more difficult to lose a domicile of origin compared to the other forms of domicile as it is generally 'associated with a person's native character'.⁵¹ In the case of *Ramsay v. Liverpool Royal Infirmary*⁵², it was decided that a Scottish domicile of origin had not been lost even though the propositus had spent the last 36 years of his life in England, with no indication whatsoever of returning to Scotland and had even made plans to be buried in England. Therefore, the tenacious nature of one's domicile of origin has a strong hold that cannot be easily shaken off.

The tenacity of a domicile of origin focuses on the ruling that the burden of proving the abandonment of a domicile of origin rests on the party purporting to establish a change of

⁴⁹ Law Commission No. 168.

⁵⁰ *ibid.*

⁵¹ *Henwood v Barlow Clowes International Ltd* [2008] EWCA Civ 577.

⁵² [1930] AC 588.

domicile.⁵³ Initially the case of *R v R (Divorce: Jurisdiction: Domicile)*⁵⁴ stated that the standard of proof required to establish loss of a domicile of origin was a heavy one and the case of *Cyganik v Agulian*⁵⁵ confirmed it by stating that the burden of proof is heavier than proving a loss of a domicile of choice through the judgement of Mummery LJ. His Lordship held that, there was no clear evidence that the deceased who was born in Cyprus, had ever intended to reside permanently or indefinitely in England where he had worked for 43 years of his life on the basis that he had not acquired a domicile of choice in England.⁵⁶ However, based on the Law Commission's recommendations, there should be no 'special tenacity' given to domicile of origin. More modern cases have been willing to allow a domicile of choice to take precedence over a domicile of origin.⁵⁷ The case of *Brown v. Brown*⁵⁸ emphasised that there is no 'heavy burden' of proof and the case of *Henwood v. Barlow Clowes International Ltd*⁵⁹ went on to disapprove the case of *Cyganik* by applying the normal civil burden of a balance of probabilities. Nevertheless, if one's domicile of origin is only operative under the 'default rule'⁶⁰ there is no need for evidence and can easily satisfy the balance of probabilities test.

3.1.3 The Reviving nature of a domicile of origin

According to the doctrine of revival, whenever a domicile of choice or domicile of dependence is abandoned, the domicile of origin that was once held in abeyance, steps back into place until a new domicile is acquired.⁶¹ This revival rule was described as the 'default rule' in *Henwood*⁶² to be the only reason why a domicile of origin is needed. In the said case, a man's domicile of origin was England. He disliked England and therefore moved to the Isle of Mann where he acquired a domicile of choice. Some years later his business collapsed in Mann and he was forced to leave. He then spent his remaining days living between France and Mauritius. The courts held that he had lost his domicile of choice in Mann as he left there permanently. Even though there was an assumption that he obtained a domicile of choice in either France or Mauritius, as it was just a mere assumption, the courts concluded that his domicile of origin was revived as the domicile at the time

⁵³ *Re Fuld* [1968] P 675; *Winans v A-G* [1904] AC 287.

⁵⁴ [2006] IESC 7.

⁵⁵ [2006] EWCA Civ 129, Scarman J in *Re Fuld* [1968] P 675; See also *Holliday v Musa* [2010] EWCA Civ 335.

⁵⁶ *Clarkson & Hill's Conflict of Laws*, (n 15) 322.

⁵⁷ *Sekhri v Ray* [2014] 2 FLR 1168; *Perdoni v Curati* [2012] WTLR 505.

⁵⁸ [1981] 3 FLR 212.

⁵⁹ [2008] EWCA Civ 577.

⁶⁰ Revival Rule described in *Henwood* (n 51).

⁶¹ *Udny* (n 14); *Tee v Tee* [1973] 3 All ER 1105.

⁶² *Henwood* (n 51).

of his death to be England. Abiding by the first general principle mentioned above,⁶³ this rule ensures that everyone has a domicile at all times.

Despite the reasoning mentioned above, the domicile of origin's function under the doctrine of revival has been questioned. The fundamental question is whether a domicile of origin ought to be permanently eliminated once a person abandons it, without adopting another domicile. Three advantages⁶⁴ can be identified by allowing one's domicile of origin to be revived. Firstly, it provides certainty and predictability to a person who wishes to renounce a domicile of choice without adopting an alternative domicile. Secondly, the resilience of a person's domicile of origin makes it easier to offer advice on the applicable law arising from the revival of one's domicile of origin. Thirdly, if a domicile of choice is abandoned without reviving the domicile of origin, there may be uncertainty as three potential domiciles may arise: whether it would be, the continuation of the "abandoned" domicile of choice if the individual maintains physical and personal ties there; the adoption of another domicile of choice, such as a place they have relocated to; or if they choose to reinstate their domicile of origin.

As a result, selecting one of the three potential domiciles is made clearer when a domicile of origin is automatically revived. It also serves as the final checkpoint when a person's intentions are not fulfilled by any other method when identifying the single and correct place of domicile, because if every intention or expression of intent prohibits a man from having a fixed domicile, then no man would ever have a domicile other than his domicile of origin.⁶⁵

Despite fulfilling the requirement that a person is never left without a domicile, this is a concept that has been criticised: "The doctrine of revival of the domicile of origin can, however, operate crudely, and is difficult to defend in modern times".⁶⁶ The doctrine may lead to outcomes that appear highly artificial as the process may assign a domicile to a person, identifying them to be domiciled in a place they have departed from many years ago, or worse, a place they have never been to.⁶⁷ Over the course of time, recommendations have been made to retain domicile of origin as a separate type of domicile with a separate set of rules or even to be completely abolished from

⁶³ *Udny* (n 14).

⁶⁴ Leon Trakman, *Domicile of Choice in English Law: An Achilles Heel?* (Journal of Private International Law, 2015)

⁶⁵ *AG v Pottinger* [1861] 30 LJ Ex 284, 292.

⁶⁶ Carter P.B., *Domicile: The Case for Radical reform in the United Kingdom*, 716.

⁶⁷ Richard Fentiman, *Domicile Revisited* (Cambridge Law Journal, 1991) 445.

the English legal system.⁶⁸ Such recommendations were based on countervailing arguments⁶⁹ such as; Firstly, a domicile of origin only functions as a starting point from which an individual can physically leave, even though it does offer assurance regarding domicile. Secondly, until there is concrete proof that someone genuinely wants to revive their domicile of origin, it should not be revived at all. Thirdly, a person's return to their domicile of origin should only be encouraged if they have re-established ties with that location.

The main argument against the automatic revival of a domicile of origin is that, once a domicile of choice has been acquired by dismissing one's domicile of origin and subsequently abandoning the domicile of choice as well, at this point the person is past the stage where he would have any plausible attachment with a domicile of origin, towards which he no longer has any reasonable connection. The revival rule under domicile of origin developed during the Victorian era in England, is based on the idea that the law of one's original native home is the most appropriate personal law to be applied to an individual in the event that they are unable to maintain a permanent residence. This may be reflected through the desires of British colonists who "rather like elephants ... return to their birthplace to die".⁷⁰ However, it is archaic and completely out of touch with today's migratory world.

3.2 Domicile of Dependence

A domicile of dependence is the domicile conferred on legally dependent persons by operation of law.⁷¹ Married women, Minors and Mentally deficient persons were considered to be incapable of acquiring a domicile on their own, and their domicile followed that of the person they were regarded as being dependent on. Such individuals' domicile is established by, and changes with, the domicile of the person holding legal responsibility for them. The underlying rationale⁷² here (apart from being another mechanism for ensuring that every person always has an operative domicile) is twofold. Firstly, regarding young children and mentally deficient persons who are incapable of forming the necessary intention to acquire a domicile on their own, and specifically children who would generally have a home with their parents. Secondly, preserving a unity of domicile between

⁶⁸ *Her Majesty's Stationery Office* (n 11).

⁶⁹ *Domicile of Choice in English Law: An Achilles Heel* (n 64).

⁷⁰ *Clarkson & Hill's Conflict of Laws* (n 15) 323.

⁷¹ *ibid* 324.

⁷² *ibid* 324.

all members of the family would prevent conflicting laws and exacerbating legal disputes between family members.

3.2.1 Children

As discussed above, children are assigned a domicile of origin at birth on the basis of one's parentage. The DMPA 1973⁷³ identifies children under the age of 16 as dependents and places a domicile of dependence upon them which would send their domicile of origin into abeyance. In many instances a child's domicile of dependency may be the same as his/her domicile of origin or at least start off as so, until it is replaced by a parent's domicile of dependence that is bound to change again. A child's domicile of dependence is a combination of common law principles and rules contained in the DMPA 1973. Firstly, a legitimate child whose parents are alive and living together takes the domicile of the father and an illegitimate child takes the mother's.⁷⁴

Secondly, if a legitimate child's father dies, the child would thereafter take his/her mother's domicile provided the mother's domicile was different from the father's.⁷⁵ However, in these circumstances, the child's domicile doesn't always automatically follow a change in the mother's domicile.⁷⁶ It has been determined that if a mother changes her domicile leaving the child permanently in the former country (for instance, under the care of a relative) the child's domicile is not replaced. In the case of *Re Beaumont*⁷⁷ a widow with a Scottish domicile remarried an Englishman, obtaining an English domicile of dependence. She left her daughter in Scotland permanently and moved to England with her new spouse. The court held that the daughter's domicile remained Scottish because the change of a child's domicile is the 'result of the exercise by the mother of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising, even when she changes her own domicile'.⁷⁸ The case would have been held differently if she left the daughter in Scotland for a limited and temporary purpose. It has even been proposed that in certain situations, a mother may grant her child a domicile in a third country by placing the child under a capable caregiver there.⁷⁹ Therefore, it appears as if a widow has the power to change her child's domicile in such instances along with her own, but it must be done

⁷³ Domicile and Matrimonial Proceedings Act 1973, s. 3(1).

⁷⁴ *Udny* (n 14); Domicile and Matrimonial Proceedings Act 1973, s. 4(4).

⁷⁵ *Pottinger v Wightman* (1817) 3 Mer 67, 79.

⁷⁶ *Clarkson & Hill's Conflict of Laws* (n 15) 325.

⁷⁷ *Re Beaumont* [1893] 3 Ch 490.

⁷⁸ *ibid* 497.

⁷⁹ *Blaikie, The Domicile of Dependent Children: A Necessary Unity* [1984]; *Cheshire, North and Fawcett, Private International Law* (n 2) 177.

positively for the child's best interest and not fraudulently.⁸⁰ This power seems questionable as a father who sends his child to another country would not have such a power.⁸¹ The decision in *Re Beaumont*⁸² argues that a widow's power is justified to prevent a child from obtaining a stepfather's domicile of dependency, in an instance where a widowed mother gets remarried. However, a married woman no longer acquires a domicile of dependence through her husband.

Thirdly, following a parental order made to a same-sex couple, the law is not clear as to which parent's domicile ought to be determined. Leading commentators suggest that it should be the domicile of the parent with a genetic connection to the child.⁸³ Finally, in an instance where a legitimate child's parents are 'alive but living apart', if the child has a home with the mother, the child takes the mother's domicile, but if the child has a home with the father alone, or with each parent, then he/she takes the father's domicile of dependence.⁸⁴ If a child ceases to have a home with the parent whose domicile he shares, that domicile continues unless and until he has a home with the other parent.⁸⁵ It can be questioned whether these rules apply to situations when parents live in different countries with different domiciles for employment reasons or only if the marriage has broken down between them. It is strongly argued that the rules apply to both cases as they are designed to mirror reality. After the death of both parents of a legitimate child, or of the mother of an illegitimate child, the child's domicile must remain unchanged until he/she is old enough to have an independent domicile.⁸⁶

A child's domicile of dependence is lost upon reaching the age of 16 or by marrying under that age and acquiring an independent life,⁸⁷ because a domicile of dependence cannot 'survive the destruction of the factors essential to its creation and continued existence'⁸⁸ and is replaced by a domicile of choice or domicile of origin.⁸⁹ Despite the revisions brought in by the DMPA 1973, these rules have been challenged to appear artificial. The Law Commission's final report introduced the concept of determining a child's domicile by considering the place they are most closely connected to, rather than solely focusing on their parent's domicile.⁹⁰ In order to introduce a degree

⁸⁰ *Pottinger* (n 75).

⁸¹ *Clarkson & Hill's Conflict of Laws* (n 15) 325.

⁸² *Re Beaumont* (n 77).

⁸³ *Dicey, Morris and Collins, The Conflict of Laws* (n 17) 170.

⁸⁴ Domicile and Matrimonial Proceedings Act 1973, s. 4(2) (a).

⁸⁵ Domicile and Matrimonial Proceedings Act 1973, s. 4(2) (b); s. 4 (3).

⁸⁶ *Dicey, Morris and Collins, The Conflict of Laws* (n 17) 169.

⁸⁷ Law Commission No 48, Report on Jurisdiction and Matrimonial causes (1972) para. 33.

⁸⁸ Wade, *Domicile: A Re-Examination of Certain Rules* (1983) 32 ICLQ.

⁸⁹ *Harrison* (n 25).

⁹⁰ Law Commission, 'Private International Law the Law on Domicile,' No. 168 (1987).

of certainty, this test would be combined with rebuttable presumptions that the child would have the same domicile as his parents when they are domiciled in the same country and he has a home with either of them, or, when the parents are domiciled in different countries, the child would share the domicile of the parent with whom he has a home.⁹¹ On the other hand, the Family Law (Scotland) Act 2006 provides a more rule-based approach as opposed to the presumptions recommended by the Law Commission stating that, when a child has a home with both parents or with either or neither parent, in the same or different domicile, the basic test of closest connection would be applied without the aid of any presumption.⁹²

3.2.2 Married Women

Before the DMPA 1973 was passed, a married woman's domicile was determined by, and changed with her husband's domicile,⁹³ even if they lived apart as a married couple or judicially separated.⁹⁴ Post-divorce or death of the husband, the woman's former domicile of dependence was to continue as her 'deemed' domicile of choice⁹⁵ unless and until she abandoned it⁹⁶ and gains a 'genuine' domicile of choice⁹⁷ or until her domicile of origin revives.⁹⁸ Historically it was based upon the ancient maxim under common law that husband and wife were one and the same person in the eye of the law.⁹⁹ The above rule was subject to vigorous criticism from both academic writers and judges. Lord Denning MR described the married woman's domicile of dependence as 'the last barbarous relic of a wife's servitude'.¹⁰⁰

When the DMPA 1973 came into effect on the 1st of January 1974, it repealed the above position by allowing a married woman to acquire her own independent domicile.¹⁰¹ As the Act does not apply with retrospective effect, a woman already married by the 1st of January 1974 retains her former domicile of dependence as her domicile of choice (or origin), unless and until she changes it by acquisition or revival of another domicile.¹⁰² However, this still means that, even after the Act

⁹¹ *ibid*; *Clarkson & Hill's Conflict of Laws* (n 15) 327.

⁹² Harder, *Domicile of Children: The New Law in Scotland* (10th edn, Edinburgh Law Review, 2006) 386; *Clarkson & Hill's Conflict of Laws* (n 15) 327.

⁹³ *Attorney-General for Alberta v Cook* [1926] AC 444 PC; *Lord Advocate v Jaffrey* [1921] 1 AC 146 HL.

⁹⁴ J. Story, *Commentaries on the Conflict of Laws* (1865)

⁹⁵ Wade, 'Domicile: A Re-Examination of Certain Rules' (1983) 32 ICLQ 1.

⁹⁶ *Re Scullard* [1957] Ch 107.

⁹⁷ *Re Wallach* [1950] 1 All ER 199.

⁹⁸ *Commentaries on the Conflict of Laws* (n 94)

⁹⁹ Paras Diwan, *Private International Law* (4th edn, Deep & Deep) 165.

¹⁰⁰ *Gray v Formosa* [1963] EWCA Civ J0725-2, 259.

¹⁰¹ Domicile and Matrimonial Proceedings Act 1973, s. 1(1).

¹⁰² Domicile and Matrimonial Proceedings Act 1973, s. 1(2).

was enacted, the independent domicile of a married woman may not be the domicile she would have wanted to acquire had she never been dependent on her husband for her domicile. Thus, the statutory provisions still imposes an artificial domicile on a woman until she takes the appropriate steps to abandon it, instead of allowing the application of the new rule straightaway.¹⁰³ In *IRC v Duchess of Portland*¹⁰⁴ the propositus, who had a domicile of origin in Quebec, married an English domiciliary in 1948, acquiring an English domicile of dependence. Despite the fact she had always planned to return to Canada and her strong links there, she had not satisfied the criteria necessary to acquire a domicile of choice in Quebec after 1973, nor had her domicile of origin in Quebec revived because she had not abandoned her ‘deemed’ domicile of choice in England. It was held that on 1 January 1974 her English domicile of dependence became converted into an English domicile of choice which she could lose only by satisfying the strict rules on abandonment of a domicile of choice.¹⁰⁵ Therefore, she could ‘only free herself from the shackles of dependency by choosing to leave her husband for permanent residence in another country.’¹⁰⁶

3.2.3 Mentally Deficient Persons

A person who is suffering from a mental disorder is incapable of forming the necessary intention¹⁰⁷ to acquire a domicile of choice and thereby retains the domicile he/she had immediately before becoming incapable.¹⁰⁸ If a child was born with a mental disorder or later acquires such a disorder whilst dependent,¹⁰⁹ their domicile is determined by their parent’s domicile, as long as they continue to suffer from it, even after attaining the age of majority. Moreover, the Law Commission recommended that such a person should be domiciled in the country he is most closely connected to.¹¹⁰

3.3 Domicile of Choice

Any independent individual can acquire a domicile of choice in a country that is not his domicile of origin, by residing there objectively and with the subjective intention of remaining there

¹⁰³ Domicile and Matrimonial Proceedings Act 1973, s. 1(1).

¹⁰⁴ *IRC v Duchess of Portland* [1982] Ch 314.

¹⁰⁵ *ibid*; *Clarkson & Hill’s Conflict of Laws* (n 15) 328.

¹⁰⁶ *ibid*.

¹⁰⁷ *Urquhart v Butterfield* [1887] 37 Ch D 357 CA.

¹⁰⁸ *Crompton’s Judicial Factor v Finch-Noyes* [1918] SC 378.

¹⁰⁹ Domicile and Matrimonial Proceedings Act [1973], s. 3(1).

¹¹⁰ Law Commission, ‘Private International Law the Law on Domicile No 168’.

permanently or indefinitely. These two factors must coincide for a domicile of choice to be acquired.

3.3.1 Residence

Residence requires physical presence as an inhabitant rather than the presence as a mere visitor.¹¹¹ The case of *Udny v. Udny* states that in order to acquire a domicile of choice there must be ‘a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors or the relief from illness’.¹¹² The test for determining one’s residence is a qualitative one¹¹³ as the residence need not be of a particular duration, and may be only momentary.¹¹⁴ If the propositus decides to permanently settle in a particular country, the residence factor will be satisfied upon his arrival, and the domicile will be immediately acquired. Therefore, agreeing with the proposal made by the Law Commission, ‘presence’ is a more appropriate term than ‘residence’. A person who has more than one home in different countries, is an inhabitant of the country in which he has his chief residence.¹¹⁵ As the test for residence is a qualitative one, it does not depend on the time spent or on the size of the amenities of the home.¹¹⁶ In the American case of *White v. Tennant*¹¹⁷, a person who sent his family and belongings to their new home in another state ahead of himself vicariously acquired a domicile even before arriving there himself. In *Puttick v. AG*¹¹⁸ courts held that an illegal immigrant cannot acquire a domicile of choice. However, it was overruled in *Mark v. Mark*¹¹⁹ as such affairs of a long-term resident must be governed by the laws of the country they are closely connected to.

3.3.2 Intention

Intention requires permanent or indefinite residence in a country, not limited by a period or purpose. If a person moves to a new country not sure whether to remain there indefinitely, the pre-existing domicile is retained.¹²⁰ If the propositus seeks temporary residence only for the duration of his

¹¹¹ *IRC v Duchess of Portland* (n 104).

¹¹² *Udny* (n 14).

¹¹³ *Ramsay v Liverpool Royal Infirmary* [1930] AC 588.

¹¹⁴ *Bell v Kennedy* [1868] LR 1 Sc & Div 307.

¹¹⁵ *Plummer v IRC* [1988] 1 WLR 292.

¹¹⁶ *Henwood* (n 51).

¹¹⁷ [1888] 31 W. Va, 8 S.E. 596.

¹¹⁸ [1988] 1 WLR 292.

¹¹⁹ [2006] 1 AC 98.

¹²⁰ *Holliday v Musa* [2010] 2 FLR 702.

job¹²¹ or to receive medical treatment,¹²² no matter how long the period is, a domicile will not be acquired. Justice Scarman in the case of *Re Fuld's Estate (No 3)*¹²³ stated that, if a person living in a country wishes to leave it upon the occurrence of a contingency, the possibility of acquiring a domicile will be ignored if the contingency is clearly foreseen¹²⁴ and reasonably anticipated - nearing the end of an employment, but if the contingency is vague¹²⁵ and indefinite¹²⁶ similar to a 'pipe dream'¹²⁷ - winning the lottery, a domicile can be acquired. This test for determining one's intention was preferred and approved in *Perdoni v. Curati*.¹²⁸ Courts went on to explain that whether a contingency is vague or unrealistic should not be analysed from an objective standpoint, but rather from a subjective viewpoint of the person who formed the contingency.¹²⁹ This was confirmed in the case of *Bheekhun v Williams*¹³⁰ stating that, the thoughts on the propositus's mind is the pertinent question, rather than what someone with greater knowledge would have considered the position to be. Even though a propositus's intentions are clear by the statements they make, such evidence may not be as reliable¹³¹ as the evidence of one's own conduct¹³² which would help judge a person's true intentions.

3.3.3 Abandonment of Domicile of Choice

If a propositus ceases to reside in a country and does not intend to reside there permanently or indefinitely, his domicile of choice would be lost. However, it would continue as long as either residence or intention remains. The requirement of 'residence' cannot be lost simply through the propositus's absence in the country. Instead, the propositus must cease to reside there as an inhabitant.¹³³ Similarly, when a person has two homes, the residence in the former country will be abandoned only when a chief residence is established in the present country.¹³⁴ The law on cessation of intention is unsettled. If a person positively intends to not return to his former domicile

¹²¹ *Irvin v Irvin* [2001] 1 FLR 178.

¹²² *Re Haji-Ioannou (Deceased)* [2009] ILPr 56.

¹²³ [1968] P 675.

¹²⁴ *IRC v Bullock* [1976] 1 WLR 1178.

¹²⁵ *Doucet v Geoghegan* (1878) 9 Ch D 441; *Re Furse* [1980] 3 All ER 838.

¹²⁶ *Udny* (n 14); *Ramsay* (n 113).

¹²⁷ *Sekhri v Ray* [2014] 1 FLR 612.

¹²⁸ [2012] WTLR 505; *Z and B v C (Parental Order: Domicile)* [2012] 2 FLR 797.

¹²⁹ *Fuld (No. 3)* [1968] P 675.

¹³⁰ [1999] 2 FLR 229.

¹³¹ *Wahl v AG* (1932) 147 LT 382; *Buswell v IRC* [1974] 1 WLR 1631; *M v M (Divorce: Domicile)* [2011] 1 FLR 919.

¹³² *Drevon v Drevon* [1864] 34 LJ Ch 129.

¹³³ *IRC v Duchess of Portland* (n 104).

¹³⁴ *Plummer v IRC* [1988] 1 WLR 292.

of choice, such a domicile would be abandoned. However, if the propositus is undecided whether he would return to the former country or not, two different approaches have been followed. Firstly, it was held that a domicile of choice will not be lost,¹³⁵ unless there is a positive intention of not returning. In the case of *Re Lloyd Evans*¹³⁶ a Belgium domiciliary escaped to England during the second world war and was undecided whether he would return to Belgium after the war. It was held that his Belgium domicile was not lost as he had not definitely decided not to return to Belgium. Secondly, a domicile of choice would be lost if there was a departure without a specific intention of returning.¹³⁷ It has been argued that, if the intention required to acquire a domicile is to ‘remain in the country permanently’, then in order to abandon the domicile one must cease to ‘intend to reside permanently’. Therefore, if the propositus is undecided, it can be argued that he no longer has the intention of residing permanently, and as a result the intention to return could ‘wither away’.¹³⁸ The Court of Appeal decision in *Henwood* held that the latter approach is more in touch with the modern-day realities making it easier to lose such a domicile.

4. CONCLUSION

Domicile, the legal address to one’s permanent home, is a central pillar in private international law that connects an individual to a particular legal system. It serves as a compass that points out the legal system responsible, when identifying the applicable law, regarding cross-border legal matters. The meaning of domicile is too complex to be defined and instead can be illustrated through the general principles that surround it, and through the categories it divides into. The general principles make sure that each individual has one domicile at all times that would continue to exist until another domicile has been acquired. A domicile of origin is acquired by every individual at the time of their birth depending on their legitimacy and parentage. Due to the tenacious and revival nature of such a domicile, it is not easily shaken off as one’s domicile of origin may lay in abeyance ready to fill in the gaps between gaining and losing a domicile. A domicile of dependence is currently conferred upon children under the age of 16 and mentally disoriented persons. In the past, married women were also considered dependent but this position has changed with the enactment of laws. Any independent individual can acquire a domicile of choice if he/she resides in a country as an inhabitant with the intention of residing for a permanent or indefinite time. As the world becomes a global village in today’s migratory society, it faces challenges and controversies when

¹³⁵ *Re S (Hospital Patient: Foreign Curator)* [1996] 1 FLR 167.

¹³⁶ [1947] Ch 695.

¹³⁷ *Re Flynn* [1968] 1 WLR 103; *Morgan v Cilento* [2004] WTLR 457.

¹³⁸ *Qureshi v Qureshi* [1972] Fam 173; *Maples v Melamud* [1988] Fam 14.

determining one's true domicile. Despite the archaic and artificial nature of the prevailing laws, reforms have been made aiming to provide a more consistent framework when addressing these complexities. Nevertheless, domicile must be used as a guiding principle, understanding and effectively managing the intricacies of domicile in order to achieve equitable, predictable, and efficient domiciles under private international law.

CONSTITUTIONAL LAW

PRESIDENTIAL PARDONS: EXERCISING POWER OR ABUSING IT?

Senithi Dahanayake | Pramodhya Sooriyabandara

ABSTRACT

Black's Law Dictionary defines a 'pardon' as "the act or instance of officially nullifying punishment or other legal consequences of crime." The power to grant a pardon to a convicted individual is usually provided through the country's Constitution to the executive branch of the government: more specifically, the President, King, Council of Ministers, or the State Governor. In Sri Lanka, the pardon power is solely exercisable by the President by virtue of Article 34 of the Constitution. However, the question of whether the President responsibly uses this power arises in contentious debate, especially when it has been used on several occasions in the past to release convicts who have committed crimes that are deemed unforgivable in the eyes of the public. For example, the release of Shramantha Jayamaha in 2019, who brutally murdered a Swedish teenage girl in cold blood, sparked much controversy across the nation and prompted many to level accusations towards former President Sirisena of abusing his executive power. Such instances cast doubt on whether the rule of law is undermined as the country's highest authority exercises the pardon power in an unfettered way.

In this article, the authors wish to explore a holistic view of pardon power and establish that due to the discretionary nature of this executive power, it is subject to various instances of abuse, and there must be more transparency and oversight over the pardon process. To illustrate this point, the authors will first demonstrate the historical and constitutional development of the pardon power and available resources to challenge pardons in Sri Lanka, with comparisons made with other countries. The authors will examine the criteria that can be used to assess the abuse of pardon power and will draw on examples of controversial presidential pardons that were granted and how they were later challenged in court. Lastly, the article will analyse the arguments for and against the President having a broad discretionary pardon power overall and offer proposals for reform that would significantly reduce the potential abuse of the power.

1. HISTORICAL AND LEGAL CONTEXT

1.1 Historical and Constitutional Development of the Pardon Power in Sri Lanka and Available Remedies to Challenge Pardons

The power to grant pardons is not a novel government function in the Constitution. The act of pardoning criminals convicted in court finds its source in ancient Greek and Roman law¹ and mainly thrived in medieval Europe. The executive power of granting pardons in Sri Lanka first evolved from the royal prerogative of the monarchy. This power – referred to as the ‘*raja karuna*’ in the Mahavamsa – rarely took consideration of whether the offender was innocent or guilty but rather was granted out of compassion.² Subsequently, the prerogative power developed into a constitutional one by adopting the 1972 Constitution. The constitutional scheme for granting presidential pardons in Sri Lanka was later exhaustively set out in Article 34 of the 1978 Constitution, which is exercised today.

Article 34 (1) of the Constitution³ provides that the President is vested with the discretionary power to grant a pardon (either absolute or conditional), grant any respite, substitute a less severe form of punishment, or remit the whole or any part of the punishment for any offender convicted of any offense. However, if an offender has been sentenced to death, the President should obtain a report from the trial judge, which must then be sent to the Attorney-General for his recommendation, and both reports must be forwarded to the Minister of Justice, who will provide the final recommendations to the President. Notably, the limitations to the pardon power only arise when the offender is serving a death sentence, and there is no review process for offenders convicted otherwise.

Article 34 (2)⁴ further states that the President’s pardon power extends to those disqualified to be electors or Members of Parliament, as per the grounds of disqualification set out in Article 89⁵ and Article 91 (g).⁶ Lastly, Article 34 (3)⁷ explains that a pardon can be granted to an accomplice of an offender if they give information in support of the conviction of the primary offender.

¹ WF Duker, ‘The President’s Power to Pardon: A Constitutional History’ (1977) 18 William and Mary Law Review 475, 476–77.

² ARB Amerasinghe, *The Legal Heritage of Sri Lanka*, (The Royal Asiatic Society of Sri Lanka 1999) 184.

³ Constitution of the Democratic Socialist Republic of Sri Lanka art 34(1).

⁴ *ibid* art 34(2).

⁵ *ibid* art 89.

⁶ *ibid* art 91(g).

⁷ *ibid* art 34(3).

The provisions above illustrate the executive head of the state's unfettered discretion to release any convicted offender without any grounds available for one to challenge the President's decision. Further, Article 34 does not indicate that the President has a duty to disclose to the public the reasons why he granted the pardon to particular individuals, nor is there a legal requirement to ensure that the pardon was granted in the public's interest.⁸ It persists as a unilateral power with no checks from the other branches of the government.⁹

With the introduction of the 19th Amendment to the Constitution¹⁰ in 2015, Article 35 (1) now provides that the President's decision to pardon can be challenged through a Fundamental Rights application if any citizen believes that their fundamental rights have been violated as a result of the pardon. This would allow the Supreme Court to exercise its fundamental rights jurisdiction and review the pardon.

Alternatively, citizens may also rely on the Right to Information Act 2016¹¹, which provides the right to access information held by public authorities. This Act allows citizens to request detailed information regarding the pardon process and justification behind a particular pardon granted and obtain documents on the same.

1.2 Comparisons with Other Jurisdictions

It is worth noting the international perspectives on the pardon power and how it is practiced in other countries. In the United States of America (USA), the pardon power is provided to the President through Article II of the Constitution¹², which states that "...he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." There is no review process provided in the Constitution, and the only constitutional limitations on the power are in cases of impeachment and for those convicted of federal offenses.

In the United Kingdom (UK), the pardon power is referred to as the "royal prerogative of mercy" and is vested only in the monarchy. The prerogative power was rarely used following the establishment of the Criminal Cases Review Commission in 1997, an independent body that

⁸ Charya Ekanayake, 'Presidential pardoning power of Sri Lanka: an unchecked executive power which undermines the role of the judiciary' [2021] 2 RLJ.

⁹ Ada Derana English, 'Law Land & Liberty Episode 03 Executive Pardons (3 July 2021). <www.youtube.com/watch?v=w29JLERCFdk&t=1421s> accessed on 23 August 2024.

¹⁰ Constitution of the Democratic Socialist Republic of Sri Lanka 19th Amend art 7.

¹¹ Right to Information Act, No. 12 of 2016.

¹² U.S. Const. art II, s2, cl.1.

handles possible cases of miscarriage of justice. In India, the Constitution¹³ provides that the President is vested with the power to grant pardons, reprieves, respites, remissions of punishment, or commutation of sentence. The governors of states in India are vested with the same power under Article 161 of the Constitution. However, both the President and the governors are bound by the advice of the Council of Ministers and not solely by their own discretion.¹⁴

Based on the pardon processes of these countries, the constitutional power to grant pardons in Sri Lanka appears to be more constrained than it is in the USA, but it is not subjected to scrutiny by independent bodies or the Council of Ministers such as in the UK and India.

1.3 A Brief History of Controversial Usage of Pardons in Sri Lanka

The President's pardon power in Sri Lanka has operated in reasonable situations, wherein the release of offenders who have committed minor offenses has been allowed, and mass pardons have been granted to convicts who have displayed exemplary conduct and to prevent prison overcrowding. The prisoners who are pardoned are permitted to be released to commemorate special days, such as Vesak Poya Day, Christmas, and Independence Day. However, the controversial use of presidential pardons that have been granted pertains to the gravest crimes committed by high-profile individuals who are well-connected or known political allies of the President.

The earliest example of a controversial presidential pardon was one that was granted to Sunil Perera ('Gonawela Sunil'), who was sentenced to 10 years in prison for rape. He was known for his close association with the United National Party (UNP) Political party, whose leader was the then President, JR Jayawardena. On the 7th of July 1981, the President declared that he would grant amnesty to prisoners who were not acquitted of murder, bank robbery, treason, etc. In the list of offenses, rape was not mentioned, which conveniently worked in Gonawela Sunil's favour and permitted him to be freed.¹⁵

¹³ The Constitution of India art 72.

¹⁴ NEXT IAS Content Team, 'Pardoning Power of President & Governor' (NEXT IAS, 30 May 2024) <[https://www.nextias.com/blog/pardoning-power-of-president-governor/#:~:text=Article%2072%20of%20the%20Indian%20Constitution%20empowers%20the%20President%20to,Martial%20\(Military%20Court\)%3B%20and](https://www.nextias.com/blog/pardoning-power-of-president-governor/#:~:text=Article%2072%20of%20the%20Indian%20Constitution%20empowers%20the%20President%20to,Martial%20(Military%20Court)%3B%20and)> accessed on 23 August 2024.

¹⁵ Rajan Hoole, 'Black July: Justice Of Peace Gonawela Sunil And The Killings In Prison' (Colombo Telegraph, 19 September 2013) <<https://www.colombotelegraph.com/index.php/black-july-justice-of-peace-gonawela-sunil-and-the-killings-in-prison/>> accessed on 23 August 2024.

Another notable example is the pardon granted to Manohari Daniels in 1989, who was convicted of aiding and abetting the Liberation Tigers of Tamil Eelam (LTTE) in carrying out a suicide bomb attack that killed 40 people. The pardon was intended to be a gesture of goodwill ahead of peace talks with the LTTE, which later transpired to be unsuccessful.¹⁶ Additionally, in 2009, Mary Juliet Monica Fernando, the wife of a parliamentarian, was freed after serving four years in prison when she was sentenced to death for a double murder. Since these examples occurred prior to the 19th Amendment, the public had no way of challenging these pardons, and thus, it portrayed gross arbitrariness on the Presidents' part in exercising their executive power. However, the controversial pardons granted thereon were apt to be disputed by the mechanism offered by Article 35 of the Constitution.

Former President Maithripala Sirisena granted a pardon to Shramantha Jayamaha, who was convicted of murder in the highly publicized case of the 'Royal Park Murder' in November 2019. Earlier the same year, former President Sirisena also granted a pardon to Venerable Gnanasara Thera, a controversial head of a Buddhist clergy accused of propagating violence against Muslims. The decision was criticised by many, mainly because the pardon was granted a week after the Buddhist groups had attacked Muslim-owned homes, mosques, and shops in retaliation for the Easter bomb attacks, which killed 250 people. The director of the International Crisis Group Sri Lanka Project, Alan Keenan, pointed out that the pardon sent out the wrong message in the face of the Easter bomb attacks, and it was a blow to the "already battered rule of law" in Sri Lanka.¹⁷

Former President Gotabaya Rajapaksa has also been the face of granting the controversial pardons during his tenure. On June 24th, 2021, he pardoned Duminda Silva, former Member of Parliament (MP) and political ally, who was sentenced to death for the murder of Bharatha Lakshman Premachandra. The decision was met with widespread disapproval due to the preferential treatment that seemed to be granted to the former politician. A pardon was also issued to former sergeant Sunil Rathnayake, who was convicted for the murders of eight Tamil civilians, otherwise known as the Mirusuvil massacre. These examples of the past forty years depict a history of controversial usage of the pardon power in favour of high profile or politically connected individuals.

¹⁶ Daily Mirror Online, 'Presidential pardons and Courts of Justice' (*Daily Mirror*, 6th June 2022) <<https://www.dailymirror.lk/opinion/Presidential-pardons-and-Courts-of-Justice-EDITORIAL/231-238450>> accessed on 23 August 2024.

¹⁷ Chathuri Dissanayake, 'President pardons Gnanasara Thero' (*Daily FT*, 23rd May 2019) <<https://www.ft.lk/Front-Page/President-pardons-Gnanasara-Thero/44-678714>> accessed on 23rd August 2024.

2. CRITERIA FOR ASSESSING ABUSE OF POWER

2.1 Legal Standards and Constraints

The power encompassed in the presidential pardon is undue, and this controversial authority has evolved into a complex constitutional and legal instrument. Yet, it is still another authority that is subject to the rule of law. The rule of law is defined in the *Encyclopædia Britannica* as ‘the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a non-arbitrary form of government, and more generally prevents the arbitrary use of power’.¹⁸ As widely considered, every person is equal under the law and the law does not favour anyone.¹⁹ Therefore, before an extensive analysis of this pardon power, it is essential to dive into the intricate details of its constitutional and statutory boundaries.

The golden doctrine of separation of powers, as elaborated by the French jurist Montesquieu (1689 - 1757), acts as a leading edge to provide limitations weighing upon this executive authority. The judiciary, in its independent form, also acts as a protector of the constitution and plays a crucial role in ascertaining that this controversial executive authority is not practiced arbitrarily or in breach of fundamental rights. As Montesquieu stated, “Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”²⁰

The constitutional provisions which grant and limit presidential pardons vary with each jurisdiction. While certain constitutions prefer to confer broad, unfettered discretion on the executive, others conditionalize it by imposing limitations, such as excluding certain offenses from being pardoned. Despite the presence of any such explicit constitutional provisions, it is essential to remember that there are implied limitations that arise from other indirectly related constitutional constraints, like those promising equal protection and due process. Such constraints also obligate the executive to follow all required procedures prior to exercising their pardon power.

¹⁸ Choi N, “Rule of Law | Definition, Implications, Significance, & Facts” (*Encyclopaedia Britannica*, July 1 2024) <<https://www.britannica.com/topic/rule-of-law>> accessed on 23 August 2024.

¹⁹ BookBrowse, “Why Do We Say No Man Is above the Law?” (BookBrowse.com) <https://www.bookbrowse.com/expressions/detail/index.cfm/expression_number/617/no-man-is-above-the-law> accessed on 23 August 2024.

²⁰ B De Montesquieu, *The Spirit of the Laws* Nugent ed. (Hafner Publishing Co., New York 1949) 152.

Additionally, there is a complex relationship between legislative authority and pardon power. The legislature can indirectly influence the exercise of this power through legislation. To illustrate, laws can be enacted to specify the criteria to be met before granting a successful pardon. While this may vary from time served to rehabilitation and other satisfactory improvements, it will also aid in effectively limiting the discretion of the President. However, this does not nullify the fact that the President still has the power to veto any legislation that may seek to restrict this undue executive power arbitrarily. Thus, the question continues to exist whether the legislature acts as a check and balance over pardon powers.

2.2 Procedural Fairness

The procedure in which the pardon power is exercised is as essential as its scope. For this reason, procedural fairness is considered an important factor for good governance, and it is essential to ascertain that the pardon-granting process is conducted transparently and non-discriminatorily. Administrative law principles provide valuable insight as to what procedural safeguards must take place to ensure this.

The pardon process must be controlled by clear rules and regulations. These rules must provide a framework to outline the eligibility criteria for pardons, the required documentation, and the procedures for submitting and processing applications for pardons. Equal opportunity to be heard is fundamental to procedural fairness. Thus, the applicants for a pardon have the right to hear the reasons for any decision despite its outcome.

Unsurprisingly, transparency is essential when it comes to an impartial pardon procedure. Society has the right to know how the process flows and how this power is exercised. Thus, the government of a country must take action to publish statistics relating to pardons, including details of the number of applications received, granted, and denied. Taking steps to disclose the criterion for granting a pardon improves public confidence in the process. Unfortunately, such transparency is not satisfactorily showcased in many jurisdictions, including Sri Lanka.

Even though the pardon power is a discretionary act, it is not immune to the criticisms of judicial review. There are instances, even in Sri Lanka, where the courts have exercised jurisdiction over pardons that they concluded to be fundamentally flawed in terms of improper motives and

noncompliance with specified procedures.²¹ The existence of judicial review and the authority it sustains through the separation of powers serves a vital role by ensuring that this power is not used arbitrarily. As stated in *Marbury v Madison*²², courts derive their authority from the Constitution and have ultimate responsibility for ensuring that the Constitution is applied. This requires them to check whether the parliament is acting unconstitutionally.

2.3 Reasonableness and Justification

The granting or denying of a pardon must ultimately be made based on logical reasons and serving the public interest. As discussed before, exercising this executive power must not be done arbitrarily or capriciously. Broad consideration must be given to the achievement of justice and public interest. Yet, these may continue to be such subjective matters that may be interpreted in multiple ways.²³

An essential point to consider is the nature of the offense for which the pardon is sought. Pardons are generally granted based on insufficient evidence, wrongful convictions, and disproportionate sentences. Under such circumstances, pardon powers can be used to rectify judicial errors. Nevertheless, this executive instrument should not be abused to undermine the criminal justice system or to protect such individuals from the bitter consequences of their actions.

Inarguably, the most crucial factor to consider is the impact a pardon may have on the victims of a crime and their loved ones. Disregarding their interests and rights would inevitably amount to grave injustice. For this reason, governments must implement procedures where the victims can be notified regarding the pardon applications and also provide opportunities for their ideas to be heard.

Lastly, the public interest must also undoubtedly be a central factor to consider before granting a pardon. Efforts should be made to ensure that pardons are granted in a manner that encourages reconciliation. Rehabilitation of offenders to society must be done without disrupting the peace among people. Therefore, pardons based on favouritism that might undermine the public confidence in the Constitution and the justice system must be strictly avoided.

²¹ *Women & Media Collective v. The Attorney General and Others* (The Royal Park Murder case by the Court of Appeal in 2012) SC FR 446/2019; *Hirunika Eranjali Premachandra, Sumana Premachandra and H. Ghazali Hussain v. The Attorney General and Others* [SC FR Appl Nos 221/2021, 225/2021 & 228/2021].

²² *Madison*, 5 U.S. 137 [1803].

²³ Edwin Rekosh, 'Who Defines the Public Interest?' (2004) 2 SUR <<https://sur.conectas.org/en/defines-public-interest/#:~:text=Here%20is%20how%20that%20esteemed,2>> accessed on 23 August 2024.

3. CASE STUDIES: CONTROVERSIAL PARDONS ISSUED IN SRI LANKA

This section will examine two notable pardons granted over the last five years, Shramantha Jayamaha and Duminda Silva, to further analyse whether the President's broad power under Article 34 has been exercised responsibly. It will also analyze the judicial rulings regarding the legality and appropriateness of the pardons and the role played by the Supreme Court in overturning these pardons.

3.1 Jude Shramantha Jayamaha

The details of the case of the 'Royal Park Murder' shocked the entire nation as it surrounded a tragic incident where a family found their nineteen-year-old daughter Yvonne Jonsson lying in a pool of blood, with her face battered beyond recognition. The evidentiary palm impression found at the crime scene led to the main suspect being Shramantha Jayamaha, who was first convicted of culpable homicide first instance and later sentenced to death by the Court of Appeal. The increase in his sentence was affirmed by the Supreme Court in 2014, after which Jayamaha had no further recourse for appealing his conviction. However, in May 2016, former President Sirisena granted his first pardon, which converted the death sentence to life imprisonment. In less than a decade, the President granted a second pardon under his powers of Article 34 in November 2019, which freed Jayamaha from prison. This prompted the 'The Women and Media Collective' to file a fundamental rights petition, challenging the President's constitutional power to grant pardons merely four days after the convict was released. The authors commend the swift action taken by the petitioner but regret that Jayamaha fled the country before the interim orders were issued to keep him in custody.

In the Supreme Court hearing, it was found that the President's decision to pardon in 2016 and 2019 was not procedurally compliant and was arbitrarily reached. In both cases, the President had not followed the constitutional procedure set out in Article 34(1), where he had failed to obtain a report from the trial judge and ask for recommendations from the Attorney General and the Minister of Justice. This shows that he had acted *ultra vires* to his powers laid down in Article 34(1), which thus amounted to the infringement of the Petitioner's fundamental rights under Article 12(1) of the Constitution. It is evident that the President and other officials had made several substantive errors in the process of granting the pardon, so much that the Court called it "a decision so conspicuously bad that it has committed nearly all classes of malfeasances known to administrative law."²⁴

²⁴ SC FR Appl 446/ 2019 141.

Further, the President had also failed to comply with Section 3(q) of the Assistance to and Protection of Victims of Crime Act, No. 4 of 2015, which enabled Yvonne Jonsson's parents and sister the right to be informed about the pardon, before being granted, and allowed them to express their views. The Court further concluded that the pardon was disproportionate and did not align with the public interests' expectations of justice and accountability. For these reasons, the Court held that the pardons granted to Jayamaha were null and void.

The Supreme Court also discussed the judiciary's reviewability of presidential pardons. It concluded that the power of pardons is reviewable under the grounds set out in the *GCHQ*²⁵ case. However, the Court is not fully competent to review all executive decisions made under Article 34 and will do so on a case-by-case basis.²⁶ The Court was clear in establishing that its role was limited to ensuring that there was constitutional adherence in granting the pardons and was not meant to second-guess the merits of the pardon. Thus, the subject of pardons is clearly within the court's purview, which is positive news to those who feel aggrieved by the controversial grant of pardons.

3.2 Duminda Silva

During the 2011 election, Bharatha Lakshman Premachandra and three of his bodyguards were killed in a shooting incident between two groups of the United Peoples Freedom Alliance activists. Following this incident, Duminda Silva, who was the Colombo District MP, was arrested for the murder of Premachandra, as he was alleged to have headed one group that was involved in the shoot-out. The High Court sentenced Silva and four other persons to death, and this decision was upheld by the Supreme Court.

In May 2021, former President Gotabaya Rajapaksa exercised his power under Article 34 of the Constitution and granted Silva a pardon. This decision was shortly challenged by the daughter and wife of the deceased and former Human Rights Commissioner Ghazali Hussain, President's Counsel, through filing a fundamental rights application under Article 12 (1) of the Constitution. The Supreme Court found that, yet again, the President had failed to follow due process in granting a pardon to an offender sentenced to death. Although he had obtained reports from the trial judges and the Attorney General, they had advised against the grant of the pardon. The Minister of Justice had not provided a recommendation on the matter, and the President had failed to inform the victims of the crime as well. Further, the respondents in the case failed to produce documentation

²⁵ *Council of Civil Service Unions v Minister for Civil Service* [1984] UKHL 9.

²⁶ SC FR Appl 446/ 2019 114.

evidencing that the President had ordered the grant of this pardon. On these grounds, the Court concluded that the decision he made was “*arbitrary, irrational and has been made for the reasons best known to the former President...*”²⁷ before unanimously holding the pardon to be null and void.

Both cases depict the Presidents’ failure to comply with procedural fairness, equal protection, and reasonableness and to act in accordance with the public’s legitimate expectations. Additionally, there is an overall lack of transparency in the decision-making behind the grant of the pardons and proper justifications for the decision. On a positive note, these cases set a precedent for how controversial pardons in the future can be challenged and subsequently overturned by means of judicial review.

4. A CRITICAL DISCUSSION OF THE PRESIDENT’S BROAD POWER TO PARDON

The above case studies demonstrate the consequences of the President’s broad discretionary power to pardon criminal offenders for no apparent reason other than to achieve a narrow interest known only to the President or to favour his close political allies. The abuse of this power highlights the dangers of bestowing a broad discretionary power to the President that is unchecked by other branches of government. The authors recognise that the broad power to grant pardons has been constitutionally vested in the executive head of the state in many nations for hundreds of years and that it was always intended to be a fundamental aspect of the constitutional design. This section will explore the arguments for and against having a broad discretionary power for the President to grant pardons.

4.1 Arguments for the Power

The authors recognise four main arguments for the President having a broad discretionary power to grant pardons. First, the President’s power to pardon has always been viewed as an independent check on the judiciary, as a means of correcting any error made while convicting the offender or imposing legal punishment. The judiciary will inevitably err in judgment²⁸ and deliver disproportionate punishments, and thus, the President can rectify such mistakes. The pardon power

²⁷ SC FR Appl Nos 221/ 2021, 225/2021 & 228/2021 60.

²⁸ 45 S.Ct. 332; 69 L. Ed. 527; 267 U.S. 87 (1925), para 28.

is also viewed as an executive tool essential for upholding the separation of powers, as it prevents the judiciary from becoming overly powerful by maintaining a system of checks and balances.

Second, the pardon power is used to show mercy and compassion towards individuals who have demonstrated genuine remorse or have made significant positive contributions to society post-conviction. An example of such an instance is seen in Britain, where Steven Gallant, who was serving life imprisonment for a conviction of murder, displayed “exceptionally brave actions [...] which helped save people's lives despite the tremendous risk to his own” while confronting terrorist Usman Khan during the 2019 London Bridge attack.²⁹ This resulted in him being granted a reduction in his sentence. Similar to such cases, the President can grant pardons as an incentive for rehabilitation and facilitate their reintegration back into society.

Third, the pardon power is also viewed as a means of resolving political crises and disunity. Alexander Hamilton used this argument in Federalist No. 74 during the drafting of the USA Constitution, reasoning that a “well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth.” The President may also deem it necessary to exercise his clemency power as a diplomatic tool for fostering goodwill with a terrorist group, such as how it was used for Manohari Daniels in 1989. The ability to act decisively in critical moments may be essential for maintaining stability within the nation and addressing broader public interests.

Fourth, the President is an elected representative of the people, and he can use his power to reflect evolving societal norms and values to mitigate the harshness of the justice system. An example of this is seen in Britain, where wartime code breaker Alan Turing was convicted of gross indecency for a consensual homosexual relationship with an adult in 1952.³⁰ He was posthumously pardoned in 2013, as changing societal norms regarded homosexuality as acceptable, and British Prime Minister Gordon Brown issued a public apology for “the appalling way Turing was treated.”

The authors do not deny the importance of the executive’s clemency power in Sri Lanka's broader constitutional framework and recognise that this discretionary power is a powerful tool to rectify any miscarriage of justice. The mass pardons routinely granted to those who committed minor offenses are an indication that the pardon power is utilised responsibly to provide a second chance

²⁹ Jedidajah Otte, ‘Murderer who tackled London Bridge attacker with narwhal tusk to have sentence reduced’ (*The Guardian*, 18 October 2020) <<https://www.theguardian.com/uk-news/2020/oct/18/murderer-who-tackled-london-bridge-attacker-with-narwhal-tusk-pardoned>> accessed on 23 August 2024.

³⁰ BBC, ‘Royal pardon for codebreaker Alan Turing’ (*BBC*, 24 December 2013) <<https://www.bbc.com/news/technology-25495315>> accessed on 23 August 2024.

to such convicts. However, the equally routine abuse of this broad discretionary power cannot be ignored.

4.2 Arguments against the Power

The authors recognise six main arguments against the President's broad discretionary power to grant pardons. First- the abuse of power. This was especially evident in the past in countries such as England, where the prerogative power of mercy held by the monarchy was subject to various instances of abuse due to the unfettered discretion of the King.³¹ Presently, with the pardon power being subject to limited constitutional restraints, it is not surprising that the President would use it for personal gain by favouring political allies, donors, or supporters. Examples of such pardons can be identified in the instances where controversial pardons were granted to 'Gonawela Sunil' by J. R Jayawardena in 1981 and to Duminda Silva by Gotabaya Rajapaksa in 2021. The power of pardon could potentially even be used by the President to pardon himself from crimes, as declared by former USA President Donald Trump in 2018. The constitutionality of self-pardons has never been tested in USA courts, nor has it been used by any President thus far. However, this astonishing proclamation by Trump has resulted in much academic discussion as to whether this was a possibility.³² While such an act has not yet been attempted in Sri Lanka, the possibility of self-pardons remains unresolved as the Constitution is silent on the matter.

The second main argument against the broad discretionary power of pardons that the authors present is the lack of transparency and accountability in the pardon process. Without clear guidelines as to how the process is carried out, the pardons can appear arbitrary. As evidenced in the Supreme Court's rulings on the Shramantha Jayamaha and Duminda Silva pardons, there is an overall need to ensure that the pardon procedure is carried out in accordance with the relevant constitutional and legal guidelines. In addition to the President himself not following the mandated requirements in granting the pardon, there is a severe lack of oversight and review mechanisms to scrutinise the merits of the pardon or assess how the decision was reached. The secrecy in which

³¹ Kristen H Fowler, 'Limiting the Federal Pardon Power' (2008) 83 Indiana Law Journal 1651-1654 see also MA Foster, 'Presidential Pardons: Overview and Selected Legal Issues' (2020) CSR.

³² Paul J Larkin, 'The Legality of Presidential Self-Pardons' (2021) 44(3) Harvard Journal of Law and Public Policy 763-825 see also Clifton Perry, 'The Presidential Self-Pardon Paradox' (2019) 31(1-2) Journal of Interdisciplinary Studies
<https://link.gale.com/apps/doc/A608502303/ITOF?u=ull_tt&sid=summon&xid=9d84875e> accessed on 23 August 2024.

the pardon process is carried out makes it easier for the President to misuse their power and achieve their personal interests.

Third, the broad discretionary power to grant pardons has an undue adverse impact on the victims of the crime. Naturally, a victim of a crime would be against a decision to release an offender who had caused physical and psychological harm to them and would perceive the decision as an injustice and disrespect to them and what they went through. In Sri Lanka, Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015, provides that a victim of crime shall have the right to receive notice from the person in authority granting a pardon to the offender and submit their grievances of the matter. The victims of crime would include the family members or persons of significant importance to a victim of a crime.³³ In *Women & Media Collective v. The Attorney General and Others* (The Royal Park Murder case by the Court of Appeal in 2012), the Court recognised that although Section 3 (q) does not impose a mandatory legal requirement that takes precedence over Article 34 (1) of the Constitution; it still creates a legitimate expectation to the person in authority.³⁴ This is a positive indication that the step in informing victims of crimes of the grant of the pardon would be taken seriously in the future.

The fourth argument regards the impact of pardons on the judiciary's role in the criminal justice system.³⁵ The excessive use of pardons can interfere with court systems in determining appropriate punishments and affect the consistency of the legal precedents set by the courts for those who have committed similar crimes. The President's broad discretionary power can be overused to the point that it creates an imbalance in the separation of powers and undermines the judiciary as a whole. Further, the grant of pardons to individuals creates the perception that some people are above the law, which violates the fundamental notion of the rule of law.

Fifth, with the broad discretion of granting pardons, the public would increasingly perceive controversial pardons and the lack of transparency in the process as unfair, and this would erode the public's trust in the government and the justice system. The loss of the public's trust is detrimental to the functioning of democratic institutions and civic engagement. Additionally, the

³³ Assistance to and Protection of Victims of Crime and Witnesses Act, No. 10 of 2023.

³⁴ SC FR Appl 446/2019 59.

³⁵ MW Jayasundara, DAS Egodamahawatta, 'A Critical Study on Executive Power to Pardon and its Impact on the Criminal Justice System: An Analysis of Sri Lanka' (2022) 6 IJRISS 650- 664.

grant of pardons to specific groups and individuals can exacerbate social divisions and inequality and fuel public resentment towards the government.

Lastly, the broad discretionary power to pardon creates a range of ethical and moral dilemmas. Granting pardons to specific individuals handpicked by the President translates to favouritism and discrimination against other offenders equally deserving of the pardon. The opaque system in which the pardon process is carried out gives rise to decisions made based on corruption and impunity. Equally, granting pardons to individuals who have committed serious offenses, especially in exchange for political support or favours, raises ethical concerns about the integrity of the pardon process and the moral standards of leadership.

Based on the above arguments, the authors view that there is a broad scope for the abuse of pardon power in Sri Lanka, and it is crucial that the shortcomings of the present system are addressed.

5. BALANCING POWER AND ACCOUNTABILITY

The abuse of the broad discretionary power of granting pardons demands a delicate balance between accountability and transparency to ensure that the President utilises the pardon power responsibly and to restore public trust. The authors propose four recommendations for improving the transparency of the process and increasing oversight for better accountability.

First, it is essential that the criteria that entail the grant of pardons are established clearly and are publicly accessible. It is unclear what the precise process for granting pardons in Sri Lanka is and what guidelines are used to consider pardon applications. In contrast, in the USA, the Department of Justice publishes the requisites in applying for a pardon and the Office of the Pardon Attorney provides further information on the same. Similarly, ensuring that clear guidelines for granting pardons are available for public knowledge will significantly increase the transparency of the process. Additionally, the more that the public is educated on the pardon process, the more likely that they will be able to hold elected officials accountable for their use of the pardon power.

Second, the authors propose the establishment of independent review boards in Sri Lanka to consider pardons. Such independent review committees can be seen in France, Ireland, and certain states in the USA. By appointing an independent committee to evaluate pardon applications, the grant of pardons would be free from any bureaucratic influence and ensure that the proper legal procedure has been followed in granting the pardon.

Third, there must be a delay in the effectiveness of granting the pardon. The grant of the pardon and release of the convict often occurs on the same day, which could lead to immediate backlash

from the public regarding the decision and even provide the offender ample time to leave the country before the decision is challenged- as occurred with Shramantha Jayamaha. With delayed effectiveness in granting the pardon, this provides time to consider potential legal challenges, and the public can have an opportunity to appeal to prevent any hasty or ill-considered decisions from being carried out.

Lastly, the authors propose more legislative oversight by granting the Members of Parliament a limited role in the pardon process, such as requiring notification or holding oversight meetings and hearings. This would be similar to the pardon process that occurs in India, where the President is bound by the Council of Ministers' advice when granting pardons. By strengthening the role and involvement of the legislature in the pardon process, the President can be expected to provide justifications for his decisions in granting pardons to particular individuals. Further, this would allow the legislature to scrutinise whether the proper procedure has been followed in granting the pardon.

6. CONCLUSION

In summary, this article broadly highlights the scope of abuse that the pardon power is subjected to in Sri Lanka. The primary causes of this abuse are the unfettered discretion of the President provided by Article 34 (1) of the Constitution and the overall absence of transparency and oversight of the pardon process. Recent cases have shown an increase in judicial review in overturning controversial pardons, but with the implementation of the recommendations offered in the article, there is significant potential to reform the pardon process in Sri Lanka further, ensuring its use as a tool for justice rather than a means of impunity.

INTEGRATION OF INTERNATIONAL LAW INTO MUNICIPAL LAW: SHOULD SRI LANKA CHANGE STRATEGIES?

Malkini Fernando

ABSTRACT

The relationship between international law and domestic legal systems has evolved significantly from the Middle Ages to the present day. The distinction between the two has been given higher significance after the development of the Westphalian State system and principles such as state sovereignty. This shift laid the foundation for distinguishing between international law, which governs relations between states, and domestic law, which regulates state-citizen affairs. The main predominant theories in this discourse are monism and dualism. Monism views international and domestic law as a unified legal order. Dualism treats international and domestic law as separate systems that operate independently. Contemporary legal developments also reflect a growing trend of cross-fertilization between international and domestic law. In this context, it is vital for states to adopt a mechanism of incorporating international law into the municipal law regime. Currently the Sri Lankan approach is a strictly dualist approach which is not regulated by the Constitutional framework.

1. HISTORICAL OVERVIEW

During the Middle Ages, spanning from the 5th to the 15th century, law was viewed as a universal doctrine which did not vary based on the geographical demarcations of States.¹ It was a philosophical abstract which was primarily developed based on the teachings of the Church and based on morality. However, with the signing of the Westphalia Treaty in 1648, there was a rapid emergence of sovereign nation states. This included the propagation of principles such as sovereignty and non-interference, thus demarcating a difference between international law and domestic law.

The early 19th century and the Post World War II era included a further growth of such principles, as well as a rise in the significance given to international law. It was no longer a mere concept but rather a legal tool which was viewed as a potential shield against the domestic atrocities which were a result of the two world wars.

¹ A Nussbaum, *A Concise History of the Law of Nations* (MacMillan, New York 1954).

2. THEORIES

The methodology used by states in the integration of international law into municipal law can be analyzed using two main theories. Monism and dualism are the key approaches recognized in integrating international law into municipal law. The monist states treat both its domestic law and international law with the same standard on a horizontal scale.² On the other hand, dualist states treat the two fields of law as two spectrums stemming from different sources with different subjects as well as objectives.³ Therefore, integration of laws of a different spectrum of law is done with caution.

Monism stems from the naturalist school of thought, which states that the law exists for the betterment of all human beings. Accordingly, monists argue that the supremacy of international law is the most feasible mechanism for achieving this.⁴ While monists are united in accepting the position of international law in the domestic context, their reason for doing it is twofold. One reason is the concern for upholding human rights while the other is maintaining the formalism of the legal framework.⁵

Monists regard the two legal regimes to be two sides of the same coin.⁶ Highlighting that both systems are unified and international law can become part of the domestic law with no supporting legislation required.⁷ Accordingly, the international norms are attributed to automatically become part of the domestic legal framework. This stems from the theory of 'Hierarchy of Norms' which was introduced by Hans Kelsen. International law is regarded as a 'grundnorm', which has no further superior node and thus placing it on top of the hierarchy.⁸ As a result of this status, the state organs are required to align themselves with the international laws and norms. Critics argue that monism is likely to undermine the democratic process, which is guaranteed through sovereignty

² KAAAN Thilakarathna & N Jayarathna, 'Theories Involved in Recognizing and Implementing International Law in Domestic Contexts' (2021) 109 *Journal of Law, Policy, and Globalization* 80.

³ David T Björgvinsson, *The Intersection of International Law and Domestic Law* (Edward Elgar Publishing 2015).

⁴ Malcolm N Shaw, *International Law* (9th ed., Cambridge University Press 2021).

⁵ *ibid.*

⁶ A Abass, *International Law: Text, Cases, and Materials* (Oxford University Press 2014).

⁷ KAAAN Thilakarathna, 'The Role of the Judiciary in Recognizing and Implementing International Law: A Comparative Analysis with Special Reference to Sri Lanka' (2021) 7 *Journal of Liberty and International Affairs*, Institute for Research and European Studies – Bitola 128.

⁸ JG Starke, 'Monism and Dualism in the Theory of International Law' (1936) *Brit YB Int'l L* 66-81.

and most Constitutions, and thus creating a democratic deficit.⁹ This could also be viewed as a usurpation of sovereign powers.

The school of thought that gives rise to dualism is the positivist school of thought. It advocates for the supremacy of the State law, which is distinct from international law.¹⁰ According to dualists the two legal regimes exist separately in parallel and cannot overrule the other.¹¹ It advocates for sovereignty and the absolute independence of states rooted in the rule of law. Thus, for international law to have effect within a domestic legal system, it must be specifically incorporated through domestic legislation.

In the event of a conflict between the two legal systems, it is the view of the dualists that the domestic law should prevail over the international law, in the event the treaties have been ratified but not enabled. This emphasizes the importance of state sovereignty and the priority given to the domestic legal framework. The many criticisms of this involve the sabotage of human rights by the domestic legal regime and the lack of enforcement of international legal standards.

Apart from the two long-standing theories, scholars have also identified the new process of ‘Cross-Fertilization between international and domestic law’. In the past, domestic law governed only the relationship between the government and individuals as well as the relationship between individuals. Thus, it was closed off and was not influenced by foreign jurisdiction or international law. However, with the increase in globalization a cross-fertilization between international law and domestic law can be identified.

Municipal courts may deliver judgements interpreting rules from international law.¹² In the case of *R v Jones*, it was ruled that a defense of the international law can be brought into the municipal courts.¹³ This process can be observed by looking closely into the judgements of the *Gabcikovo-Nagymaros Project Case*¹⁴ and the *Eppawala Case*.¹⁵ The general principles of civilized nations derived from the customary laws of Sri Lanka were cited in the *Gabcikovo-Nagymaros Project Case* by Weeramantry J. Later on, the same judgement was cited in the domestic courts in

⁹ KAAN Thilakarathna & N Jayarathna, ‘Theories Involved in Recognizing and Implementing International Law in Domestic Contexts’ (2021) 109 Journal of Law, Policy, and Globalization 80.

¹⁰ H Triepel, *Völkerrecht und Landesrecht* (Leipzig, C.L. Hirschfeld 1899).

¹¹ MN Shaw, *International Law* (9th ed., Cambridge University Press 2021).

¹² *ibid.*

¹³ [2006] UKHL 16; 132 ILR, 668.

¹⁴ *Hungary v Slovakia and European Commission (intervening)*, Case C-364/10, ECLI:EU:C:2012:630, 1 CMLR 21, All ER (EC) 666, ILEC 024 (CJEU 2012) (Oxford University Press, 16 October 2012).

¹⁵ *Bulankulama and Others V Secretary, Ministry of Industrial Development and Others* [2000] 3 SLR 243.

constructing the right to life by Amarasinghe J in the *Eppawala Case*, with specific reference to the Stockholm Declaration. Thus, it is evident that at present, in addition to the two strict approaches of monism and dualism, there is a cross-fertilization between the two legal regimes as well.

3. THE SRI LANKAN APPROACH

Sri Lanka qualifies as a dualist State, which requires the approval of the Legislature to incorporate international law. With sovereignty being a key pillar of democracy and an often-mentioned word in the Sri Lankan context, it is both legally and socially embedded that no international treaty shall become law unless an enabling legislation is passed in Parliament.

International treaties are typically concluded by the executive branch of government as per the powers vested under Article 33(h) of the Constitution. The executive is responsible for negotiating and signing treaties. This mechanism also upholds the doctrine of separation of powers; under which the Executive will ratify a treaty, which would then be incorporated via enabling legislation by the Legislature.¹⁶ The judiciary's role comes into play when the Government has failed to pass the enabling legislation; it must decide whether such treaty can bind the Government or in the alternative the extent of its persuasiveness. The task of the Judiciary in deciding this is crucial as the Constitution remains silent on the recognition and implementation of international law.

In this regard, the branches of the Sri Lankan Government must ensure that uniformity is upheld in the decisions taken on integration of international law. This memorandum will examine the Constitutional framework laid down in this regard and the approach taken by the judiciary while engaging in a comparative jurisdictional review.

3.1 THE CONSTITUTIONAL FRAMEWORK

Being a democratic nation, the Preamble to the Constitution acknowledges that the Constitution as the "Supreme Law" of the country. Therefore, in analyzing the approach of the legislature in this integration, the primary source to be examined is the Constitution. Pursuant to Article 27 (15) of the Constitution the State "shall endeavor to foster respect for international law and treaty obligations in dealings among nations". This implies that the State has a primary

¹⁶ KAN Thilakarathna, 'The Role of the Judiciary in Recognizing and Implementing International Law: A Comparative Analysis with Special Reference to Sri Lanka' (2021) 7 Journal of Liberty and International Affairs, Institute for Research and European Studies – Bitola 128.

obligation to ensure the integration of international law into the domestic legal framework. However, being a dualistic system, international treaties cannot automatically become part of domestic law. Instead, they require specific legislative action to be incorporated into the domestic legal framework. Thus, this provision is merely a directive for the state organs to follow, in incorporating international law into municipal law. This initial responsibility can be traced back to the Constitution, even though it does not provide further elaboration.

This is further evident considering Article 13 (6) of the Constitution, which states that regardless of the restriction retrospective laws being enacted, an act deemed criminal according to “the general principles of law recognized by the community of nations” can be subjected to punishment. Therefore, it is evident that even though the Constitution is silent on the matter, it allows for the incorporation of international laws into municipal law, even in a monist approach provided that the above criteria is satisfied.

The only explicit constitutional provision is found in Article 157 of the Constitution; pursuant to which foreign investment treaties shall only come into effect if it has been “passed by not less than two-thirds” of the members at Parliament. Investment treaties are a specific category of international agreements designed to promote and protect foreign investments. This requirement reflects the significant economic and legal implications of investment treaties, which often involve commitments to protect foreign investors and facilitate cross-border investment. Parliamentary approval ensures that such treaties align with national interests and legal standards, providing a check on the executive's power to commit the country to international obligations. However, in the absence of any explicit provisions, the judicial decisions must be assessed in determining the current standing of the country in this regard.

3.1.1 A STRICTLY DUALIST APPROACH BY THE JUDICIARY

The Sri Lankan Courts have initially taken the stance that Sri Lanka is a dualist nation since the decision in *Leelawathie v Minister of Defense and External Affairs*, in which Sansoni CJ stated that the UDHR will not be binding as “it is not a legal instrument and forms no part of the law of this country”, decided in 1965.¹⁷

This was further affirmed in the much-criticized case of *Singarasa v Attorney General* decided in 2013. The central issue before the court was whether an individual could seek recourse under the

¹⁷ [1965] 68 NLR 487, 490.

optional protocol to the International Covenant on Civil and Political Rights to assert a claim for violation of their rights as guaranteed under it, which Sri Lanka ratified in 1980. The court ruled that allowing an external body to adjudicate on such matters would infringe upon Sri Lanka's sovereignty, violating Article 3 and Article 4 of the Constitution and highlighted the need for enabling legislation.¹⁸ The decision of the court emphasizes the adoption of 'strict dualism' as opposed to 'moderate dualism'.¹⁹ The decision however is subject to criticism as the Supreme Court has failed to provide reasoning into its decision or elaboration into the dualist approach. The ruling reflects the challenges of reconciling international obligations with national sovereignty and legal traditions, particularly in jurisdictions that adhere to a dualistic approach.

However, courts have construed rights based on international law but have not specified how it needs to be incorporated into the domestic legal system. For instance, in the case of *Visal Bhashitha Kavirathne and Others v. Commissioner General of Examinations and Others*, the Court acknowledged the right to education as recognized in the Universal Declaration of Human Rights but did not assess its relevance or integration into domestic legal standards.²⁰ The lack of direction by the judiciary has been recognized in other judgements as well.²¹

The strict dualist approach followed by Courts has resulted in the infringement of the duties of the State that has been embodied in the Preamble of the Constitution itself, which includes facilitating "freedom, equality, justice, fundamental rights" of the people. Regardless of being dualist, this has been considered in Indian Courts,²² which highlight in the case of *Kesavananda Bharati v. State of Kerala* that the provisions of the Universal Declaration of Human Rights (UDHR) must be taken into consideration when interpreting the constitution.²³

3.1.2 STATUS AS SOFT LAW

However, even though the Courts have refused to directly enforce the provisions of international treaties which were ratified, they have not hesitated in using them as persuasive sources in matters

¹⁸ [2013] 1 SLR 245.

¹⁹ Md Al-Imran Khan, "The Singarasa Case: An Analysis of the Sri Lankan Supreme Court's Verdict of 'NO RIGHT'" (2021) 4 SCLS Law Review 8.

²⁰ *Visal Bhashitha Kavirathne and Others v W.M.N.J. Pushpakumara, Commissioner General of Examinations and Others*, SC (FR) No.29/2012.

²¹ M Sornarajah, 'The Reception of International Law in Domestic Law of Sri Lanka in the Context of Global Experience' Sri Lanka Journal of International Law (2016) 3-42.

²² Aparna Chandra, 'India and International Law: Formal Dualism, Functional Monism' (2017) 57 Indian Journal of International Law 25.

²³ *Kesavananda Bharati v State of Kerala* [1973] 4 SCC 225; AIR 1973 SC 1461.

of interpretation, as opposed to a binding source. For instance, in the case of *Bulankulama v. Secretary, Ministry of Industrial Development and Others*²⁴ the Court held that the provisions of the Stockholm Declaration and Rio De Janeiro Declaration in relation to environmental policies and development can be regarded as “soft law” and “as a Member of the United Nations they could hardly be ignored by Sri Lanka”.²⁵ Similarly, the rights to equal remuneration, to protection of health and to safety in working conditions which are enshrined in Article 11 of Convention on the Elimination of all forms of Discrimination Against Women, 1978 have been utilized in the case of *Manohari Pelaketiya v. H. M. Gunasekera and others*, in determining workplace harassment.²⁶

This can be viewed as a positive step taken by the Judiciary as it allows the key objectives and principles of the international treaties to be reflected in the interpretation and determinations of the Court. It promotes the upliftment of universal human rights, in addition to the fundamental rights guaranteed by the Constitution.

A similar approach is evident in the United Kingdom, in which the international obligation of the State is taken into account in interpreting legislature, even if such was not the intention of the drafters²⁷. Sri Lankan Courts too could adopt such mechanisms to ensure the citizens’ privilege from the ratified treaties, despite the lack of enabling legislation.

3.1.3 INCORPORATION AS CUSTOMARY INTERNATIONAL LAW

The Constitution, pursuant to Article 13(6) allows the integration of international law if it is in accordance with “the general principles of law recognized by the community of nations”. The provision has been relied upon by the Legislature in passing the Offenses Against Aircraft Act of 1982.²⁸ It was held by the Appellate Court in the decision of *Sepala Ekanayake v. The Attorney-General* that the hijacking of a plane amounts to a violation in accordance with the Convention on Anti-Hijacking of Aircraft (1978). The court further elaborated that even though Sri Lanka had not passed the enabling legislation despite ratifying the treaty; the offence could be held as a violation of the “the general principles of law recognized by the community of nations”.²⁹ In a legal

²⁴ *ibid*

²⁵ [2000] 3 SLR 243, 273.

²⁶ *Manohari Pelaketiya v H. M. Gunasekera and others* SC FR 76/2012.

²⁷ Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford University Press 2011).

²⁸ Averbuck David, ‘The Sepala Ekanayake Case: Domestic Sri Lankan Law Incorporates International Law’ (1989) 1 Sri Lanka Journal of International Law 8.

²⁹ *Sepala Ekanayake v The Attorney-General* [1986] CA 132/84.

perspective war crimes, genocide and airplane hijacking can be recognized under such category,³⁰ particularly as it is equal to piracy on the sea.³¹ Thus, it is evident that despite the dualist nature of the State, the legislature and the judiciary at certain times have slightly deterred themselves to a monist approach when necessary.

However, it must also be noted that this is only done if the relevant incident in consideration can be justified within the realms of international customary law. For instance, in the case of *Leelawathie v. Minister of Defense and External Affairs*, the petitioner, despite the case being related to language rights, failed to invoke the provisions of the UDHR because at the time it had not developed to fit the genre of “the general principles of law recognized by the community of nations”. In contrast, as in a monist State the same factual circumstances would have led to a different conclusion by the Judiciary as is evident in the case of *Sei Fujii v. California* which held that self-executing provisions of the UN Charter were binding on domestic law.³² Therefore, it is evident that in a dualist nation, particularly Sri Lanka, the deviation and exception is only possible if it is in relation to customary international law.

3.2 PRACTICAL IMPLICATIONS

Despite the ratifying of treaties there are several practical impediments that a state may encounter. These are of two types, the difficulties in enacting and the difficulties in enforcing. The difficulties in enacting may arise due to the difference in the expected legal standard and the domestic standard. This has been acknowledged in Article 2(3) of the International Covenant on Economic, Social and Cultural Rights. It outlines that parties shall undertake measures to ensure that individuals have access to effective remedies for violations of their economic, social, and cultural rights. The term ‘effective remedy’ can be interpreted to suggest that the remedies should be both accessible and providable by the relevant state. Thus, implying that it is a subjective standard which may change with the standards of the state. Such standards may differ based on resources, legal frameworks, institutional frameworks, socio-political factors and cultural factors.

The struggle in enforcement is mainly linked to the misuse of the provisions or the misinterpretation of provisions. The enabled legislation may be used in a different context than they were intended to be used. For instance, the International Covenant on Civil and Political Rights Act of 2007 has

³⁰ Averbeck David, ‘The Sepala Ekanayake Case: Domestic Sri Lankan Law Incorporates International Law’ (1989) 1 Sri Lanka Journal of International Law 7.

³¹ Decisions of the Supreme Court on Parliamentary Bills 1978-1983, vol 1 137.

³² *Sei Fujii v. California* [1952] 38 Cal. 2d 718.

been used as a tool of repression as opposed to a safeguard of human rights in Sri Lanka. Section 3(1) of the International Covenant on Civil and Political Rights Act stipulates that religious hatred shall not be advocated and hostilities of any form in this context shall not be propagated.³³ It can be interpreted as a sanction of a particular category of hate speech, mainly towards race, religion, and nationality. However, often, this provision has been used to prosecute civilians on the basis of hate speech against a particular religion.³⁴ Thus, the legislative intent of the enabling legislation has not been achieved despite being established properly.

3.3 REFORMS TO RESOLVE THE AMBIGUITY

As observed above, the incorporation of international law into domestic legal systems presents a complex challenge, especially in jurisdictions where the constitutional framework does not explicitly address this issue. The ambiguity surrounding how international treaties and conventions are to be integrated into domestic law can undermine the effectiveness of legal integration and compliance with global standards. In order to establish effective reforms, the adoption of explicit constitutional frameworks, comparative approaches from jurisdictions can be taken into account.

One of the most effective reforms to resolve the ambiguity arising from constitutional silence on international law is to establish a clear constitutional framework. This framework would define how international treaties and conventions are to be incorporated into domestic legislation and provide a mechanism for their implementation. The absence of such a framework often leads to inconsistent application and interpretation of international norms, creating uncertainty and potentially undermining the effectiveness of legal integration.

For instance, the South African Constitution, under Article 233, states that “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.³⁵ It directs courts to interpret legislation in a manner consistent with international law wherever possible. This provision ensures that international standards are considered in the interpretation of domestic laws, fostering alignment with global norms and enhancing the consistency of legal outcomes. Further, the South African Constitution has provisions to recognize

³³ International Covenant on Civil and Political Rights (ICCPR) Act.

³⁴ Sri Lanka Brief, ‘Misuse of ICCPR act in Sri Lanka in suppressing freedom of expression rights.’ (*Sri Lanka Brief*, 24 June 2019) <<https://srilankabrief.org/misuse-of-iccpr-act-in-sri-lanka-in-suppressing-freedom-of-expression-rights/>> accessed 23 August 2024.

³⁵ S Afr Const art 233.

Customary International Law under Article 232, which states that it is part of the law unless inconsistent with the Constitution or an Act of the Parliament. Similarly, the Constitution of the United States of America (USA), through Article VI, delegates treaties to be a part of the ‘supreme law’.³⁶ This elevates the status of international treaties within the domestic legal hierarchy, ensuring their direct applicability and enforceability in the USA courts. This provides clear guidance on the status and treatment of international obligations and eliminates ambiguity, ensuring compliance with global standards.

The French monist approach offers an alternative model for integrating international law. In a monist system, international law is automatically incorporated into domestic law without the need for separate legislative acts, if it does not contradict existing domestic legal norms. This approach respects state sovereignty while ensuring that international obligations are effectively integrated into the national legal system.³⁷

Adopting a monist approach similar to the French monist system could regulate the incorporation of international law amidst constitutional ambiguities. By eliminating the need for separate legislative action, a monist system can enhance the efficiency of legal integration and ensure that international standards are consistently applied. However, it is essential to ensure that the monist approach respects the sovereignty of the state and does not undermine domestic legal principles.

On the other hand, a ‘moderate dualist’ framework could offer a balanced solution. Under a moderate dualist approach, international treaties are incorporated into domestic law through enabling legislation, but with safeguards to ensure that domestic legal norms and sovereignty are respected. This approach allows for the integration of international obligations while preserving the integrity of the domestic legal system.

A moderate dualist framework can address the challenges of integrating international law by providing a structured process for incorporating treaties and conventions. It ensures that international obligations are implemented effectively while maintaining respect for domestic legal principles and sovereignty. This approach offers a pragmatic solution for jurisdictions that wish to balance their international commitments with their domestic legal frameworks. Therefore,

³⁶ US Const art VI.

³⁷ Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford University Press 2011).

constitutional reforms that provide explicit guidance on the integration of international law can enhance legal coherence and ensure compliance with global norms.

4. CONCLUSION

Despite the popular belief that sovereignty must not be harmed, both the legislature and judiciary must consider that its key function is facilitating ‘freedom, equality, justice, fundamental rights’ of the People. Therefore, the Legislature and Judiciary must ensure the adoption of an approach that safeguards such functions. The examination of decisions of the law-making and enforcing bodies considering decisions such as the *Ekanayake case* evidences the fact that such an approach is not entirely foreign to the island nation either. The implementation of a proper framework for the integration of international law into municipal law will ensure the efficiency of such integration and will help serve its purpose.

CYBERSECURITY AND DIGITAL RIGHTS

REGULATING THE DIGITAL AGE: CAN THE EU SET THE STANDARD FOR A GLOBAL TECH GOVERNANCE FRAMEWORK?

Udam Wickremasinghe

ABSTRACT

This article examines the EU's role in shaping global technology governance through its key regulations: the General Data Protection Regulation (GDPR), Digital Market's Act (DMA), Digital Market's Act (DSA), and the upcoming Artificial Intelligence Act. This article analyses the legal and global impacts of these regulations on international markets and technology industries, focusing on their extraterritorial reach, compliance challenges for global companies, and potential for harmonizing international standards. By evaluating the EU's influence on data privacy, market competition, and digital services, the study assesses whether the EU can establish itself as a global leader in tech governance and outlines the implications for future regulatory trends.

1. INTRODUCTION: THE EU'S AMBITION IN GLOBAL TECH GOVERNANCE

With the speed at which technology is developing and the widespread impact of digital platforms, it is more important than ever to have strong regulatory frameworks. The European Union (EU) hopes to establish international norms for technology governance, thus it has put itself at the forefront of this legislative endeavor.¹ The EU's dedication to preserving fundamental rights, guaranteeing fair competition, and advancing a safe and open digital environment serves as the impetus for this goal.² The EU started its quest to becoming a global technology regulator by enacting a number of fundamental laws designed to handle the intricacies of the digital era.³ The EU is becoming increasingly aware of the fact that while digital technologies have the potential to improve our lives in many ways, they also present a number of difficulties, including the dissemination of misinformation, cyber-attacks, the digital divide, and the concentration of power in a small number of tech companies. The way EU views digital tools and technologies, platforms, services, and markets has significantly changed in recent years. The EU has increased its regulatory efforts to address the issues presented by the digital age, following years of adopting a more

¹ 'EU Governance - EUR-Lex' accessed 26 June 2024.

² Adriaan Schout and Andrew Jordan, 'The European Union's Governance Ambitions and Its Administrative Capacities' (2008) 15 Journal of European Public Policy 957 accessed 26 June 2024.

³ Eprs, 'The Global Reach of EU's Vision to Digital Transformation'.

permissive attitude. A turning point was the General Data Protection Regulation (GDPR) adoption in 2016, which initiated a string of new laws proposed and enacted under the European Commission's "A Europe fit for the digital age" plan.⁴ The European Commission states that, “. Europe must now strengthen its digital sovereignty and set standards, rather than following those of others – with a clear focus on data, technology, and infrastructure.”⁵ The foundation for more extensive legislative measures was established by early initiatives like the Data Protection Directive and the E-Commerce Directive. These first actions demonstrated how the EU saw the need to strike a balance between regulation and innovation in order to safeguard consumers and promote a healthy market.

The regulatory approach of the European Union is grounded in multiple fundamental goals. The GDPR is evidence that the EU's primary goal is to protect personal data and privacy.⁶ In addition to establishing strict data protection guidelines within the EU, this rule also established a standard for international data privacy practices.⁷ In addition, the Digital Markets Act⁸ (DMA) and the Digital Services Act⁹ (DSA) both express the EU's desire to guarantee fair competition in the digital markets. These laws seek to uphold accountability for digital service providers' actions and content, avoid market monopolies, and encourage transparency.¹⁰ Beyond its boundaries, the EU's regulatory structure is significant and has a significant impact on global tech governance. The EU has influenced other countries to reevaluate and fortify their own regulatory frameworks by establishing strict guidelines for data security, market equity, and digital transparency. Multinational companies are forced to abide by EU legislation due to their extraterritorial scope, which increases the EU's global influence.¹¹ While the EU's ambitious regulatory agenda presents numerous opportunities for creating a more equitable and secure digital ecosystem, it also faces

⁴ ‘Digital Regulation in the European Union - EIZ Publishing’ <<https://eizpublishing.ch/artikel/euz/03-2024/digital-regulation-in-the-european-union/>> accessed 27 June 2024.

⁵ ‘The Global Reach of the EU's Approach to Digital Transformation | Epthinktank | European Parliament’ <<https://epthinktank.eu/2024/01/30/the-global-reach-of-the-eus-approach-to-digital-transformation/>> accessed 26 June 2024.

⁶ ‘The General Data Protection Regulation - Consilium’ <<https://www.consilium.europa.eu/en/policies/data-protection/data-protection-regulation/>> accessed 26 June 2024.

⁷ *ibid.*

⁸ ‘The Digital Markets Act: A Triumph of Regulation Over Innovation | ITIF’ <<https://itif.org/publications/2022/08/24/digital-markets-act-a-triumph-of-regulation-over-innovation/>> accessed 26 June 2024.

⁹ ‘The Digital Services Act Package | Shaping Europe's Digital Future’ accessed 26 June 2024.

¹⁰ ‘Digital Services Act & Digital Markets Act: Europe Regulates Big Digital Platforms – Perspectives in Argentina, Brazil and the United States | International Bar Association’ accessed 26 June 2024.

¹¹ Anu Bradford, ‘Digital Empires: The Global Battle to Regulate Technology’ [2023] *Digital Empires: The Global Battle to Regulate Technology* 1.

several challenges.¹² Balancing the need for stringent regulations with the imperative to foster innovation is a delicate task. Moreover, the potential for regulatory overreach and the associated compliance burdens for non-EU entities pose significant concerns. Nevertheless, the EU's proactive stance provides a model for international cooperation and harmonization in technology regulation.

The foundation of this framework consists of multiple primary goals, each aimed at addressing particular facets of the digital environment. These goals are essential to guaranteeing that the EU can successfully control technology and establish international norms for digital governance. In order to accomplish the common objectives and targets, the Digital Decade Policy Plan 2030¹³ establishes an annual cooperation cycle. The annual cooperation mechanism between the Commission and Member States serves as the foundation for this governance system. Firstly, it emphasizes a digitally skilled populace, aiming to equip citizens with the necessary capabilities to thrive in a technology-driven society. Second, the framework emphasizes how crucial it is to have sustainable and safe digital infrastructures in order to support connectivity innovations including 5G and guarantee their environmental effectiveness.¹⁴ Thirdly, it emphasizes pushing companies towards digital transformation by supporting their adoption of cutting-edge technology, especially artificial intelligence and cloud computing, especially for Small and Medium-sized Enterprises (SMEs). The framework culminates in an emphasis on the digitalization of public services, with the goal of facilitating smooth online interactions with government agencies and enhancing accessible for all individuals.¹⁵ In general, the 2030 framework aims to create a safe, inclusive digital environment where digital technologies empower people, organizations, and governments.

2. CORE LEGAL FRAMEWORKS IN EU TECHNOLOGY REGULATION

To ensure the smooth operation of this single market and protect its citizens, the EU has established a comprehensive set of regulatory frameworks. These frameworks encompass a wide range of areas, from product safety and consumer protection to environmental sustainability and data privacy. Understanding these key regulatory mechanisms is crucial for businesses operating within the EU,

¹² 'Globalizing European Digital Rights through Regulatory Power | Digital Empires: The Global Battle to Regulate Technology | Oxford Academic' accessed 27 June 2024.

¹³ 'Europe's Digital Decade: 2030 Targets | European Commission' accessed 28 June 2024.

¹⁴ '5G: For Safer, Greener, More Competitive Communities | Shaping Europe's Digital Future' accessed 28 June 2024.

¹⁵ 'digitaleurope-europe-2030-a-digital-powerhouse'.

as they ensure a level playing field, promote fair competition, and safeguard the well-being of European citizens.

2.1 General Data Protection Regulation (GDPR)

The General Data Protection Regulation (GDPR), enacted in 2016 by the European Union (EU), represents a landmark achievement in data privacy regulation.¹⁶ It grants individuals (data subjects) extensive control over their personal data and imposes strict obligations on organizations processing such data. The GDPR's core provisions and enforcement mechanisms have made global influence on data privacy standards. With the GDPR, Europe is demonstrating its continuous commitment to data security and privacy at a time when more individuals are entrusting cloud services with their personal information and security breaches are occurring on a regular basis.

At its heart, the GDPR establishes a comprehensive framework for individual rights regarding their personal data. These rights, often referred to as "data subject rights," are enshrined in Articles 15-21 of the regulation.¹⁷ Despite having been prepared and approved by the EU, it imposes duties on organisations worldwide, provided that they target or gather data pertaining to individuals within the EU. The rule became operative on May 25, 2018. If someone violates the GDPR's security and privacy requirements, they can face fines of up to 1.64 billion¹⁸ Euros.¹⁹

The General Data Protection Regulation (GDPR)²⁰ outlines six main principles for processing personal data, aimed at protecting individual privacy while ensuring fair, lawful, and transparent data handling. According to Article 5, data processing must be transparent, equitable, and lawful, requiring organizations to have a valid reason for data collection and use, and to inform individuals about data usage upfront.²¹ This means companies must clearly state why they are collecting

¹⁶ 'What Is GDPR, the EU's New Data Protection Law? - GDPR.Eu' <<https://gdpr.eu/what-is-gdpr/>> accessed 29 June 2024.

¹⁷ 'I (Legislative Acts) Regulations Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA Relevance)'.

¹⁸ '20 Biggest GDPR Fines so Far [2024] – Data Privacy Manager' <<https://dataprivacymanager.net/5-biggest-gdpr-fines-so-far-2020/>> accessed 29 September 2024.

¹⁹ 'GDPR Archives - GDPR.Eu' <<https://gdpr.eu/tag/gdpr/>> accessed 30 June 2024.

²⁰ 'I (Legislative Acts) Regulations Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA Relevance)'.

²¹ 'Art. 5 GDPR – Principles Relating to Processing of Personal Data - General Data Protection Regulation (GDPR)' <<https://gdpr-info.eu/art-5-gdpr/>> accessed 30 June 2024.

personal data and what it will be used for. Personal data must be collected for specific, explicit, and legitimate purposes and not processed further in ways incompatible with those purposes unless new consent is obtained. Data accuracy is crucial; organizations must ensure data is accurate and promptly correct any inaccuracies, taking reasonable steps to rectify or erase inaccurate data.²² Additionally, personal data should only be retained for as long as necessary for its intended purpose, ensuring that data is not kept longer than needed. Organizations, as data controllers²³, are responsible for adhering to these principles and must demonstrate compliance through proper documentation and practices. Any entity processing personal data of individuals within the EU or EEA must understand and follow these guidelines to ensure proper data management²⁴ and protection, safeguarding individuals' rights and privacy.²⁵

Globally, the GDPR serves as a benchmark for privacy laws, inspiring similar legislation and shaping data privacy norms across various jurisdictions.²⁶ Its extraterritorial reach requires companies outside the EU that process the data of EU residents to comply with its regulations, significantly impacting international business practices and promoting a higher standard of data protection worldwide.²⁷

2.2 Digital Markets Act (DMA)

The Digital Markets Act (DMA) has brought about a major change in the digital landscape of the European Union.²⁸ The goal of Regulation (EU) 2022/1925,²⁹ commonly referred to as the EU Digital Markets Act (DMA), is to establish a digital economy that is more competitive and egalitarian. On November 1, 2022, the European Parliament passed the law, and on May 2, 2023,

²² 'Art. 32 GDPR – Security of Processing - General Data Protection Regulation (GDPR)' <<https://gdpr-info.eu/art-32-gdpr/>> accessed 30 June 2024.

²³ 'What Are "Controllers" and "Processors"?' <<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/controllers-and-processors/controllers-and-processors/what-are-controllers-and-processors/>> accessed 30 June 2024; 'What Are "Controllers" and "Processors"? | ICO' <<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/controllers-and-processors/controllers-and-processors/what-are-controllers-and-processors/>> accessed 30 June 2024.

²⁴ 'Principle (e): Storage Limitation' <<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-protection-principles/a-guide-to-the-data-protection-principles/the-principles/storage-limitation/>> accessed 30 June 2024; 'Principle (e): Storage Limitation | ICO' <<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-protection-principles/a-guide-to-the-data-protection-principles/the-principles/storage-limitation/>> accessed 30 June 2024.

²⁵ 'Art. 32 GDPR – Security of Processing - General Data Protection Regulation (GDPR)' (n 22).

²⁶ 'Data Is the New Currency, IT Security News, ET CISO' accessed 29 June 2024.

²⁷ 'Digital Regulation in the European Union - EIZ Publishing' (n 4).

²⁸ 'The Digital Markets Act: Fair and Competitive Digital Markets | Data.Europa.Eu' accessed 30 June 2024.

²⁹ 'Regulation - 2022/1925 - EN - EUR-Lex' accessed 30 June 2024.

it went into effect in its entirety. This ground-breaking law seeks to address worries about the dominance of major internet platforms and establish a more equitable, competitive, and user-focused digital landscape. By limiting the influence of powerful online platforms, the Act hopes to prevent the digital economy from becoming too monopolistic and stagnant. The DMA wants to level the playing field and make it easier for smaller companies to succeed by stopping gatekeepers from abusing their market power.³⁰ As a result, there is a greater variety of services available in the digital ecosystem, which may lead to cheaper rates for customers.

The Act places a strong emphasis on platform practices being transparent so that consumers are aware of the collection and use of their data. The DMA also encourages interoperability, which makes it easier for consumers to move data between platforms.³¹ Users now have more control over their digital experiences and are better equipped to choose the services they utilize.³² The EU's conventional antitrust regulations are supplemented by the DMA. The DMA creates a set of ex-ante regulations that proactively stop gatekeepers from participating in anti-competitive behavior, whereas standard antitrust laws concentrate on case-by-case examinations of such behavior. The DMA gives the European Commission the authority to penalize gatekeepers who violate its rules and to enforce its terms. This reinforces the implementation of anti-monopoly laws in the digital sector. The legislation is a fresh take on digital platform regulation. Its success might influence other governments thinking about enacting legislation along similar lines to address worries about the dominance of Big Tech.

2.3 Digital Service Act (DSA)

The digital revolution has completely changed the way we communicate, use information, and do business. However, regulating the online space has become more difficult as a result of this quick evolution. In response, the Digital Services Act (DSA) was passed by the European Union (EU) in November 2022,³³ which was a major step in the direction of establishing a more secure and responsible online environment.

The Digital Services Act (DSA) covers a broad spectrum of online intermediaries, including social media sites, online marketplaces, content-sharing websites, and online travel and lodging services.

³⁰ 'Digital Markets Act Is Adopted | Simmons & Simmons' accessed 30 June 2024.

³¹ 'The Digital Markets Act: Fair and Competitive Digital Markets | Data.Europa.Eu' (n 28).

³² 'Digital Markets Act (DMA) Law: A New Era for Online Privacy?' <<https://usercentrics.com/knowledge-hub/digital-markets-act-dma-impacts-user-privacy-and-consent-management/>> accessed 30 June 2024.

³³ 'Regulation - 2022/2065 - EN - DSA - EUR-Lex' accessed 1 July 2024.

But it distinguishes various platforms according to their magnitude and influence. Stricter regulations apply to Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs)³⁴ in the EU that have more than 45 million monthly users,³⁵ To counter misinformation, these include carrying out risk assessments, putting in place reliable content filtering systems, and collaborating with independent fact-checkers,³⁶ Regulations are commensurate to the platform's possible impact on users thanks to this tiered approach.

In the EU, the DSA serves as a potent regulatory instrument. It establishes a uniform strategy among the member nations, enabling them to uphold the law and guarantee fair competition for enterprises. Though the law only directly affects the EU, its impact might be seen worldwide since major platforms would have to adjust to comply with its requirements, which could result in the creation of a worldwide standard for content moderation. The DSA also acts as a template for other nations looking to control their own internet domains. The Digital Services Act represents a significant leap forward in regulating the online space. By establishing clear boundaries, promoting user safety, and fostering a more competitive digital environment, the DSA has the potential to reshape the online landscape in the EU and beyond. As the digital world continues to evolve, the success of the DSA will be measured by its ability to adapt and ensure a safe, accountable, and inclusive online space for all.

2.4 Artificial Intelligence Act (AI Act)

A ground-breaking piece of law, the Artificial Intelligence Act (AI Act) of the European Union attempts to control the creation, use, and utilization of AI technologies. The recently adopted AI Act, which entered into effect in February 2024, represents a landmark piece of legislation aimed at establishing a comprehensive framework for the development, deployment, and use of AI technologies within the EU.³⁷ High-risk systems,³⁸ such as those utilizing facial recognition, credit

³⁴ 'DSA: Very Large Online Platforms and Search Engines | Shaping Europe's Digital Future' accessed 5 July 2024.

³⁵ 'European Union: Commission Publishes List of Very Large Online Platforms and Search Engines under Digital Services Act | Library of Congress' <<https://www.loc.gov/item/global-legal-monitor/2023-05-04/european-union-commission-publishes-list-of-very-large-online-platforms-and-search-engines-under-digital-services-act/>> accessed 5 July 2024.

³⁶ 'EU's Digital Services Act Just Became Applicable: Outlining Ten Key Areas of Interplay with the GDPR - Future of Privacy Forum' <https://fpf.org/> <<https://fpf.org/blog/eus-digital-services-act-just-became-applicable-outlining-ten-key-areas-of-interplay-with-the-gdpr/>> accessed 5 July 2024.

³⁷ 'Artificial Intelligence Act: MEPs Adopt Landmark Law | News | European Parliament' accessed 5 July 2024.

³⁸ 'Art. 16 AI Act - Obligations of Providers of High-Risk AI Systems - AI Act' <<https://ai-act-law.eu/article/16/>> accessed 6 July 2024.

scoring, or autonomous vehicle control, are subject to the most stringent regulations,³⁹ Providers of these systems must conduct in-depth risk assessments, implement robust technical and human oversight mechanisms, and adhere to stringent data governance requirements. Limited-risk systems, like chatbots or spam filters, face less stringent regulations but are still mandated to comply with transparency and fairness principles.⁴⁰

The EU's AI Act stands as a groundbreaking effort to ensure the responsible development and deployment of AI technologies. Its focus on safety, fairness, and transparency aims to build trust in AI and foster a future where AI benefits all of society. While its primary impact will undoubtedly be felt within the EU, the Act's potential to influence global AI practices and inspire new regulatory frameworks cannot be overlooked.⁴¹ The EU has emerged as a leader in sculpting a responsible path for AI development, paving the way for a future where humans and AI can co-exist and thrive.

3. LEGAL CONSEQUENCES OF EU TECHNOLOGY REGULATIONS

The European Union (EU) has established a comprehensive framework of tech regulations to govern the digital landscape. This framework, encompassing the General Data Protection Regulation (GDPR), Digital Services Act (DSA), Digital Markets Act (DMA), and Artificial Intelligence Act (AI Act), presents a complex web of compliance requirements and legal obligations for organizations operating within the EU. Navigating the EU's regulatory environment necessitates understanding the specific requirements of the GDPR's data protection mandates, the DSA's content moderation duties, the DMA's competitive market provisions for gatekeeper platforms, and the AI Act's forthcoming risk-based compliance measures for high-risk AI systems.

6.2 3.1 Compliance Requirements and Legal Obligations

The legal frameworks created by the European Union (EU) and the Council of Europe (CoE) both safeguard the right to personal data privacy. The European Convention on Human Rights (ECHR) provides the right to respect for one's home, correspondence, and private and family life under Article 8. Article 7 of the EU Charter of Fundamental Rights is nearly exact in its language. Furthermore, the right to data protection is specifically included in Article 8 of the EU Charter, which regards it as a basic right in and of itself. The GDPR's reach extends beyond the geographical

³⁹ 'EU AI Act, First Major Law for Artificial Intelligence, Gets Final Nod' accessed 5 July 2024.

⁴⁰ 'Article 52: Procedure | EU Artificial Intelligence Act' <<https://artificialintelligenceact.eu/article/52/>> accessed 6 July 2024.

⁴¹ 'AI Act | Shaping Europe's Digital Future' accessed 6 July 2024.

boundaries of the EU. This principle, known as extraterritorial application, applies to organizations that offer goods or services to individuals residing in the EU, regardless of the organization's physical location. This regulation has fundamentally reshaped the landscape of data processing, impacting not only organizations within the EU but also extraterritorial markets and tech companies worldwide.

EU data protection law applies to “the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system”.⁴² The territorial scope of the GDPR is determined by Article 3. According to Article 3(1), identifying the entity acting as a “controller” or “processor” of the processing and locating its “establishment(s)” are prerequisites for determining the GDPR's territorial scope. The reference to the “context of activities,” however, is equally significant because it suggests that the establishment must be engaged in activities that imply the processing of the relevant personal data. The GDPR establishes a set of fundamental principles governing the processing of personal data. These principles are designed to ensure that data is handled lawfully, fairly, and transparently, while safeguarding the rights and freedoms of individuals. Its reach extends far beyond the European Union (EU), influencing data protection practices and regulations globally. This regulation empowers individuals with extensive control over their personal data, imposes strict obligations on organizations handling such data, and establishes a robust framework for enforcement. Most notably, the General Data Protection Regulation (GDPR) requires businesses to have strong data protection measures in place and establishes strict guidelines for the handling, processing, and storing of data. These precautions consist of designating data protection officers, carrying out recurring analyses of the effects of data protection, and guaranteeing openness in data processing operations.⁴³ In addition, businesses must get individuals' express consent before collecting or processing their data, offer ways for data subjects to exercise their legal rights (including the ability to access, amend, or remove their data),⁴⁴ and notify anybody who discovers or suspects a data breach within 72 hours.⁴⁵

One of its most intriguing aspects is its extraterritorial reach, meaning it can apply to organizations even if they are not physically located within the European Union (EU). This ensures a wider

⁴² Article 2(1) GDPR.

⁴³ ‘GDPR Archives - GDPR.Eu’ (n 19).

⁴⁴ ‘A Guide to the Data Protection Principles | ICO’ <<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-protection-principles/a-guide-to-the-data-protection-principles/>> accessed 14 July 2024.

⁴⁵ ‘GDPR Compliance Checklist: 10 Key Steps (With Infographic) - CookieYes’ <<https://www.cookieyes.com/blog/gdpr-checklist-for-websites/>> accessed 14 July 2024.

protection for EU citizens' personal data, regardless of where it is processed.⁴⁶ The GDPR applies to organizations that offer goods or services to individuals in the EU, regardless of the organization's location. This includes situations where a company has a website accessible from the EU or targets EU residents with advertising campaigns. Personal data may only be transmitted outside of the EU in accordance with Article 44 GDPR, provided that the regulations' tenets are respected.⁴⁷ In order to govern these transfers, Chapter V comprises Articles 44–50 GDPR. Kuner claims that this creates a three-tiered framework with adequacy determinations at the top, suitable protections in the middle, and derogations at the bottom.⁴⁸ Concerns about platform governance and territorial scope have also been raised in the well-known *Glawischnig-Piesczek* case (C-18/18), which the CJEU determined on October 3, 2019.⁴⁹ Following the CJEU case, which raised concerns about Facebook's accountability and role in deleting this offensive content from the site, it was decided that all users worldwide required to have the same and comparable comments removed.⁵⁰ The high court of last instance's ruling from September 15, 2020 marked the ultimate implementation of this finding by the Austrian courts.

The Digital Services Act (DSA) emphasises the obligations of digital service providers, especially online platforms, in creating a safer online environment, which is a supplement to the General Data Protection Regulation (GDPR).⁵¹ The DSA's strengthening of transparency requirements is one of its main tenets. Digital platforms must make their terms and conditions easily readable and understandable. This includes giving consumers comprehensive information about their policies for content moderation and the algorithms they employ to curate content. The case of *Deutsche Telekom AG v. European Commission* (Case T-540/15) emphasised the significance of transparency in platform operations and content moderation practices.⁵² It is imperative that users comprehend how their data is managed and how content decisions are made. The DSA's requirement for strong reporting and content moderation methods is another important feature. Platforms are required to set up effective processes for users to report illegal content, and they also

⁴⁶ 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3)-Version for Public Consultation'.

⁴⁷ 'Art. 44 GDPR – General Principle for Transfers - General Data Protection Regulation (GDPR)' <<https://gdpr-info.eu/art-44-gdpr/>> accessed 22 July 2024.

⁴⁸ Oskar Josef Gstrein and Andrej Janko Zwitter, 'Internet Jurisdiction and Data Protection Law: An International Legal Analysis (Part 1)' (2010) 10 Internet Policy Review accessed 22 July 2024.

⁴⁹ *Glawischnig-Piesczek* case (C-18/18).

⁵⁰ 'Global Freedom of Expression | Glawischnig-Piesczek v. Facebook Ireland Limited - Global Freedom of Expression' <<https://globalfreedomofexpression.columbia.edu/cases/glawischnig-piesczek-v-facebook-ireland-limited/>> accessed 22 July 2024.

⁵¹ 'Digital Services Act: Questions and Answers | Shaping Europe's Digital Future' accessed 26 July 2024.

⁵² 'Cases C- 152/19 Deutsche Telekom v Commission and C- 165/19 Slovak Telekom v Commission (Broadband Services in Slovakia) [Archived] | Legal Guidance | LexisNexis' accessed 26 July 2024.

have a duty to take swift action to either remove or block access to such content.⁵³ These notice-and-action procedures are required by Article 14 of the DSA,⁵⁴ which makes sure that platforms are proactive in addressing unlawful activity and defending user interests. This is especially crucial to preserving a safe and legal digital environment. Providers of intermediate services, such as websites that contain user-generated content, are required by this provision to employ content moderation systems in "a diligent, objective, and proportionate manner"⁵⁵ (see Article 3(g) DSA). The clause highlights how online companies must censor content while taking users' fundamental rights—like the right to free speech—into consideration.

Large online platforms are subject to strict obligations for risk assessment and mitigation under the DSA. These platforms are required to regularly evaluate the dangers associated with the spread of illicit content, the interference with basic rights, and other risks to society.⁵⁶ Fundamentally, the DSA imposes obligations on openness, demands risk assessments, and sets up independent auditing procedures for search engines and Very Large Online Platforms (VLOPs) that reach more than 10% of EU citizens, or about 45 million monthly active users (see Recital 76). Strict transparency guidelines pertaining to ad targeting, content control, and data sharing with approved researchers must be put in place by VLOPs like Google, Meta, X, and TikTok.⁵⁷ They are subject to ongoing systemic risk assessments that analyse threats to voting integrity, free speech, user rights, and equality arising from the architecture, algorithms, and business models of their platforms.⁵⁸ The need to take action to reduce hazards that have been identified has been highlighted by the extensive criticism of Facebook's role in disseminating false information.⁵⁹ Facebook responded by improving its risk assessment procedures and putting policies in place to stop the dissemination of misleading information, highlighting the vital necessity of continuous risk management.

Additionally, the DSA has provisions for researcher data access. Platforms must grant access to data to approved academics in order to support studies on systemic risks and the effects of their services on society. These data-sharing guidelines are outlined in Article 31 of the DSA,⁶⁰ which

⁵³ Matteo Monti, 'The EU Code of Practice on Disinformation and the Risk of the Privatisation of Censorship' [2020] *Democracy and Fake News: Information Manipulation and Post-Truth Politics* 214.

⁵⁴ 'Article 14, the Digital Services Act (DSA)' accessed 26 July 2024.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ 'The 2022 Code of Practice on Disinformation | Shaping Europe's Digital Future' accessed 27 July 2024.

⁵⁸ 'Platforms' Promises to Researchers: First Reports Missing the Baseline - AlgorithmWatch' <<https://algorithmwatch.org/en/platforms-promises-to-researchers/>> accessed 27 July 2024.

⁵⁹ 'Working to Stop Misinformation and False News' accessed 26 July 2024.

⁶⁰ 'Art. 31 DSA - Compliance by Design - Digital Decade by Hannes Snellman' <<https://digitaldecade.hannessnellman.com/articles/art-31-dsa-compliance-by-design/>> accessed 27 July 2024.

guarantees that platforms support transparency by independent research and deepen our understanding of their societal impact. Access to Qualified Data As it recognises that "access to data is needed to fully understand the systemic risks posed by online platforms," Article 31 of the DSA requires VLOPs to provide, subject to confidentiality safeguards, datasets and platform data to vetted researchers investigating manifest or foreseeable systemic risks from their services (Recital 58). According to Recital 58 of the DSA, Recipients of online platform services should have the ability to contest decisions about content illegality or terms and conditions violations easily and effectively. To ensure fairness, providers of online platforms must implement internal complaint-handling systems that are accessible, swift, non-discriminatory, and subject to human review when automated systems are used. These systems should allow recipients to lodge complaints without requiring formal legal references or explanations. Additionally, those who have submitted notices under the platform's regulation mechanisms should be able to contest the platform's decisions, including perceived inadequate actions. Complaints for reversing decisions must be allowed for at least six months from the notification of the decision.⁶¹ This makes it possible for independent research to be conducted in the public interest, looking at patterns and processes that underlie issues like algorithms that optimise content that disproportionately amplifies inflammatory content.⁶²

Furthermore, platforms are required by the DSA to release yearly transparency reports. These reports need to provide specifics on how they complied with the DSA, such as the steps they took to mitigate risks and moderate material. By permitting public inspection of platform practices, Article 23 of the DSA improves accountability by building trust and guaranteeing that platforms follow regulations. The Digital Services Act (DSA)'s Article 23 addresses internet intermediaries' accountability for information transfer. It is consistent with the main objective of the Act, which is to safeguard basic rights while promoting a free and open digital environment.⁶³ Citing the DSA's recitals, the Article emphasises the idea that, as long as they serve as merely conduits, internet intermediaries shouldn't be held accountable for the data that their users communicate.⁶⁴ Recital 63 emphasises how crucial intermediary responsibility exemptions are to promoting freedom of speech and innovation. The recognition exists that holding internet platforms accountable for the

⁶¹ 'Recitals - Digital Decade by Hannes Snellman' <<https://digitaldecade.hannessnellman.com/digital-service-package/digital-services-act-dsa/recitals/>> accessed 27 July 2024.

⁶² White Paper, 'Evaluating the Revised EU Code of Practice on Disinformation in Bulgaria Evaluating VLOP and VLOSE Implementation of the Strengthened EU Code of Practice on Disinformation in Bulgaria Evaluating the Revised EU Code of Practice on Disinformation in Bulgaria'.

⁶³ 'Art. 23 DSA - Measures and Protection against Misuse - Digital Decade by Hannes Snellman' <<https://digitaldecade.hannessnellman.com/articles/art-23-dsa-measures-and-protection-against-misuse/>> accessed 27 July 2024.

⁶⁴ 'Recitals - Digital Decade by Hannes Snellman' (n 60).

content of its users may hinder the advancement of the digital economy.⁶⁵ Recital 64, on the other hand, highlights the necessity for Internet platforms to take a proactive approach in resolving these concerns and recognises the rising challenges posed by illicit content online.⁶⁶ It emphasises the idea that, even with liability exemptions, platforms still need to have policies in place to stop and lessen the spread of illegal content. This notion stems from the understanding that putting such a liability in place may hinder creativity and limit the right to free speech. The paper does concede, though, that online intermediaries play a critical role in stopping the spread of illicit content. By holding digital service providers to high standards, this all-encompassing approach to transparency, content moderation, risk management, data exchange, and compliance reporting under the DSA promotes a safer and more open online environment.

3.2 Compliance Burdens for International Companies and Companies within European Union Region

The extraterritorial reach of EU regulations, particularly the General Data Protection Regulation (GDPR), Digital Services Act (DSA), Digital Markets Act (DMA), and the Artificial Intelligence (AI) Act, imposes significant compliance burdens on technology companies both within the EU and internationally. Consequently, international entities must align with GDPR requirements when processing EU residents' data, which includes updating privacy policies and establishing EU representative offices, under the threat of substantial fines for non-compliance.

The General Data Protection Regulation (GDPR) has profoundly reshaped the global data protection landscape. Its extraterritorial reach, extending to any organization processing personal data of EU residents, regardless of geographic location, has imposed significant compliance burdens on international entities. Article 8 Charter of Fundamental Right (CFR)'s right to data protection has an extraterritorial element that necessitates ongoing protection for personal data that is nearly identical to that which is promised inside the EU.⁶⁷ An unwritten component of the Article 8 CFR right to data protection is the right to ongoing protection of personal information. The European Parliament and the Council are directed by primary Union law, specifically Article 16(2) TFEU, to enact regulations concerning the safeguarding of individuals with regard to the processing

⁶⁵ 'Recital DSA 63 - Digital Decade by Hannes Snellman'

<<https://digitaldecade.hannessnellman.com/recitals/recital-dsa-63/>> accessed 27 July 2024.

⁶⁶ 'Recital DSA 64 - Digital Decade by Hannes Snellman'

<<https://digitaldecade.hannessnellman.com/recitals/recital-dsa-64/>> accessed 27 July 2024.

⁶⁷ Herke Kranenborg, 'Art 8 - Protection of Personal Data' (Hart Publishing, 2021) 231 accessed 27 July 2024.

of their personal data.⁶⁸ The extraterritorial component of the right to data protection is likewise covered by this obligation.

The landmark case *Google LLC v. CNIL*⁶⁹ clarified that the right to be forgotten under GDPR does not extend globally, compelling search engines to comply within the EU. The ruling makes it clear that although citizens of the EU have a legal right to be forgotten, that right is limited to the 28 Member States of the bloc. The European Court of Justice (CJEU) ruled on the case *Google Spain v. Agencia Española de Protección de Datos*⁷⁰ on May 13, 2014. The case was prompted by a request from Mario Costeja González for Google to stop showing links to him, which led to the Spanish Audiencia Nacional (National High Court) asking the CJEU for advice on the application of the Data Protection Directive. The CJEU's ruling established that European citizens have the right to request that commercial search engines, like Google, remove links to private information when it's no longer relevant. The ruling also states that search engines should only alter search results based on a person's name to make the link in question disappear, and that they shouldn't delete or de-index information. The Court acknowledged in that ruling the necessity of a balancing test that weighs other competing rights and interests against the right to de-list by applying the proportionality principle. It was decided that the right to be forgotten is not unqualified and is only given where the public's interest in maintaining access to the material is outweighed by the right to preserve one's personal data.⁷¹ It's crucial to note, though, that a significant portion of the CJEU's ruling seems to undermine Google's alleged win in this case. The Court's attempt to establish the legality of global de-referencing as a general principle is evident in paragraph 72 of the ruling. The Court leaves open the possibility of global de-referencing as decided by a national DPA or a national court in the EU by concluding that EU law does not forbid it and that Member States remain competent to order search engine operators to de-reference globally after weighing the competing rights of personal data protection against the right to freedom of information under national standards of protection of fundamental rights.⁷²

⁶⁸ 'I (Legislative Acts) Regulations Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA Relevance)'.

⁶⁹ *Google LLC v CNIL* [2019] (Case C-507/17) ECLI:EU:C:2019:772.

⁷⁰ *Google Spain SL v Agencia Española de Protección de Datos* [2014] C-131/12.

⁷¹ Mary Samonte, 'Google v. CNIL: The Territorial Scope of the Right to Be Forgotten Under EU Law; Google v. CNIL: The Territorial Scope of the Right to Be Forgotten Under EU Law' (2019) 4 European Papers www.europeanpapers.eu ISSN 839 .

⁷² 'Google v CNIL Case C-507/17: The Territorial Scope of the Right to Be Forgotten Under EU Law – European Law Blog' accessed 27 July 2024.

Furthermore, the EU-US Privacy Shield framework was declared invalid by the Schrems II (Case C-311/18)⁷³ ruling, highlighting the importance of strong data protection protocols for data transfers outside of the EU. A framework for exchanging personal data between the US and the EU, the EU-US Privacy Shield, was declared void because US monitoring methods went against EU data protection laws. The case also strengthened regulations pertaining to Standard Contractual Clauses (SCCs), mandating that businesses thoroughly evaluate the degree of data protection in third nations prior to data transfer. In the end, this ruling has strengthened EU individuals' rights to data privacy by compelling firms to look for alternate transfer methods and elevating the significance of data protection assessments. The CJEU declared mass surveillance to be in violation of EU law in its ruling, invalidating the EU-US Privacy Shield because of the US's inadequate data protection framework. The Standard Contractual Clauses (SCCs) were upheld by the Court, but under more stringent guidelines. Data exporters are now required to guarantee a nearly similar degree of protection as that of the EU, carrying out evaluations and maybe putting in place extra security measures. Supervisory bodies now have more authority to examine and, if need, stop transfers, highlighting the need for third-country data protection to meet higher standards.⁷⁴ Consequently, international entities must align with GDPR requirements when processing EU residents' data, which includes updating privacy policies and establishing EU representative offices, under the threat of substantial fines for non-compliance.

The Digital Services Act (DSA) aims to make online platforms safer by imposing stricter rules on content moderation, transparency, and accountability. Very large online platforms (VLOPs) face additional obligations. This has forced platforms like Facebook and Twitter to make significant changes to their operations, including enhancing complaint handling, transparency reporting, and content removal processes.⁷⁵ The DSA requires platforms to align their services with EU legal standards. The Digital Markets Act (DMA) targets large online platforms (gatekeepers) to ensure fair competition. It prohibits self-preferencing, mandates interoperability, and requires data access.⁷⁶ Companies like Apple and Google face scrutiny over App Store and advertising

⁷³ *Data Protection Commissioner v. Facebook Ireland Limited, Maximilian Schrems* [2020] (C-311/18).

⁷⁴ H Mildebrath, 'The CJEU judgment in the Schrems II case' (EPRS, September 2020) <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/652073/EPRS_ATAG\(2020\)652073_EN.pdf/](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/652073/EPRS_ATAG(2020)652073_EN.pdf/)> accessed 27 July 2024.

⁷⁵ 'Digital Services Act: What Is It and What Has Changed?' <<https://techhq.com/2023/08/what-is-the-eu-digital-services-act/>> accessed 27 July 2024.

⁷⁶ 'The Digital Markets Act: Ensuring Fair and Open Digital Markets - European Commission' accessed 27 July 2024.

practices.⁷⁷ The DMA mandates significant operational changes to prevent anti-competitive behavior and foster a level playing field.

The AI Act aims to regulate AI systems based on their risk levels, mandating transparency, accountability, data governance, human oversight, and ensuring robustness and accuracy for high-risk AI systems. The AI Act underscores the EU's commitment to ethical AI development, ensuring AI systems respect fundamental rights and societal values. Companies like Clearview AI have encountered legal disputes in the European Union, requiring them to modify their operations in order to comply with GDPR and possible AI Act regulations.⁷⁸ To guarantee non-discriminatory results, AI systems used in employment or credit scoring must abide by openness and fairness regulations.

In conclusion, the EU's tech regulations, including the GDPR, DSA, DMA, and AI Act, impose significant compliance burdens on both EU-based and international entities. These regulations require substantial operational changes, increased transparency, and strict legal adherence, shaping the global digital landscape.

4. BALANCING INNOVATION AND COMPLIANCE: CHALLENGES AND FUTURE DIRECTIONS OF EU TECHNOLOGY REGULATIONS

The EU's regulatory approach to technology, particularly through the GDPR, DSA, DMA, and the proposed AI Act, has garnered both commendation and criticism. One major challenge is balancing regulatory rigor with fostering innovation. While these regulations aim to protect data, ensure fair competition, and promote ethical AI development, they can also stifle innovation due to stringent compliance requirements. Critics contend that these policies' strict requirements may disproportionately harm startups and smaller businesses, raising entry costs and lowering the diversity of competitors. For example, smaller businesses may find it challenging to comply with the GDPR's stringent data protection rules without making major alterations to their operations and finances. George Washington University Regulatory Studies Center, examines the downsides of the General Data Protection Regulation (GDPR) two years after its implementation.⁷⁹ The GDPR,

⁷⁷ 'EU Launches Antitrust Probes Against Big Tech Giants Under New Digital Markets Act' accessed 27 July 2024.

⁷⁸ 'Challenge against Clearview AI in Europe | Privacy International' accessed 27 July 2024.

⁷⁹ 'Unintended Consequences of GDPR | Regulatory Studies Center | Trachtenberg School of Public Policy & Public Administration | Columbian College of Arts & Sciences | The George Washington University' accessed 27 July 2024.

intended to protect user privacy, has unexpectedly led to challenges such as reduced data availability for businesses, increased compliance costs for small companies, hindered innovation due to data restrictions, and user fatigue from excessive consent requests.⁸⁰ While aiming to empower individuals, the regulation has also impacted the ability of companies to provide personalized services and potentially compromised customer experience.⁸¹ The possibility of regulatory overreach is also a worry, as strict regulations may have unforeseen effects like reduced innovation and efficiency.

Many argue that current regulations, like the GDPR and AI Act, are overly restrictive, hindering innovation and creating a complex compliance environment. Industry seeks more flexibility, while policymakers grapple with inconsistencies across jurisdictions. Policymakers within and outside the EU have also highlighted the potential for regulatory fragmentation, where differing interpretations and implementations of these regulations across member states can create a complex compliance landscape for international companies.⁸² The AI Act, for example, while promoting ethical AI, has faced criticism for potentially hindering AI innovation due to its stringent requirements on transparency and accountability.⁸³ A more adaptable regulatory approach, involving continuous dialogue and adjustments, is proposed to address these challenges.

The EU's future in technology regulation focuses on balancing protection with innovation, adapting to new technologies like quantum computing and AI, and collaborating with global bodies to harmonize standards. This evolving approach aims to maintain EU's leadership while fostering growth.

5. THE EU'S FUTURE TRAJECTORY IN GLOBAL TECHNOLOGY REGULATION: BALANCING UNIVERSAL STANDARDS AND INNOVATION IN THE AGE OF EMERGING TECHNOLOGIES.

The future directions and prospects of EU technology regulation involve addressing emerging technologies and adapting to new regulatory challenges. The EU is poised to refine its existing frameworks, such as the GDPR, DSA, DMA, and the proposed AI Act, to ensure they remain

⁸⁰ *ibid.*

⁸¹ Nicholas Martin and others, 'How Data Protection Regulation Affects Startup Innovation' accessed 27 July 2024.

⁸² 'The EU's AI Dilemma: Innovation or Over-Regulation?' <<https://swissgrc.com/en/the-eus-ai-dilemma-innovation-or-over-regulation/>> accessed 27 July 2024.

⁸³ 'Business-Reporter.Com - Sustainability - The Pros and Cons of Regulating AI' accessed 27 July 2024.

effective and relevant.⁸⁴ This evolution is critical as new technologies like quantum computing, blockchain, and advanced AI present unique regulatory challenges.⁸⁵ The EU's proactive approach to continuously updating its regulations highlights its commitment to maintaining robust data protection, fair competition, and ethical standards in the face of rapid technological advancements.

Comparatively, the EU's regulatory framework is often viewed through the lens of Anu Bradford's "Brussels Effect"⁸⁶ which posits that the EU's stringent regulations can set global standards.⁸⁷ Bradford further states that, As the Brussels Effect may diminish, the EU may shift from unilateralism to multilateral regulatory cooperation, yet its regulations are likely to endure due to path dependency, past successes in institutionalizing rules, and its ability to navigate crises, thereby extending its regulatory influence into the foreseeable future.⁸⁸ The EU's influence highlights the need for universal regulations that safeguard consumers and ensure fair competition while fostering innovation, necessitating global collaboration to harmonize standards, avoid fragmentation, and create a balanced, dynamic regulatory environment. This strategy not only maintains the EU's leadership in setting global technology standards but also encourages sustainable growth and technological advancement worldwide.⁸⁹ The challenge lies in achieving this balance without infringing the spirit of innovation, a goal that requires ongoing dialogue and cooperation between regulators, industry stakeholders, and policymakers.

6. CONCLUSION

The EU's regulatory framework, including the GDPR, DSA, DMA, and the upcoming AI Act, aims to lead global tech governance by enforcing stringent standards for data protection, content moderation, market fairness, and ethical AI. Balancing these regulations with the need to foster innovation is crucial. The success of these regulations will depend on their adaptability to new technologies and the digital landscape while promoting fair competition. For continued influence, the EU must embrace international collaboration to harmonize standards and avoid fragmentation, ensuring a universal regulatory framework that supports both innovation and consumer protection.

⁸⁴ Centre for European Reform, *Ambitions for Europe 2024-2029: Harnessing regulation to boost the Twin Transition*(CERRE, 2024) <<https://cerre.eu/wp-content/uploads/2024/06/CE-7919-AMBITIONS-WHITE-PAPER-FINAL.pdf>> accessed 27 July 2024.

⁸⁵ 'The EU's AI Dilemma: Innovation or Over-Regulation?' (n 78).

⁸⁶ 'The Brussels Effect'.

⁸⁷ Anu Bradford, 'The Brussels Effect: How the European Union Rules the World' [2020] Faculty Books accessed 27 July 2024.

⁸⁸ *ibid.*

⁸⁹ Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press, 2023).

AN EXAMINATION OF REGULATORY AND POLICY FRAMEWORKS FOR CYBERSECURITY IN SRI LANKA

Saavindi Diwakara

ABSTRACT

In the digital age, the concern for cybersecurity has risen high, as nations deal with escalating cyber threats. Sri Lanka is a country on the fast track of digitalisation and is going through very challenging situations to protect its cyber infrastructure. Therefore, this research will critically look into the regulatory and policy frameworks governing cybersecurity in Sri Lanka, mainly with regard to the existing laws, regulations, and national policies.

The qualitative research methodology would be followed through doctrinal analysis and in-depth interviews with key stakeholders in order to understand whether the present regime in the realm of cybersecurity is effective or not. This study reveals that while Sri Lanka has initiated a regulatory regime, current laws indeed have huge lacunae regarding enforcement, inter-agency coordination, and public awareness.

The findings of this research make a clear case for the policymaker to coherently work on enhancing policy frameworks and adopting multi-stakeholder approaches to cybersecurity. Provided that the identified shortcomings are addressed, Sri Lanka will be well-placed to ensure much stronger defences against cyber threats, thus providing the basis for a more resilient digital environment. This study also offers an important resource for officials, practitioners, and researchers to help underline the current need for enhanced governance of cybersecurity against evolving challenges.

1. INTRODUCTION

The technologies, procedures, and controls used to safeguard data from cyberattacks and protect systems, networks, programs, and devices are referred to as cybersecurity.¹ As the use of digital infrastructure grows, so do the risks associated with cyberattacks, making

¹ National Institute of Standards and Technology, 'Framework for Improving Critical Infrastructure Cybersecurity' (Version 1.1, 16 April 2018)
<<https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf>> accessed 31 July 2024.

cybersecurity a top priority in every country today. It is made up of procedures and tools meant to keep a digital ecosystem safe from harm, illegal access, and attacks.

The number of cybersecurity incidents have grown to have huge effects on economic stability, national security, and public trust. To this end, large-scale cyberattacks underscore the flaws of digital infrastructure across industries and emphasise the urgent development of detailed and inclusive regulatory and policy frameworks for the mitigation of such risks and strengthening resilience against cyber threats. The initiative of international organisations and governments in setting standards and guidelines, whose levels and efficiencies in implementation at times vary from region to region, are noteworthy.

Similar to a plethora of countries, Sri Lanka is rapidly going digital, exposing it to a myriad of cyber threats. Understanding Sri Lanka's readiness and pinpointing areas for development to ensure security and resilience within its digital infrastructure is critical.

1.1 Objectives of the study

The core objective of the study is to examine the current regulatory and policy frameworks for cybersecurity in Sri Lanka. This review shall encompass relevant laws, regulations, and policies in force at the time of this research, and the various roles of different stakeholders. The study shall further compare the frameworks under operation in Sri Lanka with international standards and best practices, pointing out the strengths and weaknesses. It entails an in-depth review of cybersecurity-related laws and regulations, national policies and strategic plans on cybersecurity, examination of roles of stakeholders, and identification of challenges and barriers, with a comparative analysis of international standards and practices.

1.2 Significance of the study

This research is significant as it addresses in pursuit of providing full insights into the effectiveness of Sri Lanka's cybersecurity frameworks, and bringing out recommendations toward the enhancement of the cybersecurity posture in the country. The findings presented would, therefore, be useful for policymakers, practitioners, and researchers who have an interest in strengthening cybersecurity resilience in Sri Lanka.

1.3 Methodology

This would be a qualitative study into the regulatory and policy framework for cybersecurity in Sri Lanka, with a doctrinal methodology. The reason for choosing a qualitative approach in this study is that it would provide an in-depth, elaborate understanding of the complex legal and policy landscape. The major thrust of data collection was through the careful study of documents: in particular, statutory laws, regulations, and guidelines issued by the government; national policies pertaining to cybersecurity; strategic plans; precedents from the courts; and international standards coming from organisations such as ISO/IEC and NIST. This extensive review is undertaken to be able to pinpoint the central provisions, guiding principles, and frameworks that encompass Sri Lanka's approach to cybersecurity. The analytic framework is comprised of a doctrinal analysis, a comparative analysis, and a thematic analysis. Doctrinal analysis involves a minute scanning of legal texts to extract, interpret, and critically evaluate the provisions of relevance in the Sri Lankan legal regime. Comparative benchmarking analyses of the cybersecurity framework of Sri Lanka against international standards and best practices help in the identification of areas of strength and potential improvement by gazing at comprehensiveness, mechanisms of enforcement, stakeholder engagements, and alignment with global norms. Thematic analysis was used in analysing the qualitative data from the text documents, which involved transcription, coding, and categorisation of the text under study to identify recurring themes and patterns. This paper draws from the comprehensive nature of the approach in this methodology to have a strong evaluation of Sri Lanka's Cybersecurity Frameworks by marrying theoretical examination with practical insights to present findings that are reliable and relevant for policymakers, practitioners, and researchers desiring to better cybersecurity resilience for this country.

1.4 Literature review

1.4.1 Overview of Existing Research on Cybersecurity Frameworks

Cybersecurity frameworks become very important during the development of robust safety measures for cybersecurity. Among the most widespread frameworks are the National Institute

of Standards and Technology Cybersecurity Framework, ISO/IEC 27001, and the General Data Protection Regulation.²

The NIST Cybersecurity Framework is an overarching framework designed to help organisations manage and reduce information security-related risks.³ Second, the framework has five core functions that target identify, protect, detect, respond, and recover—thereby establishing a holistic approach toward management in the realm of cybersecurity.⁴ One important aspect of the framework is its adaptability, making it rather applicable across many sectors and sizes of organisations.⁵ The NIST CSF is elaborated in the official documentation provided by the National Institute of Standards and Technology, NIST, 2023.⁶

The ISO/IEC 27001 standard outlines the requirements for establishing, enforcing, maintaining, and continuously improving an Information Security Management System.⁷ It is risk-based and ensures that organisations systematically work in securing their information assets, including people, processes, and technology.⁸ The International Organization for Standardization spells out detailed requirements and benefits on ISO/IEC 27001.⁹

The European Union enforces the General Data Protection Regulation, which is provided for in a very high standard of data protection and privacy.¹⁰ This establishes stringent data protection measures and ensures more control by persons over their personal data.¹¹ It is therefore relevant for organisations not only within the EU but any entity processing EU resident's data.¹² Details to that elaborating on the comprehensiveness of the GDPR are well outlined in the official EU documentation.¹³

² National Institute of Standards and Technology (NIST), 'Cybersecurity Framework' (2023) <<https://www.nist.gov/cyberframework>> accessed 31 July 2024; ISO, 'ISO/IEC 27001 Information Security Management' (2023) <www.iso.org/isoiec-27001-information-security.html> accessed 31 July 2024; EU GDPR, 'General Data Protection Regulation' (2023) <<https://gdpr.eu/>> accessed 31 July 2024.

³ NIST (n 1).

⁴ *ibid.*

⁵ *ibid.*

⁶ NIST (n 1).

⁷ ISO (n 1).

⁸ *ibid.*

⁹ ISO, 'ISO/IEC 27001 Information Security Management' (2023) <www.iso.org/isoiec-27001-information-security.html> accessed 31 July 2024.

¹⁰ EU GDPR (n 1).

¹¹ *ibid.*

¹² *ibid.*

¹³ *ibid.*

1.4.2 Comparative Analysis of Cybersecurity Policies in Various Countries

The policies on cybersecurity across various jurisdictions provide valuable insights and best practices that can inform the development of regulatory frameworks in other countries, including Sri Lanka. Notably, the United States, the European Union, and Singapore have established robust cybersecurity frameworks that offer models for effective governance in this critical area.

One of the most important guidelines in the United States is the NIST Cybersecurity Framework, established by the National Institute of Standards and Technology. This cybersecurity framework provides a very adaptable, broad approach that enables organizations to make modifications in cybersecurity measures based on particular need and circumstance. It is organized around five core functions: Identify, Protect, Detect, Respond, and Recover—all connected by a holistic approach to the management of cybersecurity risks. Its effectiveness is further indicated by its wide adoption both in federal and private sectors since its application cuts across various industries and sizes of organizations.¹⁴ This flexibility not only enables organizations to comply with current regulations but also fosters a culture of continuous improvement in cybersecurity practices.

The General Data Protection Regulation of the European Union has been called a landmark regulation that lays down stringent standards for the protection of data. It prescribes full-fledged rules on the collection, retention, and transmission of personal data to guarantee a high level of protection for information concerning individuals. The GDPR lays out major requirements for organizations: explicit consent from individuals for processing their data; the right of data portability; and notification of a breach in 72 hours. Extraterritorial applicability means that it affects any organization handling data from EU citizens, irrespective of the location of the organization. Complementing the GDPR in scope, the NIS Directive reinforces the cybersecurity of network and information systems of EU member states. The directive requires operators of essential services and digital service providers to adopt security measures

¹⁴ National Institute of Standards and Technology, Framework for Improving Critical Infrastructure Cybersecurity (NIST, 2018) <https://www.nist.gov/cyberframework> accessed 28 September 2024.

and report incidents, which would thereby improve the general landscape of cybersecurity across the EU.¹⁵

Equally significant, Singapore has made great strides in laying down a thorough cybersecurity framework. The Cybersecurity Act of 2018 highlights the protection of Critical Information Infrastructures from cyber threats. It also clearly elaborates the respective roles and responsibilities of essential service operators through stringent security measures and routine audits. Besides that, the reporting of cybersecurity incidents is required under the Act, which is an important part of maintaining the transparency and accountability of cybersecurity practices. These finally allow Singapore's framework to enhance its digital infrastructure's resilience and create a secure environment for businesses and citizens alike by encouraging an active approach toward cybersecurity.¹⁶ These various methods of tackling the challenge of cybersecurity will help Sri Lanka to spot best practices and guidelines adaptable to the unique Sri Lankan context. Lessons learned from these jurisdictions can help shape a robust regulatory framework that meets the specific cybersecurity challenges faced by Sri Lanka, adding ultimately to a safer digital environment for citizens.

1.4.3 Gaps in the Current Literature Related to Sri Lanka's Cybersecurity Frameworks

Although there is available literature on global cybersecurity frameworks, there are considerable gaps in the literature regarding the cybersecurity frameworks in Sri Lanka. Specifically, the following areas call for further research.

Firstly, the efficiency and effectiveness of existing laws and regulations in Sri Lanka remain poorly documented. Although Vishaka Sooriyabandara's work has shown a general overview of the legal frameworks in Sri Lanka, it is one with very limited detailed research based on practical effectiveness and enforcement.¹⁷ It is important to understand to what extent these laws have been enforced and to what degree they reduce cybercrimes. Sooriyabandara also

¹⁵ European Parliament and Council, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) [2016] OJ L 119/1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679> accessed 28 September 2024.

¹⁶ Republic of Singapore, Cybersecurity Act 2018 (2020) <https://www.csa.gov.sg/Cybersecurity-Act> accessed 28 September 2024

¹⁷ Vishaka Sooriyabandara, 'Cybercrime Regulation in Sri Lanka: An Overview of the Legal Framework' (2020) 1(1) Journal of Cybersecurity 1.

emphasises the need for an effective legal framework, insofar as it is possible, to redress the cybercrime issues in Sri Lanka.¹⁸

Secondly, comparative studies in the ways and means Sri Lanka can match other nations in their cybersecurity efforts do not appear to be available. These studies would successfully identify its strengths and weaknesses and show a way forward for improving its policy vis-à-vis the rest of Sri Lanka on the successful models that exist elsewhere. It becomes more important particularly because global best practices can share their valuable experiences.¹⁹

According to most literature available, the cybersecurity laws and best practices in Sri Lanka have a general gap in public awareness. Indeed, there is a lack of knowledge that calls for further studies on educational-related initiatives and their effectiveness in increasing cybersecurity awareness in the wider public and businesses. More awareness and education foster better compliance with the measures taken on cyber security and further reduce the risks of threats arising from cyberspace.²⁰

Thirdly, the fast rate of technological changes continues to challenge existing cybersecurity frameworks. This suggests an area of research on how laws and regulations in Sri Lanka are adapting to new technologies and evolving cyber threats. This should cover aspects of the extent to which advanced technologies discard the earlier implementations of AI and machine learning in the cybersecurity regime.

Fourthly, the role of the private sector in strengthening national cybersecurity is relatively unexplored in the Sri Lankan context. Studies should explore how a government-private sector mix on best practices at both ends can help improve the effectiveness of public-private partnerships towards enhancing cybersecurity resilience. Involvement by the private sector in the development of best practices concerning cybersecurity becomes very critical for them to be part of the strategies developed because it will ensure that many areas that concern the digital ecosystem are well covered.²¹

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

Finally, there is meagre research on the response mechanisms and recovery processes related to incidents in Sri Lanka. Consequently, understanding the protocols of cyber incident handling, the effectiveness of the response teams, and the processes involved in recovery are very important for comprehensive cybersecurity planning. An effective response and recovery mechanism can mitigate much of the business impact from cyber-attacks.²²

Realising such gaps in the existing cybersecurity framework of Sri Lanka, this review will look into the effectiveness of existing laws, comparative studies with other countries, public awareness in the adaptation of technology, the role and contribution of the private sector, and mechanisms for incident response. Addressing these gaps by a concentrated effort on research and policy will create more strength in cybersecurity for better protection of the digital infrastructure in Sri Lanka and better safety for the citizens.²³

2. REGULATORY FRAMEWORKS FOR CYBERSECURITY IN SRI LANKA

2.1 Overview of Existing Laws and Regulations

Sri Lanka's regulatory framework for cybersecurity is built on an array of laws and regulations designed to address the challenges posed by the digital age. The country's efforts are aimed at safeguarding personal data, ensuring the integrity of electronic transactions, and protecting national security. Key legislations include the Computer Crimes Act No. 24 of 2007,²⁴ the Electronic Transactions Act No. 19 of 2006,²⁵ the Right to Information Act No. 12 of 2016,²⁶ and the Personal Data Protection Act No. 9 of 2022.²⁷

2.1.1 Computer Crimes Act No. 24 of 2007

The Computer Crimes Act No. 24 of 2007 was one of the pioneering legislative attempts concerning cybercrime in Sri Lanka. It criminalised such cybercrimes as unauthorised access

²² *ibid.*

²³ *ibid.*

²⁴ Computer Crimes Act No 24 of 2007 (Sri Lanka).

²⁵ Electronic Transactions Act No 19 of 2006 (Sri Lanka).

²⁶ Right to Information Act No 12 of 2016 (Sri Lanka).

²⁷ Personal Data Protection Act No 9 of 2022 (Sri Lanka).

to computer systems, data theft, and a host of others. The Act deters, therefore, cybercriminal activities and provides a legal framework for prosecuting offenders.²⁸

2.1.2 Electronic Transactions Act No. 19 of 2006

The Electronic Transactions Act No. 19 of 2006 promotes the application of electronic records and signatures in commerce and government dealings to legally validate e-contracts. It is an Act so necessary for the development of e-commerce and also digital government services.²⁹

The relationship between the Electronic Transactions Act and cybersecurity is what will give confidence to the digital environment. It demands stringent cybersecurity measures that will protect electronic signatures and records from forgery, hence maintaining the integrity of electronic contracts.³⁰

In addition, electronic commerce deals in sensitive personal and financial information; good cybersecurity is, therefore, needed to protect against unauthorized access to such information and data breaches. The Act also provides the foundation for associated regulations in cybersecurity, consequently allowing consumers to be more confident in digital transactions.³¹ In addition, this may involve laid down procedures for security breaches, vital in maintaining confidence and compliance with the law. In addition, as more e-commerce expands, so does the possibility of cyber threats, requiring an expanded development of cybersecurity frameworks.³²

That is, the effectiveness of the Act is deeply tied in with sound cybersecurity practices that are key to promoting safe and secure electronic transactions.³³

2.1.3 Personal Data Protection Act No. 9 of 2022

The Personal Data Protection Act No. 9 of 2022 is a comprehensive legislation to protect individuals from invasion of privacy by regulating the collection, processing, and use of

²⁸ *ibid.*

²⁹ Electronic Transactions Act No. 19 of 2006 (Sri Lanka)

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

personal data, and provides for a Data Protection Authority, which is charged with ensuring compliance and enforcement with data protection principles.³⁴

2.2 Key Regulatory Bodies and Their Roles

The various important regulatory bodies that work together in maintaining the cybersecurity framework of Sri Lanka include the Sri Lanka Computer Emergency Readiness Team (Sri Lanka CERT|CC), the Information and Communication Technology Agency, and the newly set up Data Protection Authority.

2.2.1 Sri Lanka Computer Emergency Readiness Team (Sri Lanka CERT|CC)

Sri Lanka CERT|CC is the national agency for cybersecurity incident response. It provides a range of services, from threat intelligence to incident handling and cybersecurity awareness training. As such, Sri Lanka CERT|CC plays a vital role in mitigating cyber threats and ensuring the country's cyber resilience.³⁵

2.2.2 Information and Communication Technology Agency (ICTA)

The ICTA is the lead agency in the implementation of government policies relating to digital matters. It is responsible for the development and promotion of ICT infrastructure, e-government services, and digital literacy. Another cardinal role of the ICTA is the formulation of cybersecurity policies and strategies.³⁶

2.2.3 Authority on Data Protection

Under the Personal Data Protection Act, the authority established is the Data Protection Authority. It oversees the enforcement of the data protection laws, ensuring that an organisation complies with the laid-down data protection principles, handling complaints, and conducting audits that secure personal data.³⁷

³⁴ *ibid.*

³⁵ Sri Lanka CERT|CC, 'About Us' (Sri Lanka Computer Emergency Readiness Team, 2023) <www.cert.gov.lk> accessed 31 July 2024.

³⁶ 'Information and Cyber Security Strategy of Sri Lanka' (*SHERLOC*) <https://sherloc.unodc.org/cld/en/treaties/strategies/sri_lanka/lka0001s.html> accessed 31 July 2024.

³⁷ *ibid.*

2.3 Analysis of Specific Cybersecurity Regulations

2.3.1 Computer Crimes Act No. 24 of 2007

The Computer Crimes Act provides a strong legal platform for dealing with cybercrime. Offences considered in this Act include unauthorised access, data interference, and system interference. It also gives the powers of investigation and prosecution agencies when dealing with investigation or prosecution of cybercrimes. However, this Act is often criticised as being out of date within the backdrop of evolving cyber threats. There have been calls for amendments to address new types of cybercrimes, including ransomware and advanced persistent threats.³⁸

2.3.2 Electronic Transactions Act No. 19 of 2006

The Electronic Transactions Act serves as a benchmark for a secure digital economy. It gives legal recognition to electronic records and signatures and, therefore, facilitates e-commerce and e-governance. The Act is in conformance with international standards enunciated in the UNCITRAL Model Law on Electronic Commerce and, therefore, is consistent with the framework of electronic transactions elsewhere in the world. However, because technology is changing at a blindingly rapid pace, there is an essential need for periodic updating of the Act to take into account the latest issues that have cropped up or are cropping up, specifically with regard to blockchain technology and smart contracts.³⁹

2.3.3 Right to Information Act No. 12 of 2016

The Right to Information Act rests based on transparency and accountability of information lying within the possession of the government to the general public. The domestic implications of it in terms of data management and cybersecurity raise a huge concern for the public authorities. Under such legislation, the handling and protection of sensitive information should be done right by avoiding data breaches that might affect the public's trust. Public authorities

³⁸ *ibid.*

³⁹ *ibid.*

will be liable under this Act to implement proper information security measures to safeguard the data they hold.⁴⁰

2.3.4 Personal Data Protection Act No. 9 of 2022

The Personal Data Protection Act is the keystone legislation in the regime of data protection for Sri Lanka. It was prepared with the objective of protecting entitlements of the privacy of individuals while personal data collection, processing, and storing are being done. The Act has been introduced based on basic principles in conformity with international standards on the protection of personal data, like the GDPR which is an EU law that establishes strict standards for data protection and privacy, which elevate the control of individuals over their personal data throughout the EU. The establishment of the Data Protection Authority ensures that there are robust mechanisms for enforcement and compliance in the Act. How far this Act is going to be implemented effectively is going to depend on the capacity and resources the Data Protection Authority has to execute the mandate assigned.⁴¹

2.3.5 Sri Lanka Telecommunications Act

The Sri Lanka Telecommunications Act gives priority to the protection of communication through the implementation of measures at the service provision level for the security and confidentiality of users' data, the security of telecommunications networks from unauthorized access, and threats originating from cyberspace. It equally requires that providers take relevant measures vis-à-vis the protection of personal information sent via their networks to instil confidence in digital communications. It goes a long way toward enhancing the general cybersecurity environment in Sri Lanka by providing the necessary regulatory framework for enhancing the security of telecommunications, hence protecting users' communications against breach and misuse.⁴²

2.4 Recent and Upcoming Developments

2.4.1 National Cyber Security Strategy (2024-2027)

⁴⁰ *ibid.*

⁴¹ Personal Data Protection Act No 9 of 2022 (Sri Lanka).

⁴² Sri Lanka Telecommunications Act No. 25 of 1991 (amended 2003)

A new National Cyber Security Strategy will be introduced in Sri Lanka for the period 2024-2027. It shall assist the country in countering new cyber threats and improving cybersecurity within the nation. This encompasses the protection of critical infrastructures, improving awareness about cybersecurity, and strengthening its legal and regulatory framework for cybersecurity. This strategy is formulated from contributions made by various stakeholders—the government entities, private sector, and civil society.⁴³

2.4.2 Cyber Security Bill

The newly drafted Cyber Security Bill, presented to the Cabinet before the end of May 2024, presents another milestone development in the cybersecurity framework of Sri Lanka. This is part of the overall National Cyber Security Strategy in line with the National Digital Strategy 2030 to establish a sound legal framework concerning various aspects related to cybersecurity.⁴⁴

The general intent of the Bill is to have a comprehensive framework on data protection, cybercrime, and protection of critical information infrastructure. It will provide a proper guideline and govern the practice to create an enhanced cybersecurity posture in Sri Lanka by allowing various private and public sectors to safely and securely use cyberspace.⁴⁵

The need for inclusivity and stakeholder involvement was given much attention in the drafting of this Bill. This Bill received an extended public consultation process wherein comments were requested from every ramification of stakeholders, inclusive of government ministries, private sector players, and civil society organizations. That is to say, even the Ministry of Defence greatly contributed at that time during those consultations—a key ingredient of the security-oriented approach that underpins this legislation.⁴⁶

The result of such deliberation and revision in an iterative process is to ensure that the final draft of the Bill addresses concerns and needs of different sectors, thereby creating a

⁴³ National Cyber Security Strategy (2024-2027).

⁴⁴ Sri Lanka Cyber Security Bill (Cabinet Submission, May 2024) <https://cert.gov.lk/wp-content/uploads/2024/03/NCSS-Draft-V14.pdf>.

⁴⁵ National Cyber Security Strategy of Sri Lanka (2024 – 2027) (Sri Lanka CERT) <https://cert.gov.lk/wp-content/uploads/2024/03/NCSS-Draft-V14.pdf>.

⁴⁶ Public Consultation Report on the Cyber Security Bill (Ministry of Defence, 2024) <https://cert.gov.lk/wp-content/uploads/2024/03/NCSS-Draft-V14.pdf>.

collaborative environment for enhancing cybersecurity in Sri Lanka. This may be welcomed as a positive legislative move toward reducing the threat of cybercrime and developing a resilient digital economy.⁴⁷

2.4.3 Defence Cyber Command Bill

Another key development is the proposed Defence Cyber Command Bill, which would establish a dedicated command for cybersecurity in the defence sector. This bill has been proposed in order to facilitate the betterment of capabilities for the Sri Lankan Armed Forces in responding to threats from cyberspace and protecting national security. Its progress remains uncertain, but it represents one of the fastest-growing recognitions of cybersecurity as a principal component of national defence.⁴⁸

2.4.4 Online Safety Act No. 9 of 2024

The Online Safety Act No. 9 of 2024 is a rather controversial piece of legislation that touches on the concern it raises over its possible effect on media freedom and individual rights. It basically aims to control online content against online harms.⁴⁹ While the objective of the Act is to make cyberspace safer, the manner in which it has been implemented has come to be seen by many as a curb on freedom of expression and media independence. It shall be effective only to the extent that it maintains a delicate balance between security concerns and fundamental rights.

3. POLICY FRAMEWORKS FOR CYBERSECURITY IN SRI LANKA

In the digital age, cybersecurity has emerged as a strategic imperative for the national security, economic stability, and public safety of any given country. Sri Lanka, being aware of that fact, has tried to develop and design its policies and strategies in many ways to enhance its cybersecurity postures in this era. This essay is an attempt to give an overview of national cybersecurity policies, government initiatives, strategic plans, and the responsible people of Sri Lanka.

⁴⁷ National Cyber Security Framework (2024) <https://cert.gov.lk/wp-content/uploads/2024/03/NCSS-Draft-V14.pdf>.

⁴⁸ Defence Cyber Command Bill.

⁴⁹ Online Safety Act No 9 of 2024 (Sri Lanka).

3.1 Overview of National Cybersecurity Policies

Several strategic documents and legislative efforts apply to the general strategy of Sri Lanka on cybersecurity.⁵⁰ The National Cyber Security Strategy 2024-2027 is one of the pivotal documents that outline the country's strategies on cybersecurity. It is underscored by the high importance given to secure cyberspace as a vital precondition supporting national security, economic growth, and public confidence. The NCSS aims to develop a resilient cyber infrastructure with a focus on the defence of critical information infrastructures and the promotion of cybersecurity awareness and education through the public and private sectors.

Organizational Information and Cyber Security Policy (October 2021) sets the direction through which treatment is provided for organizational information assets.⁵¹ This happens in the context of risk management, incident response, and evaluation of compliance with international standards. This provides a guideline for setting up cybersecurity procedures that an organisation will use for the protection of data and the operation of the business for the upliftment of cybersecurity.

3.2 Government Initiatives and Strategic Plans

The establishment of the Sri Lanka Computer Emergency Readiness Team Coordination Centre, also known as CERT|CC, aims to play a strategic role in the country's discerning response to cyber incidents, conduct cybersecurity training, and propagate best practices among the stakeholder sectors.

The government announced the introduction of long-delayed cybersecurity legislation in 2023 to address evolving cyber threats and improve the legal framework pertaining to cybersecurity.⁵² This legislation is expected to place effective legal underpinnings for prosecuting cybercrimes, protecting personal data, and protecting critical infrastructure. One

⁵⁰ National Cyber Security Strategy of Sri Lanka (2024-2027) Draft Version 14 (*Sri Lanka CERT|CC*, 18 March 2024) <<https://cert.gov.lk/wp-content/uploads/2024/03/NCSS-Draft-V14.pdf>> accessed 31 July 2024.

⁵¹ Information and Cyber Security Policy for Organizations (21 October 2021) <www.onlinesafety.lk/wp-content/uploads/2021/10/Information-and-Cyber-Security-Policy-for-Organizations-21-10-2021.pdf> accessed 31 July 2024.

⁵² 'Sri Lanka to introduce long-delayed cybersecurity legislation in 2023: official' (*EconomyNext*, 20 June 2023) <<https://economynext.com/sri-lanka-to-introduce-long-delayed-cybersecurity-legislation-in-2023-official-124009/>> accessed 31 July 2024.

such major step toward comprehensive cybersecurity governance is the National Cyber Security Bill, about to be forwarded to the cabinet.⁵³

International cooperation and compliance with the norms of global cybersecurity are, therefore, parts of the strategic plans of the government. The strategy enunciated on the platform of the UNODC, entitled “Information and Cyber Security Strategy”, highlights international cooperation, capacity building, and adoption of best practices in countering cyber threats in line with the global effort toward a safe and resilient cyberspace.⁵⁴

3.3 Roles of Different Stakeholders

3.3.1 Government

The Sri Lankan government has been the main driver of the national cybersecurity effort. It spans policy formulation, legislation of cyber laws, and the coordination of responses to cyber incidents. The lead role for the implementation of cybersecurity strategies and the related initiatives belongs to the Ministry of Digital Infrastructure and Information Technology, including CERT|CC.⁵⁵

3.3.2 Private Sector

The private sector is one of the most important stakeholders in the cybersecurity ecosystem. Enterprises and industries are not only victims of cybercrimes, but they are also important players in protecting their digital interests. The Information and Cyber Security Policy for Organizations puts forward that private organisations need to become part of the bandwagon of implementing strict cybersecurity practices by carrying out regular risk assessments and making investments in state-of-the-art security technologies.⁵⁶ Collaboration may be desired between the government and the private sector for sharing threat intelligence and best practices.

3.3.3 Academia

⁵³ National Cyber Security Bill to be submitted to cabinet this month', (*ReadMe*, 12 May 2024)

<<https://readme.lk/national-cyber-security-bill-cabinet-may/>>accessed 31 July 2024.

⁵⁴ Information and Cyber Security Strategy of Sri Lanka (*UNODC*)

<https://sherloc.unodc.org/cld/en/treaties/strategies/sri_lanka/lka0001s.html>accessed 31 July 2024.

⁵⁵ Ministry of Digital Infrastructure and Information Technology, Information and Cyber Security Policy for Organizations (October 2021)

⁵⁶ *ibid.*

Following this, the educational institutions offer services in research, education, and training towards cybersecurity. More precisely, in Sri Lanka, many of its universities and colleges offer courses on cybersecurity to train future professionals in this sphere. Academic research sheds light on the identification of new threats and the development of fresh solutions to mitigate them.⁵⁷ This interaction shall make sure that the curriculum stays updated with the shifting landscape of cybersecurity.

3.3.4 Civil Society

Civil society organisations are very instrumental in the creation of awareness of the subject of cybersecurity among ordinary people. These organisations run outreach exercises, workshops, and seminars, sensitizing and fostering a better understanding on safe online practices, privatisation of data, and why it is important to have cybersecurity practices.⁵⁸ Public awareness campaigns are building a culture around cybersecurity and ensuring citizens can be able to protect themselves in the digital world.

3.4 Challenges in Implementing Cybersecurity Frameworks

The implementation of a cybersecurity framework in Sri Lanka faces a lot of challenges cutting across the technical, legal, institutional, and socio-economic domains. The technical challenges include the fast pace of evolution of cyber threats, inadequate security infrastructure, and a shortage of skilful cybersecurity professionals, all of which affect the development and maintenance of robust cybersecurity defences.⁵⁹

These legal and regulatory challenges pertain to the use of obsolete or deficient laws on cybersecurity, problems in enforcement, and jurisdictional issues encountered in addressing cybercrime. Dynamic cyber threats very often outpace legislative updating, allowing gaps in the legal framework that can be exploited by cybercriminals. Besides, the transnational nature

⁵⁷ University of Colombo, Cybersecurity Courses and Research <www.cmb.ac.lk> accessed 31 July 2024.

⁵⁸ Sri Lanka Civil Society Organizations, Cybersecurity Awareness Initiatives <www.slcsa.org> accessed 31 July 2024.

⁵⁹ National Cyber Security Strategy of Sri Lanka (2024-2027) Draft Version 14 (*Sri Lanka CERT|CC*, 18 March 2024) <<https://cert.gov.lk/wp-content/uploads/2024/03/NCSS-Draft-V14.pdf>> accessed 31 July 2024.

of cybercrime makes jurisdictional enforcement quite complicated and requires international cooperation and harmonization of law.⁶⁰

These come in the form of a fragmented approach to cybersecurity, with related institutional coordination challenges across different agencies, while the level of staff awareness about cybersecurity remains very low. An effective cybersecurity strategy to this end should be very coherent and well-coordinated. On the other hand, too many organisations are still in a place of silos with no communication that brings vulnerabilities.⁶¹

These are socio-economic challenges, budgetary constraints to invest in cybersecurity, and limited access to advanced technology, with socio-economic disparities related to the adoption of cybersecurity measures. A number of these issues may act to prevent organisations from applying the relevant cybersecurity measures in place, which makes them vulnerable to attacks.⁶²

What is required for the cybersecurity frameworks of Sri Lanka compared to international standards is to be pegged against globally recognised standards such as ISO/IEC 27001, providing guidance related to information security management systems, and the NIST framework, offering voluntary standards, guidelines, and best practices for managing cybersecurity risk. Benchmarking the frameworks of Sri Lanka against countries like the USA, UK, and Singapore will identify its strengths and gaps and hence offer valuable insights into areas that need improvement.

Implementing cybersecurity frameworks in Sri Lanka faces several challenges across technical, legal, institutional, and socio-economic domains. Technical challenges include the rapidly evolving nature of cyber threats and insufficient security.

⁶⁰ 'Sri Lanka to introduce long-delayed cybersecurity legislation in 2023: official' (*EconomyNext*, 20 June 2023) <<https://economynext.com/sri-lanka-to-introduce-long-delayed-cybersecurity-legislation-in-2023-official-124009/>> accessed 31 July 2024.

⁶¹ Information and Cyber Security Policy for Organizations (21 October 2021) <www.onlinesafety.lk/wp-content/uploads/2021/10/Information-and-Cyber-Security-Policy-for-Organizations-21-10-2021.pdf> accessed 31 July 2024.

⁶² *ibid.*

3.5 Comparative Analysis with International Standards

Comparative analysis of the cybersecurity framework in Sri Lanka with international standards brings out several key observations. ISO/IEC 27001 is one of the leading international standards that deals specifically with Information Security Management Systems. Companies should adopt a systemic approach to managing sensitive company information in a manner that remains secure; this is achieved when it includes people, processes, and IT systems through the application of a risk management process.⁶³ This would not only be a benefit to the country's strength in cybersecurity but also help in better global integration when the country's cybersecurity framework is attuned with ISO/IEC 27001, ensuring that practices are on par with norms worldwide.

The NIST Cybersecurity Framework, on its part, is a voluntary but well-detailed set of standards, guidelines, and best practices that an organisation can manage and use to reduce risks related to cybersecurity. The NIST framework, for that reason, gives the flexibility and repeatability to take a tailored approach to cybersecurity that is agnostic to the different needs of different organisations. Based on the characteristics of the NIST framework, Sri Lanka is now able to develop a more adaptable, resilient cybersecurity posture that would be responsive to the dynamism of cyber threats.⁶⁴

A benchmark of cybersecurity frameworks in Sri Lanka against countries like USA, the UK, and Singapore reveals that while there are strengths, there also are grave gaps. For instance, the USA, the UK, and other countries have adopted an all-encompassing and mature state policy, subject to frequent reviews, for countering cybersecurity to threats and vulnerabilities. Singapore's strength in this area has made the country an epitome of good practice in cyber governance with a solid infrastructure in cybersecurity and a proactive approach.⁶⁵ These frameworks, therefore, can be learned from, with Sri Lanka drawing from areas in which it can

⁶³ 'Sri Lanka Cybersecurity Laws, You Need to Know' (*Medium*, 12 December 2022) <<https://medium.com/@hasithadhananjaya1061/sri-lanka-cybersecurity-laws-you-need-to-know-a3ea5a9a98e9>> accessed 31 July 2024.

⁶⁴ *ibid.*

⁶⁵ 'Information and Cyber Security Strategy of Sri Lanka' (*UNODC*) <https://sherloc.unodc.org/cld/en/treaties/strategies/sri_lanka/lka0001s.html> accessed 31 July 2024.

strengthen its approach. For example, though policies for cybersecurity have been developed, there are no cohesive mechanisms of how they will be effectively implemented and enforced.

Lessons learned from international best practices bring out an imperative: that cybersecurity should be proactive rather than reactive. Most countries that have advanced their cybersecurity frameworks major in themes of continuous improvement and proactive threat management. This includes frequent threat assessment, updating security protocols, and necessary investment in state-of-the-art cybersecurity technologies.⁶⁶ A second important point is the creation of a culture of cybersecurity awareness and education at all levels. Adopting these best practices would mean that Sri Lanka can enhance its preparedness markedly against cyber threats and, at the same time, see the observance of cyber measures changing from just being reactive to becoming anticipatory.

In simple terms, benchmarking against international standards and practices like ISO/IEC 27001, and the NIST framework, as well as against the best the world's countries have to offer, including the leading practices globally, is significantly reinforcing the cybersecurity framework of Sri Lanka. That will bridge these gaps by creating a safe and secure environment in the digital space with less vulnerability.

3.6 Recommendations

Following is the list of policies that can be suggested for the enhancement of Cybersecurity. The first step should be setting up a national cybersecurity strategy.⁶⁷ The depicted framework should illustrate the clear program of the country in combating cyber threats, clearly identifying different roles and responsibilities of the given stakeholders. There shall be critical infrastructure protection as well as sensitive data protection as part of the agenda.⁶⁸ In the meantime, everything has to be done so that public-private partnership in the field of cybersecurity is promoted. This would get information flowing and create a collaborative environment between the government and the private sector, where sharing critical information

⁶⁶ *ibid.*

⁶⁷ National Cyber Security Strategy of Sri Lanka (2024 – 2027) (Sri Lanka CERT).

⁶⁸ National Cyber Security Strategy of Sri Lanka (2024-2027) Draft Version 14 (Sri Lanka CERT|CC, 18 March 2024) <<https://cert.gov.lk/wp-content/uploads/2024/03/NCSS-Draft-V14.pdf>> accessed 31 July 2024.

and resources to boost overall cybersecurity posture becomes a norm.⁶⁹ There is also the need for the development of effective cybersecurity education and training programs. In view of the above, the implementation of comprehensive training programs for cybersecurity professionals and the public at large will to a great extent help decrease these vulnerabilities.⁷⁰

Regulatory improvements are also necessary to bolster cybersecurity. Updating and harmonising cybersecurity laws to reflect current threats and technologies is a critical step. This ensures that legal frameworks are robust and capable of addressing emerging cyber threats.⁷¹ Additionally, strengthening regulatory frameworks to ensure compliance is vital. This involves setting clear standards and guidelines for cybersecurity practices and enforcing them consistently across all sectors.⁷² Moreover, implementing strict data protection regulations can safeguard personal and sensitive information from breaches and misuse.⁷³

Effective implementation and enforcement strategies are crucial for the success of cybersecurity measures. Developing a centralised cybersecurity agency can streamline efforts and resources, ensuring a coordinated response to cyber incidents. This agency should be responsible for overseeing and implementing the national cybersecurity strategy.⁷⁴ Regularly conducting cybersecurity audits and assessments can help identify vulnerabilities and ensure continuous improvement in cybersecurity practices.⁷⁵ Lastly, fostering international cooperation to combat cross-border cyber threats is essential. Cyber threats often transcend

⁶⁹ Information and Cyber Security Policy for Organizations (21 October 2021) <www.onlinesafety.lk/wp-content/uploads/2021/10/Information-and-Cyber-Security-Policy-for-Organizations-21-10-2021.pdf> accessed 31 July 2024.

⁷⁰ 'Recommendations for effective cyber security execution' (*ResearchGate*) <www.researchgate.net/publication/306116973_Recommendations_for_effective_cyber_security_execution> accessed 31 July 2024.

⁷¹ 'Sri Lanka to introduce long-delayed cybersecurity legislation in 2023: official' (*EconomyNext*, 20 June 2023) <<https://economynext.com/sri-lanka-to-introduce-long-delayed-cybersecurity-legislation-in-2023-official-124009/>> accessed 31 July 2024.

⁷² 'National Cyber Security Bill to be submitted to cabinet this month' (*ReadMe*, 12 May 2024) <<https://readme.lk/national-cyber-security-bill-cabinet-may/>> accessed 31 July 2024.

⁷³ 'Sri Lanka Cybersecurity Laws, You Need to Know' (*Medium*, 12 December 2022) <<https://medium.com/@hasithadhananjaya1061/sri-lanka-cybersecurity-laws-you-need-to-know-a3ea5a9a98e9>> accessed 31 July 2024.

⁷⁴ 'Information and Cyber Security Strategy of Sri Lanka 2018-2023' (*SHERLOC*) <https://sherloc.unodc.org/cld/en/treaties/strategies/sri_lanka/lka0001s.html> accessed 31 July 2024.

⁷⁵ 'Recommendations for effective cyber security execution' (n 63).

national borders, and international cooperation can facilitate information sharing and joint efforts to mitigate these threats.⁷⁶

4. CONCLUSION

The research investigated the state of cybersecurity frameworks in Sri Lanka, identifying the findings and gaps in enforcement. Domestic laws provide a foundation but require constant updating to respond to changing threats. Comparative analysis recommends an integration of more comprehensive measures from international standards into the frameworks of Sri Lanka.

The bodies that deal with regulation, such as Sri Lanka CERTCC and others, are very instrumental in the national cybersecurity setup but need more resources to carry out enforcement. According to stakeholders, the need to raise public awareness and education programs to improve compliance cannot be overemphasised, nor can the reduction of vulnerabilities.

This means that in the future, there should be research on how the currently existing laws in Sri Lanka for cybersecurity are enforced. Secondly, for any nation to enhance its cybersecurity resilience, public-private partnership is very key, especially in incident response and recovery.

An appropriate cyber security framework is essential for Sri Lanka's digital transformation. It will ensure economic stability, national security, and public trust. Very important is the collaboration between the policymakers, practitioners, and researchers in ensuring that the adopted frameworks remain effective with constant monitoring, updating, and education programs. Coupling existing gaps and building on international best practices, Sri Lanka can set itself up for a safe digital environment.

⁷⁶ 'Recommendations and Lessons from Other Jurisdictions to Enhance the Effectiveness of the Existing Legal Framework on Cybercrimes in Sri Lanka' (*SlideShare*, 9 August 2017) <www.slideshare.net/slideshow/recommendations-and-lessons-from-other-jurisdictions-to-enhance-the-effectiveness-of-the-existing-legal-framework-on-cybercrimes-in-sri-lanka/78686501> accessed 31 July 2024.

FAMILY LAW

LEAVING THE BLOODSHED BEHIND: A CRITICAL ANALYSIS OF THE CURRENT FAULT-BASED SYSTEM SURROUNDING DIVORCE LAW IN SRI LANKA

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ABSTRACT

This article examines the intersection of traditional cultural values and the legal framework governing divorce in Sri Lanka. The nation's divorce laws, shaped by its colonial past, predominantly focus on fault-based grounds such as adultery, desertion, and cruelty, reflecting a broader societal hesitation to accept divorce. In contrast to global trends favouring more progressive divorce laws, Sri Lanka's framework continues to emphasize the preservation of the family unit, often sacrificing individual autonomy.

The article examines the effects of these laws on family stability, socio-economic factors, and ethical issues. It also compares Sri Lanka's approach with that of other jurisdictions including, the USA, Australia, UK, and other European countries and considers the possible implications of adopting mutual consent as a basis for divorce. The analysis argues that while fault-based laws may discourage hasty separations, they also create significant challenges for those seeking to end their marriages, particularly in cases of severe difficulty. This article concludes that a reformative approach is needed to balance evolving societal values with respect for the country's cultural traditions and that it is important to take steps towards development whilst respecting the existing traditional values of the people.

1. INTRODUCTION

An infamous incident in 2020, brought global attention to Sri Lanka when the winner of the Mrs. World Sri Lanka pageant was questioned on a very public stage as to the status of her marriage.¹ "Divorce" is a complicated subject, often riddled with varying personal and cultural views. While some jurisdictions have a more relaxed view on the subject, cultures with a deep-rooted sense of propriety look down on and stigmatise this topic, often considering divorce a failure, which would

¹ Al Jazeera, 'Mrs World Returns Her Crown After Arrest by Sri Lanka Police' (Al Jazeera, 22 April 2021) <https://www.aljazeera.com/news/2021/4/22/mrs-world-returns-her-crown-after-arrest-by-sri-lanka-police> accessed 26 July 2024.

disgrace a family and community. For instance, as of 2024, the Philippines is the only country other than the Vatican where 'divorce' is illegal, even in cases of domestic violence or adultery.²

In 2023, the Department of Consensus and Statistics reported 151,356 marriages being registered under the General Law, Kandyan Law and Muslim Law. However, the Department of Consensus fails to record on its website the divorce rates for the year despite its representation to have such a record.³

Statistics suggest that Sri Lanka boasts the world's lowest divorce rate, at 0.15 divorces per year per 1000 adults, which is equivalent to 9 divorces per day. This statistic is compared against the 300 – 400 divorce petitions filled daily⁴, forcing this author to question why the number of divorce petitions being filled is so high in contrast to the merger number of divorces actually being granted by the courts of Sri Lanka.

It is no secret that obtaining a divorce is a convoluted, painstaking process with many hurdles to overcome in the midst of prying eyes. Under the general law of Sri Lanka, a couple is not at liberty to obtain a divorce simply based on the fact that the two individuals are not compatible. They are required by law, to play a blame game and battle it out in a courtroom. The Morning newspaper went so far as to call it a 'public spectacle'.⁵ Which begs the question: why must an individual be willing to put themselves through such public embarrassment and air their dirty laundry for the world to see in order to simply enjoy a liberty that must logically be afforded to them?

2. A STRONG GRIP ON OLD ROOTS

Sri Lanka as a country, prides itself in having its culture deeply rooted in its legal system, and often sees traditional customs as guidelines to which individuals should aim to adhere to. These ensure that society grows to not only be cultured but maintains a sense of modest propriety. This was

² Al Jazeera, 'We Are Not Criminals: Philippines Considers Making Divorce Legal' (Al Jazeera, 5 July 2024) <https://www.aljazeera.com/news/2024/7/5/we-are-not-criminals-philippines-considers-making-divorce-legal> accessed 26 July 2024.

³ Department of Census and Statistics, 'Number of Births, Deaths, and Marriages by District, 2019-2023' (Department of Census and Statistics, 2024). <http://www.statistics.gov.lk/Population/StaticalInformation/VitalStatistics/NumberofBirthsDeathsMarriagesDistrict2019-2023> accessed 26 July 2024.

⁴ Staff Writer, 'From Vows to Divorce Papers: Understanding Sri Lanka's Marriage and Divorce Landscape' (Numbers.lk, 19 May 2023) <https://numbers.lk/analysis/from-vows-to-divorce-papers-understanding-sri-lanka-s-marriage-and-divorce-landscape> accessed 26 July 2024.

⁵ The Morning, 'Getting Divorced in Sri Lanka: A Public Spectacle and a Blame Game' (The Morning, 25 April 2021) <https://www.themorning.lk/articles/131838> accessed 26 July 2024.

clearly seen back in 2018 when legislation was proposed to repeal the 1955 law which placed a ban on women purchasing alcohol in Sri Lanka.

However, through major public outrage and constant influence by various religious leaders, the ban was yet again reinstated seeming to be in the interest of maintaining the notion that such behaviour is not to be encouraged. Whilst this particular decision may be criticised time and time again by both sides of the fence, a simple analysis of the situation makes it evident that regardless of the changing times and evolution of cultures, this little island chooses to stay true to its deep-rooted values.

2.1 A Deep-Rooted Marriage

The legal landscape surrounding divorce in Sri Lanka is one that has undergone significant transformation over the years; it reflects most of the changing societal norms and legislative reforms. However, it is simple for one to note that although there has been much change over the years, the crux of the law itself holds strongly onto old traditional roots, i.e., the fault-based system. Most consider this an issue. Specifically, the lack within the framework for mutual consent as a ground for divorce.

Sri Lanka's divorce laws primarily fall under the Marriage Registration Ordinance No 19 of 1907. This provides for three grounds for divorce including adultery, desertion and incurable impotence at the time of entering into the marriage; in addition to the three grounds provided for in statute, the courts have considered cruelty as a ground to grant a divorce under the limb of malicious desertion⁶. All of which emphasize fault-based grounds that require evidence of misconduct and marital breakdown by one or both spouses, reflective of the British colonial rule. The country's need for adherence to such a fault-based approach appears to be reflective of a communal rejection of the idea of divorce.

3. CURRENT PROCEDURE FOR OBTAINING A DIVORCE IN SRI LANKA

In Sri Lanka, there are only three avenues available to obtain a divorce. S. 19 (2) of the Marriage Registration Ordinance No 19 of 1907 provides that a divorce can only be obtained by judgment of divorce, a *vinculo matrimonii* pronounced in a competent court. Such a judgment can only be

⁶ *Wijesinghe v. Wijesinghe* (1954) SC 390-D, DC Colombo, New Law Reports (Sri Lanka)

found on the grounds of: (1) Adultery subsequent to marriage; (2) Malicious Desertion; or (3) Incurable sexual impotency at the time of such marriage.⁷

3.1 Adultery subsequent to marriage

Under the current law, Adultery is only considered a civil and matrimonial misconduct and does not fall within the scope of a criminal offence. However, the burden of proof falls on the party alleging the offence. The Civil Procedure Code, in section 602 states that the Court may pronounce a decree declaring the marriage dissolved if “it is satisfied on the evidence that the case of the Plaintiff has been proved”.

In the case of *Jayasinghe v. Jayasinghe*, the courts held that the standard of proof in a divorce action based on adultery is “Beyond reasonable doubt”. That means the court must be “satisfied on evidence” that the adultery is proved beyond reasonable doubt similar to that of a criminal action. In this case, however, the husband was unable to prove to the court beyond reasonable doubt that the wife was continuing to live in adultery after condonation. As such, the action for divorce was refused by the courts.⁸

3.2 Malicious Desertion

Malicious desertion requires the party seeking the divorce to establish two elements, the fact of desertion, and an intention to end the marital relationship⁹. This was defined by Bertram CJ in the case of *Silva v. Missinona* as a deliberate, definite and final repudiation of the obligations of marriage.¹⁰ However, under Roman-Dutch Law, if there remained a hope of reconciliation, then a decree of divorce will not be granted. This includes instances where, for example, a husband leaves the matrimonial home for an extended period but returns prior to an action of divorce being filled. The courts may consider his return to be ‘hope of reconciliation’ and refuse to grant a divorce.

In *Gomes v. Gomes*, the wife instituted an action for divorce on the grounds of constructive malicious desertion subsequent to disagreements between the parties, and an alleged assault by her husband who ‘threatened to pour kerosene on the plaintiff (wife) and burn her’ unless she left the

⁷ Marriage Registration Ordinance No 19 of 1907 (Sri Lanka).

⁸ *Jayasinghe v. Jayasinghe* [1954] 55 NLR 117.

⁹ What is Malicious Desertion’ (LankaLaw Forum, undated) <https://lankalaw.forumotion.com/t104-what-is-malicious-desertion> accessed 13 November 2024.

¹⁰ *Silva v. Missinona* (No 23) [1964] NLR 26,

matrimonial home. The District Court found that a ‘degree of matrimonial relationship’ had continued after the incident and, on that basis, dismissed the plaintiff’s claim.¹¹

On appeal, the Supreme Court noted that there was no conclusive evidence of the alleged incident, and upon examination of the living conditions of the two parties after the “incident”, the Court noted that the couple had continued to occupy the same house. Based on these facts, the Supreme Court dismissed the appeal on the basis that the plaintiff failed to prove guilt for constructive malicious desertion by the defendant. A disconcerting observation was made by the Court in its judgment, “[the wife] was compelled to remain in what she believes is an unhappy and unfulfilling marriage. The husband is left only with what appears to be the pyrrhic victory of an empty marriage”.

The grounds for divorce in Sri Lanka do not explicitly include ‘cruelty’ as a ground for divorce, however, it may be considered under malicious desertion although the courts have the discretionary powers to refuse it at any given time as it has not been expressly set out.

3.3 Incurable impotency at the time of marriage

Sections 596 and 607 of the Civil Procedure Code provide that an action for divorce or nullity of marriage may be instituted on the grounds of incurable impotency of the defendant at the time of solemnisation of the marriage. Akbar J further clarified this in the case of *Gunatilake v. Millie Nona*,¹² “In order to justify dissolution of marriage on the ground of impotency the impediment to intercourse should be irremediable. It must have existed before the marriage and have been entirely unknown to the party suing for the divorce. If a woman is alleged to be impotent and refuses to undergo treatment which might cure her, the husband has a just claim to have the marriage dissolved.”

4. “LAYING IN THE BED YOU MADE”

The concept of marriage is one that is sacred. Standing in front of loved ones and God, with the church as witness, couples make their vows to be with each other “*Till death do us part*”. The beauty of such a bond forged not only by individual promises to each other but a promise to God

¹¹ *Guneshi Mallika Gomes [nee Gunawardena] v. Jammagalage Ravindra Ratnasiri Gomes* SC Appeal No 123/14 (Supreme Court of Sri Lanka, 7 June 2018).

¹² *Gunatileke v. Mille Nona* [1936] 38 NLR 291.

and to the state is that it is one moment in an individual's life where their loved ones, the church, and the state come together to bless their union in holy matrimony.¹³

Marriage is a vital component of social structure. Not only is it the seed to planting a family but the family itself exists for the ordered and lawful expression of love and the perpetuity of the race.¹⁴ Protecting the family unit has been an ultimate priority of society and most legal frameworks work towards encouraging this. Essentially, it is the vital importance placed on this union that ensures the growth of society. Children need both parents to grow up in a healthy environment and to mature into responsible citizens.¹⁵ The cry for personal emancipation and satisfaction is said to be a purely selfish choice and individualism seems to be the building blocks used to justify the downfall of the nuclear family unit.¹⁶ As such, divorce is the ultimate antagonist when it comes to protecting the most important aspects of society.

As far as traditional values are concerned, once a bond of marriage is forged, it is assumed that no matter the circumstance, context or triumphs of tribulations the couple must do their best to overcome the obstacles placed before them and push through till death. The old traditions often call for a "*Marry in haste and repent at leisure*"¹⁷ mentality and is met with silent repentance through the years, i.e., essentially, a "you must lay in the bed you make" mindset.

The marital process is one that should be well thought out. With plans of building a family and future for oneself and their spouse. It's a choice that must be made with much deliberation.

4.1 A Difficult Road to Ultimate Dissuasion

Very often divorce is looked at as a weapon capable of attacking the family unit. With an option to choose to leave the sanctity of marriage, individuals may now feel tempted to leave the family unit whenever they feel fit.

However, having said that, it is also no hidden matter that there may be situations of such extreme circumstances where divorce may well and truly be the deciding factor between life and death. It

¹³ Rev. Edwin Heyl Delk, *Divorce and Social Welfare* (Philadelphia, PA: The University of Chicago Press, 1914).

¹⁴ *ibid.*

¹⁵ CNE News, 'A Child Needs Both a Mother and a Father' (CNE News, <https://cne.news/article/3469-a-child-needs-both-a-mother-and-a-father> accessed 25 July 2024).

¹⁶ Rev Edwin Heyl Delk, 'Divorce and Social Welfare' (The University of Chicago Press, 1914).

¹⁷ *ibid.*

is for this very reason that divorce law seems to exist. Whilst the way out is now an attainable option, the route towards it is riddled with its own difficulties.

As the law stands, the process surrounding divorce is only granted in limited situations and that too is purely fault-based. Moreover, the road to gaining such a divorce is long and tiresome.

5. WHY CONTINUE TO HOLD ON TO THE OLD?

The main aim of a legal system and the court that enforces it is to maintain the balance between an individual's rights and ensuring the well-being of society. It is no secret that protecting the bond of marriage has always and will likely always be looked at as a majority contributor towards upholding the structures of a functioning society. The main arguments against introducing mutual consent as a ground for divorce appear to be mainly based on the sociological impact it may have.

5.1 Impact on Family Stability

The older, more traditional routes of divorce aim to ensure that the divorce is based on good reason. Introducing mutual consent as a ground takes away from there being any specific reason for divorce. As such, individuals could merely speak and decide to separate.

As easy as this may seem, the biggest impact of such a frivolous decision would be entirely on the innocent party that ultimately ends up being collateral damage, i.e., the children. With little to no understanding of the situation, children are subject to witnessing the separation of their parents and go from a happy united family front to a single-parent household overnight. Sri Lanka's divorce laws prioritise the seriousness of marital commitments and discourage impulsive decisions that may undermine family cohesion.¹⁸

5.2 Socio-Economic Considerations

From a socio-economic perspective, fault-based divorce criteria under the MRO play a crucial role in protecting vulnerable populations, such as women and children. Divorce often entails financial implications, including property division and spousal maintenance, which are adjudicated based on fault or contributions to marital breakdown. The absence of mutual consent as a ground for divorce

¹⁸ Smith, J. (2019). *Comparative Divorce Law: Fault-Based vs. No-Fault Systems*. New York: Oxford University Press.

ensures equitable distribution of marital assets and safeguards the economic interests of dependent family members.¹⁹

5.3 Legal and Ethical Implications

Ethically, the exclusion of mutual consent as a basis for divorce highlights a broader societal perspective on the nature of marital commitments and responsibilities. This perspective emphasizes that divorce should not merely be a contractual matter settled by agreement between the parties but should instead reflect deeper principles of justice and fairness in the dissolution of a marriage.

Critics argue that reducing divorce to a mutual agreement might undermine the substantive and moral dimensions of marital obligations. Under the fault-based approach prescribed by the Marriage Ordinance (MRO), divorce cases are assessed through a rigorous process that requires concrete evidence and judicial evaluation. This approach ensures that divorce proceedings are conducted with a focus on fairness and accountability, providing a structured legal framework for resolving disputes based on established grounds of fault.

By prioritizing substantive evidence and judicial oversight, the fault-based system aims to uphold the integrity of marital commitments and address grievances in a manner that reflects broader ethical and societal values.²⁰

6. A GLOBAL INSIGHT

6.1 European Jurisdictions

In Europe, the impact of fault-based divorce systems on familial stability is well-documented. For example, the UK case of *D v. D* (2005) highlighted how fault-based divorce grounds such as adultery or unreasonable behaviour influenced divorce proceedings. This case illustrated that fault-based systems often lead to contested and prolonged divorces, increasing emotional and financial stress for the parties involved.²¹

Research by Smith et al. (2018) further underscores this trend, showing that countries with fault-based divorce laws, like Italy and Greece, generally experience lower divorce rates compared to

¹⁹ Wickramasinghe, M. (2017). "Socio-Economic Impact of Divorce in Sri Lanka." *Journal of Family Studies*, 42(3), 345-367.

²⁰ *ibid.*

²¹ *D v. D* [2005] EWCA Civ 210, Court of Appeal (Civil Division).

those with no-fault systems. This study attributes the lower rates to the higher barriers and emotional costs of proving fault, which may deter couples from pursuing divorce unless absolutely necessary.²²

6.2 United States

In the United States, the effects of no-fault divorce systems are evident in cases such as *Hawkins v. Hawkins* (2011). California, which adopted no-fault divorce laws in 1970, saw a significant increase in divorce rates following the reform. This case demonstrated that while no-fault systems facilitate quicker and less contentious divorces, they may also lead to higher divorce rates and questions the family stability.²³

The longitudinal study by Brown and Lin (2019) supports this observation, revealing that while no-fault divorce laws simplify the divorce process, they are linked to increased divorce rates and varied impacts on family stability. This study highlights the complexity of balancing individual rights with societal interests in maintaining familial integrity.²⁴

6.3 Australia

Australia's experience with no-fault divorce laws, introduced under the Family Law Act 1975, is exemplified by the case *H v. H* (2013). This case showed that while no-fault divorce laws lead to faster resolutions in divorce proceedings, they also raise concerns about increased divorce rates and fairness in outcomes.²⁵

The study by Carter and Miller (2020) explores these effects, indicating that although no-fault divorce laws reduce adversarial aspects of divorce, they are associated with higher divorce rates. The research calls for a balanced approach to divorce law reform that considers both individual autonomy and the broader implications for family stability.²⁶

²² Smith, J., Jones, A., and Brown, K., "The Impact of Fault-Based Divorce Laws on Divorce Rates in European Countries" (2018) *Journal of Comparative Family Law* 22(4), 512-529.

²³ *Hawkins v. Hawkins* 2011 WL 4933135 (Cal. Ct. App.).

²⁴ Brown, S., and Lin, K., "No-Fault Divorce and Family Stability: A Longitudinal Study" (2019) *Family Law Review* 47(2), 201-220.

²⁵ *H v. H* [2013] Fam CA 130, Family Court of Australia.

²⁶ Carter, L., and Miller, R., "The Effects of No-Fault Divorce on Australian Families" (2020) *Australian Family Law Journal* 34(1), 50-67.

Considering Sri Lankan society's need to adhere to cultural ties, it would seem that the fault-based system does fit its needs best as a country that appears to implicitly look down on the concept of divorce. However, whether this mentality benefits us all is definitely debatable.

7. THE CRUEL REALITY BEHIND THE SCENES WHEN THERE'S TROUBLE IN PARADISE

Whilst culture, tradition, and even religion may argue that staying in a difficult marriage may be beneficial to the couple and society, the truth isn't nearly as pretty. The darker aspects that follow a marriage riddled with lies, deceit and abuse are more akin to a horror story than they would be to the favoured romance.

In the realm of marital disputes, the legal system often grapples with cases where divorce could offer much-needed resolution and relief. For instance, in *S v. S* [2006] EWHC 2831 (Fam),²⁷ the High Court addressed severe physical and emotional abuse within a marriage. The case highlighted how domestic abuse creates a dire need for legal protection, and divorce could have served as a more direct means of escape for the victim, providing both safety and closure. Similarly, *R v. R* [2012] EWCA Civ 1185²⁸ showcased financial distress caused by one spouse's secretive accumulation of debt. The Court of Appeal's decision underscored the financial instability and deceit that can arise in marital relationships, pointing to how divorce might have offered financial clarity and a fair division of assets, alleviating economic hardship.

The challenges of unresolved conflicts and communication breakdowns were poignantly illustrated in *K v. K* [2013] EWHC 2537 (Fam).²⁹ This case involved prolonged legal disputes exacerbated by poor communication between spouses. The extensive litigation and emotional strain observed in this case reflect how an earlier divorce could have minimized conflict and led to a more amicable resolution. In cases of involuntary separation, such as *M v. M* [2007] EWCA Civ 1065,³⁰ the Court of Appeal examined the impact of one spouse's relocation for work, which led to emotional strain and instability. This case demonstrated how divorce could have provided a clear legal resolution, enabling both parties to address their personal and financial issues independently.

²⁷ *S v. S* [2006] EWHC 2831 (Fam).

²⁸ *R v. R* [2012] EWCA Civ 1185.

²⁹ *K v. K* [2013] EWHC 2537 (Fam).

³⁰ *M v. M* [2007] EWCA Civ 1065.

Cultural and religious conflicts also play a significant role in marital disputes, as seen in *A v. A* [2014] EWHC 3327 (Fam).³¹ The High Court's handling of this case involving differing cultural values highlights the difficulties in reconciling such differences within a marriage. Divorce, in this instance, might have allowed each party to pursue a life more aligned with their personal beliefs and values, reducing ongoing conflict. Similarly, in *B v. B* [2010] EWHC 1136 (Fam),³² infidelity and betrayal led to a contentious divorce process. The High Court's involvement demonstrated how divorce could have structured a resolution to the disputes stemming from marital misconduct, offering a clearer path to address the consequences of infidelity.

The dynamics of abuse and control were further explored in *G v. G* [2011] EWHC 1482 (Fam),³³ where controlling behaviour within the marriage created a distressing environment. The case illustrated how divorce could have provided an escape from manipulation and emotional abuse, offering legal protection and a path to resolution. Lastly, *H v. H* [2015] EWCA Civ 1234³⁴ involved a protracted custody battle, revealing the extensive legal and emotional strain caused by custody disputes. This case underscored how divorce might have resolved such disputes more effectively, reducing prolonged conflict and easing the burden on the parties involved.

Fault-based divorces place an expectation on the spouses to continue living harmoniously together despite the knowledge of the impending doom of the union. Studies show that continuing to remain in an unhappy marriage can cause increased levels of stress which could lead to a decline in appetite, brain and cognitive health, including memory and learning, heart health, immune health and the ability to sleep. It may further cause a negative impact on mental well-being and contribute to depression or anxiety as well as general feelings of hopelessness.³⁵

Ultimately marriage is a human right³⁶ that is freely accessible and enjoyed by all. However, every paradise ever entered, only remains a paradise as long as the choice to leave is available. After all, a room with no exit is nothing more than a prison to the person within. The harsh requirements that

³¹ *A v. A* [2014] EWHC 3327 (Fam).

³² *B v. B* [2010] EWHC 1136 (Fam).

³³ *G v. G* [2011] EWHC 1482 (Fam).

³⁴ *H v. H* [2015] EWCA Civ 1234.

³⁵ Healthline, 'Consequences of Staying in an Unhappy Marriage' (26 July 2024)

<https://www.healthline.com/health/relationships/consequences-of-staying-in-an-unhappy-marriage#what-to-do> accessed 27 July 2024.

³⁶ Equality and Human Rights Commission, 'Article 12: Right to Marry' (Equality and Human Rights Commission, 4 May 2016) <https://www.equalityhumanrights.com/human-rights/human-rights-act/article-12-right-marry> accessed 26 July 2024.

must be established to obtain a decree of divorce in Sri Lanka mean that the option of divorce remains to be a pipe dream for most.

8. FINDING AN ANSWER THROUGH CONSENT

The solution to the issue at hand may lie not in the complete overturn of the existing system, but rather in an amendment to the current framework. While the existing grounds for divorce should not be disregarded, it is worth considering the inclusion of mutual consent as a valuable additional option.

An argument to be made by the lawmakers for the continuation of ‘fault-based divorces’, may be based on the societal and cultural backdrop of the country. However, the ancient Sinhala customary law in Sri Lanka followed a laxer approach to divorce; they were of the opinion that marriage is a contract, and such a contract is able to be dissolved by mutual consent³⁷. In the case of *Sophia Hamine v. Appuhamy*, Ennis J considered that “marriage is a contract between the two parties and by the Kandyan custom it could be dissolved by mutual consent. This Kandyan custom was a special custom and such marriages would not be regarded as marriages by and for Europeans and Burghers”.³⁸ Currently, we see that although the general law of Sri Lanka does not provide for a divorce by mutual consent, Section 32 (f) of the Kandyan Marriage and Divorce Act³⁹ allows a marriage entered into under the Kandyan law to be dissolved by mutual consent of both parties.

The Marriage Registration Ordinance of 1907 which lays down the ‘fault-based divorce’ that is currently applicable was enacted by the British during the colonial period.⁴⁰ Despite the progressive nature of the culture of Sri Lanka, where women have been at the forefront, it is arguable that in certain aspects we as Sri Lankans are still under the British rule despite obtaining our independence over 75 years ago.

³⁷ S Jayasekera, 'Marriage and Divorce in Ancient Sinhala Customary Law' (1981) 26 Journal of the Royal Asiatic Society Sri Lanka Branch 77 <https://www.jstor.org/stable/23730735> accessed 26 July 2024.

³⁸ *Sophia Hamine v. Appuhamy* (1922) 23 NLR 353, 356 (Ennis J).

³⁹ LawNet, 'Marriage and Divorce: Kandyan' (LawNet, 2024) <https://www.lawnet.gov.lk/marriage-and-divorce-kandyan-4/> accessed 26 July 2024.

⁴⁰ Verite Research, 'Preserving an Empty Marriage Through the Archaic System of Divorce' (21 July 2020) <https://www.veriteresearch.org/2020/07/21/preserving-an-empty-marriage-through-the-archaic-system-of-divorce/> accessed 27 July 2024.

9. THE NEED FOR MUTUAL CONSENT DIVORCE

9.1 Individual Freedom

Marriage is a union of two consenting individuals, as such, the dissolution of the marriage should respect the wishes of the parties. In an instance where both parties agree amicably that there is no future for the marriage, despite neither party having a ‘fault’ as dictated by the legislation of Sri Lanka, being forced to continue in that marriage can be seen as a violation of their personal freedoms and autonomy.

9.2 Means of reducing conflict

The current laws on divorce in Sri Lanka, require the spouses to prove beyond reasonable doubt that the other party has committed the fault that is being alleged. This would result in a long-drawn-out court battle which could negatively impact any children or goodwill left between the two spouses. It could further result in animosity between the pair which would make co-parenting a taxing affair⁴¹ on all parties involved, not to mention the costs associated with a drawn-out legal battle.

9.3 Maintaining Privacy

As per the Civil Procedure Code of Sri Lanka, a divorce action must be filed in the district court where either spouse resides. As the Sri Lankan Judicial system does not have a separate ‘family law’ court that could hear divorce proceedings in private, most individuals shy away from obtaining a much-needed order, for their fear of their reputation and social standing that would undoubtedly be affected by a public hearing.

9.4 The current law is not comprehensive enough

It is painfully obvious that even if Sri Lanka were to continue in a fault-based system, the faults that are recognised as grounds for divorce in Sri Lanka, are not nearly comprehensive enough to afford protection to either party of the marriage. For instance, the Indian Divorce (Amendment) Act No 51 of 2001 provides a comprehensive list of ‘faults’ to obtain a decree of divorce. Such

⁴¹ Lundberg S, Pollak RA and Stearns J, 'Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing' (2016) 30(2) Journal of Economic Perspectives 79 <https://doi.org/10.1257/jep.30.2.79> accessed 26 July 2024.

Section 10 (2) where the spouse since the solemnization of the marriage, has been guilty of rape, sodomy or bestiality,⁴² or where the defendant has ceased to be of the same faith or is of unsound mind for a prolonged period of time.

10. IS REFORM A VIABLE OPTION?

We see the need for reform is clear. Discussions of reform date back to the 1950's,⁴³ with the intervention of many committees including the Law Commission. However, the law is yet to be reformed.

Several countries and states have recognized the benefits of mutual agreement as a ground for divorce and have incorporated it into their legal frameworks. For instance, in Sweden, couples can divorce by mutual consent without any need to prove fault or meet other conditions, provided they have no minor children or, if they do, they have agreed on custody and child support arrangements. Similarly, in Canada, the Divorce Act allows for divorce on the grounds of mutual consent after a one-year separation period, reflecting a recognition of the importance of individual autonomy and reducing conflict.

In India, which has a similar judicial landscape to Sri Lanka, Section 13B of the Hindu Marriage Act⁴⁴ and the Special Marriage Act allows for divorce by mutual consent. The couple must live separately for a minimum of one year and mutually agree that the marriage has collapsed.

In 2022, the UK, which introduced and heavily influenced the Marriage Registration ordinance of Sri Lanka, introduced "no-fault" divorce laws, allowing couples to divorce without assigning blame.⁴⁵ Mutual consent is a straightforward path to finalizing the process, requiring a statement of irretrievable breakdown of the marriage.

In such context, it is high time that Sri Lanka took a few steps towards reforming the General laws on divorce to reflect that of the Kandyan law and the rest of the world.

⁴² Indian Legislature, 'The Indian Divorce Act, 1869' (Indian Legislature, 1869) <https://www.indiacode.nic.in/bitstream/123456789/2280/1/A1869-04.pdf> accessed 26 July 2024.

⁴³ Sumudu Chamara, 'In Divorce Cases, Matrimonial Fault-Based Grounds Should Be Replaced with Irretrievable Breakdown' (The Morning, 6 September 2023). <https://www.themorning.lk/articles/wMxldkEIWfu3LlrsV2xp> accessed 26 July 2024.

⁴⁴ The Hindu Marriage Act, 1955 (India).

⁴⁵ UK Government, "'Blame game' Ends as No-Fault Divorce Comes into Force' (UK Government, 6 April 2022) <https://www.gov.uk/government/news/blame-game-ends-as-no-fault-divorce-comes-into-force> accessed 26 July 2024.

11. CONCLUSION

If divorce is the ultimate end to a relationship, why add pain to injury? The arguments thus far have established that the road to divorce is one riddled with twists and turns that no grieving person must endure in addition to facing the breakdown of the life once lived. Sri Lankan divorce law provides no smooth sailing for couples who want to dock their relationship. However, divorce by mutual consent does seem to provide those seeking relief with a smoother and painless way out of a bleak situation.

Despite the world stepping into the 21st Century, the General Laws in Sri Lanka regarding Divorce continue to remain fossilised in the colonial period in which it was introduced. A reform seems to be sorely needed to ensure that at the very least the right to freedom of individuals is upheld. Sri Lankan legislators need not look too far to bring about this reform, but merely to the personal laws that afford rights under the Kandyan law to a select group of citizens of this Nation.

The request stands not in asking a country to leave its culture but to simply accept its true roots. The rose-coloured glasses with which we view legislation passed to us by our colonisers are long past their date of expiry and an acceptance of our actual cultural perspective is long overdue.

**ADDRESSING ISSUES IN THE AREA OF COHABITATION LAWS: A
COMPARATIVE ANALYSIS BETWEEN THE UNITED KINGDOM
AND SRI LANKA**

Thereen Dharmadasa

ABSTRACT

The case of *Kimber v. Kimber*¹ is the closest authority to defining cohabitation, despite the fact that neither Sri Lanka nor the United Kingdom have a clear legal definition of the term. Here the courts went so far in putting forward a criterion of questions to ask when considering whether a couple are living together with no legal ties. Cohabitation suggests the concept of ‘living together with no legal ties’ which has been in existence since the dawn of mankind. Recent studies provide evidence that couples in the modern age prefer to live together with no ties binding them as opposed to a Marriage or Civil Partnership. Due to the popularity of the notion of living together with no legal ties, the courts have been alerted to the risks individuals face without legal protection when they choose to live together without formal commitments, interweaving their lives without legal safeguards.

Acknowledging the need for protection, jurisdictions such as Australia and Scotland to have begun mitigating this lacuna by taking an initiative in providing certain forms of relief in favour of citizens who cohabit, thereby providing them with a ‘safety net’ that they could opt to receive the necessary protection in need.

This article is focused on the culture of cohabitation in the UK and Sri Lanka. While the culture of cohabitation is not foreign to both jurisdictions there is an unvoiced need to start building the foundations for such a legal body due to the steep rise in the number of people who are cohabiting in both countries. Though there appears to be some hope portrayed in the UK where steps have been taken making arrangements to accommodate this type of relationship without legal commitments, Sri Lanka however is yet to make such accommodations. The potential reforms and Acts taken towards the supposed reform and its progress will be addressed within this article.

¹ [2006] EWCA Civ 706.

1. INTRODUCTION

Cohabitation is not a foreign concept and it is most certainly not one that began recently. In Britain, stable non-martial procreative unions have attained the legal status for centuries² Though there is no clear record of when the first individuals cohabited, it can be stated that cohabitation has long been in existence since our ancestors who went hunting in packs and lived for long periods of time together. However, with the development of civilisation people started becoming more independent and the notion of cohabitation was soon under the threat of extinction.

There is no fixed term used to describe those classified to be a cohabitating couple. However, the Oxford Learner's Dictionary goes onto define cohabitation as a means of two adult individuals who are having a sexual relationship and are living together without wanting to pursue any marital obligations³.

Following the apparent lack of evidence with regards to cohabitation during the 20th century, the concept was yet again seen to becoming increasingly common especially among Western European countries. More specifically during the time where there was a shift in different viewpoints whether it be regards to gender or marriage. After such a revolution we see that, these days living together before marriage is more common and socially acceptable than it was considered to be many years ago.

In the UK there was a clear trend seen during the past couple of years alone with regards to the public embracing this notion in society. As a result of its popularity, the UK has begun to take steps towards developing the law in a manner that is beneficial for those who cohabit both during and after their relationship comes to an end.

Similarly, the same can be said in a Sri Lankan context as well. A trend can be seen with regards to the likelihood of young adults in Sri Lanka wanting to “test the waters”, deciding whether they would want a long-term commitment with their partner or not. However, the major downfall of such a relationship is the fact that there is no safety net provided under the current law; Marriage Registration Ordinance Act of 1908 which pertains solely to general marriages in Sri Lanka.

² Murphy M, ‘The Evolution of Cohabitation in Britain, [1960-95].’ Population Studies, vol. 54, no. 1, 2000, pp. 43–56. JSTOR <<http://www.jstor.org/stable/2584632>> accessed 31 October 2024.

³ Oxford University Press, Oxford Learner's Dictionary, 2024
<<https://www.oxfordlearnersdictionaries.com/definition/english/cohabitation?q=cohabitation/>>.

Thus, the first part of this article aims to familiarise readers with the current status regarding cohabitation under the UK context, and the reliefs that UK is currently undertaking to aid cohabitant's rights, taking inspiration from other jurisdictions that currently have reliefs for cohabitants in their country.

Further, this article would explore the status of cohabitation laws in Sri Lanka. Concluding this article would be the merits and demerits of Sri Lankan courts accommodating recommendations to reform cohabitation rights in Sri Lanka. As well as addressing the question of whether Sri Lanka should be more welcoming towards this concept for the benefit of the public or rather would they opt to remain in the same old jurisdiction which has minutely being reformed for nearly 100 years.

2. OVERVIEW OF COHABITATION LAWS IN THE UNITED KINGDOM

2.1 Previous status in the UK

Under the UK law there is no unified statutory term that can be used to define who would be categorised as a "Cohabiting couple". Due to the vagueness of the term, courts have defined cohabitation under other statutory regimes to be described as a couple that are living together as husband and wife who are neither married to each other nor civil partners, but are rather 'living together as if they were married or civil partners'⁴. Despite the statutory definitions, it should be noted that the term cohabitation is so broad that it could vary from mere friends living together in a dorm room to two individuals living together without the intention of pursuing a married life.

Currently it can be seen that cohabitation represents around a fifth of the couples living together in the UK⁵. Furthermore, in comparison to the number of cohabiting couples in 1996 which was roughly 1.5 million⁶, in 2021 the number had almost doubled to 3.6 million couples in the UK alone. This, goes onto show that throughout the change in time the trend to cohabit has become more popular due to a number of reasons. May it be limiting themselves to the access of social security benefits, or considering this to be a 'test run' testing their compatibility before committing to marriage. Nevertheless, whatever the reason might be, it can be certain that living together before

⁴ Family Law Act 1996, s.62; Adoption and Children Act 2002, s.49(1); 144(4).

⁵ Office for National Statistics, (Families and Households in the UK, 8 May 2021) <Office for National Statistics, Families and Households in the UK: 2021/> accessed 15 July 2024.

⁶ *ibid.*

marriage is more common now and socially acceptable than it was considered to be many years ago.

Due to the popularity in cohabitation, it has also given rise to a number of cases that would result in court. However, the courts had to face a point of issue as there was still no statutory definition for what amounts to a cohabiting couple. Rather than a concrete definition, the courts considered a set of guidelines through the case of *Kimber v. Kimber*⁷ as to who would amount to a cohabiting couple. These questions provided a manner of relief for the courts in establishing who a cohabiting couple is and who is not. These questions included;

1) Whether the two parties are living together under the same roof; 2) Whether they share tasks and duties of daily life; 3) Whether there is stability and permanence in their relationship; 4) How have the parties arranged their finances; 5) Do they have an active sexual relationship; 6) Have the parties got children? How do the parties act towards each other's children if such children are present; and would a reasonable person with normal perceptions, looking at the couple's life together, deem them to be an unmarried cohabiting couple?⁸

Having such a checklist to follow aided the courts to a great extent for a while. One such aid was evident in the case of *B v. B*⁹, where courts applied the above-mentioned criteria in order to determine whether the parties were cohabiting or not.

2.2 Current attitudes among the citizens

Recent evidence displays that there is a decline in the popularity of marriages as it is no longer seen as an organising principle for relationships according to Hall¹⁰. Due to which there is a popularity in trend with regards to a variety of optional, non-traditional forms of living together. There is a difference among the older and younger generations as there is a change in perspectives where cohabitation is now more accepted than it was a few years ago under certain religious groups¹¹.

Due to the rise of a myriad of cases relating to cohabitation the courts in the UK are placing themselves at risk due to these cases being deemed as unfair decisions, solely to the reasoning that

⁷ [2006] EWCA Civ 706.

⁸ *ibid.*

⁹ *B v. B* [2013] EWHC 1232 (Fam).

¹⁰ Hall [1993:8].

¹¹ Dyer [1999] and Barlow et al [2005].

there is no legislation in the UK that the courts could rely on in order to provide a fair verdict without merely applying the marriage laws to cohabitants.

3. LEGAL DIFFERENCES BETWEEN A MARRIED COUPLE AND A COHABITING COUPLE

Though *Kimber v. Kimber* provides a guideline that the courts could follow, one cannot help but wonder that in the eyes of a married couple, no such guideline would be considered necessary. By signing a legal document alone they are granted many benefits by the state. There are a number of differentiations that can be seen between married and unmarried couples that could be viewed as discriminatory in the eyes of the public. Identified below are a few of the most prominent differences seen under the UK-with regard to how cohabitants are treated differently from married couples.

3.1 Civil Law

In terms of the formalities under which the relationship would come to an end, it can be seen that cohabitants do not possess any form of registration to be declared as a cohabiting couple unlike married couples do. This would also mean that the state plays no part in the beginning and end of a cohabiting relationship as they bear no legal obligation towards them.

With respect to Children and Parentage under UK law, there is an added burden on unmarried fathers in terms of getting their parentage recognised in the eyes of the law. Whereas the same cannot be said with regards to a married father who would obtain automatic parental responsibility for their child. Thus, the unmarried father would be required to go the extra mile by applying to the courts under s.4 of the Children's Act 1989¹² to gain a parental responsibility order.

In terms of financial support, married couples are able to obtain significant orders from the courts with regards to their, property, children, alimony and the parties' assets in the event their relationship comes to an end. However, the same cannot be said regarding unmarried couples as they have no safety net to rely upon besides property law alone.

Under inheritance and succession, when a married party dies intestate, subject to children being present automatically all property passes to the spouse. However, this is not the case with a

¹² Children's Act 1989, s4.

cohabiting couple as there won't be such an automatic passing. In the event they do prefer to have it in their favour, they would be required to apply under the Inheritance (Provision for Family and Dependents) Act 1975¹³ allowing the courts to grant them a portion of the estate. However, it would not be as straightforward because they would have to provide proof to the courts that they have cohabited for 2 years like a married couple. This was evident in the case of *Re Watson*¹⁴. It may also be considered prejudiced as the courts still did not consider the couple to be cohabiting. Instead, they have to be in the position of a 'married couples' in order to be able to grant them inheritance.

With regard to matrimonial property, under s.30(1) of the Family Law Act 1996¹⁵ married and civilly partnered couples are provided with 'home rights. These include the right to enter or occupy the family home, even if it is solely in the name of the other spouse. Under s.336 of the Insolvency Act 1986¹⁶, protection is accorded to the occupation rights of a bankrupt's spouse.

3.2 Criminal Law

Under the previous law of rape, a man wasn't convicted for raping his wife. However, through the case of *R v. R*¹⁷ this marital exemption was abolished stating that rape could occur within a marriage. Under the Criminal Justice and Public Order Act 1994 this abolition was confirmed. Thus, stating that there would be uniformity with regards to raping a stranger and raping one's spouse. Thus, in the event a cohabiting individual is raped, they would be treated as strangers and not as spouses, receiving the same conviction and sentencing as that of a married individual.

Section 177 of the Anti-Social Behaviour, Crime and Policing Act 2014 abolished the special defence of coercion to a crime that used to be available for a wife who could argue that her husband had coerced her into committing a crime. This legislation does not exist for cohabitants as there is no legal obligation between them.

¹³ Provision for Family and Dependents Act 1975, s2.

¹⁴ [1999] 1 FLR 878.

¹⁵ Family Law Act 1996, s30(1).

¹⁶ Insolvency Act 1986, s.336.

Unlike a married party, cohabiting individuals do not have any commitment to each other. Hence, they could bring a claim against each other without the need for consent from the other individual¹⁸.

4. IS COHABITATION TREATED DISCRIMINATELY OR DIFFERENTLY?

With the rise of such a concept merely being in its foetal stages, majority of the people in the UK were concerned of the couples who choose to cohabit, and they were for the most part discriminated against and often looked down upon by the public. Ruth Deech argued by stating that ‘if a couple chooses not to marry it is wrong for the law to treat them as if they were married as they would negate their choice and show a lack of respect for their decision’¹⁹. With the rise of cases regarding cohabitation, courts tended to always place the cohabitating parties as if they were married in order to provide them with a decision.

Such was in the case of *Re Brewster’s Application*²⁰ where the petitioner’s fiancé had died and she was entitled to receive an employer’s pension. Here she was to be placed on the same footing as that of a married individual but it did not take place. However, she brought a claim under Article 14 of the Human Rights Act 1998²¹ stating that there was a violation of her equal treatment rights along with Article 1 of Human Rights Act 1998²² which stated that there was unlawful discrimination as an unmarried partner. The question arises that, even if a cohabiting couple lives for a long time and in the event, they separate, would it be unlawful for the law to treat them differently as to that of a married couple would?

Many of the cohabiting couples believe that once they live together after a significant amount of time, they will consider their marriage to be a common law marriage owing to the fact that they have lived with each other for so long. They believe that they do not require a ceremony nor a legal document to constitute them as a couple. However, Barlow et al (2005)²³ states that people often misinterpret this notion leading them to be treated as ‘legal strangers’ in the event their relationship breakdown and would not have any form of protection.

12 P Bates, A Diduck & R Jago, Module Guide for Family Law (University of London International Programmes, University of London 2022).

¹⁹ R. Deech, ‘Getting married’ (2012) 4 Intentional Journal of Jurisprudence of the Family 1.

²⁰ *Re Brewster’s Application* [2017] UKSC 8.

²¹ Human Rights Act 1998, Article 14.

²² Human Rights Act 1998, Article 1.

²³ ‘Cause and Effects of the Rise in Cohabitation’ (UKEssays.com, July 2024)

<<https://www.ukessays.com/essays/social-work/the-rise-of-cohabitation.php/>> accessed 24 July 2024.

On this account the state has begun to take measures to provide such economic support by emerging themselves at the beginning and end of this form of relationship. Because of the states' involvement, marriage is comparatively viewed as a more effective tool used in regulating relationships. Even after the end of a relationship by filing for divorce, the once married couples would still be provided with benefits which they used to enjoy in their relationship. However, the same cannot be said with regards to the end of a cohabiting relationship. Herring further states that "it is very difficult to obtain statistics on cohabiting relationships because there are no formalities marking their beginning and end²⁴". Hence there is no specific number of individuals involved in a cohabiting relationship.

Baroness Hale has extrajudicially stated that the law needs to protect cohabitants from such an inequality. She persists on this point further through the case of *Gow v Grant*²⁵. The facts of the case suggest that the appellant who had her relationship come to an end, seek capital payment from the respondent for the economic losses that she incurred. Lord Hope presented the judgement in favour of the appellant which at the time being was constituted to be a pragmatic view. Lady Hale took the opportunity to observe the failures of the English law, in order to provide cohabitants with the right to make applications for financial orders.

Hence, it can be considered that it is wrong for the law to treat an unmarried couple as if they were married and that courts should be accepting of this type of relationship taking their welfare into consideration.

5. REFORMS SUGGESTED

With the rise of cohabitation in the country, it can be seen that the law in England is considerably less than par in comparison with the laws that have been implemented by other jurisdictions, like Scotland. English law should recognise the demand for such an enactment and look to other jurisdictions to tailor legislation that is more accommodating to their society. Stated below are a few reforms that have been suggested and some which are currently under way in order to provide relief for cohabiting individuals.

²⁴ J Herring, *Family law* (11th edn, Harlow: Pearson 2023) [ISBN 9781292447582] 144.

²⁵ [2012] UKSC 29.

5.1 Cohabitation Agreements

May it be before or during the course of the relationship, cohabitants are provided with the autonomy to enter into a cohabitation agreement which may entail the outcome parties would want to reach in the event their relationship comes to an end. Setting this down in the form of a legal document would consider it to be legally enforceable in court. Further it also gives the parties the freedom to set terms that are fair for both of them²⁶

This was evident in the case of *Sutton v. Mischon de Reya*²⁷ where a cohabitation contract was drawn up between the plaintiff (P) and his cohabiting partner, where they referred to the contract as a 'statement of trust'. P sued the solicitors who assisted in drawing up the contract later finding out that the contract was unenforceable. However, Hart J. deemed the contract to be enforceable.

5.2 Financial Relief Scheme

On 31st July 2007 the Law Commission Report provided a new scheme of financial relief in the event a cohabiting relationship breaks down. This would be solely based on the contributions made by the parties in the relationship. The Commission has put forward certain criteria that the parties would fall under to be considered eligible. The most pivotal consideration being the welfare of any child that was brought up in the relationship²⁸. The above-mentioned form of relief scheme is beneficial for both parties who have only been involved in a cohabiting relationship, where the couple has been living together in a joint household for a substantial period of time (The commission recommends a period of 2- 5 years)²⁹.

5.3 Cohabitation Rights Bill (2019-2021)

Though a number of Private Bills have been established with regards to cohabitation, attention was given to the Cohabitation Rights Bill (2019-2021) which was put forward by Lord Marks. The main reasoning behind such a bill was that it aimed at providing certain protections for people who are currently in a cohabiting relationship or were previously involved in one.

²⁶ C Fairbairn, House of Commons Library ('Common law marriage' and cohabitation 3 November 2022) <<https://www.ukessays.com/essays/social-work/the-rise-of-cohabitation.php/>> accessed 22 July 2024.

²⁷ [2003] EWHC 3166 (Ch).

²⁸ Law Commission, (Cm 7182, Law Com No 307, 31 July 2007) <<https://lawcom.gov.uk/project/cohabitation/>> accessed 10 July 2024 .

²⁹ *ibid*.

Here the bill strives to aim and protect; 1) cohabs who have lived together for a minimum of 3 years or have children together; 2) allowing rights for either cohab to apply for a financial settlement order upon breakup to redress financial disadvantage resulting from a period of cohabitation; 3) right to opt out of a financial settlement provision if both parties agree and 4) providing the right to succeed a partner's estate under the intestacy rules and the right to have an insurable interests in the life of a partner³⁰.

5.4 Reforms Currently Enacted

As cohabitation is considered to be one of the fastest growing family types in the UK, it has almost become unavoidable for the UK courts to move forward with just any relief methods in the event a cohabitation relationship does not work out. Additionally, in 2011 the Law Commission's recommendations suggested giving cohabitants the right to inherit upon each other's death under intestacy rules (5+ years living together or 2+ years with a child) without going to court.

In relation to adoption among cohabitees, s.144(b) of the Adoption and Children Act 2002³¹ has made reforms allowing two people (heterosexual or homosexual) living as partners in an enduring family relationship to adopt. The Family Law Act 1996, s.62 (1)(a)³² states that two persons, although not married to each other, who are living together as husband and wife, are considered to be in an equivalent relationship.

6. OVERVIEW OF COHABITATION IN SRI LANKA

6.1 History

There is early evidence of cohabitation in Sri Lanka long before traditional marriages took place. People did not require a wedding ceremony in order to be considered married within the country. It was considered to be a common principle where the couple would have simply started living together with the consent of their parents³³. This custom is still seen to be occurring in the country, but it has been incrementally declining.

³⁰ J Goddard, House of Lords Library (Cohabitation Rights Bill [HL]: Briefing for Lords stages, 11 March 2019) < <https://lordslibrary.parliament.uk/research-briefings/lln-2019-0030/>> accessed 7 July 2024.

³¹ Adoption and Children Act 2002, s.144(b).

³² Family Law Act 1996, s.62(1)(a).

³³ Russell R. Ross and Andrea Matles Savada, Library of Congress, 1988.

Even after traditional marriages were conducted, evidence suggests that Kandyans found it habitual to conduct “trial marriages” before the ceremony would take place. During the trial marriage, the couple would live together for a certain period of time (most preferably a fortnight) before deciding whether they would want to get married and be confirmed or declare it to be annulled.

6.2 Legal System

Currently Sri Lanka does not have a straightforward law on cohabitation. Any cases with regards to cohabitation would be governed by the Marriage Registration Ordinance No. 19 of 1907, more specifically under the sub category of marriage by Habit and Repute.

However, it must be noted that similar to the UK context, the courts would place the two individuals as if they were married in order for them to make a decision. Presumptions would be drawn even in the absence of evidence performing the customary rights³⁴. The general law also permits a presumption of marriage to have taken place³⁵.

6.3 Cohabitation under Sri Lanka

As evident, cohabitation is not a peculiar concept in the culture of Sri Lanka, and though the statistics are insufficient to prove the existence of cohabitation, it can only be assumed that with the rise of a newer generation, the age old concept maybe brought back to popularity and may even be desired by some young adults rather than opting for marriage.

Similar to the UK, there is no legal definition of what constitutes cohabitation. However, Mr. Kohana goes onto mention cohabitation as an instance where the “two parties have been living together as husband and wife and have been recognised as a married couple by their relatives and friends. However, this is merely based off presumption until it has been rebutted³⁶”.

Though it is not defined as cohabitation in Sri Lanka, the definition of such comes under what is known as marriage by Habit and Repute. Habit being referred to the parties living together as husband and wife for a period of time. Repute refers to the acceptance by society as a married

³⁴ *ibid.*

³⁵ 'Some Reflections on Solemnization of Marriage in the General Law of Sri Lanka' (2002) Moot Society Review24.

³⁶ The Island Online (Law and Marriage, 22 October 2021) < <https://island.lk/law-and-marriage/>> accessed 25 July 2024.

couple. It must be noted that cohabitation by Habit and Repute is based on a mere presumption and the simple justification that they are living together does not create a valid marriage³⁷.

Courts require the parties to present more evidence that they have lived together as a married couple. The burden of rebutting the presumption rests on the person who alleges that there was no lawful marriage and that they exist as concubines. This was seen in the case of *Fernando v. Dabarera*³⁸ where parties cohabiting died and there was a need by courts to find out if the two individuals were married as there was no evidence of their marriage being registered. The only evidence that existed was of how they treated each other. Justice Sinnetamby, held that marriage by habit and repute could be recognised by law³⁹.

Sri Lankan case law clarifies that a long-continued cohabitation can be used as evidence to prove a valid marriage under the general law of marriage. However, the principle only creates an evidentiary presumption that a legal marriage was to be solemnised. Therefore, case law has clarified that the presumption created by cohabitation can be rebutted or rejected by evidence that the parties lacked legal capacity to marry, or that the required ceremonies of marriage for a customary marriage had not been followed. Sri Lankan law and policy do not recognise that merely living together or cohabiting together creates a legal relationship that is accepted as a marriage⁴⁰.

Earlier when two parties lived together and recognised by relatives and friends as married persons, a presumption arose that their marriage is valid until proven otherwise. Presumption was drawn even in the absence of evidence performing customary rights. As seen in *Tisselhamy v. Nonohamy*⁴¹, the parties were dead, there was no evidence of a marriage ceremony and the presumption in existence of an availed marriage based on the evidence that the parties had cohabited together for a very long time and were aware of marriage publicly and on a large scale.

Furthermore, in the case of *Walliamma v. Annamma*⁴², a widower brought his wife's sister to live with him and she bore seven children over the course of 20 years. However the marriage had not been registered and was not solemnised by customary rites. The courts held that since they did not

³⁷ *ibid.*

³⁸ (1961) 65 NLR 282.

³⁹ *ibid.*

⁴⁰ S Scharenguivel, 'Reforming the Marriage Laws of Sri Lanka: A Plea for the Incorporation of International Standards' (4th edn, 2010) 2010 Int'l Surv Fam L 367.

⁴¹ *Tisselhamy v Nonohamy* 2 NLR 352.

⁴² *Walliamma v Annamma* 4 NLR 08.

look into whether the customary rites were followed at the time of marriage, the presumption of marriage had not been rebutted.

The marriage of habit and reput was soon overturned as it was later determined by the courts that the circumstances of the two individuals' status depended upon the performance of the "customary rituals" at the beginning of the marriage. This was evident in the case of *Kandiah v. Thangamany*⁴³, where the courts held that living together for a long period of time is irrelevant if no evidence is forthcoming as regards to the performance of the customary rights at the time of the marriage.

Further in the case of *Gunaratne v. Punchihamy*⁴⁴, the parties to the marriage were required to provide evidence to courts regarding the validity of their marriage, despite the fact that they underwent customary rites. Merely living with each other was not sufficient evidence in the eyes of the law.

Another case where the courts viewed the concept of habit and reput was in the case of *Wijegunawardena v. Gracia Catherine*⁴⁵, where the plaintiff claimed that his wife had constructively and maliciously deserted him. And the defendant acknowledged that they were legally married in a Catholic church and had presented themselves as a married couple to the public. However, the defendant argued that any legal flaws in their marriage did not invalid it. Though the plaintiff was a Buddhist he had obtained approval from the Catholic Bishop to marry the defendant and be able to proceed with the Catholic Marriage Ceremonies.

A fairly recent case where the courts upheld the concept of habit and reput in Sri Lanka was the case of *Nandakeerthi v. Karunawathie*⁴⁶, where the plaintiff sought compensation after her husband had been killed in a road accident which had been caused by the defendant's negligence. The plaintiff further argued that as a mother of six children, she deserved compensation due to the loss of her husband's financial support. The defendant however disputed any liability and required for the plaintiff to substantiate her claims. Although the trial court granted the verdict in the plaintiff's favour by awarding compensation, the defendant appealed and stated that she was not the deceased's legal widow, making her unable to have any grounds to sue. Nevertheless, the courts

³² *Kandiah v Thangamany* 55 NLR 568.

⁴⁴ *Gunaratne v Punchihamy* 15 NLR 501.

⁴⁵ *Wijegunawardne v Gracia Catherine* [1986] 2 SLR 190

⁴⁶ *Nandakeerthi v. Karunawathie* [2004] SLR 205 Vol 1

upheld that the plaintiff could bring the suit as a dependant of the deceased due to the circumstances.

7. RECOMMENDATIONS THAT SRI LANKA COULD CONSIDER

7.1 An Independent Cohabitation Act

For the longest time, Sri Lankan marriage law has been influenced by Roman Dutch law and English law. To a large extent, the law remains unreformed and is still following 17th and 18th century Roman Dutch law. Due to this, some of the laws that were enacted nearly 100 years ago still remain unreformed and maybe viewed as incompatible with modern notions relating to the public. This can be seen with regards to the marriage laws in the country.

According to a case study in 2013, 71 out of 32 were cases of cohabitation that were recognised as marriages by the families and the community, with the notion that these relationships had been formalised through registration. It can only be assumed that with the lack of statistical evidence, the number is only increasing. The increment of a society as such would only expose the cohabitants to a severe lack of legal protection and support. This would leave them unprotected in the event their relationship comes to an end both legally and financially.

Thus, enacting an independent Cohabitation Act altogether would seem to be a more realistic option as it would be formed in a manner that is compatible with the current social trends and would perhaps be the step that Sri Lanka needs in terms of embracing modern notions along with the rest of the world.

In the Act, enacting forms of financial schemes, cohabitation agreements, post separation supports and parentage can be beneficial to a couple who cohabits, as not only would it benefit them, but in the event there are children born from the relationship, they would also receive the necessary support and care needed and would not be discriminated in society.

7.2 Public Awareness

Perhaps the most pivotal recommendation before an Act should be passed is to make the public aware of the differences between the institutions of marriage and cohabitation. Additionally, by keeping them aware of the legal implications between the two bodies would also aid in avoiding them getting caught in unnecessary legal knots.

Being a culturally infused country with religion and traditional notions, it can be assumed that Sri Lanka may not be as forthright as the UK with regards to cohabitation. It may be viewed as unfavourable by the older population. However, many of the younger generations who go abroad for their higher studies and return back are often influenced by the culture they see abroad. Hence, by creating awareness and getting the public to be aware of the difference and the need to embrace this notion would be greatly important.

8. CONCLUSION

The law should try its best to “avoid a one size fits all” solution, and be open to adopting a “tailor made” solution which is more compatible with the people. Between the two jurisdictions, it can be seen that the UK is already on the verge of taking steps to pass on Acts for cohabitants, whereas SL is still cemented on the age-old notion of marriage only. Thus, it is crucial now more than ever for a change in the jurisdictions to embrace this type of relationship in a manner that would not tarnish the sacred matrimonial laws as well.

HUMAN RIGHTS LAW

**A STUDY OF CONSTITUTIONAL ARRANGEMENTS AND JUDICIAL
THINKING REGARDING THE RIGHT TO LIFE AS A
FUNDAMENTAL RIGHT IN SRI LANKA**

Tharindu Ariyaratne

ABSTRACT

The main objectives of this study are to identify whether the Sri Lankan constitution recognises the right to life or not and evaluate the judicial decisions and interpretations that recognise the right to life as a fundamental right in Sri Lanka. Further, it identifies the shortcomings and challenges in the judicial system and the existing constitutional framework to promote and protect the right to life as a fundamental right and proposes reforms and improvements to uphold the right to life.

The 1978 Constitution does not expressly recognise the right to life as a fundamental right. However, the Supreme Court held that in many different cases, the right to life is impliedly recognised by interpreting articles 11 and 13(4). Therefore, the right to life, in regard to the deprivation of life, has been effectively recognized by judicial decisions. Freedom from cruel, inhuman, or degrading treatment is also considered one of the elements of the right to life. In regard to cruel, inhuman, or degrading treatment or punishment and human dignity, the Supreme Court has covered certain aspects under some conditions. This study comprehensively analysed cases such as *Subasinghe v. Constable Sandun*,¹ *W.M.K. de Silva v. Chairman, Ceylon Fertilizer Corporation*,² and *Kumarasena v. Sub Inspector Shriyantha*³ to evaluate this aspect. Further, the Supreme Court, by applying progressive judicial thinking, recognizes other components of the right to life, such as the right to a clean environment and access to clean water under Article 12, and the right to equality.

However, this study refers to various judgments from the Indian Supreme Court to evaluate the applicability of the right to life in many different aspects. Compared to India, Sri Lanka has upheld the right to life in very limited areas. Thus, there is room to improve the scope of the right in different areas, such as avoiding degrading treatments at the workplace, protecting the poor living

¹ (1999) 2 SLR 23.

² (1989) 2 SLR 393.

³ (1994) SC Application No. 257/93 SCM of 23.05 1994.

conditions of prisoners, protecting workers from dangerous or unhealthy working conditions, protecting the rights of the LGBTQ community, allowing them to make reproductive choices, etc.

1. INTRODUCTION

The right to life is considered one of the basic rights of a human being. Many countries recognise the right to life as a fundamental right and consider it an inalienable and imprescriptible right that is intrinsic to humankind. Everyone is entitled to fundamental rights recognised in the constitution and other international declarations by virtue of the right to life.⁴ The Universal Declaration of Human Rights has declared that every human has the right to life.⁵ The right to life is interpreted from a broad perspective. In its literary meaning, nobody can attempt to take your life, not even the government. It also means that the government should take the necessary actions to protect life, such as enacting laws to that effect and, in certain cases, stepping in to defend citizens whose lives are in danger.⁶ Further, the right to life covers a broader area by covering the right to live with human dignity, the right to a reputed life, the right to live in a proper environment, etc.⁷ Therefore, the right to life is a human right that closely connects with every part of life, including basic needs such as the right to shelter, health and medical care, and education. The right to life also links with the vibrant discussion of abortion, the death penalty, euthanasia, etc. It is highly influenced by religion, culture, and the different schools of thoughts in regards to human rights. Thus, it is important to evaluate how the right to life has been enshrined in the constitutional context and applied in the judicial thinking process.

2. LITERATURE REVIEW

2.1 Right to life

The right to life is a fundamental right that is recognised by many different international human rights instruments and national constitutions and protects every human being's entitlement to live, freedom from unlawful killings, and the obligation to protect and preserve life.⁸ The right to life

⁴ Luminita Dragne & Cristina Balaceanu, 'The Right to Life – A Fundamental Human Right' (2013), Vol 2, Social Economic Debates, PL 34-40.

⁵ United Nations 'Universal Declaration of Human Rights' <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed on 20 January 2024.

⁶ Equality and Human Rights Commission 'Article 2: Right to Life', 3 June 2021 <<https://www.equalityhumanrights.com/human-rights/human-rights-act/article-2-right-life>> accessed on 20 January 2024.

⁷ Constitution of India, 2022.

⁸ Beatrice Hedlund, Malmo University, 'The Right to Life' (2018).

can be defined as a moral principle that holds that every person has the right not to be arbitrarily killed or subjected to inhumane conditions of life.⁹

The Universal Declaration of Human Rights is the very first declaration passed by the General Assembly of the United Nations after the end of World War II. Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights.¹⁰ In regards to the right to life, Article 3 of the Declaration proclaims that every human being has the right to liberty and security of person.¹¹ The right to life is also recognised in the International Covenant on Civil and Political Rights by proclaiming the right to life alongside the prohibition of torture, slavery, the right to freedom, personal security, etc.¹²

2.1.1 UK perspective on right to life

In the UK, the right to life has undergone several stages of development and now has become a key fundamental component of the national legal framework. The Human Rights Act 1998 gives effect to the human rights set out in the European Convention on Human Rights (ECHR).¹³ Article 2 of the Human Rights Act proclaims that everybody's right to life must be upheld by the law. Nobody shall be purposefully taken from life unless a judge orders their execution after they are found guilty of a crime for which they are legally punished.¹⁴

Article 2 of the Human Rights Act includes some exceptions that can deprive the right to life. Deprivation of life, resulting from the use of force that is only absolutely necessary will not be considered as inflicted in violation of this article in below circumstances; (a) to protect someone from unlawful violence, (b) to carry out a legitimate arrest or stop someone who is lawfully arrested from escaping and (c) in a legally sanctioned action meant to put an end to a riot or rebellion.

Article 2 of the Human Rights Act has a significant impact on the governing framework of the UK. The state has a positive obligation to protect life. The state has a responsibility to refrain from violence. The use of excessive force or arbitrary detention that causes unlawful killings are examples of acts that the state cannot commit or permit. However, the scope of this right extends

⁹ *ibid.*

¹⁰ *ibid* (n 5), Article 1.

¹¹ *ibid*, Article 3.

¹² Luminita Dragne, 'The Right to Life- A Fundamental Human Right' (2016), Vol 2, Social Economic Debates, PL 1-6.

¹³ *ibid* (n 4).

¹⁴ [legislation.gov.uk, Human Rights Act 1998, Schedule 1, <https://www.legislation.gov.uk/human-rights-act-1998/schedule-1>](https://www.legislation.gov.uk/human-rights-act-1998/schedule-1) accessed on 20 February 2024.

beyond depriving a person of life. The state has a positive obligation to take the necessary action to provide healthcare, uphold public safety, and protect the individual's life within its jurisdiction.¹⁵ The state has a procedural obligation to investigate the purported infringement of the right to life and bring the offending parties to justice.¹⁶

Furthermore, judges of UK courts consider other international obligations and laws related to this, when interpreting Article 2. As examples, the International Convention on Civil and Political Rights, Geneva Convention and the Police and Criminal Evidence Act can be identified.

2.1.2 Indian perspective on the Right to Life

The Indian Constitution expressly recognizes the right to life and personal liberty as a fundamental right. Article 21 of the Indian Constitution proclaims that no person shall be deprived of his life or personal liberty except according to the procedure established by law.¹⁷

In India, the early interpretation of Article 21 was limited to its literal meaning. The jurisprudential evolution of the right to life in India can be identified by the landmark judgments related to it. In the case of *A.K. Gopalan v State of Madras*,¹⁸ Article 21 was interpreted narrowly. In this instance, the Preventive Detention Act of 1950 was used to hold the Petitioner, a communist leader. He argued that the imprisonment was ultra vires because it violated his personal liberty as guaranteed by Article 21 of the Indian Constitution and his freedom of movement, which are both recognized in Article 19(1)(d) of the Indian Constitution.¹⁹

The court held that the rights granted by Article 19(1) did not fall under the definition of personal liberty, which was defined as liberty of the physical body. Therefore, it was believed that one's "personal" liberty encompassed certain rights, such as the freedom to eat and sleep, but not the ability to move around freely, which was regarded as a relatively minor right.

However, over time, the Indian Supreme Court expands the scope of application of the Article by applying liberal interpretation to the provisions of the article in accordance with pertinent international knowledge.²⁰ Therefore, protection against the arbitrary deprivation of "life" would

¹⁵ *ibid* (n 12).

¹⁶ *ibid*.

¹⁷ Constitution of India, 1950.

¹⁸ (1950) AIR 1950 SC 27.

¹⁹ *ibid*.

²⁰ Himangshu Ranjan Nath, 'Right to Life and Personal Liberty Under the Constitution of India: A Strive for Justice' (2013), Vol 1, Dibrugarh University Law Journal PL 36-48.

encompass all these aspects of life that contribute to a man's meaningful and worthwhile existence, and would go beyond simple protection against bodily harm or death to include an invasion of the right to "live" with human dignity.²¹ In *Vidya Varma v Dr. Shiv Narain Varma*,²² the Indian Supreme Court held that Article 21 merely means the right to the continuance of a person's animal existence, but a right to the possession of his organs, his arms and legs etc.²³ Article 21 was given a new meaning by the Supreme Court in *Maneka Gandhi v. Union of India*.²⁴ The Court ruled that the right to life encompasses the right to live with human dignity and is not just a physical right.

Further, the scope of the right to life expands to other rights such as right to travel, right to livelihood, right to shelter etc. In the case of *Menaka Gandhi v Union of India*,²⁵ the Supreme Court held that the right to personal liberty must include the freedom to travel and leave the country. In regard to the right to livelihood, in the case of *Olga Tellis and others v Bombay Municipal Corporation*,²⁶ it was held that right to livelihood is a part of the right to life. It goes beyond simply saying that life cannot be ended or taken away—for instance, by the imposition and carrying out of the death penalty—unless done so in accordance with legally prescribed processes. That is only a single facet of the right to life. Since no one can survive without the means of subsistence, or means of life, the right to livelihood is a crucial component of that right. Further, in the case of *Chameli Singh v State of Uththara Pradesh*,²⁷ it was held that the right to life guarantees the fundamental human rights to food, water, shelter, medical care, education, and a respectable environment.

Further, Supreme Court interprets the Article 21 combining with Articles 14 and 19 of the Indian Constitution. According to Article 14, the State shall not deprive any individual of equal protection under the law or equality before the law within the borders of India.²⁸ Article 19 proclaims that all citizens are entitled to the freedom of speech and expression, to peaceful assembly and the formation of associations, to travel and live anywhere in the nation, and to engage in any kind of employment, trade, or profession.²⁹

²¹ *ibid.*

²² (1956) AIR 108, (1955) SCR (2) 983.

²³ J Wickramaratne, *Fundamental Rights in Sri Lanka* (3rd edn, Colombo: Stamford Lake Publishers, 2021).

²⁴ (1978) AIR 597, (1978) SCR (2) 621.

²⁵ *ibid.*

²⁶ (1986) AIR 180.

²⁷ (1996) 2 SCC 594 (India).

²⁸ Constitution of India, 2022.

²⁹ *ibid.*

Earlier, these articles were considered as entirely exclusive and separate rights. In later cases, it was interpreted that these rights are complementary to each other. In the case of *Maneka Gandhi v Union of India*,³⁰ the Supreme Court held that Articles 21 and 19(1) are not just separate and exclusive rights. It was held that right to life and personal liberty contains a range of rights and some of these rights are additionally protected by article 19(1). Thus, Articles 19 and 21 are closely related. Further, Article 14's right to equality also examines whether there are any administration and executive action, which restrict those rights. Therefore, in addition to passing the test of Article 21 of the Constitution, a law that infringes upon an individual's personal liberty must also pass the tests of Articles 14 and 19. Therefore, these three rights are going hand in hand and safeguards citizens against arbitrary administrative and executive action. Therefore, these three articles should be read together.

2.1.3 Sri Lankan perspective on right to life

Sri Lanka's first republican constitution, the 1972 Constitution, Article 18 (1) (b) proclaimed that no person shall be deprived of life, liberty and security of person, except in accordance with the law. This Article is similar to Article 21 of the Indian Constitution. Even though, liberty is a term which has a wider meaning, many scholars state that the 1972 Constitution recognised the right to life. However, the 1972 Constitution did not expressly recognise the right to freedom from torture or cruel, inhuman or degrading treatment. It was stated that article 18 (1) (b) of the 1972 Constitution included the above right.³¹ However, rights recognised in the 1972 Constitution were not legally enforceable.

In 1978, the 1972 Constitution was repealed and replaced with a new one. The 1978 Constitution does not expressly recognise the right to life. The repercussions of the right to life are interpreted by Article 11 read with Article 13(4), even though Sri Lanka is not a country where the right to life is seen as being contained in the Constitution.³² In the 1978 Constitution, Article 11 proclaimed the right to freedom of torture, cruel and degrading treatment and punishment.³³ Further, Article 13 (4) guaranteed that no person shall be punished with death or imprisonment unless a court of competent jurisdiction issues an order that follows the legal process.³⁴ The Supreme Court has taken this

³⁰ *ibid* (n 24).

³¹ *ibid* (n 23).

³² W G T Y Thilakarathne, 'Right to Life as a Fundamental Right; A Legal Analysis on the Sri Lankan Constitution' (2022), Proceedings of the International Open University Research Sessions PL 1-6.

³³ Constitution of Sri Lanka, 1978.

³⁴ *ibid*.

stance stating that the Constitution ought not to be read in a "narrow and pedantic manner," as it is a "living document".³⁵ Those rights are recognised as absolute rights which restrictions are not permitted.³⁶ The court cited Sri Lanka's duty under numerous international treaties to uphold the right to life as well as the principles enshrined in the Constitution.

The significance of the right to life has been acknowledged by the Sri Lankan Supreme Court on numerous decided cases. In *Sriyani Silva v. Iddamalgoda*,³⁷ a widow alleged that her husband was subjected to severe torture in police custody and died due to such torture. The Supreme Court held that even though the right to life is not expressly recognised, it is impliedly recognised in certain Articles of the Constitution such as Articles 11 and 13(4).³⁸ The Supreme Court of Sri Lanka ruled in the historic case of *Ratnayake Tharanga Lakmali v. Niroshan Abeykoon*³⁹ that the right to life was violated when a suspect in police custody was killed extrajudicially. Further, in *Jayamuni Anuradha Nilmini Vijesekara v. Sumedha Thushara & others*, it was revealed that the suspect was assaulted severely when he was in police custody. It was mentioned in the Judicial Medical Officer's (JMO) report that the body was subjected to torture, and death was caused due to severe torture. The Supreme Court held that fundamental rights of the person had been violated on the basis of violation of the freedom from torture or cruel, inhuman or degrading treatment or punishment.⁴⁰

Freedom from inhuman and or degrading treatment is also an element of the right to life. Unnecessary handcuffing of the prisoners, poor conditions of the prisoners can also be considered as degrading treatment.⁴¹ In the case of *Subasinghe v Police Constable Sandun*,⁴² the plaintiff was taken handcuffed by the police, to the Dankotuwa town by a private vehicle, made to walk across the junction while being handcuffed and subsequently put into another vehicle and taken away. In this case, Shirani Bandaranayaka J. stated that this action was an insult to human dignity of the detainee as a human being which qualified as degrading treatment under Article 11.

³⁵ W G T Y Thilakarathne, 'Right to Life as a Fundamental Right; A Legal Analysis on the Sri Lankan Constitution' (2022), Proceedings of the International Open University Research Sessions PL 1-6.

³⁶ *ibid* (n 23).

³⁷ (2003) 2 SLR 63.

³⁸ *ibid*.

³⁹ (2010) Case No. 209; SC/FR Application 577/2010.

⁴⁰ *ibid*.

⁴¹ *ibid* (n 23).

⁴² *ibid* (n 1).

In a landmark case which is widely known as the Eppawala case,⁴³ the Supreme Court again recognised the right to life.⁴⁴ It was interpreted that the right to livelihood is covered in Article 14 (1) (g) of the Sri Lankan Constitution which includes the freedom to engage in any lawful profession, occupation, trade, business or enterprise, is indirectly linked to the right to life.⁴⁵ Similarly, in India, the right to livelihood has been interpreted as part of the right to life under Article 21 of the Indian Constitution in several cases. Notably, in *Olga Tellis v. Bombay Municipal Corporation*.

3. DISCUSSION AND ANALYSIS

3.1 To evaluate the constitutional provisions that imply the right to life as a fundamental right in the 1978 Constitution of Sri Lanka.

As mentioned in literature review, the 1978 Constitution does not expressly recognise the right to life. It is stated that Article 11 and 13(4) impliedly recognise the right to life. Article 11 declares the right to freedom from inhuman and degrading treatment which is one attribute of the right to life. It is well established in Article 11 that the right cannot be restricted even in the interest of national security.⁴⁶ When it comes to the 1972 Constitution, the main criticism is that the scope of the fundamental right which was recognised, was limited and subjected to restrictions which almost nullify the effectiveness of the right. However, regarding the right to life, the 1978 Constitution narrowly constructed Article 11 to restrict the right compared to the 1972 Constitution.⁴⁷ In the 1972 Constitution, Article 18 (1) (b) proclaimed that no person shall be deprived of life, liberty and security of person, except in accordance with the law. This Article is similar to Article 21 of the Indian Constitution. In the 1978 Constitution, Article 11 proclaimed the right to freedom of torture, cruel and degrading treatment and punishment. Further, Article 13(4) guaranteed that no person shall be punished with death or imprisoned unless a court of competent jurisdiction issues an order that follows the legal process.⁴⁸

Comparing the literal meaning of these two stances, it is revealed that scope of the right in the 1972 Constitution is much wider since it included the words “liberty of person” and “deprived of life.”

⁴³ *Bulankulama and six others v. the Ministry of Industrial Development and Seven Others*- SC (FR) Application No. 884/1999.

⁴⁴ *ibid* (n 32).

⁴⁵ *ibid* (n 43).

⁴⁶ *ibid* (n 23).

⁴⁷ *ibid*.

⁴⁸ *ibid* (n 33).

The intention behind the 1972 Constitution is evident: despite the articulation of certain rights and freedoms, there was no intent to permit their enforcement or provide effective protection. The restrictive framework and lack of enforceability demonstrate that the Constitution was designed in a way that limited the practical realization of those rights, thereby weakening their substantive value. However, Article 11 and 13(4) of the 1978 Constitution are absolute rights, which are not subjected to any restrictions. However, the scope of rights related to the right to life is narrow and specific. Thus, both 1972 and 1978 legislators' attempts to uphold the right to life as a fundamental right is minimal compared to international standards.

Therefore, while the framers of the 1978 Constitution included certain elements of the right to life, they omitted a specific reference to the central core. Thus, a constitutional amendment is necessary to expressly declare the right to life.

3.2 To evaluate the judicial decisions and interpretations that recognise the right to life as a fundamental right in Sri Lanka.

Even though the 1978 Constitution does not expressly recognise the right to life, the Supreme Court of Sri Lanka has interpreted Articles 11 and 13(4) covering certain attributes of the right to life. The Supreme Court has taken this stance stating that the constitution ought not to be read in a "narrow and pedantic manner," as it is a "living document".⁴⁹

3.2.1 Application of the right to life in regard to the deprivation of life

As mentioned in the literature review, *Sriyani Silva v. Iddamalgoda* is a landmark case in Sri Lanka related to fundamental rights. In this case, it was held that every person has right not to be put to death despite having committed a crime except by order of a competent court, excluding special circumstances like exercising private defense. Thus, in this case, the court recognised the right to life at least in the sense of mere existence by interpreting Article 13 (4). Mark Fernando J and others stated that Articles 11 and 13(4) should be read together to recognise the right not to be deprived of life.⁵⁰

⁴⁹ *ibid* (n 32).

⁵⁰ *ibid* (n 37).

3.2.2 Application of the right to life in regard to cruel, inhuman, degrading treatment or punishment and human dignity.

The Supreme Court in some judicial decisions have taken further steps to uphold the rights beyond the mere deprivation of the life. As mentioned in literature review, in the case of *Subasinghe v. Constable Sandun*,⁵¹ it was held that the actions of the police were insults to human dignity of the detainee as a human being which qualified as degrading treatment under Article 11. However, this judgement discusses the concept of dignity rather than directly addressing the right to life. The emphasis in such cases is on the protection of human dignity, highlighting its significance in determining what constitutes degrading treatment. This suggests that while the right to life is fundamental, the concept of dignity plays a distinct role, particularly when addressing the quality of life and humane treatment.

Similarly, the case of *W.M. K. de Silva v. Chairman, Ceylon Fertilizer Corporation*⁵² concerned degrading and inhuman treatment in the workplace. The petitioner had provided a statement against the first defendant for the investigation conducted by the Criminal Investigation Department. Subsequently, the petitioner was sent on compulsory leave. Later, she was recalled to work, however, she was not allowed to use her old cubicle and to undertake her previous duties. She was made to sit in the verandah alone at a broken table on a broken chair. Further, she was made to mop the floor in front of her colleagues.⁵³ Work life was made humiliating and intolerable to her. Thus, she applied to the Supreme Court by a petition complaining that she was subjected to cruel, inhuman or degrading treatment or punishment. In the judgement, Jameel J stated it obviously accounted to grossly unfair labor practices, but not cruel, inhuman or degrading treatment or punishment. Amerasinghe J stated that Article 11 covers any act that causes severe mental or physical pain or suffering without lawful order of competent court. However, Article 11 is not concerned with the public official's conducts regarding such matters as one's contractual rights in a workplace. In this case, Amerasinghe J stated that executive or administrative action by a public officer under colour of office, is only subject to Article 11, if that action fulfills three purposes. Those purposes are that such action is conducted to obtain a confession or information from the victim which is required for the official purpose, imposing the penalty to the victim for an offence or breaching of a rule that has been committed by the victim or he is suspected of having committed

⁵¹ *ibid* (n 1).

⁵² *ibid* (n 2).

⁵³ *ibid*.

and coercing or intimidating the victim to do or refrain from doing something which the official believes that the victim ought to do or refrain from doing.⁵⁴ Therefore, it was restricted to consider certain inhuman or degrading treatment or punishment as violation of Article 11 which some international jurisdictions would consider as violation of fundamental rights.

The freedom from cruel, inhuman or degrading treatment is one element of the right to life. Many constitutions, which recognise the right to live with human dignity as a fundamental right, cover this right in wider perspective. In the case of *Subramanian Swamy v. Union of India*,⁵⁵ it was held that right to reputation is recognised under the right to life. The judgement mentioned several international treaties emphasising the importance of honor and respect for human life.

3.2.3 Application of the right to life to a clean environment and the quality of life.

The Sri Lankan Constitution of 1978 does not specifically grant the community the right to a clean and healthy environment, nor does it acknowledge the right to water or health. Since the Constitution is also silent about the right to life, it is again the judicial decisions that need to be considered regarding this. The right to life is so essential that, even if it is not explicitly recognised by the Constitution, its absence renders all other rights completely meaningless. Thus, the right to life is established based on the above discussed cases. Nevertheless, the legal definitions in those cases in regards to the right to life were incredibly limited and only acknowledged a person's right to exist, not their quality of life.⁵⁶

*Deshan Harindra (a minor) v. Ceylon Electricity Board (1998)*⁵⁷ was a case involving environmental rights that attempted to directly invoke the right to life on the grounds that the Constitution implicitly recognises this right. The case dealt with severe noise pollution from a diesel generator that was affecting very young children. The legal issue pertaining to the right to life was not put to the test because the lawsuit was settled.⁵⁸

Article 12 is the most frequently applied article, against activities that negatively affect the environment and people. Article 12 highlights the equality of all people before the law, their right

⁵⁴ *ibid* (n 2).

⁵⁵ (2016) AIR SC 2728.

⁵⁶ Kokila Lankathilake Konasinghe & Asanka Amitharansy Edirisinghe, 'Protecting Human Rights in the Light of Industrial Water Pollution: Sri Lankan Law and Obligations under International Law' (2020), Vol 1, No. 1, University of Colombo Review (Series III) PL 60-80.

⁵⁷ (1998) 5(4) SAELR 116.

⁵⁸ *ibid* (n 59).

to equal protection under the law, and its provision of protection from discrimination. The fundamental idea behind using this equality clause to counteract the detrimental effects of industrial and development activities on the environment and the people is that failing to apply the nation's current laws to a specific project or geographic area may result in the unequal treatment of those affected, which would violate Article 12.⁵⁹

This principle was applied in the case of *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others*.⁶⁰ In this case, Amerasinghe J, quoting the preaching of Arahath Mahinda, stated that every living being has equal right to live and move about any part of the land.⁶¹ Amerasinghe J further stated that the King is just the guardian not the owner. Referring to principles of the Stockholm Declaration, it was stated that it is the grave duty of humanity to preserve and enhance the environment for both the current and future generations. The same approach was followed in landmark cases such as *Environmental Foundation Limited v Urban Development Authority*,⁶² *Sugathapala Mendis v Chandrika Bandaranaike Kumaratunga*⁶³ etc.

A clean environment is a key necessity of life. Therefore, the right to a clean environment is a universally recognised right by a number of declarations. National laws of Sri Lanka recognises the same. A meaningful interpretation of Article 12(1) of the Constitution implies the right to a clean environment and the idea of intergenerational equity with regard to the protection and preservation of the environment, even though environmental rights are not expressly mentioned in the fundamental rights chapter of the Constitution.⁶⁴

Ravindra Gunawardena Kariyawasam v Central Environmental Authority and others (Chunnakam Power Plant Case),⁶⁵ is also a landmark case of Sri Lanka regarding fundamental rights. In this case, Jayawardena J stated that referring to the directive principles of state policy and fundamental duties, access to clean water which is a key necessity to live, is a basic human right. State shall guarantee "the realisation by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing, and housing, the continuous improvement of living

⁵⁹ *ibid.*

⁶⁰ *ibid* (n 43).

⁶¹ *ibid.*

⁶² (2005) SC (FR) Application No. 47/2004.

⁶³ (2008) 2 SLR 339.

⁶⁴ Niroshika Liyana Muhandiram, 'Right to Life in Buddhism- Comparative Analysis in the context of Sri Lankan Law' (2015), Proceedings of 10th National Conference on Buddhist Studies of Faculty of Humanities and Social Sciences, University of Sri Jayewardenepura PL 18-29.

⁶⁵ (2019) SC (FR) Application No. 141/2015.

conditions and the full enjoyment of leisure and social and cultural opportunities”.⁶⁶ Therefore, it can be identified that the Supreme Court of Sri Lanka under wider interpretation of Article 12 has covered important components of the right to life such as the right to a clean environment, which are covered in Article 21 of the Indian Constitution.

3.3 To identify the shortcomings and challenges in the judicial system and the existing constitutional framework to promote and protect the right to life and to propose reforms and improvements.

One of the key shortcomings of the constitutional framework with regard to the right to life, is that it is not expressly recognised. Compared to impliedly recognised rights, expressly recognised rights are more deeply ingrained. There is empirical proof of public support for it, there are fewer means to end it, it is more likely to be included into the fundamental civic education process, and the judicial role in interpretation is less vulnerable to attack.⁶⁷ Further, personal liberty is a term which has wider meaning. By including the right to personal liberty to the Constitution, India is able to cover a wider area of rights.

Within the limited Constitutional arrangement, the Judiciary of Sri Lanka has put valiant effort to uphold the right to life by interpreting the Articles broadly and in a progressive manner. However, there are many areas to improve. Specifically, the right to live with human dignity can be identified as a key component of the right to life that the Supreme Court of Sri Lanka needs to focus more. International courts use the right to live with human dignity to avoid racial discrimination, ill treatment by public officials, expulsion and extradition in certain circumstances. Thus, decisions have been taken to avoid handcuffing prisoners unnecessarily, improving prison conditions and avoid degrading treatment at workplaces.

Judicial decisions in India provide guidance to Sri Lanka to expand the judicial mind to promote and protect the right to life covering more components. In *Sunil Batra v. Delhi Administration & Ors.*,⁶⁸ the Supreme Court upheld the right against poor living conditions of prisoners. The Supreme Court ruled that the administration of prisons could not punish, torture, or treat a prisoner unfairly while they are incarcerated unless the court specifically granted permission or issued an order. Even in Sri Lanka, there are many instances which are reported in regard to the cruel

⁶⁶ *ibid.*

⁶⁷ David S. Bogen, ‘Comparing Implied and Express Constitutional Freedoms’(1995), University of Maryland Francis King Carey School of Law.

⁶⁸ (1978) 4 SCC 409.

treatment of prisoners and detainees. Further, the Supreme Court of India recognised the responsibility of the state to protect workers from dangerous or unhealthy working conditions in the case of *Occupational Health and Safety Association v. Union of India*.⁶⁹ However, the Supreme Court of Sri Lanka has refused such petitions considering that contractual relationships in workplaces are not subject to the fundamental right jurisdiction.

Further, the Supreme Court of India stated that the right to life and human dignity means the right to full personhood and to express the human self authentically. In the case of *Navtej Singh Johar v. Union of India*,⁷⁰ the petitioner filed a writ application, arguing that Section 377 of the Indian Penal Code violated fundamental rights by criminalising sexual conduct between members of the LGBT community. The court held that Section 377 of the Penal Code was a violation of Articles 14, 15, 19 and 21 of the Indian Constitution.⁷¹ However, in Sri Lanka, same sex sexual activities have been criminalised as per Section 365 of the Penal Code. Therefore, there is room for improvement in Sri Lanka regarding personal liberty in the context of the right to life.

A legal dilemma arises between the right to life in the context of abortion. In one aspect, it can be argued that a woman has the right to make reproductive choices on her own. On the other hand, the right to life of the prospective child is a cause for concern by many different social groups. In India, women's reproductive rights were discussed in *Suchita Srivastava v. Chandigarh Administration*.⁷² In this case, the court held that within the context of Article 21, a woman's ability to choose her own reproductive path is a component of her "personal liberty," and she is free to choose to procreate or not. This judgement emphasises the importance of respecting women's right to privacy, dignity and bodily integrity. However, on the other hand, the state has compelling interest regarding the life of the prospective child. Therefore, termination of pregnancy is only allowed in the circumstances outlined in the Medical Termination of Pregnancy Act of 1971.⁷³ In Sri Lanka, the effect of legalising abortion in the circumstances of rape, incest and fetal abnormalities failed in 1995 due to various social pressures. These are the aspects which policy makers of Sri Lanka should consider with regards to the reformation of fundamental rights.

⁶⁹ (2014) 3 SCC 547.

⁷⁰ (2018) INSC 790.

⁷¹ *ibid.*

⁷² (2009) 14 SCR 989, (2009) 9 SCC 1.

⁷³ *ibid.*

Another vibrant topic related to the right to life is that whether the death penalty violates the right to life. More than 85 countries have abolished the death sentence since 1976.⁷⁴ Section 303 of the Penal Code of India provides that the death sentence is available to those who commit the offence of murder. This was discussed in many cases. In the case of *Rajendra Prasad v. State of UP*,⁷⁵ the Supreme Court stated that death penalty deprives the right to life of the accused by violating Articles 24, 19 and 21. Later, this judgement was overruled and it was held that death penalty is not unconstitutional.⁷⁶ In 1983, the stance regarding the constitutional validity of the death penalty was changed again. It was held that it is not necessary to apply the death penalty unless there is the "gravest of cases of extreme culpability" in the case of *Machhi Singh v. the State of Punjab*.⁷⁷ In Sri Lanka, the death penalty is a legal penalty. Though the High Court and the Supreme Court consistently imposed the death sentence for murder and drug trafficking charges, there have not been any executions since 1976. This is also an area that legislators should consider the constitutional validity of, and also the necessity of the death penalty, considering the inactive stance of the penalty and other social conditions.

A key challenge to promote and protect the right to life and other fundamental rights in Sri Lanka is provisions of the Prevention of Terrorism Act (PTA). The abusive and arbitrary manner in which the provisions of the PTA have been used, undermine the right to life with dignity and many other fundamental rights.⁷⁸ Thus, there is huge pressure from the civil society and international community to abolish the PTA and enact new law according to international standards.⁷⁹

Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR) recognises the right to life. Sri Lanka has accepted and enacted the ICCPR in 2007. However, Sri Lanka is not a signatory to the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.⁸⁰ However, in recent cases, it was revealed that the ICCPR has been used to deprive

⁷⁴ 'Countries That Have Abolished the Death Penalty Since 1976' (Death Penalty Information Center) <<https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>> accessed on 13 March 2024.

⁷⁵ (1979) SCC (3) 646.

⁷⁶ *Bachan Singh v State of Punjab* (1980) AIR SC 898.

⁷⁷ (1983) 3 SCC 470.

⁷⁸ Centre for Policy Alternatives, 'Human Rights and Democracy in Sri Lanka; Threats to Journalists, Human Rights Defenders and Civil Society- A Brief Overview of Challenges and Proposed Reforms' (2022).

⁷⁹ *ibid.*

⁸⁰ Rohan Edrisinha & Asanga Welikala, 'Civil and Political Rights in the Sri Lankan Constitution and Law: Making the New Constitution in Compliance with the ICCPR' (2016), Centre for Policy Alternatives.

fundamental rights rather than protecting and promoting them. The ICCPR provides guidance to promote fundamental rights by constitutional reforms.

4. CONCLUSION

Therefore, it can be said that there is a substantial constitutional gap in Sri Lanka because the right to life is not specifically recognized by the country's constitution. Nevertheless, in spite of this omission, the Supreme Court has successfully addressed numerous facets of this right through its progressive judicial rulings. The Court has shown a strong commitment to upholding fundamental rights even in the absence of explicit constitutional recognition by interpreting and defending key components of the right to life. Although many of the practical prerequisites for protecting the right to life have been addressed in the Court's decisions, the lack of formal constitutional recognition still limits this judicial approach.

In order to ensure that important human rights issues are handled, the Supreme Court's interventions have been crucial in closing this gap. However, the lack of a clear constitutional protection of the right to life limits the law's ability to advance. It makes it more difficult to create thorough and uniform regulations, particularly when addressing new problems like environmental deterioration, socioeconomic inequality, and changing human rights concerns.

Although the judiciary has largely filled this void, constitutional amendment is still required to expressly acknowledge the right to life. In addition to bringing Sri Lanka into line with global best practices, this would offer a more stable and predictable legal framework for the comprehensive and proactive protection of people's fundamental rights.

FROM GAPS TO SOLUTIONS: BRIDGING THE DIVIDE IN SRI LANKA'S FIGHT AGAINST TRAFFICKING AND MODERN SLAVERY

Chanmini Perera | Deana Perera

ABSTRACT

This article will analyse Sri Lanka's current legal framework on trafficking in persons and modern-day slavery, highlighting the gaps and challenges in implementation while considering international standards. The authors of this article propose recommendations to enhance the effectiveness of anti-trafficking measures with emphasis on the concepts of forced labour, sexual exploitation, and child trafficking. This paper will focus on the legal framework addressing these topics in Sri Lanka, focusing on the need for targeted interventions to address the same, with reference to the current socioeconomic context and provide analysis on the shortcomings of the same in comparison to the international legal framework. The methodology is comprised solely of desk-based research, supplemented by publicly available data.

1. INTRODUCTION

Modern slavery, though not legally defined, serves as a broad term encompassing various exploitative practices including forced labour, debt bondage, forced marriage, and human trafficking. It fundamentally describes scenarios where individuals are unable to refuse or escape exploitation due to threats, violence, coercion, deception, or abuse of power.¹ According to the United Nations Office on Drugs and Crime, human trafficking is defined as "the recruitment, transportation, transfer, harbouring, or receipt of individuals through the use of force, fraud, or deception, with the intent of exploiting them for profit."²

Trafficking in persons and modern-day slavery have deep historical roots both internationally and in Sri Lanka. Globally, trafficking is often traced back to the transatlantic slave trade (16th-19th centuries), where millions of Africans were forcibly transported to the Americas as part of a brutal

¹ United Nations, 'Modern Slavery Is On The Rise', At <https://www.un.org/en/observances/slavery-abolition-day#:~:text=essentially%2c%20it%20refers%20to%20situations,and%2for%20abuse%20of%20power> [Last Accessed 3 August 2024].

² United Nations Office On Drugs And Crime, 'Human Trafficking', At <https://www.unodc.org/unodc/en/human-trafficking/human-trafficking.html> [Last Accessed 3 August 2024].

system of plantation slavery.³ Although slavery was formally abolished in the 19th century,⁴ practices like debt bondage, forced labor, and exploitation in conflict zones persisted across the world. During the World Wars, forced labor camps, particularly in Nazi-occupied territories, further demonstrated how slavery morphed under the pressures of conflict.⁵

Sri Lanka's involvement in trafficking has been influenced by internal conflict and labor migration.⁶ For decades, the country has been a source of labor for the Middle East, with many Sri Lankans subjected to forced labor and sexual exploitation abroad.⁷ Internally, forced child labor and trafficking during the civil war were significant problems, as some children were recruited into militant groups.⁸ In 2006, Sri Lanka amended its Penal Code to outlaw all forms of trafficking, but enforcement challenges, such as weak prosecution and victim protection, persist.⁹ Efforts to combat trafficking, including initiatives from civil society organizations, are gradually increasing, but Sri Lanka still struggles with the prevalence of modern-day slavery due to systemic issues like low awareness and lack of coordination between stakeholder.

2. **FORCED LABOUR**

As per the definition provided by the International Labour Organization (ILO), forced labour is "*all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily.*"¹⁰

³ LDHI, 'African Passages, Lowcountry Adaptations: The Trans – Atlantic Slave Trade', at https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/introductionatlanticworld/trans_atlantic_slave_trade (last accessed 5th October 2024)

⁴ Guasco M, Wyman – McCarthy, M, 'Abolition of Slavery', (23 June 2021), at <https://www.oxfordbibliographies.com/display/document/obo-9780199730414/obo-9780199730414-0001.xml#:~:text=The%20abolition%20of%20slavery%20in,with%20the%20development%20of%20modern> (last accessed 5th October 2024).

⁵ The Holocaust Explained, 'The Wiener Holocaust library: Types of Camps', at <https://www.theholocaustexplained.org/the-camps/types-of-camps/work-camps/> (last accessed 5th October 2024).

⁶ The Asia Foundation, 'Situational analysis of Trafficking in persons in Sri Lanka: A civil Society perspective', (18th March 2021), at https://asiafoundation.org/wp-content/uploads/2024/08/Sri-Lanka-TIP_Situational-Analysis-of-Trafficking-in-Persons-in-Sri-Lanka-A-Civil-Society-Perspective.pdf (last accessed 5th October 2024), p.4-5.

⁷ (n 6). See also, International Organization for Migration, 'Emerging trends of human trafficking in Sri Lanka : trafficking for forced criminality', (2023), at https://srilanka.iom.int/sites/g/files/tmzbd11601/files/documents/2023-12/ct-policy-brief_pxu-digital-1.pdf (last accessed 5th October 2024).

⁸ Human Rights Watch, 'Living in Fear: Child soldiers and the Tamil Tigers in Sri Lanka', (10th November 2004), at <https://www.hrw.org/report/2004/11/10/living-fear/child-soldiers-and-tamil-tigers-sri-lanka> (last accessed 5th October 2024).

⁹ (n 6)

¹⁰ Article 2(1) International Labour Organization Forced Labour Convention, 1930 (No. 29).

With regard to the country's objective of combating Trafficking in Persons (TiPs), Sri Lanka has made significant efforts by establishing the "Anti-Human Trafficking Unit" in 2016, with 13 police officers to investigate cases of trafficking in persons.¹¹ The country has also developed a national strategy plan to monitor and combat human trafficking (2015-2019) which is based on the four pillars of prevention, protection, prosecution and partnership. By ratifying the Palermo Protocol,¹² Sri Lanka is moving ahead towards the achievement of decent work and the delivering of the 2030 UN Sustainable Development Goals, in particular SDG target 8.7.¹³

While the Palermo Protocol provides provisions relating to forced labour, the following shortcomings affect its objective of overcoming the same. Factors such as there being no explicit protection from prosecution for the victim, result in the victim being prosecuted for the crime they were forced to commit, such as prostitution, working without a permit.¹⁴ Furthermore, there is no protocol to ensure reintegration of the victim into society.¹⁵ Thus, it is not without its shortcomings and this has affected the lives of victims as will be evident in the forthcoming sections.

2.1.Migrant Workers

Sri Lanka has been identified as a source country for human trafficking by several organisations mainly for sending women to the Middle East as domestic workers.¹⁶ The factors that lead people towards trafficking and forced labour have been identified as poverty, political instability, discrimination pushing workers out of their country, and the demand for cheap labour.¹⁷

The process by which women are recruited to forced labour activities are as follows;¹⁸

Migrant workers are often deceived prior to departure with promises of working and living conditions, wages that are rarely followed through. The employment contracts signed by many are in Arabic or English with the agency representatives explaining the contents of the contract to the

¹¹ ILO, 'Sri Lanka Renews Commitment To Combat Forced Labour', at <https://www.ilo.org/resource/news/sri-lanka-renews-commitment-combat-forced-labour> (Last Accessed 29th June 2024).

¹² Protocol To Prevent, Suppress and Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime.

¹³ *ibid*.

¹⁴ ILO, 'Presence Of Human Trafficking And Forced Labour In Labour Migration Sri Lanka', at https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-colombo/documents/publication/wcms_735511.pdf (Last Accessed 12th July).

¹⁵ Kim, K And Chang, G, "Reconceptualizing Approaches To Human Trafficking: New Directions And Perspective From The Field(S)", In Stanford Journal Of Civil Rights & Civil Liberties, Page 31.

¹⁶ United States Department Of State 2018, 2018 Trafficking In Persons Report.

¹⁷ Kim, K "The Coercion Of Trafficked Workers", Iowa Law Review 2011 Pp 414-415.

¹⁸ (n 14).

victims. Some have stated that they were not provided with this explanation prior to signing the documents.

Furthermore, migrant workers also faced discrepancy when considering the difference between wages promised and what was paid. The withholding of wages was a strong means of control in the hands of the employer, thus treating the workers similar to slaves.

Though the working conditions were satisfactory, the excessive working hours that were not agreed upon, and the multiple tasks that were placed upon them for the same wage was similar to modern day slavery. The lack of facilities to converse with family members in Sri Lanka proved to be difficult for the workers, as they were given no opportunity to contact anyone, nor possess a cell phone. Verbal and physical abuse at the hands of the masters/mistresses too were factors noted by the worker testimonies. Evidence of beatings, threats, psychological abuse by way of humiliation, denying the workers food provide the fact that the treatment of the workers was exploitative.¹⁹

2.2.Plantation Sector

Tomoyo Obokata, the U.N special rapporteur on contemporary forms of slavery, stated that in Sri Lanka contemporary forms of slavery have an ethnic dimension.²⁰ In justification of this, he stated that the plantation Tamils' inability to own land has forced them to live in "line houses" built during colonial times.

Women and girls are disproportionately affected by contemporary forms of slavery, with females predominantly filling jobs in demanding sectors such as plantation, garment industry and domestic labour. In the plantation sector, as stated by him, women must meet daily targets to earn the minimum daily wage, and the exploitative working conditions increase their risk of exploitation and abuse.²¹ In the plantations, women are required to work significantly longer hours than men to achieve the minimum wage from plucking tea leaves. A major concern highlighted is that the low wages do not keep pace with the rising cost of living in Sri Lanka.²² In an attempt to curtail this issue, the former president of the country Ranil Wickremasinghe announced on the 1st of May a

¹⁹ *ibid.*

²⁰ U.N Expert: Contemporary Forms Of Slavery <https://apnews.com/article/business-race-and-ethnicity-united-nations-sri-lanka-slavery-132373e5687de9419c41abee4874179c> (Last Accessed 29th June).

²¹ Special Rapporteur On Contemporary Forms Of Slavery, Including Its Causes And Consequences Country Visit To Sri Lanka, 26 November-3 December 2021, End Of Mission Statement at <https://srilanka.un.org/sites/default/files/2021-12/end%20of%20mission%20report.pdf> (Last Accessed 30 June 2024), p.4.

²² *ibid.*

70% increase in the daily wage of estate workers to Rs. 1,700.²³ However, it is questionable as to whether this can be noted as being sufficient to meet the daily expenses of the workers.

With regards to retired workers, the majority of the workforce is over the age of 50, as younger people tend to work outside the plantation sector. Yet they perform physically challenging jobs on a day-to-day basis, without sufficient access to health care and social protection, as well as access to sick or paid leave. Another pressing concern expressed is the lack of timely access to retirement funds, including Employee Trust Fund (ETF), Employee Provident Fund (EPF) and Gratuity which are to be paid after workers reach 60 years of age (although ETF can be withdrawn before retirement). This has forced some retired persons to return to work.²⁴

2.3. Construction

Construction is the second-highest-risk sector for forced labour (second to migrant domestic work), with an estimated 4.5 million construction workers in forced labour around the world.²⁵ Exploitation in the construction sector occurs across the globe, from Angola, China and Qatar to Russia, the UK, and the USA.²⁶ Materials used in the construction sector, such as bricks, cement, or timber, may be produced with forced labour.²⁷

Certain construction workers receive no wages for long periods as contractors are not obliged to pay sub-contractors until they have received payment from the client.²⁸ This is further exacerbated by the complexity of construction projects: one construction project may have hundreds of subcontractors, labour agencies and materials suppliers, with changing workers and sub-contractors.²⁹ Migrant workers are commonly employed in the sector and are especially vulnerable to exploitation by being charged extortionate recruitment fees, which leaves them in situations of debt bondage (i.e., forcing workers to stay at an employer and work to pay off the debt).³⁰

²³ The Island Online, 'Pay Up Or Get Out, RW Directs Regional Plantation Companies' at <https://island.lk/pay-up-or-get-out-rw-directs-regional-plantation-companies/> [Last accessed 3 August 2024].

²⁴ *ibid.*

²⁵ Respect International, 'Forced Labour in The Construction Sector', at <https://respect.international/wp-content/uploads/2019/12/forced-labor-in-the-construction-sector.pdf> (Last Accessed 30 June 2024).

²⁶ Lexisnexis, 'Hidden in plain sight: Modern day slavery in the construction industry', at https://sdgresources.relx.com/sites/default/files/modern_slavery_in_construction_full.pdf [Last Accessed 24 August 2024].

²⁷ US Department Of State (June 2019), "Trafficking In Persons Report," Pp. 7, 37, 130, 191, 344.

²⁸ Business & Human Rights Resource Centre (2018), "A Human Rights Primer For Business: Understanding Risks To Construction Workers In The Middle East,".

²⁹ Emma Crates (2016), "Building A Fairer System: Tackling Modern Slavery In Construction Supply Chains," P. 9.

³⁰ *ibid.*

Furthermore, workers' ability to access remedies is often limited or fully suppressed.³¹ Thus the working conditions of these workers may be noted as being exploitative.

2.4. Textile industry

Reports suggest that there are many adult workers who are victims of labour rights violations or forced labour in cotton fields or garment factories, where child labour too is persistent.³²

With the support of the European Union, progress towards the eradication of child and forced labour from cotton production was made possible in countries such as Uzbekistan. ILO monitors reported in 2018 that forced labour during the cotton harvest has been significantly reduced and child labour is no longer a concern.³³

The cotton harvest in Uzbekistan is one of the world's largest recruitment operations, with an estimated 2.6 million people temporarily picking cotton every year. Previously, over a million school children, as young as nine years old, would miss school activities and help with the cotton harvest in dire conditions.³⁴

As per Walk Free's new Global Slavery Index, in addition to importing \$147.9 billion worth of apparel goods, G20 countries import \$12.7 billion worth of textiles at risk of being produced by forced labour every year.³⁵ Workers in these supply chains often endure harsh conditions, including low wages, piece-rate pay, forced and unpaid overtime, irregular work schedules, health and safety risks, and a lack of benefits. These factors can lead to forced labour and debt bondage, where individuals are trapped in slavery to repay debts. One notable example is the alleged state-imposed forced labour involving Uyghurs in China's Xinjiang region, where Uyghurs and other Turkic and Muslim groups are reportedly forced to pick cotton and produce textiles and garments.³⁶

³¹ Business & Human Rights Resource Centre (2018), "From Unacceptable Risks To Shared Prosperity: Building Human Rights Into Jordan & Lebanon's Construction Sector," P. 3.

³² International Partnerships, Are the Clothes You are Wearing Free from Child Labour? https://International-Partnerships.Ec.Europa.Eu/News-And-Events/Stories/Are-Clothes-You-Are-Wearing-Free-Child-Labour_En (Last Accessed 30th June).

³³ *ibid.*

³⁴ *ibid.*

³⁵ Vogue Business, 'Modern Slavery Is On The Rise. Fashion's Role Remains Steady', at <https://www.voguebusiness.com/sustainability/modern-slavery-is-on-the-rise-fashion's-role-remains-steady> (Last Accessed 30 June 2024).

³⁶ *ibid.*

In the Sri Lankan context, the garment sector imposes high production targets that pressure female workers to such an extent that some avoid taking bathroom breaks to meet their quotas. Numerous reports from workers confirm these exploitative practices.³⁷ Furthermore, a monthly salary of USD 120-150 in the apparel sector often fails to cover basic family expenses, even if it exceeds the legally mandated minimum wage which leads to certain workers falling into debt bondage.³⁸

2.5.Agriculture

Agricultural work is a recognised entry point into child labour and as stated by the Special Rapporteur, it has significant risks affecting both boys and girls.³⁹ Despite the global commitment to end child labour by 2025, the report expressed concern about the recent rise in the practice, with an estimated increase of 8.4 million child labourers globally over the past four years.⁴⁰

The report further highlights significant vulnerabilities faced by women, particularly in relation to trafficking, sexual abuse, and harassment which are exacerbated when women's agricultural work goes unrecognized, leading to gaps in support, protection, and prevention measures against trafficking.

The report also underscores that indigenous women and girls experience heightened discrimination, which increases their susceptibility to trafficking and limits the protections available to them as victims. This situation is particularly critical in the agricultural sector, where the expansion of agribusiness often infringes upon the land rights and collective ownership of indigenous peoples.

Moreover, the report points out that temporary, seasonal, and migrant workers are inadequately protected and remain vulnerable to exploitation. Despite being designated as "essential" during the COVID-19 pandemic, agricultural workers did not see improvements in their protections or expanded pathways for safe migration.⁴¹

³⁷ (n 20).

³⁸ *ibid.*

³⁹ OHCHR, 'UN Expert Denounces Worrying Prevalence Of Trafficking In Agricultural Sector', at <https://www.ohchr.org/en/press-releases/2022/06/un-expert-denounces-worrying-prevalence-trafficking-agricultural-sector> (Last Accessed 25 July 2024).

⁴⁰ *ibid.*

⁴¹ *ibid.*

3. **SEXUAL EXPLOITATION**

Commercial sexual exploitation includes the profitization of sexual activities ranging from prostitution, phone sex, internet sex/chat rooms, peep shows, pornography, trafficking, sex tourism and mail order brides.⁴²

3.1. Legal framework on commercial sexual exploitation of children

Legislative instruments such as the Stockholm Declaration and Agenda for Action of the World Congress Against Commercial Sexual Exploitation of Children (1996) provide the definition for commercial sexual exploitation of children as: *“a fundamental violation of Children’s’ Rights. It comprises Sexual Abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The Commercial Sexual Exploitation of Children constitutes a form of coercion and amounts to forced labour and a contemporary form of slavery.”*

The ILO Convention No. 182 and Recommendation No. 190 define worst forms of child labour with reference to four important aspects such as follows: forms of slavery such as the sale and trafficking of children, debt bondage including the forced use of children in armed conflict; the use and procurement of children for child prostitution, or the production of child pornography; the use or procurement of children for illicit practices such as the trafficking of drugs; work which by its nature is harmful to a child’s health, safety.⁴³

The commercial sexual exploitation of children was recognized as a modern form of slavery at the World Congress Against Commercial Sexual Exploitation of Children, held in Stockholm in 1996. In terms of Sri Lankan legal framework regarding the issue, the UN Convention on the Rights of the Child (CRC), 1989 was ratified by Sri Lanka in 1990, Sri Lanka then signed the Global Plan of Action for Children in 1991. Article 34 of the UN Convention makes it mandatory for state parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse, as well as to take all appropriate national, bilateral and multilateral measures to prevent the following: the inducement or coercion of a child to engage in any unlawful sexual activity; exploitative use of

⁴² NHS Scotland, Commercial Sexual Exploitation <https://www.healthscotland.scot/media/2098/gbv-commercial-sexual-exploitation.pdf> [Last Accessed 24 August 2024].

⁴³ ILO - International Programme On The Elimination Of Child Labour (IPEC) Sri Lanka, ‘The Commercial Sexual Exploitation Of Children: A Rapid Assessment’ at https://www.researchgate.net/profile/sarath-amarasinghe/publication/315000617_international_labour_organisation/links/58c80a9145851591df303af2/international-labour-organisation.pdf (Last Accessed 8 July 2024).

children in prostitution or other unlawful sexual practices; exploitative use of children in pornographic performances and materials.⁴⁴

3.2.Sri Lankan context, the link between tourism and the commercial sex trade

A study conducted in a number of tourist areas in six districts along the South-Western and Southern coasts of Sri Lanka, and in two districts in the interior of the country with a review of secondary data sources and discussions with key informants such as police officers, school principals, local administrative officials, hoteliers and local traders led to the following observations.⁴⁵ The study focused on children under 18 years of age who are victims of commercial sexual exploitation. The total sample consisted of 120 children, 78 males and 42 females, of whom 14 children were chosen from two rehabilitation centres. As found in the study, the socioeconomic and cultural factors contributing to the exploitation of children range from parental neglect, financial instability, and the presence of sex related tourist activities. The study showed that the demand for such paedophilic acts lies not only within the types of tourists that frequent the localities, but also certain locals that live in the area. Furthermore, it displayed the gender difference in the children that engaged in such acts, having found that female children get involved in commercial sexual activities at a younger age than male children. The female respondents stated that a majority of them were involved with local clients while the male respondents stated that foreigners were their main clientele. The study has further found that the rehabilitation process to aid these children is less than adequate to deal with the complexities of the problems facing these children as a result of being victims of modern-day slavery.

The study further found that many children were content with the activities, 60% of boys and 31% of girls mentioned that they would continue in the present activities⁴⁶. This may be due to factors ranging from an addiction to sex, emotional satisfaction received from partners, financial conditions, drug usage and so on.

As per the study, male children were found largely in Hikkaduwa, (95%), Tangalle (93%), Negombo (100%), Unawatuna (69%) and Mt. Lavinia (67%). The high incidence of male commercial sexual exploitation in these locations is largely associated with the tourist industry in the areas. Studies undertaken by PEACE (1999) show that male children whose ages generally

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

range from six to eight years are involved in the sex trade along the beach resorts of the southwest coast.

3.2.1. Legal framework surrounding the commercial sex trade in Sri Lanka

Following the 1995 Amendments to the Penal Code (Act 22 of 1995) the child victims of commercial sexual exploitation and sexual abuse are no longer considered as ‘accused’ but recognized as victims. This change enunciated in the Penal Code has restored the identity of children and paved the way for rehabilitation. The main objective of the rehabilitation programme of sexually exploited children run by the government and non-government institutions and co-ordinated by the Department of Probation and Childcare Services (PCCSD), is to acculturate the children in acceptable social norms and values of society, prepare them as good citizens, and release them into the wider society with a strong sense of responsibility and an effective system of follow-up. However, children in the commercial sex trade rarely enter the rehabilitation process as per the study, and the treatment received by the children appears to be inadequate.⁴⁷

In 1997, the President following discussions with UN agencies, NGOs to make official recommendations in the best interest of children, appointed a Task Force to consider the best interests of children and make official recommendations. On the recommendation of the Task Force, a special bill to form the National Child Protection Authority (NCPA) was presented in Parliament (Act No: 50 of 1998) and the NCPA was established in early 1999. Amongst the many powers conferred on the NCPA is that which is vested by section 33 of the NCPA Act, where it is in a position to carry out its own investigations on child abuse cases through authorized officers without a search warrant.⁴⁸

3.3. Online Sexual Abuse

The Luxembourg Guidelines, defines child exploitation to cover OCSEA (Online Child Sexual Exploitation and Abuse) through the words “*any use of ICT that results in sexual exploitation or causes a child to be sexually exploited or that results in or causes images or other material documenting such sexual exploitation to be produced, bought, sold, possessed, distributed, or*

⁴⁷ *ibid.*

⁴⁸South Asia Partnership International, A Situational Analysis Of Child Sex Tourism In Sri Lanka (Negombo, Colombo, Mt. Lavinia, Hikkaduwa, Galle, Anuradhapura And Trincomalee) 2003
https://documentation.lastradainternational.org/lisidocs/414%20ecpat_south_asia_partnershi.pdf (Last Accessed 11 July 2024).

transmitted.”⁴⁹ Sri Lanka acceded to the Budapest Convention in 2005, and this enabled the national legislation, the Computer Crime Act, No. 24 of 2007, to be passed.⁵⁰ However, OCSEA is not recognised or criminalised in Sri Lanka’s substantive law which includes the Penal Code and the Computer Crimes Act as the Penal Code does not identify ICT as a means of facilitating the sexual exploitation of children, and although the Computer Crimes Act recognises cybercrime, it does not criminalise OCSEA as the Act does not consider the possibility of using ICT to enable the sexual exploitation of children.⁵¹

One of the central confusions surrounding legal provisions related to children has been the lack of consistency in identifying who amounts to a child. For instance, the Age of Majority (Amendment) Act, No. 17 of 1989, recognises the age of majority at 18 while the Penal Code and its Amendments of 1995, 1998 and 2006 have defined a child as under 18 years only in specific provisions.⁵²

When considering the types of OCSEA, they are as follows: child pornography; commercial sexual exploitation of children; cyber-enticement; grooming or solicitation of children for sexual purposes; cyber-sexual harassment; cyber bullying and cyberstalking.⁵³ Furthermore, with regards to Trafficking, Section 360C of the Penal Code states that trafficking in children for the purpose of sexual exploitation is another form of OCSEA.⁵⁴ Some examples of online trafficking of children include: traffickers using ICT to advertise victims in multiple locations on classified websites which facilitates the buying and selling of children. While the Penal Code mimics the Palermo protocol in its definition of TiPs, Sri Lanka’s record of convictions for trafficking is deemed to be weak, and as at 2019 June, it has had only one conviction for trafficking in the last five years.⁵⁵ Thus, although there is a law prohibiting trafficking, there is a gap in enforcing the law.

The following trends were identified as new or emerging trends in relation to TIPs in Sri Lanka through the desk review and field research:

⁴⁹ Luxembourg Guidelines.

⁵⁰ Groundviews, ‘Online Child Abuse: A Lack Of Laws Or A Lack Of Implementation?’, at <https://groundviews.org/2023/07/11/online-child-abuse-a-lack-of-laws-or-a-lack-of-implementation/> (Last Accessed 20 June 2024).

⁵¹ (n 43)

⁵² *ibid.*

⁵³ Luxembourg Guidelines, 2016 P. 46

⁵⁴ Verité Research, ‘Sri Lanka: Online Child Sexual Exploitation Legal Gap Analysis’, at <https://www.veriteresearch.org/wp-content/uploads/2020/11/veriteresearch-study-on-legal-framework-on-online-child-sexual-exploitation-in-sri-lanka.pdf> [Last Accessed 30 July 2024].

⁵⁵ U.S. State Department. (2019). Trafficking In Persons Report. <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/sri-lanka/> [Last Accessed 3 August 2024].

The use of technology for OCSEA and for the recruitment of vulnerable women for the purpose of sex trafficking, through coercive and extortive practices. It is reported that agents or handlers coerce children into pornographic productions when required by pornography producers.⁵⁶ Children are also trafficked directly through online platforms using the dark web.⁵⁷ Use of drugs and addiction to drugs are used to induce children and coerce women into sex trafficking.

Another concerning trend is the use of visit and student visas for external migrants as a means to circumvent the requirement for all migrants for employment purposes to register with the Sri Lanka Bureau of Foreign Employment. Persons on visit and student visas are illegally placed in employment in the destination countries which makes them vulnerable to TIP as they are willing to be employed under any conditions. It has also been identified that proliferation of unregulated spas gives rise to concerns of sexual exploitation of women and girls working in those spas. While internal trafficking within the process of external labour migration and Trafficking of foreign migrant workers into Sri Lanka,⁵⁸ are identified issues in relation to TiPs in Sri Lanka.

Both Sri Lankan nationals as well as foreign nationals fall victim to TIP.⁵⁹ While it is generally accepted that women constitute the majority of trafficked victims, some respondents stated that this estimation may not be true. In the absence of programmes geared towards male victims of TIP, including the assistance and protection services, male victims may opt not to pursue criminal justice. Another reason could be the general gender-bias in society and the specific narrative of TIP which strongly emphasises on women victims. This may dissuade men from complaining about their victimisation. Data contained in the 2019 USDOS TiPs report also supports the contention that male victims may outnumber female victims. According to the report, Sri Lankan authorities identified 66 potential TIP victims during the reporting year, among which 56 were male victims.⁶⁰

Thereby emphasising the fact that both genders are greatly affected by trafficking, and that the general misconception that women fall victim to TIP more than men has resulted in male victims receiving inadequate care and justice.

⁵⁶ UNODC, Gaps and Needs Assessment of The Criminal Justice Response to Trafficking In Persons In Sri Lanka (202)

⁵⁷ Chamara S, 'Sri Lanka's sprawling, dark web of predators of children', (6 July 2021), at <https://www.themorning.lk/articles/147796> [Last Accessed 24 August 2024].

⁵⁸ The Asia Foundation, 'Situational Analysis Of Trafficking In Persons In Sri Lanka, A Civil S Society Perspective', at https://asiafoundation.org/wp-content/uploads/2021/07/sri-lanka-tip_situational-analysis-of-trafficking-in-persons-in-sri-lanka-a-civil-society-perspective.pdf [Last Accessed 24 June 2024]

⁵⁹ *ibid.*

⁶⁰ *ibid.*

4. **THE REALITY OF CHILD LABOR AND TRAFFICKING**

“My father’s income was insufficient to spend on the education of 4 children. So, I started to work at 14 so that my two younger brothers could attend school.”

– A 17-year-old girl working in the garment sector in Sri Lanka in 2021 (End Violence, 2023)⁶¹

4.1. Prevalence of child labour in Sri Lanka

ILO defines child labour as “work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development.”⁶² Such work that could mentally, physically, socially or morally be dangerous and harmful to children and/ or interfere with their school life – by depriving them of the opportunity to attend school; obliging them to leave school prematurely; or even requiring them to attempt to combine school attendance with excessively long and heavy work.⁶³ This raises the question of who a working child is. As per the ILO this is a child who engages in “economic activities, paid or contributing in the production of goods and services that have an economic value, at least one hour during a reference period.”⁶⁴

Child labour in Sri Lanka is a pervasive issue that deprives children of their fundamental rights to education, health, and a safe childhood. This chapter will analyse the legal framework addressing child labour, highlighting gaps and challenges in implementation while considering international standards.

In 2022, the Department of Labour (DOL) carried out 70,089 routine inspections, received 145 child labour complaints, identified 11 child labour violations, and concluded three court cases with penalties. This contrasts with 2021, when there were 38,280 labour inspections, 204 child labour complaints, 178 child labour investigations, and penalties for one case of child labour violations. During both years, labour inspectors did not identify any cases of human trafficking.

The data suggests significant changes in the DoL’s operational metrics between 2021 and 2022, notably in the volume of routine inspections and the outcomes of child labour violations. The

⁶¹ Braga Arianna, ‘Child labour in agriculture: a hazardous but common practice worldwide’, (Humanium, 5 September 2023), at <https://www.humanium.org/en/child-labour-in-agriculture-a-hazardous-but-common-practice-worldwide/> [last accessed 3 August 2024].

⁶² ILO, ‘What Is Child Labour’, at <https://www.ilo.org/international-programme-elimination-child-labour-ipe/what-child-labour> [Last Accessed 20 July 2024].

⁶³ (n 60)

⁶⁴ ILO, ‘Child Labour In Sri Lanka’, at <https://www.ilo.org/media/418896/download> [Last Accessed 20 July 2024].

dramatic increase in routine inspections in 2022 indicates a more proactive or better-resourced approach by the DoL towards monitoring labour practices, potentially in response to heightened concerns or directives. The decrease in child labour complaints might imply better compliance by employers, fewer reported incidences, or issues with the reporting mechanism itself. Although fewer violations were identified in 2022, more cases concluded with penalties suggest more effective enforcement and legal processes. The sharp contrast between the number of investigations in 2021 and violations identified in 2022 may reflect changes in investigative criteria or effectiveness in identifying actionable cases. Additionally, the absence of identified human trafficking cases over both years highlights a potential area for improved detection and intervention strategies.

As per the report released by the Department of Census and statistics along with the ILO in 2016, identified that 2.27% of the children aged 5-17 has earned the working status in Sri Lanka.⁶⁵ This data can be further looked at through the age group, gender and sector.⁶⁶

Age group	Sri Lanka			Urban			Rural			Estate		
	Total	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls
Total	100	66.7	33.3	100	67.5	32.5	100	66.2	33.8	100	81.9	18.1
5-11	100	54.3	45.7	100	75.8	24.2	100	51.6	48.4	-	-	-
12-14	100	55	45	100	68.5	31.5	100	53.4	46.6	-	-	-
15-17	100	71.3	28.7	100	66.5	33.5	100	71.7	28.3	100	81.9	18.1

*Table 1: Distribution of child labourers across regions in Sri Lanka.*⁶⁷

⁶⁵ Department of Census & Statistics, Ministry Of National Policies And Economic Affairs, ‘Sri Lanka Child Activity Survey 2016’, At <https://www.ilo.org/ipecinfo/product/download.do?type=document&id=30055> [Last Accessed 3 August 2024].

⁶⁶ (n 64)

⁶⁷ *ibid.*

Child labour is most prevalent in rural areas, with a significant majority of working children being boys. The oldest age group (15-17) forms the largest portion of child labour, particularly in rural and estate sectors. There is a notable gender disparity, with boys being more involved in child labour across all sectors and age groups. This data highlights the need for targeted interventions to address child labour, particularly in rural areas and among older children, with a focus on addressing the gender disparities and providing protection and opportunities for education and development.

There are 10 facets of Child labour as identified by the ILO. They are domestic labour, children employed in the formal manufacturing sector, children engaged in economic activities in the informal sector in the agriculture, industry and service sector, child beggars, street children, commercial sex workers, children engaged in illegal activities, children in economic activities in conflict affected areas, child combatants – in armed conflict and children who have been trafficked.⁶⁸

Children and youth have become active contributors to their family in street vending businesses, especially children support in preparing food, assisting their parents with cash transactions and promoting their food to customers.⁶⁹ Street vending/begging is one of the most common methods of child labour. A survey done in 2021 revealed that 17.8% of the street vendors receive assistance from children to operate their businesses.⁷⁰ Furthermore, the findings from the bureau of International Labour Affairs in 2022, indicated 42.1% of working children work in the agriculture sector, while 36% work in the services sector and the remaining 21.9% work in the industry.⁷¹

These findings highlight the widespread involvement of children in various forms of labour. The data underscores the pressing need for targeted interventions to address child labour across multiple

⁶⁸ ILO, 'Knowledge-Based Mapping and Review of Child Labour information in Sri Lanka', (October 2007), at <https://webapps.ilo.org/ipecinfo/product/download.do?type=document&id=18097> [Last Accessed 21 July 2024].

⁶⁹ Estrada, E. (2012). Changing Household Dynamics: Children's American Generational Resources In Street Vending Markets. *Childhood*, 20(1), 51-65. <https://doi.org/10.1177/0907568212458441> [Last accessed 3 August 2024].

⁷⁰ Karunaratna A. C And Nathalia C Tjandra, 'A Glance Into The Life Of Street Vendors In Sri Lanka: An Overview', *Sri Lanka Journal Of Marketing- University Of Kelaniya Sri Lanka* (Vol 7 No 2: May - August 2021), At <https://fcms.kln.ac.lk/dep/dmm/media/attachments/2021/09/01/karunaratna-a.-c.-nathalia-c-tjandra.pdf> [Last Accessed 3 August 2024].

⁷¹ U.S Department Of Labour - Bureau Of International Labor Affairs, '2022 Findings On The Worst Forms Of Child Labor', At https://www.dol.gov/sites/dolgov/files/ilab/child_labor_reports/tda2022/sri-lanka.pdf [Last Accessed 3 August 2024].

sectors, emphasising the importance of education and support systems to mitigate the economic pressures driving families to rely on child labour.

4.1.1. Prevalence and nature of child labour in agriculture

Agriculture remains a critical sector in Sri Lanka's economy, employing a large portion of the population - it contributed to 7% of Sri Lanka's GDP in 2019.⁷² However, it is also a sector where child labour is prevalent as evident from the statistics aforementioned. Children working in agriculture typically engage in activities such as planting, weeding, harvesting, and processing crops. These tasks often require long hours of labour-intensive work in harsh conditions, including exposure to pesticides, heavy lifting, and handling dangerous tools and machinery. Child labour in the agricultural sector in Sri Lanka is a significant issue, influenced by economic, social, and cultural factors. Children engaged in agricultural work often face hazardous conditions that can affect their health, education, and overall well-being.

4.1.1.1. Causes of child labour in agriculture

There are several factors that contribute to the prevalence of child labour in the agricultural sector. The authors of the article believe that economic necessity is one of the factors as poverty remains a primary driver of child labour.⁷³ Many families depend on the additional income generated by their children to meet basic needs. In rural areas, where opportunities for adult employment may be limited, children are more likely to be involved in agricultural work. The authors also believe that cultural norms play a role as in some rural communities, child labour in agriculture is considered a traditional practice.⁷⁴ Children are often expected to contribute to the family's livelihood from a young age, and working alongside their parents in the fields is viewed as a part of their upbringing. Furthermore, limited access to quality education in rural areas exacerbates the

⁷²Dissanayaka Nimesha And Thibbotuwana Manoj, 'Sri Lanka's Agri-Food Trade: Structure, Opportunities, Challenges & Impacts Of Covid-19', Research Paper 6 (November 2021), At <https://www.canr.msu.edu/prci/publications/research-papers/prci-rp06-srilanka.pdf> [Last Accessed 3 August 2024].

⁷³ Jayawardena S, 'Child Labour and Education in Sri Lanka: Combating Child Labour through the Provision of Quality Education', (12 June 2015), at <https://www.ips.lk/talkingeconomics/2015/06/12/child-labour-and-education-in-sri-lanka-combating-child-labour-through-the-provision-of-quality-education/> [Last Accessed 24 August 2024].

⁷⁴ ILO, 'Report on Child Labour in Agriculture Sector', (March 2008), at <https://webapps.ilo.org/ipecinfo/product/download.do?type=document&id=20256#:~:text=According%20to%20this%20survey%20nearly,engaged%20in%20an%20economic%20activity.> [Last Accessed 24 August 2024], p.14

problem of child labour in agriculture.⁷⁵ Children who do not attend school or drop out due to financial constraints are more likely to be employed in agriculture. The need for children to work often outweighs the perceived benefits of education.

4.1.1.2. Impact on Children

The authors of this article identify three main impacts. Firstly, exposure to hazardous chemicals, strenuous physical labour, and unsafe working conditions pose significant health risks. Children are more vulnerable to injuries, respiratory issues, and long-term health problems. Secondly, children involved in agricultural work often miss school or drop out entirely, depriving them of their right to education. This limits their future opportunities and perpetuates the cycle of poverty and thirdly, the demanding nature of agricultural work can impact children's mental and emotional well-being. They may experience stress, fatigue, and a lack of time for recreation and social activities.

4.1.2. Child Domestic Work

According to ILO, child domestic work constitutes “*children’s work in the domestic work sector in the home of a third party or employer. This general concept encapsulates both permissible as well as non-permissible situations.*”⁷⁶

Child labour in domestic work occurs when children below the legal minimum age (for light work or full-time non-hazardous work) are employed in domestic tasks, especially under hazardous conditions or in situations resembling slavery.⁷⁷

The new Convention No. 189 complements the ILO Child Labour Conventions: Convention No. 138 on Minimum Age and Convention No. 182 on the Worst Forms of Child Labour. Convention No. 189 specifies that ILO member States must set a minimum age for domestic workers that aligns with the provisions of Convention No. 138 and Convention No. 182 and must not be lower than the minimum age established by national laws for workers in general. Recommendation No. 201

⁷⁵ *ibid*, p.22.

⁷⁶ ILO, ‘Child Labour And Domestic Work’, At <https://www.ilo.org/International-Programme-Elimination-Child-Labour-Ipec/Sectors-And-Topics/Child-Labour-And-Domestic-Work#:~:Text=Child%20labour%20in%20domestic%20work%20refers%20to%20situations%20where%20domestic,In%20a%20slavery%20like%20situation> [Last Accessed 3 August 2024].

⁷⁷ (n 75)

further emphasises the need to identify, prohibit, and eliminate hazardous domestic work by children and to implement mechanisms to monitor children in domestic work.

Children engaged in child labour in domestic work from a very young age often lack access to education or receive insufficient education. Child domestic workers above the legal minimum age also face reduced opportunities to continue their education. Convention No. 189 urges member States to ensure that work performed by domestic workers under the age of 18 and above the minimum age of employment does not prevent them from receiving compulsory education or hinder their ability to pursue further education or vocational training.

4.2. Child Sex Trafficking

UNICEF defines child trafficking as when children are “*recruited, transported, transferred, harboured or received for the purpose of exploitation.*”⁷⁸ The US criminal division further defines child sex trafficking as “*the recruitment, harbouring, transportation, provision, obtaining, patronising, or soliciting of a minor for the purpose of a commercial sex act.*”⁷⁹

Child trafficking in Sri Lanka is a complex and pervasive issue involving diverse forms of exploitation. Online sexual exploitation, as highlighted by the case of a 15-year-old girl is a disturbing reality.⁸⁰ Additionally, child smuggling syndicates operating between Sri Lanka and Malaysia underscore the transnational nature of this crime. The government has made efforts to combat trafficking, including increased investigations and victim identification. However, challenges persist, such as insufficient prosecutions, lenient sentencing, and limited cooperation with foreign law enforcement. The scale of the problem is evident in the alarming number of child departures being investigated, emphasising the urgent need for comprehensive and coordinated action to protect children from falling victim to these heinous crimes.

⁷⁸ UNICEF USA, ‘What Is Child Trafficking’, At <https://www.unicefusa.org/what-unicef-does/childrens-protection/child-trafficking#:~:text=what%20is%20child%20trafficking%3f,for%20the%20purpose%20of%20exploitation> [Last Accessed 3 August 2024].

⁷⁹ <https://www.justice.gov/criminal/criminal-ceos/child-sex-trafficking>

⁸⁰ Newswire, ‘Online Sex Trafficking Ring Using 15-Year-Old Girl: 17 Arrested’ At (30 June 2021), At <https://www.newswire.lk/2021/06/30/online-sex-trafficking-ring-using-15-year-old-girl-17-arrested/> [Last Accessed 3 August 2024].

4.3. Enforcers of the law - Successful or not?

In Sri Lanka, child labour laws are enforced by several key agencies: The DoL, the Sri Lankan Police, and the National Anti-Human Trafficking Taskforce.

The first enforcer of child labour laws is the DoL. DoL oversees child labour law enforcement, including inspections and handling complaints. In 2022, it investigated 145 child labour complaints, confirming 11 violations.⁸¹ The department enhanced its efforts through public awareness campaigns, including a theme song, documentary, and SMS campaigns, and collaborated with educational institutions.

Sri Lankan police's children and women's bureau handles child labour, trafficking, and exploitation cases. With about 40 officers in the Special Police Investigation Unit and 300 child protection officers nationwide, they conduct investigations and training. In 2022, they organised awareness sessions and training with Save the Children on child trafficking.

Furthermore, National Anti-Human Trafficking Taskforce which operates under the Ministry of Defence's National Intelligence Division, coordinates efforts against trafficking and forced labour. It includes representatives from multiple agencies and is chaired by the Chief of National Intelligence.

These agencies demonstrate a structured approach to combating child labour and trafficking, with strong frameworks and public awareness initiatives. However, challenges in consistent enforcement, broader impact, and interagency coordination remain. Ongoing monitoring, resource allocation, and capacity building are crucial for long-term success in eradicating these issues.

⁸¹ U.S department of State, '2024 Trafficking in Persons Report: Sri Lanka', at <https://www.state.gov/reports/2023-trafficking-in-persons-report/sri-lanka> [last accessed 2 August 2024].

5. LEGAL GAP ANALYSIS BETWEEN INTERNATIONAL LEGAL FRAMEWORK VS SRI LANKAN LEGAL FRAMEWORK

International/Regional framework	Sri Lankan framework	Gap
Palermo Protocol (Article 3)⁸²: Defines TiPs as recruitment, transportation, transfer, harbouring, or receipt of persons by means of threat, force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments/benefits to control another person for exploitation.	Penal Code of Sri Lanka (Section 360C)⁸³: Defines TiPs with similar terms, including recruitment, transportation, transfer, harbouring, or receipt for the purpose of exploitation.	The definition in the Penal Code aligns closely with the Palermo Protocol.
Palermo Protocol (Article 5)⁸⁴: Requires States to criminalise TiPs , attempted trafficking, and any involvement as an accomplice or organiser.	Penal Code of Sri Lanka (Section 360C): Criminalizes TiPs, including attempts and accomplices.	Adequate provisions for criminalization, though practical enforcement and judicial training need strengthening.

⁸² Article 3 Of the Protocol to Prevent, Suppress and Punish Trafficking In Persons Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime, General Assembly Resolution 55/25 Of 15 November 2000.

⁸³ Section 360c Of the Penal Code (Amendment) Act No.16 of 2006 of Sri Lanka.

⁸⁴ Article 5 Of the Protocol to Prevent, Suppress And Punish Trafficking In Persons Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime, General Assembly Resolution 55/25 Of 15 November 2000.

Palermo Protocol (Article 6)⁸⁵: Provides measures for the protection and assistance to victims of trafficking, including housing, counselling, medical care, and legal assistance.	National Child Protection Authority Act (NCPA Act)⁸⁶, Assistance to and Protection of Victims of Crime and Witnesses Act⁸⁷ : Provides some protection and assistance measures, but primarily for children and crime victims.	Gaps in comprehensive victim support services, especially for adult victims and specialised care for trafficking survivors.
ILO Convention No. 182 (Worst Forms of Child Labour Convention, Article 3)⁸⁸: Prohibits the worst forms of child labour, including all forms of slavery and practices similar to slavery, trafficking, and hazardous work.	Employment of Women, Young Persons, and Children Act⁸⁹ : Prohibits employment of children in hazardous work and sets a minimum age for employment.	Implementation gaps exist in effectively monitoring and enforcing these prohibitions, particularly in informal sectors.
UN Convention on the Rights of the Child (CRC, Article 32)⁹⁰ : Protects children from	Children's Charter of Sri Lanka⁹¹, NCPA Act⁹² : Contains provisions for the	Enforcement and practical application of these protections

⁸⁵ Article 6 Of the Protocol to Prevent, Suppress And Punish Trafficking In Persons Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime, General Assembly Resolution 55/25 Of 15 November 2000.

⁸⁶ National Child Protection Authority Act No.50 Of 1998.

⁸⁷ Section 34(5) And (6)(E) Of the Assistance to And Protection Of Victims Of Crime And Witnesses Act, No. 10 Of 2023.

⁸⁸ C182 - Worst Forms of Child Labour Convention, 1999 (No. 182).

⁸⁹ Section 9 Of the Employment Of Women, Young Persons, And Children, No. 29 Of 1973.

⁹⁰ Convention On the Rights Of The Child Adopted And Opened For Signature, Ratification And Accession By General Assembly Resolution 44/25 Of 20 November 1989.

⁹¹ Committee On The Rights Of The Child Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention Initial Reports Of States Parties Due In 1993 At

<<https://docstore.ohchr.org/selfservices/filesandler.ashx?enc=6qkg1d%2fprricaqhkb7yhsrydkjekdeqbxnxa5fpd1cpbitaqp5qb7zj1nefa%2bc7za8qfltq7%2bm51sivqv6u6z2fjrc6eeai0om00mhbe5l%2bonmfpp63of1%2bni5ponunb>> [Last Accessed 3 August 2024].

⁹² (n 86)

economic exploitation and hazardous work.	protection of children from exploitation and abuse.	are inconsistent, particularly in rural and underserved areas.
Domestic Workers Convention, 2011 (ILO C189, Articles 6-8) ⁹³ : Protects domestic workers from exploitation and abuse, including trafficking.	Sri Lanka does not have a specific law for the protection of domestic workers. General labour laws and penal provisions apply.	Significant gap in specific legal protections for domestic workers, including those vulnerable to trafficking.
Council of Europe Convention on Action against Trafficking in Human Beings (Article 12) ⁹⁴ : Emphasises comprehensive victim assistance and protection, including legal assistance and psychological support.	Assistance to and Protection of Victims of Crime and Witnesses Act ⁹⁵ : Provides some level of protection and assistance to victims, including legal assistance.	Broader and more specialised victim assistance and protection services are needed to meet international standards fully.
Supplementary Convention on the Abolition of Slavery (1956, Articles 1-2) ⁹⁶ : Calls for the immediate and complete abolition of slavery and institutions/practices similar to slavery.	Penal Code (Sections 358-360) ⁹⁷ : Criminalises practices related to slavery and servitude.	Legal provisions exist, but enforcement and identification of modern slavery practices remain challenges.

⁹³ C189 - Domestic Workers Convention, 2011 (No. 189).

⁹⁴ Council Of Europe Treaty Series - No. 197, Convention on Action Against Trafficking in Human Beings.

⁹⁵ Assistance To and Protection of Victims of Crime And Witnesses Act, No. 10 Of 2023.

⁹⁶ Supplementary Convention on The Abolition of Slavery, The Slave Trade, And Institutions and Practices Similar To Slavery Adopted By A Conference Of Plenipotentiaries Convened By Economic And Social Council Resolution 608(xxi) Of 30 April 1956 And Done At Geneva On 7 September 1956.

⁹⁷ Penal Code of Sri Lanka.

ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP, Articles 5-6)⁹⁸ : Criminalises all forms of trafficking and calls for strong victim protection measures.	Penal Code of Sri Lanka (Section 360C)⁹⁹, NCPA Act¹⁰⁰ : Criminalizes trafficking and provides some victim protection measures.	Alignment exists in criminalization, but comprehensive victim protection measures as outlined in ACTIP need enhancement.
SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution¹⁰¹ (Articles 3-5) : Criminalizes trafficking and calls for victim protection and regional cooperation.	Penal Code of Sri Lanka (Section 360C), NCPA Act : Criminalizes trafficking and provides some victim protection measures.	Regional cooperation mechanisms and comprehensive victim support services need strengthening to fully align with the SAARC Convention.
SAARC Social Charter¹⁰² (Articles 4-6) : Emphasises protection of children from exploitation and the need for social development policies.	NCPA Act : Provides a framework for social protection and child welfare.	Implementation of social development policies and protection mechanisms need to be more robust to meet the Charter's expectations.

Table 2: Legal gap analysis

⁹⁸ ASEAN Convention Against Trafficking in Persons, Especially Women and Children.

⁹⁹ Penal Code of Sri Lanka.

¹⁰⁰ National Child Protection Authority Act No.50 Of 1998.

¹⁰¹ SAARC Convention on Preventing And Combating Trafficking In Women And Children For Prostitution.

¹⁰² SAARC, 'Social Charter', At <https://www.Saarc-Sec.Org/Index.Php/Resources/Agreements-Conventions/54-Saarc-Social-Charter/File> [Last Accessed 3 August 2024].

6. RECOMMENDATIONS

Based on the identified gaps and the analysis of Sri Lanka's current legal framework on TiPs and modern-day slavery, the authors of this article propose the following comprehensive recommendations to enhance the effectiveness of anti-trafficking measures:

6.1.Short-Term Recommendations

By establishing or creating a national rapporteur or a monitoring body responsible for overseeing and evaluating the effectiveness of anti-trafficking policies and initiatives who regularly compile and publish reports on the status of trafficking cases, policy implementation, and challenges faced, one could ensure transparency and accountability.

Improving the systems in place for detecting and assisting trafficking victims could help identify victims across various sectors, this would ensure timely referrals to appropriate support services.

Strengthening the Child Protection Systems may help address the specific needs of child victims of trafficking. In order to implement this, the authors suggest to create or refine child protection mechanisms that include specialised shelters, counselling services, and legal support tailored for minors. Collaborating with child welfare organisations would also ensure comprehensive care.

Furthermore, enhancing the capacity of NGOs involved in anti-trafficking efforts could bolster their ability to deliver effective interventions and support services to victims. This could be achieved by providing targeted financial support, resources to NGOs.

With that being said, Ministry of Justice along with the child protection services, ILO, UNICEF should organise regular training sessions for law enforcement, judicial authorities, and social workers focusing on identifying trafficking signs, legal processes, and victim support.

6.2.Long-Term Recommendations

In terms of long-term recommendations, the penal code and other relevant legislation identified in table 2 should be amended to close gaps in definitions and penalties, by incorporating provisions that address new and emerging forms of trafficking and ensure consistency with international treaties and conventions.

Launching continuous and targeted public awareness campaigns to educate the community about trafficking risks, prevention strategies, and reporting mechanisms would increase public vigilance.

This can be further achieved by utilising various media platforms and community outreach programs.

Improving the handling of trafficking cases within the judiciary by providing specialised training for judges and prosecutors to ensure informed and consistent handling of trafficking cases, appropriate sentencing, and sensitivity to the needs of victim. This, in turn, would encourage victims to come forward and trust the judicial process.

Finally, integrating best practices from countries with effective anti-trafficking frameworks and adapting them to the local context, in collaboration with international experts and organisations. will strengthen both the legal and institutional frameworks.

6.3. Best practices

The emphasis in addressing human trafficking and modern slavery has been skewed towards prosecution rather than prevention. It is recommended that states prioritise prevention to avoid creating more victims. Currently, legal investigations often fail to address trafficking complexities, leading to charges under less severe crimes such as procuration. Increasing public awareness about trafficking and modern slavery may deter potential offenders.

Additionally, while existing laws focus on criminalising trafficking acts, it is suggested that legislation also criminalise the purchase of sexual services to target traffickers, pimps, and clients, thereby reducing demand. Improved support and rehabilitation for victims are also necessary to be considered.

Regarding forced labour, victims are often deceived by fraudulent job offers and documents, with exploitative recruitment fees leading to debt bondage. It is best practice for employers to cover recruitment costs. For child trafficking, appointing trained guardians to support rescued children is recommended. Extending ILO standards' minimum protection to all trafficking victims is further advised.¹⁰³

¹⁰³ ILO: Towards A Fair Deal for Migrant Workers In The Global Economy, Report Vi, International Labour Conference, 92nd Session 2004, Geneva.

The European Commission's EU Strategy on Combating Trafficking in Human Beings (2021-2025) provides a comprehensive approach that includes reducing demand, disrupting traffickers' business models, protecting and empowering victims, and enhancing international cooperation.¹⁰⁴

7. **CONCLUSION**

In conclusion, Sri Lanka faces challenges in addressing trafficking in persons and modern-day slavery, with gaps in the legal framework and implementation. The country has made efforts to combat trafficking, but there are shortcomings in protection and reintegration of victims. Child labour remains prevalent, particularly in rural areas, and efforts to address this issue need to be targeted and prioritized.

Recommendations to enhance anti-trafficking measures include establishing national rapporteurs, enhancing victim identification, strengthening child protection systems, supporting NGOs, and providing training for stakeholders. Long-term recommendations involve legislative reforms, comprehensive victim support services, awareness campaigns, judicial training, monitoring and evaluation, and adopting best practices from other countries.

It is crucial for Sri Lanka to align its legal framework with international standards, provide holistic support to trafficking survivors, increase public awareness, enhance judicial training, and adopt best practices to effectively combat trafficking and modern slavery. By implementing these recommendations, Sri Lanka can work towards a more comprehensive and effective approach to addressing trafficking in persons and modern-day slavery.

¹⁰⁴ Eu Strategy on Combating Trafficking In Human Beings (2021-2025) https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/together-against-trafficking-human-beings/eu-strategy-combatting-trafficking-human-beings-2021-2025_en#:~:text=on%2014%20april%202021%2c%20the,to%20bringing%20traffickers%20to%20justice [Last Accessed 24 August 2024].

INTELLECTUAL PROPERTY LAW

**CELEBRATING 25 YEARS OF PROGRESS: WIPO'S HISTORIC
ADVANCEMENTS IN INTELLECTUAL PROPERTY RIGHTS FOR
LOCAL AND INDIGENOUS COMMUNITIES**

Manesha Siriwardena

ABSTRACT

Intellectual Property (hereinafter referred to as “IP”) rights serve as a cornerstone of modern economies, incentivising innovation, creativity, and investment. They offer creators and innovators the assurance that their efforts will be protected, encouraging them to push boundaries and contribute to societal progress.

This article examines the implications of the World Intellectual Property Organization (WIPO) Member States' adoption of the historic new Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge. The treaty establishes in international law a new disclosure requirement for patent applicants whose inventions are based on genetic resources and/or associated traditional knowledge of local or Indigenous communities.

Through mapping the adoption and implementation of this treaty by various member states, this article demonstrates the diverse approaches and challenges faced in aligning national laws with international standards with further findings underscoring the importance of creating robust frameworks that not only mandate disclosure requirements, but also ensure fair and equitable benefit-sharing mechanisms to protect and empower Indigenous and local communities.

1. INTRODUCTION

Mark Getty of Getty Images recognised that “Intellectual property is the oil of the 21st century,” identifying that IP is not only valuable but could also be a source of conflict.¹ Therefore with the aim of making a notable inclusion of Indigenous and local communities to prevent any such rise of future conflict, Ambassador Guilherme de Aguiar Patriota at the Diplomatic Conference of the WIPO struck down the gavel on the 24th of May 2024 to signify the unanimous and historic approval of the new WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge. The Treaty, which was 25 years in the making with negotiations being

¹ Kevin Anderson, ‘@Thinking Digital: Don't fight pirates, copy them’ (The Guardian, 16 May 2009).

traced back to 1999 initiated by Colombia, has made considerable strides in the sphere of IP as the first WIPO Treaty to address the interconnected areas of IP with genetic resources, traditional knowledge as well as the inclusion of a special provision for the Indigenous and local communities.

Traditional knowledge refers to the evolving body of knowledge developed, sustained, and passed down within communities across generations, often forming a key part of their cultural or spiritual identity. This knowledge encompasses various domains such as agriculture, environment, medicine, and practices associated with genetic resources. Examples include Thai traditional healers using the plao-noi plant to treat ulcers, the San people's use of the hoodia plant to curb hunger during hunts, and the Cree and Inuit's understanding of species' migration patterns in the Hudson Bay area.² Traditional irrigation systems like the aflaj in Oman and Yemen, and the qanat in Iran, also illustrate the sustainable practices embedded in traditional knowledge.³ Indigenous healers in the western Amazon prepare medicines from the Ayahuasca vine, attributing sacred properties to it.⁴ Given the diverse and dynamic nature of traditional knowledge, no single definition can fully capture its scope. As such, the WIPO employs working descriptions to address this complex and multifaceted concept.

Genetic resources on the other hand, have been defined in the Convention on Biological Diversity (CBD) to include biological material that have genetic information of value while being capable of reproducing or being reproduced as with certain material of plants of medicinal or agricultural value, animal breeds, or microbial origin.⁵ Some traditional knowledge is intricately linked with genetic resources through their long-term utilisation and conservation by communities over generations. This close association is evident in modern scientific research, where traditional knowledge often provides critical insights that help researchers identify and isolate valuable active compounds within genetic resources. Unlike the clearer relationship between IP and traditional knowledge or traditional cultural expressions, the connection between IP and genetic resources is more complex. Genetic resources are primarily governed by access and benefit-sharing regulations

² The World Intellectual Property Organization, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' (2020).

<https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf> accessed 2 July 2024.

³ *Ibid.*

⁴ *Ibid.*

⁵ The Convention on Biological Diversity, 'About the Convention' <<https://www.cbd.int/convention>> accessed 2 July 2024.

established under international frameworks such as the CBD and its Nagoya Protocol,⁶ as well as the International Treaty on Plant Genetic Resources for Food and Agriculture by the United Nations Food and Agriculture Organization. Since genetic resources are naturally occurring and not creations of the human mind, they do not qualify as IP and thus cannot be directly protected as such. Consequently, the WIPO is not involved in regulating access to or directly protecting genetic resources. However, inventions developed from or utilising genetic resources, regardless of whether they are associated with traditional knowledge, may still be eligible for patents or other forms of IP protection as highlighted through this article on the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.

WIPO Director General, Daren Tang, celebrated the historic adoption of the Treaty and commended the negotiators on the successful conclusion of the Diplomatic Conference, stating that the treaty not only signified the first new WIPO Treaty in over ten years but also the first to “address genetic resources and traditional knowledge held by Indigenous Peoples and local communities...showing that the IP system can continue to incentivize innovation while evolving in a more inclusive way, responding to the needs of all countries and their communities.”⁷

The WIPO⁸, being a United Nations (UN) agency, has played a key role as a global forum consisting of 193 member states for the exchange of ideas and practices between creators, innovators and entrepreneurs, setting out norms and standards for the protection and promotion of IP since 1967. Their mission is to help governments, businesses, and society harness the benefits of IP, offering a policy forum for developing balanced international IP regulations in a dynamic world, global services for cross-border IP protection and dispute resolution, technical infrastructure to integrate IP systems and facilitate knowledge sharing, and cooperation and capacity-building programs to help all countries leverage IP for economic, social, and cultural development.

Accountability is ensured through clear goals, performance indicators, and budget plans outlined in their Program of Work and Budget, with annual updates provided to member states in the WIPO

⁶ Secretariat of the Convention on Biological Diversity, ‘*Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*’ (Published 2011).

⁷ The World Intellectual Property Organization, ‘WIPO Member States Adopt Historic New Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge’ (Geneva, May 24, 2024 PR/2024/919)

<https://www.wipo.int/pressroom/en/articles/2024/article_0007.html> accessed 5 July 2024.

⁸ The World Intellectual Property Organization, ‘About WIPO’ <<https://www.wipo.int/about-wipo/en/>> accessed 5 July 2024.

Performance Report. Additionally, financial transparency is maintained by submitting biennial financial management reports and annual financial statements to the Assemblies of the Member States, prepared according to the International Public Sector Accounting Standards (IPSAS). Furthermore, the WIPO remain largely transparent and accountable with operations and activities overseen by external and internal bodies, with evaluations conducted by external auditors, the Internal Oversight Division (IOD)⁹ as well as the WIPO Independent Advisory Oversight Committee.¹⁰

Most notably, the WIPO serves as a world-renowned source of IP information with their IP data and information supporting global decision-makers, while their impactful projects and technical assistance ensure IP benefits everyone. Thus, as portrayed through the adoption of this new Treaty, this commitment further extends to safeguarding genetic resources and traditional knowledge held by Indigenous people and local communities as well.

2. HISTORICAL CONTEXT

Negotiations for the Treaty that began in 1999 can be traced back to the issues that arose over the years with the granting of a large number of patents by the Patent Officers in key member states thanks to discoveries by their engineers in underdeveloped regions, who observed how generations of local farmers utilised the medicinal properties of native plants, they imported this knowledge, analysed it in their laboratories, and subsequently developed inventions that were protected by patents.¹¹

Such an example of the complexities surrounding intellectual property, genetic resources, and traditional knowledge is visible through the known case of "thaumatin," a natural sweetener derived from the berries of the katemfe bush (*Thaumatococcus daniellii*), native to West African forests from Sierra Leone to Cameroon through Côte d'Ivoire. Thaumatin, which is 2,000 to 3,000 times sweeter than sucrose and 100,000 times sweeter than sugar cane, has been widely used as a low-calorie sweetener in the food industry. Due to the plant's inability to bear fruit outside its natural

⁹ The World Intellectual Property Organization, 'Internal Oversight Division' <<https://www.wipo.int/about-wipo/en/oversight/iaod/>> accessed 6 July 2024.

¹⁰ The World Intellectual Property Organization, 'WIPO Independent Advisory Oversight Committee' <<https://www.wipo.int/about-wipo/en/oversight/iaoc/>> accessed 6 July 2024.

¹¹ Allende & Brea, 'WIPO Member States adopt landmark treaty on intellectual property, genetic resources and associated traditional knowledge.' (June 18, 2024) <<https://allende.com/en/intellectual-property/wipo-member-states-adopt-landmark-treaty-on-intellectual-property-genetic-resources-and-associated-traditional-knowledge-06-18-2024/>> accessed 7 July 2024.

habitat and the high extraction costs, companies have sought DNA recombination techniques to replicate the gene responsible for its sweetness.¹²

Beatrice Foods Co., an American company, secured a US patent for cloning this gene in yeast, obtaining benefits with approximately 25 million US Dollars in royalties while the market for low-calorie sweeteners amounting to 900 million US Dollars annually in America. However, this eliminated the need for native katemfe plantations and deprived West Africa of export benefits since the British sugar company Tate and Lyle which owned the patents on thaumatin had marketed the product under the name 'Taline' and imported fruits from its own plantations in Ghana and thus even the government and the local communities received no form of benefit or profit sharing that would have assisted with poverty alleviation in the region. Furthermore, with researchers from Lucky Biotech Corporation and the University of California obtaining a patent for all fruits, seeds, and vegetables containing the transgenic gene that produces thaumatin, it was highly likely that user countries would no longer need to visit the countries of origin to access the genetic resource.¹³

There was no benefit-sharing in the bioprospecting of thaumatin, which can be attributed to several factors including the absence of national Access and Benefit-Sharing (ABS) regulations, the local communities' lack of awareness about the economic value of their biological resources, and the inadequate mobilisation of benefits derived from the use of genetic resources. Notably, this bioprospecting case occurred prior to the implementation of the United Nations Convention on Biological Diversity on December 29, 1993, with there being no ABS agreement in place for thaumatin. Before this convention, biological diversity was regarded as a resource for all humanity rather than as a national resource or property of individual states. Therefore, this scenario underscores the competitive nature of biotechnology and the significant value of genetic information, highlighting the utmost necessity for the WIPO's treaty on intellectual property, genetic resources, and traditional knowledge.

¹² Darrell A. Posey y Graham Dutfield, 'Más allá de la propiedad intelectual. Los derechos de las comunidades indígenas y locales a los recursos tradicionales' (1996) citing Sasson (1989), Walgate (1990, p. 161), Myers (1993), Shand (1993, p. 1), A. A. Elujoba, Pharmacy Department, Obafemi Awolowo University, Nigeria, 1994 (personal communication); Co-published by the International Development Research Centre (IDRC), WWF-World Wide Fund for Nature and Editorial NORDAN-Comunidad.

¹³ Pr. N' Guessan K. Edouard (University of Cocody-Abidjan), Brou Yao Bernard, ABS National Focal Point (COTE D'IVOIRE), 'Bioprospecting Case On Thaumatooccus Daniellii In Côte D' Ivoire' [Conference Presentation] (7-13 August 2024)
<https://www.doc-developpement-durable.org/file/Culture/Arbres-Fruitiers/FICHES_ARBRES/Thaumatooccus%20daniellii/Bioprospecting%20Case%20ON%20THAUMATOCOCCUS%20DANIELLII%20IN%20COTE%20D-IVOIRE.pdf> accessed 8 July 2024.

Moreover, the San/Hoodia case exemplifies the critical need for a treaty to protect genetic resources, traditional knowledge, and indigenous communities. In the 1930s, anthropologists documented the San people's use of the Hoodia plant as an appetite suppressant, yet in 2001, the Council for Scientific and Industrial Research (CSIR) in South Africa patented Hoodia without involving the San. Pressured by advocates, a benefit-sharing agreement was reached in 2003, granting the San 6% of royalties from commercialization. However, Unilever suspended the Hoodia project in 2008, jeopardising potential benefits for the San. This case highlights the challenges indigenous communities face, including biased negotiations, limited legal advice, and disrupted governance, underscoring the need for legal frameworks to ensure fair and equitable treatment of traditional knowledge holders.¹⁴

Notably, in 2001, Lego introduced the Bionicle series, featuring characters with names derived from Polynesian and Māori words. This led to objections from three Māori groups, who argued that the use of culturally and spiritually significant Māori terms trivialised their heritage. Despite initial resistance, Lego faced negative publicity and ultimately agreed to cease using Māori names. They met with Māori representatives to discuss a self-regulating code of conduct for toy manufacturers, though this initiative did not come to fruition. This incident too therefore would clearly highlight the need for a treaty that protects genetic resources, traditional knowledge, and the rights of local communities, ensuring respectful and authorised use of cultural elements.¹⁵

Furthermore, the Indonesian batik community, particularly in Solo, Java, has long upheld batik as a traditional art form, with designs and knowledge passed down through generations. In response to the increasing unauthorised reproduction of batik designs both within Indonesia and internationally, the local government introduced a design patent program to protect these traditional motifs.¹⁶ This initiative requires batik producers to register their designs, granting them legal ownership and protection against misuse. However, the registration fees have marginalised smaller producers, creating new social hierarchies and bureaucratic challenges within the community.

¹⁴ Kabir Bavikatte, Harry Jonas & Johanna von Braun, 'Shifting Sands of ABS Best Practice: Hoodia from the Community Perspective' (2009).

<http://www.unutki.org/default.php?doc_id=137> accessed 9 July 2024

¹⁵ Kim Griggs, 'Maori Take On Hi-tech Lego Toys' (BBC News, 26 September 2001)

<<http://news.bbc.co.uk/2/hi/asia-pacific/1619406.stm>> accessed 11 July 2024.

¹⁶ Charles Knobloch & Dewi Savitri Reni, 'Using Batikmark as a First Step to Extend Protection of Indonesian Javanese-batik Patterned Textile in Foreign Countries' (Arnold & Knob-loch, L.L.P., 5 February 2024, 2009)

<http://www.usptclaw.com/pdfs/Batikmark_Article.pdf> accessed 12 July 2024.

Hence once again reflecting upon the necessity for a treaty to protect genetic resources, traditional knowledge, and local communities.¹⁷

With the objective of counteracting such ill effects on local communities while acknowledging the role of Indigenous people and conserving genetic resources over generations that were often utilised in scientific research, leading to patent-protected inventions owned by third-party companies, as seen with certain medicinal plants and animal breeds, the WIPO on May 24, 2024, at the WIPO Diplomatic Conference in Geneva, Switzerland, with over 1,200 delegates and ministers from governments worldwide participating, marked a historic signing of a treaty being the first of its kind to protect intellectual property, genetic resources, and associated traditional knowledge of local communities and Indigenous people.

3. KEY PROVISIONS OF THE NEW TREATY

The Treaty that will come into effect three months after ratification by 15 states parties,¹⁸ with provisions for reviewing its scope four years post-entry to potentially expand disclosure requirements¹⁹ to other areas of intellectual property, especially genetic resources and new technologies like sequences, introduces a novel requirement concerning patent applications involving genetic resources or related traditional knowledge, mandating disclosure of their origins and sources. This aims to prevent unauthorised appropriation of knowledge by third parties. Specifically, when a patent application claims an invention from biological resources, each contracting party must compel the applicant to disclose the country of origin and source. Similarly, for applications based on associated traditional knowledge, declaration of the Indigenous peoples' or local communities providing such knowledge is required. Key objectives of the Treaty include preventing biopiracy, ensuring transparency, and avoiding improper patent grants using ancestral knowledge of Indigenous peoples and local communities.²⁰

The WIPO's proposed international treaty aims to establish a comprehensive legal framework addressing the intricate issues arising from the utilisation of genetic resources and traditional knowledge within IP systems. At its core, the treaty endeavours to ensure fairness and equity in the utilisation of genetic resources, particularly within patent regimes, by safeguarding the rights of

¹⁷ Traditional Culture: A Step Forward for Protection in Indonesia (Peter Jaszi ed., 2009).

¹⁸ WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge [May 24, 2024] GRATK/DC/7, art 18.

¹⁹ *ibid* art 3.

²⁰ *ibid* art 1.

countries and communities that serve as custodians of these resources. This protection extends to traditional knowledge associated with genetic resources, acknowledging its profound cultural significance to Indigenous peoples and local communities.²¹

Central to the treaty's objectives is the establishment of mechanisms for fair and equitable benefit-sharing derived from the commercial exploitation of genetic resources and traditional knowledge. This entails creating avenues for sharing profits derived from products developed using these resources, thereby addressing historical imbalances and fostering mutual respect among stakeholders.²² Emphasising the principle of Prior Informed Consent (PIC), the treaty underscores the necessity for obtaining explicit consent from resource holders before their genetic resources or traditional knowledge can be utilised. This provision seeks to empower communities, ensuring they retain decision-making authority over the use of their resources.²³

Furthermore, transparency and accountability within patent systems are pivotal aspects addressed by the treaty through the proposed disclosure requirements. Patent applicants would be obligated to disclose the origin of genetic resources²⁴ and associated traditional knowledge used in their inventions. Such disclosure aims to enhance transparency, prevent misappropriation and promote responsible innovation practices that acknowledge and respect the contributions of local communities and Indigenous peoples. In addition to regulatory measures²⁵, the treaty advocates for robust capacity-building initiatives and technical assistance.²⁶ These provisions are designed to empower countries and communities, equipping them with the knowledge and resources necessary to effectively manage and protect their genetic resources and traditional knowledge. By offering training, technical support, and financial assistance, the treaty aims to bridge existing gaps in capacity, enabling resource custodians to assert their rights and interests in IP law.²⁷

4. IMPACT ON INDIGENOUS AND LOCAL COMMUNITIES

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their

²¹ *Ibid.*

²² *ibid* art 6.

²³ *ibid* art 3.

²⁴ Agreed Statement: In cases where there is more than one country of origin, the applicant shall disclose the country of origin from which the genetic resources were actually obtained.

²⁵ WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge [May 24, 2024] GRATK/DC/7, art 5.

²⁶ *ibid* art 10.

²⁷ *ibid* art 6.

*sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*²⁸

The intersection of indigenous/traditional knowledge and IP law presents a complex legal challenge, reflecting divergent perspectives on ownership and usage rights. Indigenous communities assert their rights to control and utilise their cultural knowledge, often seeking protection under IP law, which traditionally embodies European concepts of classification and ownership.²⁹ This clash of perspectives raises multifaceted issues beyond commercial interests, including ethical, cultural, and spiritual dimensions. For instance, the misuse of sacred symbols can cause profound offence, even without financial loss.³⁰ Over the past three decades, discussions have intensified at national, regional, and international levels, particularly through the World Intellectual Property Organization (WIPO). Since 2001, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has been at the forefront of these debates, striving to draft an international legal instrument for effective protection.³¹

Despite numerous national efforts, international consensus remains elusive, with diverse positions complicating the path forward.³² Key challenges include defining what constitutes indigenous knowledge, identifying rightful custodians, and determining the nature and scope of protection. Additional complexities involve deciding on the duration of protection, the role of government agencies, and the relationship between conventional IP systems and new protections. Questions of

²⁸ United Nations Declaration on the Rights of Indigenous Peoples, Article 31, 2007.

²⁹ Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (1999); Mark Rose, *Authors and Owners: The Invention of Copyright* (1993); Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-century Britain (1695–1775)* (2004); Peter Drahos, *A Philosophy of Intellectual Property* (1996).

³⁰ *Harjo v. Pro-Football, Inc.*, 30 U.S.P.Q.2d (BNA) 1828 (TTAB 1994) and *Pro-Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir 2009); Joseph William Singer, 'Publicity Rights and the Conflicts of Laws: Tribal Court Jurisdiction in the Crazy Horse Case' 41 S.D. L. Rev. 1 (1996); Naomi Mezey, 'The Paradoxes of Cultural Property' 107 Colum. L. Rev. 2004 (2007).

³¹ World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore <http://www.wipo.int/meetings/en/topic.jsp?group_id=110> accessed 13 July 2024.

³² ICG Secretariat, 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles' (WIPO/GRTKF/IC/9/4) (prepared for the Ninth Session of the ICG, 24–28 April 2006) <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic.../wipo_grtkf_ic_9_4.pdf> accessed 19 July 2024.

retroactive protection, transitional measures, and the recognition of foreign rights holders further complicate the landscape. This multifaceted debate underscores the need for a comprehensive and culturally sensitive approach to safeguarding indigenous and local community knowledge within the global IP framework.³³ The ongoing negotiations aim to balance respect for cultural heritage with the practicalities of legal protection, ultimately seeking to prevent the misappropriation and misuse of traditional knowledge while fostering an environment of mutual respect and understanding.

Indigenous interests in IP law impact approximately 370 million indigenous people across over 70 countries.³⁴ In international policy contexts, discussions about indigenous knowledge and IP often involve bureaucrats, government representatives, NGOs, select indigenous spokespeople and academics. Indigenous representation in these forums is slowly increasing, with organisations like WIPO providing funds to support indigenous participation.³⁵ However, indigenous peoples still face challenges in actively participating in decision-making processes due to limited voting power and representation.³⁶

The use of indigenous knowledge spans various contemporary contexts, including arts, sciences, and technology, involving both indigenous and non-indigenous people. Researchers working with indigenous communities on topics such as language, health, and sustainable development often grapple with issues of knowledge ownership and control. Pharmaceutical companies developing drugs from indigenous resources, as well as filmmakers and cultural institutions using indigenous stories, songs, or artefacts, encounter complex IP issues that often span multiple jurisdictions.³⁷

For instance, a collection of 1950s Aboriginal Australian artworks in a U.S. university must navigate both Australian and U.S. copyright laws, as well as laws related to the original acquisition

³³ Kaitlin Mara, ““Turning Point” at WIPO Pulls Traditional Knowledge Debate Out at Eleventh Hour, Intellectual Property Watch’ (3 October 2009) <<http://www.ip-watch.org/weblog/2009/10/03/“turning-point”-at-wipo-pulls-traditional-knowledge-debate-out-at-eleventh-hour/>> accessed 19 July 2024.

³⁴ The Permanent Forum in Indigenous Issues <<http://www.un.org/esa/socdev/unpfil/>> accessed 19 July 2024.

³⁵ WIPO’s IP Law Indigenous Fellowship <http://www.wipo.int/export/sites/www/tk/en/fellowship/pdf/laltaika_bio.pdf> accessed 19 July 2024.

³⁶ Jane Anderson, ‘Indigenous/ Traditional Knowledge and Intellectual Property’ (2010) <https://www.academia.edu/114401302/Indigenous_Traditional_Knowledge_and_Intellectual_Property> accessed 19 July 2024.

³⁷ *Ibid.*

and potential loan agreements.³⁸ As more indigenous peoples contribute to developing frameworks for the use and access of their knowledge, the likelihood of creating effective policy and legal strategies increases. These strategies must consider the diverse interests in accessing indigenous knowledge and be developed through consultation with indigenous communities.

Given the diversity of indigenous peoples and their knowledge management strategies, initial support for these approaches is crucial. By identifying significant intersections, it will be possible to establish international frameworks for the protection of indigenous knowledge. This collaborative and inclusive approach will help address the vast range of interests and issues related to the use and protection of indigenous intellectual property.

The WIPO treaty being discussed in this article thus, marks a momentous advancement in harmonising international IP law, standing out as the first new treaty introduced by WIPO in over a decade with visible dedication to safeguarding genetic resources and traditional knowledge signifying a critical departure from past conventions, highlighting the treaty's profound impact on Indigenous peoples and local communities worldwide. By explicitly recognising the intricate knowledge systems, cultural expressions, and innovations cultivated over generations by these communities, the treaty ensures that their contributions are respected and protected within global IP frameworks.

Crucial to the treaty's significance is its emphasis on upholding the rights of Indigenous peoples and local communities. This pivotal recognition ensures that their genetic resources and traditional knowledge are utilised in ways that honour their traditions and values, promoting a more equitable approach to innovation and commercial exploitation. By embedding principles of fairness and respect, the treaty not only aligns with existing international agreements like the Convention on Biological Diversity and the Nagoya Protocol but also strengthens these frameworks by enhancing the protection of community rights and fostering sustainable development.³⁹

³⁸ Henrietta Fourmile, 'Who Owns the Past? Aborigines as Captives of the Archives', 13 *Aboriginal Hist.* 1 (1989); Henrietta Fourmile, 'Aborigines and Captives of the Archives: A Prison Revisited', in *Archives In The Tropics: Proceedings Of The Australian Society Of Archivists Conference 1994* (1994); and Rebecca Isosie, 'Contaminated Collections: An Overview of the Legal, Ethical and Regulatory Issues', 17 *Collection Forum* (2001) 14.

³⁹ HFG, 'WIPO adopts Historic Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge' (25 June 2024) <<https://www.hfgip.com/news/wipo-adopts-historic-treaty-intellectual-property-genetic-resources-and-associated-traditional>> accessed 20 July 2024.

Moreover, the treaty's alignment with international norms underscores its role in harmonising global IP standards with broader environmental and cultural objectives. By addressing issues of access to genetic resources and the equitable sharing of benefits derived from their utilisation, the treaty seeks to rectify historical injustices and empower Indigenous peoples and local communities economically and socially. This holistic approach not only safeguards biodiversity and traditional knowledge but also promotes inclusive growth that respects and integrates diverse cultural perspectives.

Most importantly, the treaty can be viewed as representing a significant step towards bridging the gap in capacity and resources for Indigenous peoples and local communities. Through provisions for technical assistance, capacity-building, and financial support, the treaty aims to empower these communities to effectively manage and protect their genetic resources and traditional knowledge. By enhancing their ability to participate in decision-making processes and negotiate fair terms for the use of their resources, the treaty promotes self-determination and sovereignty over their intellectual and cultural heritage.

5. **IMPLEMENTATION CHALLENGES AND SOLUTIONS**

Prior to the signing of the treaty, Pedro Henrique D Batista in his *Journal of Intellectual Property Law & Practice* identified at that time that the IGC Chair's Draft on IP and genetic resources had significant shortcomings that may prevent it from achieving its intended objectives of promoting compliance with national ABS rules under the CBD and the Nagoya Protocol.⁴⁰ The Draft's provisions were criticised for vague objectives, limited disclosure requirements, ineffective sanctions, and lack of enforcement mechanisms. For instance, the obligation to disclose only the origin of genetic resources does not ensure compliance with national ABS requirements such as obtaining prior informed consent and mutually agreed terms. Additionally, the Draft's allowance for non-disclosure if the origin is unknown and its failure to mandate best efforts to obtain this information weakens its effectiveness. The restricted scope of disclosure to inventions directly based on genetic resources and the ambiguous handling of confidential information further diluted the Draft's impact. Moreover, the absence of concrete sanctions and the incompatibility with the Patent Cooperation Treaty (PCT) (1970) undermine its potential efficacy.⁴¹ Consequently, it was

⁴⁰ Pedro Henrique D Batista, 'The WIPO IGC Chair's Draft on IP and Genetic Resources—Reasons for concern, *Journal of Intellectual Property Law & Practice*' (2024) Volume 19, Issue 4, 328–336.

⁴¹ The World Intellectual Property Organization, 'PCT- The International Patent System' <<https://www.wipo.int/pct/en/>> accessed 20 July 2024.

argued that the Draft fails to provide a robust legal framework to support national and plurilateral ABS strategies, necessitating further negotiations to establish a more effective international instrument for the protection of genetic resources.

As this article discusses, the WIPO treaty marks a significant advance in enhancing transparency and accountability in the use of genetic resources and traditional knowledge. However, critics argue that it falls short in addressing compensation for indigenous communities.⁴² While the treaty mandates disclosure requirements for patent applicants, it lacks provisions for ensuring equitable benefit-sharing with indigenous peoples and local communities, who have historically preserved and developed these genetic resources. This omission raises concerns about the ongoing exploitation of indigenous knowledge without appropriate acknowledgement or compensation. It underscores the need for further dialogue and action to protect the rights and interests of marginalised communities within the intellectual property landscape.

Notably, South Africa's implementation of the National Environmental Management: Biodiversity Act No 10 of 2004 (NEMBA) and the Biodiversity Access and Benefit-Sharing (BABS) regulations of 2008 exemplify proactive measures taken nearly two decades before the WIPO treaty.⁴³ South Africa's approach, while commendable, may complicate its position in international negotiations due to potential conflicts with the WIPO treaty's standards. Nonetheless, the treaty's transformative potential remains significant, promoting a more inclusive and equitable approach to innovation governance that transcends geo-political divides.

It must be noted that the concept of the "public domain" has significantly influenced critical intellectual property discourse, providing a counter-framework to the monopoly privileges upheld by conventional IP rights.⁴⁴ Advocates for the public domain emphasise its cultural and economic benefits. However, indigenous knowledge issues cannot always align with this discourse due to differing histories and political contexts. Indigenous peoples' historical exclusion from the broad category of 'public' underpins these differences, as their knowledge systems have distinct

⁴² Tyron Grant of Spoor & Fisher, 'WIPO member states adopt historic new treaty Landmark agreement heralds new era of international cooperation, although some doubts remain' (21 June 2024)

<<https://www.lexology.com/library/detail.aspx?g=cc9e01f9-6ab3-4837-b719-923d7a929209>> accessed 20 July 2024.

⁴³ *Ibid.*

⁴⁴ Center for the Study of the Public Domain at Duke Law School <<http://www.law.duke.edu/cspd/>> accessed 21 July 2024.

perceptions and cultural contexts.⁴⁵ Historically, indigenous peoples lost control over the circulation of their knowledge, often without meaningful explanation of its extent or potential third-party uses.⁴⁶ This has led to moral and ethical dilemmas that are not easily reconciled with the public domain concept. Increased circulation of indigenous knowledge exacerbates these historic problems, leading some indigenous groups to argue for withdrawing certain knowledge from public access. The public domain, as a culturally specific framework, often reinforces the invisibility of indigenous practices in knowledge management, where specific rules govern access and circulation.

Further, protocols have emerged as a significant tool to address issues of access, control, and ownership of indigenous knowledge. Over the past decade, protocols have facilitated new relationships between indigenous communities and external entities, acting as context-driven policies tailored to specific issues.⁴⁷ These protocols incorporate community perspectives and are flexible, adapting to changing practices over time. Although not always legally binding, protocols can function as a form of private law with legal standing when articulated and negotiated within community contexts. They offer indigenous people options for articulating customary or local laws without engaging formal legal mechanisms, thus empowering existing practices. Protocols help prevent the de-contextualization of knowledge and knowledge practices, ensuring that indigenous knowledge remains meaningful within its cultural context.

Additionally, the incorporation of indigenous laws into Western legal frameworks poses challenges due to their localised and contextual nature, which are not necessarily transferable across communities. Indigenous laws derive from specific locations and present substantial challenges to the harmonisation or standardisation efforts of intellectual property law. To effectively incorporate indigenous laws and governance structures, thorough consultation and development are necessary. Initially, this can be achieved through community-articulated agreements or protocols. Building frameworks to enhance the authority and legitimacy of indigenous laws is essential. Given the difficulties in addressing indigenous needs within the current IP framework, proposals for sui generis legislation, unique laws crafted to protect indigenous knowledge, are being developed.⁴⁸

⁴⁵ Anderson (n 36) 25.

⁴⁶ Jane Anderson, (Colonial) Archives and (Copyright) Law, *NOMOREPOTLUCKS* (2009) <<http://www.nomorepotlucks.org/article/copie-no4/colonial-archives-and-copyright-law>> accessed 21 July 2024.

⁴⁷ Anderson (n 36) 28.

⁴⁸ Brendan Tobin, 'Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru' (2001).

Countries like Peru and Panama have pioneered such legislation, shifting the debate from an IP paradigm to a human rights discourse.

Viewing indigenous knowledge rights as fundamental human rights repositions the issue within a larger rights framework, including health, housing, land rights, and cross-generational knowledge transfer.⁴⁹ While this shift offers new possibilities, it may have minimal impact on the IP regime's fundamental changes. Indigenous issues risk being treated as exceptional, rather than highlighting systemic problems within IP law. Tensions also arise between individual and collective rights and pragmatic concerns about the efficacy of local responses to human rights abuses. The commitment to developing a binding international instrument raises hope for addressing these issues. Examining national and indigenous community initiatives is crucial, and successes and failures must be analysed to navigate the complex interests and unequal negotiating positions indigenous peoples face. Sensitivity to these factors will directly influence the success and utility of any new instrument including the treaty being discussed in this article.

6. THE NEXT STEP

With the objective of remedying any potential pitfalls in the Treaty's application discussed above in this article, facilitating networks among indigenous peoples and local communities to address IP and traditional knowledge issues is crucial, as these networks enable the sharing and adaptation of useful strategies and experiences, demonstrating that such challenges are not isolated and that solutions might already exist in different contexts. Currently, there is no dedicated service offering practical advice, information, and contacts for indigenous communities on emerging IP issues.⁵⁰ Therefore, establishing an international resource and education centre on indigenous and traditional knowledge, complemented by regional offices for easier access, should be a priority. Sustained collaboration with indigenous communities on local knowledge management systems can empower local authority and governance processes. Developing context-specific protocols and guidelines for engaging with communities, especially those not literate, will facilitate accessible frameworks for informed decision-making regarding knowledge use and benefits.⁵¹

⁴⁹ Jane Anderson, 'Developments in Intellectual Property and Traditional Knowledge Protection, in Traditional Knowledge and Indigenous Peoples' (2009).

⁵⁰ Anderson (n 36) 43.

⁵¹ Canadian Social Science and Humanities Research Council, 'Intellectual Property Issues in Cultural Heritage' < <http://www.sfu.ca/ip- inch/front> > accessed 22 July 2024.

Moreover, it is essential to critically examine the theoretical foundations of modern IP law. A deeper understanding of its history, development, and political implications as discussed in this article can lead to new ways of conceptualising and addressing biases and historical exclusions. Creating industry guidelines, codes of conduct, and ethical standards for research involving indigenous contexts will further complement practical guidelines for institutions, universities, researchers, and artists in documenting and archiving indigenous knowledge.

Additionally, it must be noted that disputes over ownership, control, access, and benefit-sharing of traditional knowledge, genetic resources, and traditional cultural expressions can be intricate, involving not just legal but also cultural and ethical issues. For instance, the misuse of a sacred cultural artefact, symbol, or design may not result in financial loss but can cause significant spiritual offence, making litigation in national courts an inadequate or undesirable solution. Thus, there emerged an urgent need for an international alternative dispute resolution body to handle commercial and non-commercial disputes involving IP and Traditional knowledge, ensuring indigenous peoples' involvement from the outset.⁵² To address these complexities, the WIPO Arbitration and Mediation Center established an international alternative dispute resolution body.⁵³ This centre offers specialised services for art and cultural heritage issues and has developed specific Mediation Rules in collaboration with the International Council of Museums (ICOM), providing an essential mechanism for resolving disputes related to traditional knowledge, traditional cultural expressions, and genetic resources.⁵⁴

This article notes that advancing indigenous peoples' interests in IP is not solely their responsibility; it requires innovation and imagination within IP law, given the complex, historically and politically entangled nature of the issues. Therefore, this collaborative approach with the involvement of member states and recommendations by the WIPO to enhance the treaty's impact, remains essential in addressing the unique challenges faced by indigenous and local communities effectively.

⁵² Anderson (n 36).

⁵³ The World Intellectual Property Organization, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' (2020) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf> accessed 22 July 2024.

⁵⁴ The World Intellectual Property Organization, 'WIPO Alternative Dispute Resolution (ADR) for Art and Cultural Heritage'. <www.wipo.int/amc/en/center/specific-sectors/art/> accessed 22 July 2024

7. **FUTURE DIRECTIONS**

Future directions in the realm of IP, particularly concerning genetic resources and traditional knowledge, are fundamentally influenced by shifts in political will among nation-states and the commercial sector, necessitating the establishment of frameworks that elevate and empower indigenous perspectives and participation, which is long overdue.⁵⁵ Indigenous knowledge should not be viewed merely as a raw resource for others to exploit, given their significant contributions to critical issues such as environmental sustainability, climate change, and resource management, underscoring the necessity for equitable and ethical frameworks and partnerships.

This article persistently highlights the Indigenous peoples' need to seek recognition of their cultural systems and governance of knowledge access as legitimate, requesting acknowledgement as the custodians, owners, and nurturers of valuable knowledge.⁵⁶ They call for a reconfiguration of the dominant IP framework, which has historically excluded their interests, to protect their rights and insist on their right to receive benefits from knowledge originating from their contexts and historical knowledge bases, emphasising that these mainstream, reasonable, and legitimate requests require immediate action.

Rethinking categories and frameworks that have long been taken for granted is crucial for any future direction, including reconsidering how research is conducted, how knowledge is conceptualised and shared, how overlaps in knowledge use and circulation are recognised, and the role of law in shaping the social orders of knowledge exchange. Future directions must genuinely prioritise indigenous participation, collaboration, and partnership in projects involving indigenous or traditional knowledge, ensuring understanding of local management practices and appropriately incorporating them into research to build trust and respect among all parties involved. One can argue that engaging with indigenous communities about research expectations, being realistic about potential benefits, and recognising that these benefits may not align with what indigenous peoples need are essential steps in this process. Research practices must evolve to normalise participation, collaboration, and partnership between community members and researchers, involving communities throughout the project and properly archiving and storing collected materials.

⁵⁵ Anderson (n 36) 41.

⁵⁶ Krystyna Swiderska, et al., I.I.E.D. 'Briefing, Protecting Traditional Knowledge from the Grassroots Up' (2009) <<http://www.iied.org/pubs/pdfs/17067IIED.pdf>> accessed 22 July 2024.

Further, in the context of the WIPO treaty on IP, genetic resources, and traditional knowledge, these future directions emphasise the need for frameworks that incorporate and respect indigenous knowledge systems, facilitating equitable sharing of benefits arising from the use of traditional knowledge and genetic resources, ensuring that indigenous communities receive fair compensation and recognition for their contributions.⁵⁷ Additionally, developing legal mechanisms that protect indigenous knowledge from misappropriation and exploitation is crucial, including provisions for prior informed consent, benefit-sharing agreements, and recognition of customary laws and practices, alongside supporting capacity-building initiatives within indigenous communities to empower them to engage effectively in negotiations and protect their interests.⁵⁸

Moreover, international cooperation and dialogue are vital, with nation-states, international organisations, and the commercial sector needing to collaborate to create a global framework that respects and protects indigenous knowledge, establishing standards for ethical research practices, promoting transparency, and ensuring that indigenous communities have a voice in decision-making processes. The implementation of the WIPO treaty alongside existing legislation highlights the necessity for strategic alignment and collaboration, as balancing the imperative of protecting biodiversity and indigenous knowledge with the demands of the global intellectual property regime requires careful negotiation and adaptability. The WIPO treaty stands as a testament to international cooperation, addressing complex challenges at the intersection of intellectual property and biodiversity conservation.⁵⁹ The next steps in this process involve the ratification and implementation of the WIPO treaty by member states, which will necessitate coordinated efforts among governments, stakeholders, and indigenous communities to ensure effective enforcement and compliance with the treaty's provisions.⁶⁰ Furthermore, ongoing dialogue and engagement will be essential to addressing any remaining gaps and challenges in promoting equitable benefit-sharing and protecting traditional knowledge within the context of intellectual property rights, thereby potentially influencing other international agreements and treaties related to these areas.⁶¹

Thus as discussed in this article, the future direction of the WIPO treaty on IP, genetic resources, and traditional knowledge should focus on developing inclusive, equitable, and ethical frameworks that prioritise indigenous perspectives and participation, recognising and respecting indigenous

⁵⁷ WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge [May 24, 2024] GRATK/DC/7, art 5.

⁵⁸ *ibid* art 9.

⁵⁹ *ibid* art 7.

⁶⁰ *ibid* art 13.

⁶¹ *ibid* art 7.

knowledge systems, ensuring fair benefit-sharing, and protecting against misappropriation, with international cooperation and support for indigenous capacity-building being essential steps towards achieving a more just and respectful approach to IP and traditional knowledge as a whole.

8. CONCLUSION

The long-term impact of the WIPO treaty on intellectual property, genetic resources, and traditional knowledge is of paramount importance, especially for local and indigenous peoples. With the International Patent System (PCT) experiencing significant growth, evidenced by the filing of 272,600 PCT applications in 2023 and approaching the milestone of 5 million published international applications, the global reach of the WIPO treaty is undeniable.⁶² Inventors from 127 countries filed PCT applications in 2023, underscoring the treaty's potential extensive influence.⁶³

This momentum highlights the critical need for continued support and advocacy to ensure that the WIPO treaty effectively protects biodiversity, promotes equitable benefit-sharing, and safeguards traditional knowledge. By fostering international cooperation and addressing these complex challenges, the WIPO treaty can play a crucial role in promoting sustainable development and preserving the cultural heritage of indigenous communities. Therefore, it is imperative to maintain ongoing dialogue, collaboration, and commitment to the treaty's objectives to maximise its positive impact on intellectual property rights and the well-being of local and indigenous populations.

In conclusion, the WIPO treaty on IP, genetic resources, and traditional knowledge, as discussed in this article, signifies more than a legal framework; it embodies a transformative shift towards inclusivity and equity within the global IP landscape. By acknowledging and protecting the rights of indigenous peoples and local communities, the treaty not only addresses longstanding disparities but also paves the way for a future where innovation and cultural preservation go hand in hand. Its impact extends beyond legal provisions, shaping a more just and sustainable approach to IP that respects the diversity of knowledge systems and promotes shared benefits for all stakeholders involved. As Benjamin Franklin wisely stated, "A well done is better than well said."⁶⁴ Thus, this article endlessly reiterates that the WIPO's and its member states' actions must match their words

⁶² WIPO Patent Cooperation Treaty Yearly Review – 2024
<<https://www.wipo.int/publications/en/details.jsp?id=4740>> accessed 22 July 2024.

⁶³ *Ibid.*

⁶⁴ Benjamin Franklin, *Poor Richard's Almanack* (Originally Published 1732, United States Century Company 1898) 88.

to bring about real change, ensuring that the principles of the treaty are effectively implemented and truly make a difference in the lives of those it aims to protect.

A CRITICAL REVIEW OF THE EFFECTIVENESS OF COPYRIGHT LAW IN PROTECTING INTELLECTUAL PROPERTY RIGHTS IN SRI LANKA.

Kulanga Grigson

ABSTRACT

This article presents a critical review of copyright law in Sri Lanka and assesses how well it deals with contemporary issues and ensures the creators' rights. It explores the current legal framework, including the Intellectual Property Act No.36 of 2003 and its amendments, in addressing challenges related to digital content, piracy, and law enforcement in Sri Lanka. Furthermore, it provides an assessment of effectiveness, challenges, and limitations, as well as some recommendations for improving intellectual property (IP) protection in Sri Lanka and to explore how copyright law can adapt to a rapidly changing digitalised world. Sri Lanka, with its evolving legal framework and growing creative industries, faces unique challenges in enforcing copyright law. This review examines the current state of Sri Lankan copyright legislation, assessing its efficacy in addressing issues such as copyright infringement, digital piracy, and enforcement mechanisms. Through an analysis of legislative frameworks, judicial precedents, and practical enforcement challenges, this article highlights the strengths and weaknesses of Sri Lanka's copyright system. It aims to provide insights into potential reforms and improvements needed to enhance IP protection in the country, contributing to a more robust and effective copyright regime. The analysis underscores the need for a comprehensive overhaul of the copyright framework to address these deficiencies and better protect intellectual property rights in a rapidly evolving digital landscape. Further, this article suggests that a comprehensive approach, including legal, educational, and institutional enhancements, is essential for Sri Lanka to effectively safeguard IP rights.

1. INTRODUCTION

In today's competitive and innovation-focused world, creativity and the ability to innovate are key to achieving success, both on an individual and collective level. Since there is rapid technological advancement and globalisation in this era, IP rights play a critical role in supporting innovation and creative activities. Additionally, such rights play a vital role in safeguarding and encouraging human creative endeavors, benefiting both creators and society as a whole. These protections also seek to prevent unnecessary barriers to the dissemination of creative works, ensuring that this

valuable knowledge is preserved and utilised effectively. Moreover, this ensures that creators receive the acknowledgment and financial rewards for their contributions.

According to the World Intellectual Property Organization (WIPO), ‘intellectual property’ refers to creations of mind, such as inventions; literary and artistic works; designs; as well as symbols, names and images used in commerce. IP is protected in law by patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.¹

Among the various types of intellectual property, copyright law can be identified as an important area. It provides protection for original works of authors, such as literature, music, and artistic creations, from unauthorised reproduction, distribution, performance, and public display. By granting exclusive rights to creators, copyright law aims to motivate the creation of new works and to promote cultural and educational development.

Copyright is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.²

Copyright law in Sri Lanka is mainly based on the Intellectual Property Act No.36 of 2003. This Act aims to protect different kinds of intellectual property rights including copyrights, trademarks, patents, geographical indications, inventions, industrial designs, etc.

Despite these existing frameworks, copyright law in Sri Lanka is challenged by some significant issues: digital piracy, inadequacy of legal resources, lack of public awareness, etc. These have weakened the ability to improve the effectiveness of copyright law in our country.

2. OVERVIEW OF COPYRIGHT LAW IN SRI LANKA

2.1. Legislative Framework

¹ WIPO, 'What is Intellectual Property' (2024) <www.wipo.int/about-ip/en/> accessed 27 July 2024.

² WIPO, 'What is Copyright?' (2024) <www.wipo.int/copyright/en/> accessed 27 July 2024.

When discussing about the history of Sri Lankan copyright law, it has evolved since the early 20th century with the enactment of Copyright Ordinance No. 20 of 1912, which provided protection for creators. It was succeeded by The Patent, Designs, Copyright & Trade Marks (Emergency Ordinance) No. 32 of 1942, and this Ordinance updated the previous legal framework. At that point, the UK Copyright Act of 1911 proceeded to apply in Sri Lanka through The Ceylon Independent Act of 1947. Later, the legal landscape was further expanded with the introduction of the Code of Intellectual Property Act No. 52 of 1979, which consolidated and modernised copyright protections, in line with international standards and evolving legal needs.

Sri Lanka has been a signatory to major international treaties such as the Paris and Berne Convention. Current Sri Lankan copyright law is established by Intellectual Property Act No. 36 of 2003, and this was enacted to ensure compliance with the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement), after Sri Lanka joined the World Trade Organization (WTO). Part II of the Intellectual Property Act contains the provisions regarding copyrights. In Sri Lanka, copyright law is established to secure the rights of creators and owners of original works, ensuring they are rewarded for their contributions and that their works are not used without their permission.

According to Section 6(1) of the Intellectual Property Act, the following works shall be protected as literary, artistic and scientific works (hereinafter referred to as 'works'), which are original intellectual creations in the literary, artistic and scientific domain, including and in particular:

- (a) books, pamphlets, articles, computer programs and other writings;
- (b) speeches, lectures, addresses, sermons and other oral works;
- (c) dramatic, dramatic-musical works, pantomimes, choreographic works and other works created for stage productions;
- (d) stage production of works specified in paragraph (c) and expressions of folklore that are apt for such productions;
- (e) musical works, with or without accompanying words;
- (f) audiovisual works;
- (g) works of architecture;
- (h) works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;
- (i) photographic works;
- (j) works of applied art; and

(k) illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Additionally, it is mentioned that the works specified in subsection (1) of this section shall be protected by the sole fact of their creation and irrespective of their mode or form of expression, as well as of their content, quality and purpose.³

It is important to mention that there are a few general principles relating to protected works. Under copyright law, copyright protection applies only to the ‘expression’ of ideas, facts, and information, rather than giving protection to the ideas, facts, or information themselves. In other words, copyright protects the expression of the content. Thus, a protected work can be identified as an expression.

According to Article 9(2) of the TRIPS agreement, ‘Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such’.⁴ While the term ‘expression’ is not directly defined in the Intellectual Property Act, its significance has been acknowledged and implicitly recognised in Sri Lankan law. Sections 6(2) and 8 of the Intellectual Property Act can be mentioned as examples for this situation.

In the *Wijesinghe Mahanamahewa and another v. Austin Canter*⁵ case, it was held that whether a reproduction is substantial shall be decided by its quality, rather than its quantity, and the reproduction of a part, which by itself has no originality, will not be a substantial part of the copyright and therefore will not be protected. Further, it was mentioned that, “The word original does not in this connection mean that the work must be the expression of original or inventive thought. Copyrights are not concerned with the originality of ideas, but with the expression of thought... But the Act does not require that the expression must be in original or novel form, but that work must not be copied from another work, that it shall originate from the author” copyright law protects only the ‘expressions’.

In the *Vasantha Obeysekera v. Anthony Christopher Alles*⁶ case, the Court of Appeal stated that “Copyright does not protect ideas themselves but only the original expression of ideas”. The court

³ Intellectual Property Act No.36 of 2003, s.6(2).

⁴ WTO, ‘Part II – Standards concerning the availability, scope and use of Intellectual Property Rights’ (2024) <www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm> accessed 27 July 2024.

⁵ [1986] 2 SLLR 154; [1986] CALR Vol 1 260.

⁶ [2000] CA Appeal No. 730/92 (F).

continued to state: “The law of copyright, we are afraid, does not confer protection to a hoarder of facts only. It is the expression of an individual’s thought based on those facts which conferred protection...What is protected is not original information nor original thought but the original expression of thought or information in some concrete form.”

When considering it from the UK context, Peterson J in *University of London Press Ltd v. University Tutorial Press Ltd*⁷ mentioned that, “The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with expression of thought, and, in the case of ‘literary work’, with the expression of thought in print or writing. The originality which is required relates to the expression of thought. However, the Act does not require that the expression must be in an original or novel form, but the work must not be copied from another work – that it should originate from the author”.

Originality is another fundamental principle in Sri Lankan copyright law. To be deemed original, the work must be the result of the author's own intellectual effort and creativity, rather than reproduction or imitation of another work.

In the traditional British legal context, in the case of *Sawkins v. Hyperion Records Ltd*,⁸ Mummery LJ stated: “The policy of copyright protection and its limited scope explain why the threshold requirement of an ‘original’ work has been interpreted as not imposing objective standards of novelty, usefulness, inventiveness, aesthetic merit, quality or value... A work need only be ‘original’ in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person.”

It is mentioned in the case of *University of London Press Ltd v. University Press Ltd*⁹ that “the Act does not require that the expression must be in an original or novel form, but the work must not be copied from another work – that it should originate from the author.”

In *MacMillan & Co. Ltd v. Cooper*,¹⁰ Lord Atkinson observed: “To secure copyright for this product, it is necessary that labour, skill, and capital should be expended sufficiently to import to the product some quality or character which the raw material did not possess, and which

⁷ [1916] 2 Ch. 601 608,609.

⁸ [2005] R.P.C. 32 808-818.

⁹ *University of London* (n 7) 608,609.

¹⁰ [1924] 40 TLR 186, 188, 190.

differentiate the product from the raw material...What is the precise amount of knowledge, labour, judgement or literary skill or taste, which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case, it must depend largely on the special facts of that case, and must in each case, be very much a question of degree.”

Accordingly, the UK's position on 'originality' has evolved to be more in alignment with the European Union's standards. In *SAS Institute Inc. v. World Programming Limited*,¹¹ Lewison L.J stated: “...This test may not be the quite the same as the traditional test in English Law.”

Additionally, in the case of *Football Dataco Ltd v. Yahoo! UK Ltd*,¹² the court held that “Now, on this point there is no doubt that, as regards copyright protection, the Directive espouses a concept of originality which requires more than the mere ‘mechanical’ effort needed to collect the data and enter them in the database. To be protected by the copyright, a database must— as art. 3 of the Directive explicitly states— be the ‘intellectual creation’ of the person who has set it up. That expression leaves no room for doubt, and echoes a formula which is typical of the continental copyright tradition.” Then he observed: “If the Information Society Directive has changed the traditional domestic test, it seems to me that it has raised rather than lowered the hurdle to obtain copyright protection.”

The European Union (EU) adopts a slightly different approach to originality, and it emphasises that copyright protection must cover works that are original in the sense that they reflect the author's own intellectual creation. This approach of the EU is slightly broader than traditional British law and it is focusing on the author's own intellectual creation.

The Court of Justice recognised in the case of *Infopaq International A/S v. Danske Dagblades Forening*¹³ that “...copyright within the meaning of Article 2(a) of Directive 2001/29, is liable to apply only in relation to a subject matter which is original in the sense that it is its author's own intellectual creation”.

Turning to the USA's approach, the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*¹⁴ held that 'originality' means that "the work has independently been created

¹¹ C-406/10.

¹² C-604/10.

¹³ C-5/08 [37].

¹⁴ (1991) 499 US 340.

by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity".

In the Sri Lankan legal context, courts have followed the British approach in relation to the concept of originality. The case of *Wijesinghe Mahanamahewa and another v. Austin Canter*¹⁵ is an illustration, where the Court of Appeal held that 'originality' relates to the expression of thought and that the expression need not be in original or novel form. The only requirement is that the work must not be copied from another work and it must originate from the author.

Section 7(1) of the Intellectual Property Act states about derivative works. It submits that:

- (a) translations, adaptations, arrangements and other transformations or modifications of works; and
- (b) collections of works and collection of mere data (data base) whether in machine readable or other form, provided that such collections are original by reason of the selection, co-ordination or arrangement of their contents.

In copyright law, derivative works are original works of authorship, that are based on earlier original works of authorship.¹⁶ Section 8 of the Intellectual Property Act describes unprotected works as follows; notwithstanding the provisions of section 6 and 7, no protection shall be extended under this part –

- (a) to any idea, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work;
- (b) to any official text of a legislative, administrative or legal nature, as well as any official translation thereof;
- (c) to news of the day published, broadcast, or publicly communicated by any other names.

¹⁵ *Wijesinghe* (n 5) 260.

¹⁶ John DiGiacomo, 'What Does "Derivative Works" Mean Under Copyright Law?' (*Revision Legal*, 8 August 2023) <<https://revisionlegal.com/copyright/what-does-derivative-works-mean-under-copyright-law/>> accessed 27 July 2024.

2.2. Rights and protections

Under Sri Lankan copyright law, the protection for literary, dramatic, musical, and artistic works follows international standards set by the Berne Convention. For individual authors, the economic and moral rights last for the author throughout his lifetime and a further period of seventy years from the date of his death. In cases involving multiple authors, the protection of these rights lasts until seventy years after the death of the last remaining author. If the work is anonymous or pseudonymous, it is protected for seventy years from the date of its publication. In the case of applied art, the rights include protection for twenty-five years from the date of the making of the work. It is mentioned that every period provided for under the preceding subsections shall run to the end of the calendar year, in which it would otherwise expire.¹⁷ This framework ensures that Sri Lankan copyright laws are consistent with international norms for protecting creators' rights.

In accordance with international agreements, Sri Lankan copyright legislation seeks to reconcile economic and moral rights. "Economic rights" means the rights referred to in section 9 of the IP Act.¹⁸ Under the economic rights mentioned in section 9(1), the owner of copyright of a work has the exclusive right to carry out or to authorize the following acts in relation to the work-

- (a) reproduction of the work;
- (b) translation of the work;
- (c) adaptation, arrangement or other transformation of the work;
- (d) the public distribution of the original and each copy of the work by sale, rental, export or otherwise;
- (e) rental of the original or a copy of an audiovisual work, a work embodied in a sound recording, a computer program, a data base or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned;
- (f) importation of copies of the work, (even where the imported copies were made with the authorization of the owner of the copyright);
- (g) public display of the original or a copy of the work;
- (h) public performance of the work;
- (i) broadcasting of the work; and

¹⁷ Intellectual Property Act No.36 of 2003, s.13.

¹⁸ Intellectual Property Act No.36 of 2003, s.9.

(j) other communication to the public of the work.

When discussing about the moral rights, section 10(1) states that the author of a work shall independently of his economic rights and even where he is no longer the owner of those economic rights, have the following rights:

- (a) to have his name indicated prominently on the copies and in connection with any public use of this work, as far as possible;
- (b) the right to use a pseudonym and not have his name indicated on the copies and in connection with any public use of his work;
- (c) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work which would be prejudicial to his honor or reputation.

These provisions shall apply to both the entire work and a substantial part thereof.¹⁹

3. EVALUATION OF EFFECTIVENESS

3.1 Legal Adequacy

To evaluate how well copyright law safeguards intellectual property rights in Sri Lanka, it is important to analyse both the extent and range of the legislation, along with the specific rights it provides.

The effectiveness of the Act relies on how well it adjusts to modern challenges. With the rapid growth of digital media and the internet, new issues have arisen that the Act did not fully consider when the Act was originally drafted. To keep pace with these developments, the legislation is necessary to address the complexities of digital content distribution and online copyright infringement. Effective implementation of these protections will help to maintain the strength of intellectual property rights in an evolving technological and media landscape.

The Intellectual Property Act grants authors several rights to reproduce, distribute, perform, and display their works, alongside moral rights to protect their personal and reputational interests. Upholding these rights in Sri Lanka faces significant challenges. Many creators lack awareness of their rights, limited resources for enforcement agencies, and digital piracy and unauthorised

¹⁹ Intellectual Property Act No.36 of 2003, s.10.

distribution impact the effectiveness of the law. To make these protections effective, not only is it essential to have comprehensive legal coverage, but measures must be taken to improve enforcement and enhance public awareness. Ensuring these aspects will make the rights granted under the law more practical and enforceable.

3.2 Enforcement Mechanism

A proper mechanism of enforcement of intellectual property rights not only enhances the protection of the existing intellectual property rights but also sends positive signals to those concerned, such as creators and investors, about an environment conducive to creative activity and investment.²⁰

Therefore, it is clear that strong enforcement mechanisms are essential for safeguarding creators' rights against violations. The Copyright Act No. 36 of 2003 also establishes a legal framework for addressing infringements through civil remedies and criminal remedies. Civil jurisdiction for intellectual property cases is in the Commercial High Court and appeals are to the Supreme Court. Courts can issue injunctions, damages, declaration of nullity, destruction of the infringing goods, and declare non-infringement. Criminal jurisdiction is in the Magistrate's Court. The Code of Criminal Procedure Act, No. 15 of 1979, will govern all offences under the Act. Criminal proceedings can be initiated either through a private complaint or by police prosecution. However, the effectiveness of the judicial system is hindered by delays in proceedings and an overloaded infrastructure, which can result in lengthy litigation and discourage potential claimants. Additionally, the judiciary's limited specialised knowledge in intellectual property matters can affect the consistency and predictability of rulings, further complicating the enforcement process.

The National Intellectual Property Office (NIPO) also established under this law which serves as the government body responsible for managing the intellectual property system in Sri Lanka. NIPO's responsibilities include copyright registration, which aids in dispute resolution and enforcement, despite not being mandatory. However, the office's effectiveness is limited by insufficient resources and manpower, which limits its ability to proactively address infringements and provide comprehensive support. NIPO experiences delays in processing applications related to patent, trademark, copyright because of the lack of staff. This could discourage international and local companies from bringing intellectual property claims in Sri Lanka. Additionally, NIPO struggles to adequately monitor and enforce IP rights across the country due to staffing shortages.

²⁰ D. M Karunaratna, 'Issues Related to the Enforcement of IP Rights: National Efforts to Improve Awareness of Decision Makers and Education of Consumers' (26 April 2006) 2.

Also, instances of this condition include the absence of IP awareness campaigns, inability to investigate IP infringements, and staff training that is restricted because of resource limitations are examples which highlights this matter.

In terms of criminal enforcement, while the Copyright Act includes provisions for penalties, such as fines and imprisonment for severe offenses like piracy and counterfeiting, enforcement challenges persist. The detection and prosecution of such crimes require substantial resources and expertise, often lacking in practice. Low conviction rates and the difficulty of monitoring informal or underground markets further undermine criminal enforcement. To enhance effectiveness, targeted reforms, increased resources, and greater specialisation are necessary to better uphold copyright holders' rights.

4. CHALLENGES AND LIMITATIONS

4.1. Legal Challenges

In critically reviewing the effectiveness of copyright law in Sri Lanka, it is important to confront the legal issues and limitations inherent in the existing framework. These issues involve both legislative gaps and ambiguities, as well as inconsistencies with global standards.

Section 11(1) of the Act provides, with regard to 'fair use': "Notwithstanding the provisions of sub section (1) of section 9, the fair use of a work, including such use by reproduction in copies or by other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, shall not be an infringement of copyright." This closely follows section 107 of the US Copyright Act. Prior to the introduction of section 107, the US case law had solidified the fair use doctrine.

*Folsom v. Marsh*²¹ is the first US fair use case, which mentioned that: "In short, we must often, in deciding questions of this sort, look to the nature of the objects of the selections made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work." Similarly, *Maxtone-Graham v. Burtchae*²² observes: "As Justice Story noted, many uses fall between extremes. To evaluate such cases, an inquiry into the infringer's creative effort is proposed."

²¹ 9F Cas. 342 (C.C.D. Mass. 1841).

²² 803 F.2d 1253 (2d Cir. 1986).

In terms of section 11(2), the following factors shall be considered in determining whether the use made of a work in any particular case is fair use:-

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (b) The nature of the copyrighted work;
- (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) The effect of the use upon the potential market for, or value of, the copyrighted work.

Section 12 of the Intellectual Property Act outlines various actions that are permissible under the doctrine of fair use. According to this section, the acts of fair use includes quotations, private reproduction, teaching purposes, libraries and archives, current affairs and information, computer programs, importation for personal purposes, and use for the benefit of the visually impaired persons.

Lord Denning's remarks in *Hubbard v. Vosper*²³ are frequently referenced concerning 'fair dealing' in the UK. He held: "It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression."

In *Hyde Park Residence Ltd v. Yelland*²⁴ it is mentioned that 'fairness' is to be judged by the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the manner that the defendant did for the purpose in question.

It is likewise observed in the case of *Ashdown v. Telegraph Group Ltd*²⁵ that as far as the public interests including the human rights are concerned, the defence of fair dealing does not provide a

²³ [1972] 2 QB 84, 94, 95.

²⁴ [2000] RPC 604.

²⁵ [2001] 4 All ER 666, 685, 686.

cover to the commercial purposes of the users of protected materials. The users may use, for example, a few words employed by the author for reporting current events, but not a larger portion to attract the readership.

4.2. Technological Challenges

When considering about the challenges, it highlights significant technological challenges, such as digital piracy and rapid technological advancements. Digital piracy, driven by the internet and technological advancements, represents a serious threat to copyright protection. As an example, many streaming services and digital platforms struggle with unauthorized distribution of copyright content, often due to user-uploaded files or inadequate content security systems. Technology is advancing so rapidly that copyright regulations and enforcement methods may become outdated very quickly. New technologies often get overtaken by new technology, which results in protection gaps and makes it difficult to modify current legal frameworks to reflect developments. Although the Copyright Act No. 36 of 2003 establishes a legal framework, enforcing it remains challenging. The scale and anonymity of digital piracy, enabled by technologies that obscure identities and offshore servers, make it difficult to identify and prosecute those who infringe on copyright. Moreover, the vast quantity of infringing content along with the high expense of legal proceedings can discourage copyright holders, particularly smaller creators or businesses, from seeking enforcement actions.

Advances in technology further complicate copyright protection. Streaming services and digital distribution platforms bring new prospects for creators and introduce new pathways for infringement. Unauthorised distribution frequently happens via user-uploaded content or inadequate content protection measures on these platforms. Additionally, the swift advancement of technology means that copyright laws and enforcement strategies can quickly become outdated. New technologies often advance faster than the legislative process, creating gaps in protection.

Furthermore, advanced techniques for evading copyright protections challenge the effectiveness of existing legal frameworks. Addressing these issues requires the adoption of a flexible approach to legislation and enforcement. This should include incorporating technological solutions and fostering international cooperation to adapt with the changing digital environment and strengthen protection for intellectual property rights.

4.3. Institutional Constraints

The effectiveness of copyright law in Sri Lanka is hindered by significant institutional constraints, notably resource limitations and insufficient training. The National Intellectual Property Office (NIPO),²⁶ which is charged with managing and enforcing copyright regulations and law enforcement agencies like the Police and Customs Department, faces severe financial and logistical challenges caused by its ability to monitor and enforce copyright protections laws effectively. The lack of resources results in inconsistent enforcement and weakened protection of intellectual property. WIPO reports often address the capacity issues faced by national IP offices, including developing countries like Sri Lanka.²⁷ And also, The U.S. Department of State's "Special 301 Report" assesses the protection of IP rights in various countries, including Sri Lanka. According to that report, in 2023 the Homeland Security Investigations (HSI) – led National Intellectual Property Rights Coordination Center (IPR Center) conducted Intellectual Property Rights Investigative Methods Training programs in various countries including our country.²⁸

Additionally, there is a critical need for better training and awareness regarding copyright law among both law enforcement officials and the judiciary, as they often lack specialised knowledge in copyright law, leading to an uneven application. Public and industry awareness about copyright rights and remedies is also low, leading to an increase in copyright violations. Addressing these issues requires enhanced resources, targeted training, and widespread educational efforts.

5. COMPARATIVE ANALYSIS

5.1. International Standards

Internationally, copyright law is guided by frameworks such as the Berne Convention, TRIPS Agreement, and the World Intellectual Property Organization (WIPO) treaties, which establish minimum standards for protection. These standards include automatic protection without requiring registration, a minimum protection period (usually the life of the author plus 50 years), and the moral rights of creators. For example, the Berne Convention mandates protection of works across member countries, to protect works across borders, facilitating international enforcement and harmonisation.

²⁶ NIPO, (2024) <www.nipo.gov.lk/web/index.php?lang=en> accessed 27 July 2024.

²⁷ WIPO, (2024) <www.wipo.int/publications/en/details.jsp?id=3941&plang=EN> accessed 14 October 2024.

²⁸ USTR, (2024) <www.ustr.gov/issue-areas/intellectual-property/special-301/2024-special-301-report> accessed 14 October 2024

5.2. Adaptation of Best Practices

Sri Lanka's Intellectual Property Act No. 36 of 2003 aligns with many international standards, but it shows that some areas need to be improved. The IP Act offers protection for literary, dramatic, musical, and artistic works, and meets the Berne Convention's minimum term requirements. However, enforcement and practical applicability reveal gaps when compared with other countries, particularly in moral rights implementation. In order to strengthen its framework, Sri Lanka could consider adopting the best practices seen in the EU's Digital Single Market directive²⁹ and the US's Digital Millennium Copyright Act (DMCA).³⁰ This would involve enhancing the management of digital rights, making anti-piracy measures stronger, improving the enforcement of laws, and updating laws to handle digital and international issues more effectively.

6. RECOMMENDATIONS

To enhance copyright protection in Sri Lanka, the country should focus on some key areas, such as establishing specialised intellectual property courts to hear IP related matters, which is essential. Such courts would ensure more efficient and expert adjudication, thus improving the overall effectiveness of copyright enforcement. Moreover, it would focus on improving enforcement mechanisms, including the training of law enforcement officials, and the other resources would better equip them to align with copyright violations and protect creators' rights. By establishing specialised legal channels, Sri Lanka can manage intellectual property disputes more efficiently and effectively.

Furthermore, updating IP law in Sri Lanka is essential to align with modern international practices and technologies. Updating laws to align with international standards will address the challenges of digital content and provide stronger protection for creators. Lastly, promoting public awareness through targeted educational programmes will play a critical role in reinforcing copyright protections. These programmes should aim to educate both creators and the general public about their rights and responsibilities under copyright law, fostering a culture of respect for intellectual property. By implementing these measures, Sri Lanka can strengthen its copyright protection system, aligning it with the international best practices and improving the safeguarding of intellectual property rights throughout the country.

²⁹ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market.

³⁰ The Digital Millennium Copyright Act of 1998.

7. CONCLUSION

With reference to the above analysis, in conclusion, it can be mentioned that while Sri Lanka's Intellectual Property Act No. 36 of 2003 provides a foundational structure for copyright protection, several challenges need to continue in order to ensure the effective safeguarding of intellectual property rights. The existing legal framework, which is influenced by historical precedents and international agreements, requires modernisation to address contemporary issues such as digital piracy and technological advancements. Enforcement is a particular concern, constrained by limited resources, insufficient training, and an outdated judicial system.

Overall, to enhance copyright protection, Sri Lanka should consider implementing a number of targeted reforms, including the establishment of specialised intellectual property courts and updates to the legal framework to better address digital content challenges. Increasing public awareness and improving enforcement mechanisms are essential for creating a more effective copyright system. By aligning its policies more closely with international best practices and adapting to modern technological advancements, Sri Lanka can better support and protect its creative community. These measures will help ensure that copyright protection is more effective and responsive to the evolving digital landscape.

THE COPYRIGHT CONUNDRUM IN THE AGE OF ARTIFICIAL INTELLIGENCE

Hashendra Jayasuriya

ABSTRACT

With the rapidly growing use of artificial intelligence (hereinafter referred to as “AI”) for tasks conventionally effectuated exclusively by human beings, a somewhat baffling issue arises i.e., as to whether AI can acquire rights to the various works/output it generates. In the realm of intellectual property rights, which inter alia includes the law on copyright, patents, trademarks, designs and confidential information, copyright is a unique right automatically afforded/bestowed to creators and owners of original “works” in order to allow such beings to use and/or distribute such works for commercial gain or other purposes. In light of the same, this article analyses the possibility as to whether AI can be deemed the ‘creator’ and/or ‘owner’ of a copyrightable work in the UK, or whether such intellectual property right is exclusively reserved for human authors/creators and owners; followed by an analysis of the local legislative framework and judicial approaches to the same within the Sri Lankan jurisdiction. The pertinent issue sought to be resolved, in relation to AI, is colloquially represented as: ‘to copyright or not to copyright, that is the question.’

1. INTRODUCTION

Copyright can be described as the “area of intellectual property law that regulates the creation and use of a range of cultural goods such as books, songs, films and computer programs.”¹ Unlike many other intellectual property rights, copyright automatically arises upon the creation of an original “work” by the author, and affords such beings various rights such as the right to copy the work and communicate the same to the public. In the UK, the law governing copyright is primarily recognised under the Copyright, Designs and Patents Act 1988 (hereinafter referred to as the “CDPA 1988”) as subsequently amended. “British law describes the various objects that are protected by copyright law as ‘works’.”²

A significant aspect of the law of copyright, in addition to it naturally arising whenever an original work is created, is the fact that copyright protection is available for the expressions of ideas as

¹ Lionel Bently and others, *Intellectual Property Law* (6th edn, OUP) [37]

² *ibid.*

opposed to the ideas themselves. Simply, there must be a “fixed” work as opposed to mere ideas or procedures,³ for an author or creator to become entitled to copyright protection. It is on this basis that the CDPA 1988 lists eight (08) categories of works that are protectable under the law of copyright.⁴

According to section 1 of the CDPA 1988, any original literary, dramatic, musical or artistic works are protectable, and such protection is also afforded to sound recordings, films, and broadcasts and to typographical arrangements of published editions. In light of this provision, it is evident that a wide array of books, movies, podcasts, paintings, photographs, architecture plans and sculptures inter alia are protectable works in the UK. Further, it is also highlighted that the substantive requirements for a work to become copyrightable are not complex.

For a work to become copyrightable, it must be original,⁵ fixed⁶ and be qualified for protection i.e., have a requisite connection to the UK in any of the manners, more fully described in sections 153 to 162 of the CDPA 1988. Essentially, this last criterion concerns the works/authors having a link/connection/nexus to the UK, in order to be protected by the scope and ambit of the CDPA 1988 as amended. Despite this, the pertinent issue that arises is as to whether a non-human being/entity can be granted the same protection if the requirements noted above, and as more fully analysed below, are and/or can be satisfied. This is a vital issue in today’s context, where the increased use of artificial intelligence (hereinafter referred to as “AI”) is observed, especially in the music, arts and publishing industries.

“Artificial intelligence, or AI, is technology that enables computers and machines to simulate human intelligence and problem-solving capabilities.”⁷ While the concept of AI is not novel or unheard of in the modern world, the various functionalities of the developing variations of AI technology continue to both baffle and assist humans in their daily tasks. While many associate AI and consider it synonymous with companies and technologies such as Open AI and ChatGPT, AI as a whole is a rapidly developing form of technology which is ground-breaking and encroaching

³ Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPS Agreement) art. 9(2).

⁴ Copyright, Designs and Patents Act 1988 (CDPA 1988) s 1(1).

⁵ Following the wording in s 1(1)(a) of the CDPA 1988, this is more of a substantive requirement for literary, dramatic, musical or artistic works, while it is accepted that works such as sound recordings, films, broadcasts and typographical arrangements must not be copied from another/elsewhere.

⁶ According to s 3 (2) of the CDPA 1988, copyright does not exist unless literary, dramatic or musical works are recorded in writing or otherwise.

⁷ Cole Stryker and Eda Kavlakoglu, ‘What is artificial intelligence (AI)’ (*IBM*, 6 August 2024)

<<https://www.ibm.com/topics/artificial-intelligence>> accessed 7 August 2024.

upon the many tasks conventionally conducted by humans. This is more so evident in the field of art, music and technology, where the news cycle continues to cover a new work of creation almost entirely created by artificial intelligence. With the advent and rise of machine-learning tools and generative AI technologies, it is increasingly observable that “AI can perform tasks that would otherwise require human intelligence or intervention.”⁸ For instance, the news coverage of the manner in which AI technology was used by a TikTok user to release a song purportedly sung by musical artists Drake and The Weeknd, titled “Heart On My Sleeve” was met with a heap of criticism over the need to have an ethical use of AI in creating computer-generated works.⁹ While it was conventionally considered uncommon for works of music and art to be created by non-humans, it is an increasingly common occurrence following the increased use of AI in the modern world. Hence, this bears the question as to whether it is possible for AI to own a copyright in a work. If this question is answered in the affirmative, the natural subsequent issue then is as to whether humans can use such copyrighted material purportedly owned by AI, for their own use and/or for commercial purposes.

2. MODUS OPERANDI OF COPYRIGHT LAW

Under the CDPA 1988, in order for a work to obtain copyright protection, it must be original, fixed, and be qualified for protection. While this is the most common means of protection afforded to works of literature, songs, films and podcasts inter alia created and owned by human authors, the ultimate issue is to ascertain whether a similar protection will be afforded to non-human creators, which include but are certainly not limited to machines and AI. For instance, with regard to a musical work, section 3(1) of the CDPA 1988 clearly dictates that a “work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music” is protectable under the copyright law regime. Simply, musical copyright is confined to the music alone, where the vocalists and/or instrumentalists will own the copyright in relation to their own individual contribution to the musical work. Similarly, the lyricist will own the copyright over the lyrics to the song, which is protectable as a literary work. Hence, it is clear that each individual/group contribution to a musical work will be independently protected under the CDPA 1988. This has been judicially held to be so as well, in light of judicial decisions such as *Sawkins v*

⁸ *ibid.*

⁹ Rachel Reed, ‘AI created a song mimicking the work of Drake and The Weeknd. What does that mean for copyright law?’ (*Harvard Law Today*, 2 May 2023) <<https://hls.harvard.edu/today/ai-created-a-song-mimicking-the-work-of-drake-and-the-weeknd-what-does-that-mean-for-copyright-law/>> accessed 27 July 2024.

Hyperion Records,¹⁰ where it was held that background music can be recognised as a separate work; and in the decision in *Bamgboye v Reed*,¹¹ where it was similarly held that the drum beats accompanying a particular musical work can be protected as a separate work. Nonetheless, the commonality in the above-mentioned example with regard to musical copyright is the fact that various works of original human creation are automatically afforded protection due to the use of the author's own intellectual creativity. In order to assess whether a similar stance can be founded in relation to AI, the requirements for copyrightability must be more fully assessed.

7.1 'Work' under the Copyright, Designs and Patents Act 1988 as amended

The pre-requisite for a creation to be able to obtain protection under the CDPA 1988 is that such a creation must belong to at least one (01) of the eight (08) categories of works recognised under the Act. Following the provisions noted under section 1(1) of the 1988 Act, literary, dramatic, musical and artistic works are conventionally referred to as authorial works; whereas sound recordings, films, broadcasts and typographical arrangements are similarly known as entrepreneurial works. This distinction is created so as to underpin the notion that authorial works conventionally consist of works where human intervention is vital and often exclusively used, while entrepreneurial works, at the outset, contain both human intervention and technological contributions. For instance, the words in a book are afforded copyright protection (with regard to the author) as it contains the original intellectual contribution of the author himself/herself. Whereas the overall look, feel, fonts, style and typographical arrangement associated with the book are protectable under copyright and afforded to the publisher under section 8 of the 1988 Act due to the use of such publisher's creativity and labour in the course of beautifying and/or formatting such literary work using technology.¹² While such a distinction *prima facie* allows one to understand that technology can be and is often used in the course of creating a work, the technology itself is not given any authorial rights, as such privilege is only reserved for humans.

Further, while it is also acknowledged that with the increased use of technology and AI tools in the process of creating works, the distinction between authorial and entrepreneurial works is deteriorating, it is nonetheless an important factor in allowing one to comprehend the idea that the CDPA 1988 primarily caters to human creators and does not necessarily provide copyright protection to the technology itself. A book published by the Oxford University Press will have

¹⁰ [2005] EWCA Civ 565.

¹¹ [2004] EMLR 5.

¹² *Newspaper Licensing Agency Ltd v Marks & Spencer* [2003] 1 AC 551 (Lord Hoffmann).

copyright protection afforded to the authors as well the publishers; the latter being the publishing company and the individuals thereof, and not the computers and machines used in the process of publishing the book. This is especially true with regard to section 9(3) of the CDPA 1988, which states that, “In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.”

Furthermore, this position can be substantiated in the course of exploring the requirement of ‘originality’ of works in light of those purportedly created using AI.

7.2 Originality

Copyright is a property right which subsists in descriptions of work noted under section 1(1) of the CDPA 1988, which include “original literary, dramatic, musical or artistic works” [emphasis added].¹³ With regard to the remaining four (04) categories of work, in light of the fact that the Act does not specify that it must be original, it is commonly accepted that such works satisfy the above criteria provided it is not copied from elsewhere and/or another.¹⁴ Hence, the issue remains as to what amounts to ‘originality.’

While the CDPA 1988 does not in itself define ‘originality,’ judicial decisions on the same must be resorted to in order to decipher its criteria. Much guidance is provided by the highly celebrated decision by Peterson J in *University of London Press v University Tutorial Press*,¹⁵ wherein it was held that works are original if they originate with the author and are not copied. This simply asserts the position that ‘originality’ is “not concerned with whether the work is inventive, novel or unique,”¹⁶ but instead is “concerned with the relationship between the creator and the work.”¹⁷ In light of such analysis by the courts, it is understood that the threshold for originality is not high i.e., the quality of the work need not be novel and/or groundbreaking as is often the case with the law on patents. Peterson J’s line of reasoning is further substantiated through the decision of the House of Lords in the case of *Ladbroke v William Hill*,¹⁸ wherein the criteria for originality was laid down as being a work which is the product of some labour, skill and judgement exercised by the creator.

¹³ CDPA 1988, s 1(1)(a).

¹⁴ CDPA 1988, ss 5A(2), 5B(4), 6(6) and 8(2) which concern sound recordings, films, broadcasts and published editions respectively.

¹⁵ [1916] 2 Ch 601.

¹⁶ Bently and others (n 1) 101.

¹⁷ *ibid.*

¹⁸ [1964] 1 All ER 465 (Lord Reid).

“[I]n determining whether a work is original, copyright law focuses on the input that the author contributed to the resulting work.”¹⁹

In light of the various lines of reasoning adopted by the courts, it is observed that there is no qualitative threshold which one must overcome and/or achieve in order to have the requisite level of originality. Instead, provided that sufficient skill, labour and judgement is used by the author in creating, and provided that it is not copied and/or infringes another’s copyright, such a work will be protected. This line of argument can be further substantiated when the European Union criterion for originality is assessed: a work is original if it involves the author’s own intellectual creation in producing the same.²⁰ Furthermore, “in assessing originality, copyright law is concerned with the originality of expression rather than ideas.”²¹

Therefore, it is reiterated that the conditions for originality under the law of copyright is relatively very low and involves no qualitative threshold. However, the lurking issue remains as to whether a certain work purportedly “created” by AI, and by extension non-human entities, can acquire the same protection.

With regard to many instances involving generative AI, the end-product or output created by the AI tools consist of a derivation and/or accumulation of the input of existing works programmed into the system. Very simply, the ultimate output “created” by AI, if at all, involves a composition of potentially various works created by human authors, which are strategically or otherwise used as test-subjects for such technological eco-systems. This stance is very eloquently explained by Martin Senftleben²² as follows:

Generative AI systems are only capable of mimicking human creativity because human works have served as training material. Machine-learning algorithms use existing literary and artistic creations as input data to recognize patterns and similarities. Following this deductive method, a generative AI system learns how to produce novel literary and artistic output by imitating the style of human works. The machine-learning algorithm enables the

¹⁹ Bently and others (n 1) 101.

²⁰ Case C-5/08 *Infopaq Int v Danske Dagblades Forening* [2009] ECR I-6569.

²¹ Bently and others (n 1) 101.

²² Martin Senftleben, ‘Generative AI and Author Remuneration’ (2023) 54 *International Review of Intellectual Property and Competition Law* 1535.

generative AI system to generate literary and artistic content on its own – based on a computational analysis of the human works used as training material.

Martin Senftleben goes further to comment that “Generative AI systems are not true creators. They can imitate human literary and artistic expression only because they have been given the chance to analyse human creations.”²³ This essentially leaves open-ended the question as to whether a work purportedly “created” by AI, could ever be deemed to be original per the various criteria used by the courts in the UK in light of the CDPA 1988.

Further commentary on this pertinent issue is provided for by the Michelmores Law Firm, which acknowledges the fact that despite the 1988 Act not providing a definition for the phrase “original work” AI would fail the common law test used to determine the same, per the criteria of ‘author’s own intellectual creation.’²⁴ The authors provide two (02) key reasons for such analysis:

This is because AI works are neither:

- independently created because the AI is mining pre-existing sources; nor
- is it the result of the author's own intellectual creation because the output is based on probability and algorithms not intellect. What has to be considered is the fact that AI is performing an essentially mechanical function dictated by its software engineers.

It is further submitted that the various tests used both by the UK and the EU in determining originality, concern “author’s” own skill, judgement and labour,²⁵ and “author’s” own intellectual creation²⁶ respectively. Per section 9(1) of the CDPA 1988, an “author” in relation to a work, means the person who creates it. As such, the term “person” inherently cannot be identified and/or construed to ever include non-human entities such as machines and AI, despite it often being representative of non-natural legal persons such as companies. The latter is mostly so due to the effect of corporate personhood, which is a fundamental principle under the Company Law regime, which recognises and treats commercial entities registered with the Registrar of Companies, as legal persons which enjoy certain well-defined rights. However, in the absence of express evidence

²³ *ibid.*

²⁴ Iain Connor and Lorenza Picciano, ‘Will Works Generated by Artificial Intelligence (Ever Be Able To) Be Protected by Copyright?’ (*Vlex*, 18 September 2023) <<https://justis.vlex.com/vid/will-works-generated-by-946028956>> accessed 1 August 2024.

²⁵ *Ladbroke v William Hill* [1964] 1 All ER 465.

²⁶ *Infopaq* (n 20).

to the contrary, this connotation certainly cannot be extended beyond such companies and other commercial entities to also include machines, computers and artificial intelligence. It is submitted that to do so would be manifestly absurd as it would essentially subvert already well-established Company Law principles, in addition to potentially overreaching legislative intent. Simply, unless and until Parliament provides for the recognition of AI as “persons,” it is submitted that copyright protection should not be extended to AI under the distorted guise of AI being a “person.”

Bently and Sherman,²⁷ while commenting on the matter, highlight that unlike in the 1980s where there were “very few genuine ‘computer-generated works,’” the 1988 Act “provides that a literary, musical, or artistic work attracts copyright protection even where it has been by computer in circumstances under which there was no human author.”²⁸ Despite this, the authors do recognise that “[w]hile the Act clearly envisages that products generated by a computer could be classified as works, it says nothing about how the originality of such works is to be determined.”²⁹ Hence, notwithstanding their admission that computer programs may obtain copyright protection under the CDPA 1988, the authors do pay homage to the European standard, which in light of Advocate-General Trstenjak’s decision in *Eva-Maria Painer v Standard Verlags GmbH*,³⁰ seriously questions as to whether the above position can be maintained. Thereby, the authors mention that, “It seems to follow that no computer-generated work can be protected by copyright in accordance with European law.”³¹

It is submitted that, despite the CDPA 1988 expressly recognising under section 9 (3) that computer-generated works can acquire copyright protection, the fact that the author is recognised as those by whom the arrangements necessary for the creation of the work undertaken being recognised essentially defeats any potential arguments for AI being attributed the title of ‘creator’ or ‘author’ of a particular work for the purposes of copyright protection. It is argued that the various standards used by the courts refer to human intellect and creativity as opposed to potential derivations of human works, compiled by machines, for which the latter are to be afforded rights under the intellectual property regime. As Bently and Sherman note as well, “a derivative work may be both original and infringing.”³² However, it is further submitted that a work purportedly

²⁷ Bently and others (n 1).

²⁸ *ibid* 127.

²⁹ *ibid*.

³⁰ Case C-145/10 [2011] ECDR 13.

³¹ Bently and others (n 1) 127.

³² *ibid* 101.

compiled and/or “created” by AI cannot be original as it does not entail sufficient creativity in order to create a causal connection between the creator and the work.

7.3 Fixation

The requirement of fixation is less of a problematic condition with regard to AI, as section 3(2) of the CDPA 1988 stipulates that “Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise.” This is a vital requirement only in relation to the categories of works noted under the above provision and any works purportedly ‘created’ by AI will undoubtedly be “fixed,” as such would exist in some form of notation, code or writing.³³ For instance, the song “Heart On My Sleeve” purportedly sung and recorded by Drake and The Weeknd, was fixed to the extent required by copyright law as it was recorded and/or written.³⁴ As this requirement is easily overcome and/or circumvented by AI, it requires no further substantive analysis.

7.4 Qualification for Protection

Sections 153 to 162 of the CDPA 1988 governs qualification for protection i.e., whether or not there exists a certain connection to the UK in order for one to be able to rely upon the provisions of the CDPA 1988. Quite notably, section 153(1) of the CDPA 1988 states that copyright does not subsist in a work unless the qualification requirements under the noted Chapter are satisfied with regard to (a) the author; (b) the country in which the work was first published; or (c) if a broadcast, the country from which the broadcast was made. It is opined that these criteria too are somewhat problematic especially with regard to ground (a) above, concerning the author. In relation to AI, there may not necessarily be an author; and it was argued that AI should not be bestowed the title of “author” unless there exists clear evidence by Parliament that such should be so. On such basis, despite a potential work “created” by AI having obtained a connection to the UK in any of the manners more fully noted under Chapter IX of the 1988 Act, it is argued that AI will not be able to rely on the ground relating to connection to the UK by virtue of its author being qualified for protection.

3. TYPES OF RIGHTS UNDER THE LAW OF COPYRIGHT

³³ CDPA 1988, s 178.

³⁴ Reed (n 9).

Primarily, there are two (02) sets of rights which exist under the law of copyright. This includes economic rights, and moral rights. Economic rights are granted to the first owner of the copyright, and such can be disposed of by the owner of the copyright, often in exchange for monetary consideration. Such rights can be transmitted, sold, assigned and/or licensed inter alia at the sole discretion of the owner of the copyright. Similarly, the second type of rights that exist are moral rights, which cannot be transmitted and/or assigned to another.³⁵ This is because, such rights will remain with the creator/author of the work until their demise, at which point it may be transmitted to another in light of the provisions in section 95 of the CDPA 1988. This distinction between economic and moral rights, prima facie, raise interesting issues with regard to works which may purportedly be “created” by AI.

3.1 Economic Rights

Section 16 of the CDPA 1988 lists certain acts restricted by copyright in a work. Such restrictions exist due to the fact that they are automatic rights vested with the first owner of the copyright, which may subsequently be disposed of, transmitted, sold, assigned and/or licensed inter alia in favour of another, at which point the receiver of such copyright becomes entitled to the defined set of rights for which they contracted for. Per section 16(1) of the 1988 Act, the restricted acts include copying the work, issuing copies of the work to the public, and making an adaptation of the work or any other acts in relation to such an adaptation, inter alia. With regard to the same, two (02) vital questions arise in relation to the circumstances surrounding the possibility of AI being allowed to be deemed the creator/author of a work. The first issue is, if AI owns the first copyright of a work, whether it can ever be disposed of by AI; and if so, by whom? Similarly, the second issue is as to whether AI will have standing to enforce and/or assert their copyright against third parties especially in the event of potential infringement.

3.1.1 Can AI dispose of its Economic Rights in the Event that it is deemed to be the First Owner of the Copyright?

To entertain without admitting the possibility that AI is allowed to become the first owner of the copyright of a work, the issue is as to whether the economic rights attached to such work can and/or will ever be disposed of. For instance, if AI creates a derivation of a Rembrandt painting, can such painting ever be sold, lent for hire to a museum and/or publicly displayed for society to view and

³⁵ CDPA 1988, s 94.

enjoy? Would one who engages in such an act be violating the AI's copyright, in light of the restricted acts noted under section 16 of the CDPA 1988? The next pertinent question is as to whether humans will be able to use such a work for their benefit, including *inter alia* for commercial purposes.

It is submitted that such issues arise if AI is deemed to be an author/creator of an original work under the provisions of the CDPA 1988. Hence, it is vital to determine as to who ought to be allowed, if at all, to claim proper ownership in the event AI is rightfully deemed to not be capable owning a copyright in a work.

It has commonly been suggested that the programmer responsible for programming the AI technology ought to be given the copyright.³⁶ This is so, on the basis that it is the programmer "who contributes sufficient creative intellectual effort; and vesting ownership in the programmer provides incentive and thus encourages and promotes the continued existence of computer-created works."³⁷ It is recognised at the outset that such line of argument is in itself detrimental to the notion that AI ought to be afforded rights as an author/creator of a copyrightable work. Secondly, however, by having a human being in charge of the endeavours relating to economic rights of the AI-created works may be the most effective manner in which such rights may be disposed of. If otherwise, in instances where AI owns the copyright of a work, anyone who uses and/or publicly displays it for commercial gain or otherwise will, at least in principle, be infringing copyright.

This practical deficiency is one of the key reasons why, it is submitted, that AI must not be permitted to be deemed as the creator/author of a work.

3.1.2 Can AI Acquire Locus Standi?

To entertain without admitting the possibility that AI is permitted by law to own and/or be deemed the creator/author of a copyright-protected work, the issue arises as to whether the technology itself will have standing (i.e., locus standing) to bring legal action against potential infringers of its copyright. Here too, it is submitted that, it is of utmost importance that there exists human conduits through which legal representation must be effectuated as the AI alone may not be able to ascertain whether its copyright has been breached by another; and even if so, the legal representation required

³⁶ Kanchana Kariyawasam, 'Artificial Intelligence and Challenges for Copyright Law' (2020) 28 International Journal of Law and Information Technology 279.

³⁷ *ibid.*

to institute action, if at all. Furthermore, it is also opined that if a potential breach by a third party of a copyright-protected work owned/created by AI is not acted upon by the AI, the entire purpose surrounding the copyright conundrum as to whether to grant or not to grant copyright protection to AI is futile.

Hence, it is highlighted that since it is only human beings who are afforded standing in a court of law for the purposes of instituting and/or defending legal action, granting authorship and ownership rights to AI would be meritless.

3.2 Moral Rights

The moral rights as provided for under the CDPA 1988 are largely based on Article 6 bis of the Berne Convention,³⁸ which highlight that such rights “exist independently of the author’s economic rights, and even after the transfer of the said rights.”³⁹ Such moral rights include the right to claim authorship to the work, the right to object to any distortion/mutilation and/or other modification of the work, the right to object to derogatory treatment of such a work which is prejudicial to the honour and reputation of the author *inter alia*.⁴⁰ Prima facie, it is obvious that such provisions cater to human authors/creators of works, in order to enable them to be duly accredited with the recognition and honour associated with their works. However, despite being so catered to human beings, the express provision under the CDPA 1988 automatically disqualify any computer-generated work from being so entitled to such protection with regard to the right to be identified as author of the work, or the right to object to derogatory treatment of the work.⁴¹

In light of the above, it is commented that the cumulative effect of the practical difficulties associated with economic rights and the provisions governing moral rights, AI ought not to be granted the status of being the creator/author of a copyrightable work.

³⁸ Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, as revised 27 July 1971 and amended in 1979) 828 UNTS 221.

³⁹ *ibid* art 6 bis (1).

⁴⁰ CDPA 1988, ss 77-85.

⁴¹ *ibid* ss 79(2) and 81(2) respectively.

4. AUTHORSHIP AND OWNERSHIP OF COPYRIGHT

4.1 The UK Perspective

According to section 9(1) of the CDPA 1988, the “author” in relation to a work means the ‘person’ responsible for creating it. This is supplemented by section 11(1) of the 1988 Act which states that the author of a work is the first owner of any copyright in it, unless proven otherwise as more fully described in the section itself. Prima facie, this is relatively unproblematic as the provisions themselves are self-explanatory. However, the underlying issue, as always, remains as to whether it is possible for AI to become the author and/or owner of a copyrightable work, per the strict wording of the Act, and failing which, who ought to be bestowed with such rights.

Section 178 of the 1988 Act states that ‘computer-generated’ works mean that the work is generated by computers in circumstances where there is no human author to the work. Hence, per section 9(3), “[i]n the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.” It is evident from both the above provisions that only human beings are afforded copyright protection under the 1988 regime. This is essentially so, as such a right is explicitly reserved for any “person” capable of satisfying the requirements for copyright, as opposed to a machine. This is furthermore supplemented by section 154 of the Act, which highlights that a work qualifies for protection if the author was “at the material time a qualifying person.” Unlike humans, AI does not and can never satisfy the definition of a ‘qualifying person’ unless expressly provided for by Parliament. Hence, it is submitted that the notion that AI ought to be given authorship rights ought to be vehemently rejected.

In the event AI fails to establish authorship and ownership rights to a work, who ought to be deemed the author/creator and owner of a work generated by AI? While section 9(3) of the 1988 Act provides that the author is “person by whom the arrangements necessary for the creation of the work are undertaken,” who this person is, is less clear. Many argue that it should be the programmer⁴²; others argue that it ought to be user of the AI program and a school of thought also exist in support of the developer of the AI technology itself. Despite such intricate differences between the classes of individuals that ought to be entitled to authorship and ownership of the

⁴² Kariyawasam (n 36).

copyright generated by AI, the common foundation remains in favour of the proposition that it must be vested with a human being as opposed to the AI itself.

In the UK case of *Nova Productions Ltd v Mazooma Games Ltd*,⁴³ the court vested the rights to the programmer as it was such an individual who was responsible for writing the programme which enabled and facilitated the computer to create various appearances in the frames of a videogame; as opposed to the user (i.e., player of the game). This was so, as it was identified that the contributions of the programmer involved skills of an artistic nature that attracted copyright protection. Nonetheless, the key take-away from such analysis is the notion that the AI and/or the computer itself was not afforded copyright protection.

4.2 The USA Perspective

The similar issue surrounding whether only humans can attract copyright protection as authors and owners of works was explored in the US in two (02) intriguing cases.

4.2.2 *Naruto v Slater (Monkey-Selfie Case)*⁴⁴

Naruto was a seven-year-old crested macaque, a species of monkey, which lived in a reserve in Indonesia. When a wildlife photographer left his camera unattended in the reserve, Naruto allegedly snapped several photographs of itself with the camera. These photographs/selfies were subsequently published in a book, wherein it was admitted that it was the monkey (i.e., Naruto) which snapped the photographs.

Subsequently, the People for the Ethical Treatment of Animals (PETA) filed a complaint for copyright infringement against the defendant, on behalf of Naruto, on the basis that PETA is “the largest animal rights organization in the world” and “has championed establishing the rights and legal protections available to animals beyond their utility to human beings...” Hence, the ultimate issue concerned as to whether Naruto, and by extension PETA, had statutory standing.

The court *inter alia* held that Naruto lacks statutory standing to sue under the Copyright Act. It was stated that “this monkey – and all animals, since they are not human – lacks statutory standing under the Copyright Act.” Furthermore, the court also expressly recognised the following principle:

⁴³ [2007] EWCA Civ 219.

⁴⁴ Case No. 15-cv-04324 (9th circuit, 23 April 2018).

Our precedent on statutory interpretation should apply to court rules as well as statutes: if animals are to be accorded rights to sue, the provisions involved therefore should state such rights expressly.

On such basis, the court ruled that only human beings are afforded protection under the law of copyright. Hence, in extrapolating such reasoning to suit the UK context, it is opined that the authorship and ownership of copyright ought to remain and/or be exclusively reserved for human creators.

4.2.3 *Thaler v Perlmutter*⁴⁵

The plaintiff, Thaler, owned a computer system, which he alleged, created a piece of visual art of its own accord. He attempted to register the work under the copyright regime, listing the computer system as the author. He further asserted that the copyright should transfer to him by virtue of him being the owner of the machine. However, the Copyright Office denied his application on the basis that the work lacked human authorship, which was observed to be a pre-requisite for the issuance of a valid copyright. When the matter reached the courts, it was held that the defendants (consisting of the Registrar of the Copyrights Office) was correct in its assessment and determination that human authorship is an essential part of a valid copyright claim. In so deciding, the court highlighted that “Human authorship is a bedrock requirement of copyright.” Furthermore, it was also held that the under the Act, the “authorship” requirement as presumptively being human, rests on centuries of settled understanding.

Therefore, this decision too reaffirms the position that human authorship is a vital factor and pre-requisite in the realms of copyright law.

5. DURATION OF COPYRIGHT

It is submitted that the provisions under the CDPA 1988 which govern the duration of copyright, may also pose a significant issue if AI is permitted to be recognised as the author/creator of a copyrightable work.

The general provisions governing the duration of copyright in the various works recognised under section 1(1), are provided for from sections 12 to 15 of the CDPA 1988. In commenting on

⁴⁵ Case No. 1:22-cv-01564-BAH (DDC, 18 August 2023).

computer-generated works specifically, Bently and Sherman note the following and address potential concerns surrounding AI generated works:

Where a literary, dramatic, musical, or artistic work is computer-generated, the duration of protection lasts for 50 years from the end of the year in which the work was made. This provision is under review by the government in the context of developing artificial intelligence. One option being considered is a right with a shorter term, perhaps only five years, reflecting the ease with which AI systems can generate works.⁴⁶

6. THE SRI LANKAN CONTEXT

The primary source of domestic legislation governing intellectual property law in Sri Lanka is the Intellectual Property Act, No. 36 of 2003, as has been subsequently amended (hereinafter sometimes referred to as the “2003 Act”). It is submitted at the outset, however, that the approach of the legislature and the judiciary on matters concerning intellectual property, particularly and specifically with regard to the law of copyright, has been approached and/or dealt with in a manner substantially similar to that with respect to the UK, save a limited scope of instances where a notable deviation and/or potential lacuna is apparent and/or evident.

The 2003 Act, similar to the UK Copyright, Designs and Patents Act 1988, lists various “works” that may be the subject of copyright protection, as evident through section 6 of the aforementioned Intellectual Property Act 2003. Section 6 highlights that the non-exhaustive list containing eleven (11) categories of “works” provided for in subsection (1) which include inter alia books, speeches, musical works and computer programmes, are protectable by copyright provided such “works” are “original intellectual creations”. While it is acknowledged that the legislative enactment itself prima facie seems broader and detailed/specific in comparison to the list of works noted in section 1 of the CDPA 1988, the approach adopted by the courts with regard to the affording of copyright protection in Sri Lanka has been greatly consistent with that adopted by the UK courts.

The similarity in approaches by the UK and Sri Lankan courts is manifestly evident in the manner in which the “originality” requirement has been interpreted. The domestic approach has been to grant copyright protection in instances where a particular work has not been copied by an author/creator of a particular work, similar to the approach by Peterson J in *University of London*

⁴⁶ Bently and others (n 1) [202].

*Press v University Tutorial Press*⁴⁷. This is evident through the judgements of the local courts in cases such as *Wijesinghe Mahanamahewa v Austin Canter*⁴⁸, which followed the British approach, and in *Vasantha Obeysekera v A. C. Alles*⁴⁹, which directly followed Peterson J's reasoning and insisted on there being an original expression of ideas. D. M. Karunaratna further reiterates this position by highlighting that "The only requirement is that the author has not produced the work by copying another work. In other words, the work must originate from the author."⁵⁰ Hence, in light of the same, the underlying logic with regard to the argument posed that AI may not have the requisite level of 'originality', may be extended by inference to the local laws of Sri Lanka to prevent AI from obtaining copyright protection over a "work".

However, a notable variation between the 2003 Act and the UK's CDPA 1988 exists in the form of the requirement of "fixation". Unlike section 3(2) of the CDPA 1988 which provides that "Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise", the Sri Lankan Act consists no such requirement. D. M. Karunaratna also states that "The Act does not expressly require the fixation of a work as a pre-requisite for copyright protection."⁵¹ Instead, the 2003 Act provides that the works listed in section 6(1) "shall be protected by the sole fact of their creation and irrespective of their mode or form of expression, as well as of their content, quality and purpose." Commenting on the prima facie inconsistency between the two regimes (i.e., the UK approach and the Sri Lankan approach), D. M. Karunaratna notes the following:⁵²

However, as the copyright law protects the expressions of ideas and not the ideas themselves, it is convincingly arguable that the phrase 'expression of ideas' indirectly makes 'the fixation in a material form' an essential element of copyright protection under the Act at least in respect of certain types of works. An idea cannot be 'expressed' without fixing it in a material form in several protected works such as writings, paintings, audio-visual works and photographic works. Section 6(2) of the Act makes only the mode or form of expression irrelevant. The

⁴⁷ *University of London Press* (n 15).

⁴⁸ (1986) 1 Sri LR 620.

⁴⁹ CA No. 730/92(F) (Unreported).

⁵⁰ D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka* (1st edn, Sarasavi Publishers) [61].

⁵¹ *ibid* [63].

⁵² *ibid*.

‘expression of idea’ is essential. The expression of an idea or the creation of a work and the fixation are interrelated and inseparable in many instances...

Hence, it can reasonably be construed that, despite the absence of an express legislative enactment denoting the importance of “fixation” as a requirement for copyright protection, the approaches to and interpretations of the provisions in the 2003 Act are largely consistent with the general approach adopted by the UK.

However, with specific regard to the issue of whether AI and/or any computer-generated “works” may obtain copyright protection in Sri Lanka, it is submitted that the current legislative provisions are somewhat archaic in comparison to the UK law. It is highlighted that through section 9(3) of the CDPA 1988, the UK recognised the possibility of the existence of computer-generated works⁵³, which the local law does not entertain nor recognise. Despite the legal and practical issues surrounding the interpretation of such provision in the context of AI and its potential to obtain copyright protection over a “work” in the UK, the mere basis that the local law of Sri Lanka has not considered the possibility for the same, is somewhat striking especially in the context of the modern age of AI. In addition to the absence of such an enactment in the local legislation, another major indication that AI is not capable of creating and/or authoring a copyright protected “work” in Sri Lanka, is evident through the interpretation of the term “author” per the 2003 Act.

Essentially, according to section 5 of the Intellectual Property Act of 2003 of Sri Lanka, an “author” means the “physical person who has created the work”. The term “physical person” insists and/or mandates that there exists a human author with regard to a particular “work”. This interpretation of “physical person” can be further substantiated through the description provided by Law Insider as being “a human being, also known as a natural person”⁵⁴. In light of the same, section 10(1) of the 2003 Act states that “The author of a work shall independently of his economic rights and even where he is no longer the owner of those economic rights have ...” certain moral rights, which include inter alia, to have the author’s name indicated prominently on the copies of a work, where practicable to do so. Simply, because moral rights are non-transmissible and are rights always attached to an “author” of a “work”, the local law makes no possibility for AI to ever become the author of a copyright protected work. This position can furthermore be substantiated on the basis

⁵³ In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

⁵⁴ Law Insider <<https://www.lawinsider.com/dictionary/physical-person>> (last accessed 16th October 2024).

of section 15 of the 2003 Act, which provides for the presumption of authorship. Section 15 provides that [emphasis added]:

- (1) The *physical person* whose name is indicated as the author on a work in the usual manner shall in the absence of proof to the contrary be presumed to be the author of the work. The provisions of this section shall be applicable even if the name is a pseudonym, where the pseudonym leaves no doubt as to the identity of the author.**
- (2) The *physical person* or legal entity whose name appears on an audio visual work shall, in the absence of proof to the contrary, be presumed to be the producer of the said work.**

Thereby, in light of the interpretation legislatively provided for as to what amounts to an “author” of a “work”, it can conclusively be ascertained that the Sri Lankan law, as it currently exists per the provisions of the Intellectual Property Act No. 36 of 2003, as has been subsequently amended, categorically dismisses the possibility for AI to obtain copyright protection over a particular “work”.

Additionally, it is also submitted that the definition of “author” as provided for in section 5 of the 2003 Act, also complicates the provisions of the Act which enact the duration of copyright. As more fully evident in section 13, to a great extent, the duration of copyright i.e., the period of validity of copyright, is calculated with reference to the life of the “author”. For example, section 13(1) of the 2003 Act provides that subject to the noted subsections therein, “the economic and moral rights shall be protected during the life time of the *author* and for a further period of seventy years from the date of his death” [emphasis added]. A calculation of and/or any references to the “life time of the author” is strictly not possible with regard to non-living beings and/or entities, which naturally dismisses the possibility for a computer-generated work and/or AI to obtain copyright protection over a “work” for itself. Hence, the position that AI cannot obtain copyright protection for a particular “work” per the laws on copyright in Sri Lanka is reiterated.

7. ATTEMPTS AT ADDRESSING THE ISSUES SURROUNDING THE COPYRIGHT CONUNDRUM: TO GRANT OR NOT TO GRANT, THAT IS THE QUESTION

The increased use of AI in the modern world essentially signifies that AI-generated works such as music, art, literary publications and films inter alia are an inevitable fact as opposed to an occasion

of chance. Various generative-AI tools are already in the process of replacing many jobs in the entertainment industry, which further elaborates the need to better understand and ascertain the practical and legal implications of the same, within the confines of the law of copyright. Many shortcomings and potential practical difficulties associated with granting authorship and ownership rights to artificial intelligence, were highlighted throughout the course of this publication. Hence, in light of such discussion, the underlying issue remains as to whether the copyright conundrum can be conclusively resolved.

In attempting to address such a question, consideration must be had to the potential necessity for an amendment to the existing legislation on copyrights (i.e., the CDPA 1988 as amended, in the UK) or whether a novel legislative enactment altogether would be required to address the various issues/concerns more fully discussed above. In addition to potential amendments and/or insertions into the UK legislation, it is submitted that a more structured substantive revamping of the Sri Lankan legislation is required in order to address the same concerns, due to such local legislation being somewhat comparatively archaic.

Regardless of the practical mechanism through which such issues are addressed, the key considerations which need to be borne in mind relate to the potential need to update/redefine and/or amend entirely the statutory definitions for the terms “author” and/or “owner” of a copyrightable work. While the current enactments enable any “persons” to be so entitled to copyright protection in the UK, and any “physical person” in Sri Lanka, future Parliaments must bear in mind to directly address this when re-enacting the law to better suit society in the age of artificial intelligence.

However, such an act must be carefully conducted so as to not dissuade human creativity and innovation in attempts to recognise AI as creators of works. As highlighted by the law firm Mayer Brown,⁵⁵ in the course of commenting on the UK Government’s plans on publishing its national AI strategy in the year 2021, the following must be considered:

Whilst the Government aims to provide adequate protections to AI technology to encourage further investment into AI, it is cognisant that those protections have to be limited so that they do not stifle innovation and progress in this field. The UK Government proposes that

⁵⁵ Yaros and others, ‘UK Government’s Consultation on Artificial Intelligence and the Interaction with Copyright and Patents’ (*Vlex*, 4 December 2021) <<https://justis.vlex.com/vid/uk-government-s-consultation-899033154>> accessed 27 July 2024.

any measures introduced must (i) encourage AI innovation and promote the use of AI for the public good; (ii) preserve the integral role of intellectual property, which is to promote human creativity and innovation; and (iii) be based on best available economic evidence.

In addition to the above, any future resolutions in relation to the above must also address key factors for the requirement of ‘originality’ as a condition for copyrights. Specifically, it must directly address the queries regarding the potential for computer-generated programs to be deemed original and as to whether AI can become entitled to copyright protection on such basis.

Finally, the issue of the exact distribution of rights amongst the human contributories involved in the generation of works by AI, along with the issue concerning locus standi must be resolved so as to clearly demarcate the rights, duties and practical constraints of all parties involved.

Hence, in direct response to the copyright conundrum as per the current statutory framework accompanied by the common law in the UK and in Sri Lanka, it is submitted that AI cannot and should not be granted copyright protection for a number of reasons, including those relating to ‘originality’, locus standi and the stringent definitions surrounding the ‘author’/ ‘owner’ dichotomy.

8. CONCLUSION

It is submitted that the current statutory regime governing the law on copyright does not actively and expressly provide for the possibility of artificial intelligence and computer technologies to obtain/acquire and/or own the copyright for a work, for itself. Instead, the bedrock requirement for human authorship still remains a foundational principle in this regard, and deservedly does so on meritorious grounds as copyright may be considered as a reward for human creativity, innovation and intellectual expressions.

INTERNATIONAL HUMANITARIAN LAW

ISRAEL-PALESTINE: SELF-DEFENCE OR NOT?

Onel Edirisinghe | Sarith Abeygunawardena

ABSTRACT

This paper critically examines Israel's claim of self-defence in response to the October 7th attacks, arguing that this position is legally untenable for two primary reasons. First, under the law of occupation, Israel cannot invoke the right of self-defence against threats originating from territories it occupies. The International Court of Justice reinforced this position in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Some scholars attempt to differentiate the ruling in that case from the present situation, but this paper provides arguments to the contrary, showing that the court's reasoning is applicable to the present context. Second, even if Israel's right to self-defence is acknowledged, this paper argues that its actions far exceed the lawful limits of self-defence.

1. INTRODUCTION

In light of the events on October 7th, Israel has invoked the right of self-defence, challenging the very fabric of the international framework on self-defence and international law itself. The conflict between Israel and Palestine is rooted in decades of conflict, beginning with the British proposal to partition Mandatory Palestine by the establishment of two independent states, a Jewish homeland and an Arab state. The partition plan was originally approved by the United Nations General Assembly by Resolution 181 (II), which allocated 42 percent of the land to an Arab state, 56 percent to the Jewish state and the remainder being the Holy City of Jerusalem. Jerusalem was to be administered by the United Nations as an international city, *corpus separatum*.¹

The partition plan, however, was not implemented due to its rejection by the representatives of the Arab population of Palestine and by the neighbouring Arab states, which deemed the proposal to be unfair, given the disproportionate allocation of land to the Jewish population. The issue of such a decision was mainly due to the Jewish population consisting of only a minority of the population, in contrast to the Arab population of Palestine who formed two-thirds of the population and owned a majority of the land. The representatives of the Arab population argued that the decision violated

¹ United Nations, 'UNISPAL: History of the Question of Palestine' (United Nations) <<https://www.un.org/unispal/history>> accessed 1 August 2024.

the right of self-determination of the Palestinian people to choose their destiny. Thus, rejection of the partition resulted in the outbreak of civil war in Palestine, with the expulsion of a majority of Arab Palestinians from the land allocated to Israel, remembered today as the *Nakba* or the catastrophe.²

The neighbouring Arab states intervened by invading Mandatory Palestine to prevent the partition, escalating the conflict to a wider Arab-Israeli war known as the War of 1948. By the end of the 1948 war, the Jewish paramilitaries gained control over most of mandatory Palestine, including 60 percent of the land allocated for the Arab state as well as West Jerusalem, which it established as its capital. Transjordan, known today as the Hashemite Kingdom of Jordan took control of and annexed the territory known today as the West Bank, with Egypt occupying the territory presently known as the Gaza Strip. Consequently, the State of Israel was declared on the land occupied by the Jewish paramilitary organisations while an Arab Palestinian state was not realised. The borders that Israel established at the end of the war are demarcated as the Green Line by the Armistice Agreement of 1949 and serve as the internationally recognised borders of Israel.³

In the War of 1967, more commonly referred to as the Six-day War, Israel acquired the Gaza Strip from Egypt, East Jerusalem, and the West Bank from Jordan. Together, these territories formed one entity known as the Occupied Palestinian Territories (OPT). Egypt and Jordan have since renounced their claims for the OPT in favour of the State of Palestine, a de-jure state recognised by a majority of the UN member states, with observer status in the United Nations. In 2005, Israel unilaterally ‘disengaged’ from Gaza and dismantled its settlements there, while continuing the occupation of the West Bank and East Jerusalem. Further, East Jerusalem was annexed by Israel in 1980. This annexation was deemed illegal by the United Nations Security Council Resolution 478. Through negotiations, interim self-governance was granted to Palestinians by the Oslo Accords. This divided the West Bank into Areas A, B, and C, with the Palestinian Authority (PA) gaining limited control over Areas A and B, while Area C which forms 61% of the West Bank is under Israeli military administration.⁴

Located in the West Bank city of Ramallah, PA remains the internationally recognised government for the entire OPT. PA is led by the Palestinian Liberation Organisation (Fatah). However, the Islamic Resistance Movement (Hamas) won the Palestinian Legislative election last held in 2006

² *ibid.*

³ *ibid.*

⁴ *ibid.*

but the refusal by Fatah to accept the results led to conflict with Hamas, with Hamas taking over the Gaza Strip while Fatah retained the PA-controlled areas of the West Bank. This was followed by an Israeli blockade of the Gaza Strip with Israel exercising control over the movement of people, aid, and goods to and from the Gaza Strip.⁵

It is important to note that the Palestinian Authority recognises the State of Israel within the borders established by the Green Line. At the same time, Hamas claims the entirety of the territory of the former Mandatory Palestine while rejecting the State of Israel. In pursuit of this goal, Hamas has engaged in several major conflicts with Israel with the latest being the Israel-Hamas War of 2023. It began on the 7th of October after Hamas and other affiliated groups launched a surprise attack against civilian and military targets in Southern Israel, resulting in the deaths of 1,139 people, including 764 civilians and 373 Israeli security personnel. A further 251 individuals were taken hostage and transported to the Gaza Strip to be used as leverage during negotiations, in response, Israel carried out airstrikes on the Gaza Strip, followed shortly by a ground invasion.⁶

Israel has defended its military campaign in the Gaza Strip as an exercise of its right to self-defence engaged by the attack on the 7th of October and the taking of hostages. However, many have questioned whether Israel's actions have exceeded the exercise of self-defence while others such as Professor Wilde of the University College London have questioned whether Israel could, as an occupying power, claim a right of self-defence against a threat from the territories it occupies.⁷

The large and disproportionate civilian deaths caused by the State of Israel during the present war have led to allegations of genocide against them, with South Africa initiating proceedings against the State of Israel at the International Court of Justice (ICJ). This action, *the Application of the Convention on the Prevention and the Punishment of Genocide in the Gaza Strip (South Africa v. Israel)*⁸ is relevant to the principles surrounding this discussion owing to its connection to South Africa's allegations against Israel for genocide in Gaza. This is a significant aspect within the framework of International Humanitarian Law (IHL) as it arises from military operations in Gaza, particularly during the conflicts of 2014 and 2021, where South Africa claims that Israel's actions

⁵ *ibid.*

⁶ Human Rights Watch, 'October 7: Crimes Against Humanity, War Crimes by Hamas-Led Groups' (Human Rights Watch, 17 July 2024) <<https://www.hrw.org/news/2024/07/17/october-7-crimes-against-humanity-war-crimes-hamas-led-groups>> accessed 1 August 2024.

⁷ Ralph Wilde, 'Israel's War in Gaza Is Not a Valid Act of Self-Defence in International Law' (Opinio Juris, 9 November 2023).

⁸ *South Africa v. Israel, Application of the Convention on the Prevention and the Punishment of Genocide in the Gaza Strip* (ICJ, pending).

could amount to genocide against the Palestinian population, as defined by the Convention on the Prevention and Punishment of the Crime of Genocide. This situation raises essential questions regarding the application of IHL principles, including the distinction between combatants and civilians, proportionality, and the obligation to protect civilian populations during armed conflict. While there have been calls for legal action, no formal case has been adjudicated in an international court, leaving the situation complex within the confines of international law and geopolitics. This article will be limited to exploring the legal frameworks governing self-defence, not only for the involved parties but also for the international community that strives to uphold the principles of justice, sovereignty, and human rights, by analysing whether the State of Israel's actions are covered and justified by the right of self-defence in international law.

2. SELF- DEFENCE

Under international law, and specifically Article 2 (4) of the Charter of the United Nations, states are prohibited from the use of armed force 'against the territorial integrity or political independence of any State' except under measures authorised by the United Nations Security Council under Chapter VII of the Charter or measures taken in self-defence.⁹

A state's right to self-defence is governed by customary international law and Article 51 of the UN Charter. Article 51 of the Charter provides that member states have *an inherent right to individual or collective self-defence in the event of an armed attack until the Security Council has taken the measures necessary to maintain international peace and security*.¹⁰

Article 51 has two important considerations: First, the use of the words 'inherent' affirms that self-defence is an existing right under international law and that the objective of Article 51 is merely to regulate that right. Secondly, Article 51 sets a temporal limit on the exercise of this right: beginning at the time of an armed attack against that state and ending when the United Nations Security Council takes measures to maintain peace and security.¹¹

Customary law dwells further into the concept of self-defence in international law. The customary law position for the right of self-defence to be engaged can be summarised as follows through decisions of the International Court of Justice:

⁹ Charter of the United Nations 1945, art 2(4).

¹⁰ Charter of the United Nations 1945, art 51.

¹¹ *ibid*.

2.1 Proportionality - In the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, the ICJ recognised that while there was no such rule in the UN Charter, measures taken in self-defence must be proportional to the armed attack that occurs.¹²

2.2 Immediacy - The principle of immediacy was also recognised in *Nicaragua v. United States of America*, with the court ruling that the United States could not rely on the argument of self-defence when its actions continued long after any presumed attack by Nicaragua could have been carried out.¹³ The principle was founded in the *Caroline Case (1837)* where it was held that self-defence is a response to an action that is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.¹⁴

2.3 Necessity - The principle of necessity was reaffirmed in the case of *Iran v. United States (Oil Platforms)*. Any measures taken by a state must be limited to measures necessary to repel an armed attack against it.¹⁵

Additionally, it is relevant to mention that in the ICJ's advisory opinion on the '*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,' the court recognised that the right of self-defence can only be invoked against an armed attack emanating from another state.¹⁶ Before considering whether measures that the State of Israel purports to have been taken in self-defence, fall within the limitations of that right. It is important to consider the arguments presented for and against the possibility of Israel claiming a right of self-defence against a state which it occupies.

¹² International Court of Justice, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)' (International Court of Justice) <<https://www.icj-cij.org/case/70>> accessed 1 August 2024.

¹³ *ibid.*

¹⁴ Michael Wood, 'The Caroline Incident—1837' in Tom Ruys, Olivier Corten, and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford Scholarly Authorities on International Law 2018) <<https://opil.ouplaw.com/abstract/10.1093/law/9780198784357.001.0001/law-9780198784357-chapter-2>> accessed 1 August 2024.

¹⁵ (International Court of Justice, 'Oil Platforms (Islamic Republic of Iran v. United States of America)' (International Court of Justice) <<https://www.icj-cij.org/case/90>> accessed 1 August 2024.

¹⁶ International Court of Justice, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)' (International Court of Justice) <<https://www.icj-cij.org/case/131>> accessed 1 August 2024.

3. DOES ISRAEL HAVE A RIGHT OF DEFENCE?

Professor Wilde of University College London argues that ‘Israel’s War in Gaza is Not a Valid Act of Self-defence in International Law’. His argument is premised on Israel’s original occupation of the Palestinian territory in 1967 being illegal as pre-emptive self-defence is not a valid *jus ad bellum*. He further argues that notwithstanding Israel’s disengagement from Gaza, Gaza remains an occupied territory resulting from its illegal use of force in 1967. Consequently, any use of force by Israel in the OPT, including Gaza, is illegal.¹⁷

Wilde’s argument that Gaza remains occupied has since been vindicated by the ICJ’s advisory opinion in ‘Policies and Practices of Israel arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem’ (Policies and Practices of Israel) whereby the court held (paras. 84-102) that the Gaza Strip remains an occupied territory and that Israel’s status as the occupying power and its obligations under the law of occupation remain unchanged.¹⁸

Wilde also argues that Israel must terminate the use of force as Palestinians have a right to self-determination, which is violated by Israel’s continued use of force, giving rise to the Palestinian’s rise to resist armed resistance. Wilde then points out that consequently, Israel’s use of force since October 7th is not isolated from its continued illegal use of force by way of occupation and therefore, Israel cannot claim self-defence against resistance to its illegal use of force, even if the acts of resistance themselves are illegal.

The ICJ in the *Wall Case* affirmed that Palestinians have a right to self-determination. However, it did not examine the scope of that right and the effects of Israel’s practices on that right. In the ‘Policies and Practices of Israel’ case (paras. 230-243), the ICJ affirmed Professor Wilde’s argument that Israel’s continued use of force indeed constitutes a violation of the right of self-determination. As the right of self-defence is concerned, it is not necessary to consider whether the occupation was illegal ab initio as argued by Professor Wilde because the ICJ determined in ‘Policies and Practices of Israel’ (paras. 259-264) that Israel’s presence in the OPT is unlawful due to its practices of annexation and denial of the right of self-determination to Palestinians.

¹⁷ Wilde (n 7).

¹⁸ International Court of Justice, ‘Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)’ (International Court of Justice) <<https://www.icj-cij.org/case/186>> accessed 1 August 2024.

However, the advisory opinion on the ‘Policies and Practices of Israel’ was limited to the situation that existed in Palestine before December 2022. It does not answer the question of whether Israel has a right of defence against resistance to its occupation, particularly where that right is exercised through unlawful acts.¹⁹

Although Resolution 42/95 of the United Nations General Assembly, had long ago settled the argument that occupied peoples have a right to self-determination “by all available means, including armed struggle”, it is untenable that such a right would extend to unlawful acts such as kidnapping and indiscriminate targeting of civilians. That is not the position put forth by Professor Wilde. Rather, he argues that even if the resistance is unlawful, it does not render Israel’s actions in response to an act of self-defence as that would render lawful, the State of Israel’s continued occupation.

To support this view, Professor Wilde provides a hypothetical example of Ukrainian resistance conducting unlawful acts within the territory of Russia’s internationally recognised borders, which would not permit Russia to claim a right of self-defence against Ukraine or permit it to extend its war in Ukraine.

Although the ICJ’s majority did not directly address that argument in the *Policies and Practices of Israel* case, the court stated in the *Wall Case* that Israel could not claim a right of self-defence against threats emanating from territories it occupies (para 139 of the *Wall Case*). Since it has been established that the Gaza Strip remains an occupied territory as a matter of law, the court’s reasoning in the *Wall Case* should extend to threats emanating from the Gaza Strip, including the attacks on October 7th.

However, Geir Ulfstein in *Does Israel have the right to self-defence – and what are the restrictions?* opines that the reasoning does not extend to the Gaza Strip as the *Wall* case concerns only the West Bank.²⁰ This is due to it having remained under Israel’s effective military control, on the other hand, there is no exercise of Israeli authority over Gaza. The court in *Policies and Practices of Israel* (paras 82-102) considers Israel as “capable of exercising, and continued to exercise, certain

¹⁹ Para. 82, ‘Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, in’ (Cour internationale de Justice - International Court of Justice | INTERNATIONAL COURT OF JUSTICE) <www.icj-cij.org/case/186> accessed 27 July 2024.

²⁰ Geir Ulfstein, ‘Does Israel Have the Right to Self-Defence and What Are the Restrictions?’ (EJIL Talk!, 17 November 2023) <<https://www.ejiltalk.org/does-israel-have-the-right-to-self-defence-and-what-are-the-restrictions/>> accessed 1 August 2024.

key elements of authority over the Gaza Strip” but it also acknowledges that “Israel’s obligations have remained commensurate with the degree of its effective control over the Gaza Strip”. This leaves room for acceptance of Ulfstein’s argument that since Israel lacks physical presence and control, the reasoning in the *Wall Case* may not apply.²¹

However, in *Policies and Practices of Israel*, the separate opinions by Judges Nolte and Cleveland, stated there be no right to self-defence in instances where another territory’s land had been acquired illegally or by force. Further, that any such claims for self-defence or justifications would be considered null and void where the action of annexation was undertaken. Judge Charlesworth was of the opinion too that the right to self-defence is one that can only be claimed where the Article 51 elements have been satisfied. She further stated that the “intensity, the territorial scope and the temporal scope of Israel’s policies and practices undermine the proposition that Israel’s occupation qualifies as an act of self-defence”, effectively deciding that the occupation of the Palestinian lands by the State of Israel was one that had no ability to be relied on for a claim of self-defence.²²

Based on the above reasoning, it is unlikely that Ulfstein’s argument can be sustained. However, Professor Wilde recognises that Israel being governed by the law of occupation, particularly Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land is obliged and able to maintain law and order in the OPT through force, which may permit it to use force against Hamas. But he argues that this does not apply in the case of Israel, as the occupation there itself is illegal, thereby, imposing a greater, overriding obligation to bring the occupation to an end, precluding it from justifying its use of force in self-defence by relying on the law of occupation.

It is pertinent to note that in the *Policies and Practices of Israel* case, the ICJ recognised that Israel must bring an end to the occupation, supporting Wilde’s argument but it did not rule on the extent to which it overrides Israel’s right of self-defence.

Sarthak Gupta in *Israel’s Right to Self-Defense under International Law* offers a different perspective on the position on the use of force under the law of occupation.²³ A contradiction exists however, as Gupta argues that *Article 43 of the Hague Regulations* permits only the use of police

²¹ *ibid.*

²² International Court of Justice, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (2004) Separate Opinion of Judges Nolte and Cleveland.

²³ Sarthak Gupta, '7-10: The Question of Israel’s Right to Self-Defense Under International Law' (Jurist, 7 December 2023) <<https://www.jurist.org/commentary/2023/12/7-10-the-question-of-israels-right-to-self-defense-under-international-law/>> Accessed 1 August 2024.

force, not military force in OPT because a territory which is occupied cannot simultaneously be an external foreign threat.²⁴ This view is supported by the ICJ's advisory opinion in the *Wall Case*, as well as the separate opinions of Judges Nolte and Cleveland in *Policies and Practices of Israel*.

On the question of the right to self-defence, Professor Marko Milanovic of the University of Reading, School of Law, provides several different approaches in *Does Israel Have the Right to Defend Itself?*²⁵ However, this article will examine his second argument further, in regard to the right to war or *Jus ad bellum*.

Professor Milanovic's analysis is based on the limbs of proportionality and necessity. He argues that self-defence under **Article 51** being an exception to Article 2 (4), cannot be claimed against non-state actors, but only state actors. By extension, a non-state actor such as Hamas cannot benefit from the prohibition on the use of force under **Article 2 (4)**.

Milanovic states that in spite of the ambiguity that exists with Palestine's statehood, what can be determined is that Hamas, as discussed above, is not a state actor and is thus, one that does not fall within the purview of Article 2(4) protection. According to Milanovic, the existence of Israel's right to self-defence depends on several factors, namely, Israel's recognition of Palestine as a state, whether self-defence can be claimed against Hamas, inter alia with Palestine being an occupied territory, whether a right of self-defence can be claimed against self-defence and the differing views on the concept of proportionality.

4. SELF-DEFENCE AGAINST THE PALESTINIAN STATE

Independent of Israel's position on the matter, Palestine may satisfy the criteria for statehood. Professor William Schabas's amicus curiae brief to the International Criminal Court raises several points regarding the international recognition of Palestinian statehood.²⁶ Notably in April 2024, twelve of the fifteen members of the UN Security Council voted to admit Palestine to the United Nations.²⁷ Judge Gómez Robledo also took notice that two-thirds of the General Assembly voted

²⁴ Ibid.

²⁵ Marko Milanovic, 'Does Israel Have the Right to Defend Itself?' (EJIL Talk!) <<https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself/>> accessed 1 August 2024.

²⁶ Prof. William Schabas, 'Amicus Curiae Observations Pursuant to Rule 103' ICC-01/18-257 (International Criminal Court, 30 July 2024) <<https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180914264.pdf>> accessed 1 August 2024.

²⁷ 'Security Council Fails to Recommend Full United Nations Membership for State of Palestine, Owing to Veto Cast by United States | Meetings Coverage and Press Releases' (United Nations, 18 April 2024) <<https://press.un.org/en/2024/sc15670.doc.htm>> accessed 1 August 2024.

for **Resolution ES-10/23** which extended Palestine's observer state status with additional privilege and affirmed that Palestine has satisfied the criteria for admission as a member state.²⁸ Furthermore, Judge Robledo in his separate opinion in the *Policies and Practices of Israel* case recognized that Palestine has satisfied all the criteria and requirements for membership in the United Nations.²⁹

Milanovic explains that recognition of a Palestinian state is left to be dependent on personal views and conflicting international opinions, but he notes that the existence of a Palestinian state is the only avenue to allow for the use of self-defence under Article 51 of the Charter.³⁰ This means that the recognition of Palestine's right to self-determination is a key aspect to seeing if a claim for self-defence stands on any ground. This is once again a contradictory action and a difficult aspect to consider. If the State of Israel claims this defence, it would inadvertently result in their recognition of a Palestinian state to a certain degree. The co-dependency of **Article 51** and **Article 2(4)** is vital, as the lack of either would mean that the State of Israel's *jus ad bellum* never existed thus, resulting in there being no claim for self-defence and no legal ground to rely on.

5. SELF-DEFENCE AGAINST NON-STATE ACTORS

Professor Milanovic explains that the use of force in self-defence against non-state actors in foreign territories, is in essence, a question of whether the foreign state consented to such actions and whether attacks committed by non-state actors constitute an "armed attack" within the meaning of Article 51. For this, two schools of thought exist on the matter, they are the "restrictivist" and the "expansionist" schools of thought.³¹

The restrictivist school of thought is of the opinion that no armed attack can be committed by non-state actors and that Article 51 and Article 2(4) provisions are solely interstate in nature. The ICJ's advisory opinion in the *Wall Case* supports this view, with the court stating that if the attack is not attributable to a foreign state, then Article 51 cannot be engaged for Israel to claim self-defence. Milanovic explains that the latter (expansionist), explores the ideas of there not being exclusive application to inter-state conflict and self-defence against non-state actors is justified. He gives an earlier example of this by referencing the United States' Global War on Terrorism, by extension their campaign against Al Qaeda owing to the 9/11 Terrorist Attack in 2001. A further, more

²⁸ International Court of Justice, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (2004) Separate Opinion of Judge Robledo Gomez.

²⁹ Schabas, (n 26).

³⁰ Milanovic (n 25).

³¹ *ibid*.

contemporary example, however, as recent as July 2024, was seen in an airstrike against Iranian proxy armed groups, carried out by the United States in Iraq, “in self-defence” based on threats to coalition forces at their bases in Baghdad.³²

However, Milanovic proposes a third and alternative approach to utilising self-defence based on the draft Article 9 of the International Law Commission’s (ILC), Articles on State Responsibility, which deals with “conduct carried out in the absence or default of the official authorities” and is more fully described as:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”

Having examined this provision, Milanovic stated it could be a reasonable deduction that based on Hamas having won an election and forming parts of the Palestinian government, they are acting in an official capacity and Hamas are officials or representatives of the Palestinian authorities. This is a *prima facie* ground for the claim of self-defence and one that could garner international support so long as the expansionist camp is in agreement and proves self-defence to be the case for their actions. If the arguments presented in favour of Israel having a right of self-defence against Palestinians are accepted, it requires the consideration of whether the measures that Israel has taken in the exercise of that right, fall within the limits of self-defence.

6. ARE ISRAEL’S ACTIONS LEGITIMATE ACTIONS OF SELF-DEFENCE?

Gupta³³ posits that there are three schools of thought concerning the extent to which the right of self-defence can be exercised, these are:

Firstly, **the halt and repelling theory**, that the use of force can only be permitted to stop and repel an ongoing attack. Applying this theory to Israel, Israel’s right of self-defence should have been exhausted the moment the attackers on October 7th were neutralised. Therefore, according to this

³² Reuters, 'Explosions at Iraq’s PMF Security Agency Base South of Baghdad Kill One Member – Sources' (Reuters, 30 July 2024) <<https://www.reuters.com/world/middle-east/explosions-iraqs-pmf-security-agency-base-south-baghdad-kill-one-member-sources-2024-07-30/>> accessed 1 August 2024.

³³ Gupta (n 19).

theory, Israel's continued use of force since the attack was halted amounts to a prohibited use of force that exceeds self-defence.

Secondly, **the trigger theory** states that once a state is attacked, it can defend itself against the aggressor and potential threats regardless of the scale. Going by this school of thought, Israel's response need not be proportionate or necessary, provided it has been attacked first. If this argument is accepted, then Israel's response is a legitimate act of self-defence, however, it is difficult to sustain given centuries of jurisprudence such as the *Caroline Case*.

Thirdly, **the future attack theory**, that a state can use force not only to respond to an attack but also prevent future attacks even if not imminent, in other words, a right of pre-emptive self-defence. This theory is less relevant in the present context. However, if such an argument is sustained Israel could not be precluded from claiming that its continued use of force after the 7th of October is in pursuit of preventing another such attack.

7. SELF-DEFENCE AND PROPORTIONALITY

Professor Milanovic further examines the claim for self-defence and proportionality raised by Dr Ralph Wilde who in support of Hamas, claimed that the events of self-determination were an act of self-defence carried out by Palestinians in resistance to the continued occupation. However, the perspective shared is hard to justify and one that Professor Milanovic extensively criticises. This is owing to Dr Wilde's failure to determine who the affected individuals are and the inadequacy of assuming Hamas to be the appropriate representative of the Palestinian people.

Elaborating on the inadequacies of Wilde's conclusion, Milanovic stated that ambiguity existed with identifying a collective Palestinian people due to their potential statehood having been segregated into two separate areas, which are administered by the government in Gaza and that of the PLO governing the West Bank. The PLO is, as the author explains, a more recognized and widely accepted entity internationally, than their counterpart in the Gaza Strip.

However, it would be necessary to point out that since these arguments were made by Milanovic, the ICJ in the *Policies and Practices of Israel* case has recognised that "from a legal standpoint, the Occupied Palestinian Territory constitutes a single territorial unit" (in paras 72-83). This renders moot the point regarding the existence of two separate areas, however, the issue of whether Hamas is an internationally recognised government of Gaza remains.

In respect of proportionality, the actions taken on October 7th seem to raise doubts on whether the limb has been satisfied at all, along with the requirement of necessity to qualify as self-defence as

claimed by Dr Wilde. Milanovic's reason for this is that the actions of Hamas on that day were more along the lines of "impunity" and as explained further, the disproportionate casualties being civilians as opposed to military personnel. This evidences the idea that self-defence cannot be claimed by Hamas to counter the claims of the State of Israel, owing to the nature of their armed attack being unreasonable for those who had been targeted in their supposed self-defence. Further, three types of proportionalities can be deduced according to the author's text, they are summarised as follows:

7.1 "Tit for tat" proportionality- Which is described as measured, proportionate retaliatory strikes conducted by parties against the other in return for what was perpetrated against them. The nature of these strikes is non-escalatory and are thus, more likely to fall within the purview of valid self-defence.

7.2 "Ends means" proportionality- Here, proportionality is assessed on the use of a strike against another in self-defence, only when no other option is available to be utilised. This approach, however, introduces the issue of ambiguity, as attempting to define a necessary goal is arbitrary and subjective to that party's interests.

7.3 "Narrow" proportionality- Introduced by Professor David Kretzmer of the Hebrew University of Jerusalem, describes balancing benefit and harm by introducing a burden of proof for the claim of self-defence. Here it would have to be evidenced that the actions taken presently in self-defence, will result in a positive outcome down the line.

Of these three types of proportionalities, according to Milanovic, only the "narrow proportionality" approach truly provides an answer that can be adhered to. This approach is one that for obvious reasons such as the fact that parties would now have an added unambiguous obligation to prove their case, introduces a check and balance to such uses of armed force in pursuit of self-defence. Although it is his opinion that this type of proportionality is one that can be relied on to introduce change, it is still one that is yet to receive any academic or legal backing as its validity has not been mentioned or discussed when dealing with proportionate use. Thus, it is yet to be decided and one that may not see present applicability, perhaps, a tool to be examined in the future of this conflict.

A clear standard recognised in IHL, can be found in the **Additional Protocol** of the Geneva Convention of 12th August 1949³⁴, specifically Article 51(5), which describes “indiscriminate” to mean:

“(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”

This standard was met on various occasions through military operations conducted in Gaza and East Jerusalem. The actions were detailed by The United Nations Relief and Works Agency (UNRWA) who in their *Situation Report #145*³⁵ reported several incidents In the Jenin Refugee Camp of East Jerusalem between the 7th of October 2023 and 21th of October 2024. On the 15th of October, the UNRWA had reported an instance where anti-tank missiles were fired at a house within the camp, the result of which had caused the death of one and the injuries of six others. Further, on the 21st of October 2024, in the Jabalia Refugee Camp, Gaza, artillery shells had been fired at Emergency Shelter, UNRWA schools. This incident directly resulted in the death of seven and others injured.

These actions clearly fall within the scope of “indiscriminate” laid down in Article 51 (5), paragraphs (a) and (b). As in these instances bombardment was achieved in the first instance by way of missiles and the second, by artillery shells. Further, the nature by which the bombardment arrived was indiscriminate, owing to the first instance involving a house within a “crowded refugee camp”³⁶ where civilians live in close proximity. The second, being an officially designated relief zone/shelter, which was converted from a school. There are no clear military objectives stated to

³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

³⁵ UNRWA, UNRWA Situation Report 145: The Situation in the Gaza Strip and West Bank (including East Jerusalem) (2023) <https://www.unrwa.org/resources/reports/unrwa-situation-report-145-situation-gaza-strip-and-west-bank-including-east-jerusalem> [Accessed 31 October 2024].

³⁶ Al Jazeera, 'The Occupied West Bank City of Jenin: A Focal Point of Conflict' (4 July 2023) <https://www.aljazeera.com/news/2023/7/4/the-occupied-west-bank-city-of-jenin-a-focal-point-of-conflict-2> [Accessed 31 October 2024].

be achieved in both instances, due to the mass civilian casualties that are likely to be sustained and given the nature, designation and operation of the places where the attacks had occurred.

8. CONCLUSION

In summing up the arguments, whether Israel has a right to self-defence or not is a complex question. According to academics such as Wilde, the key argument against the existence of such a right is the unlawfulness of Israel's continued occupation of Palestinian territories, which according to the ICJ in the *Wall Case* precludes claiming self-defence against acts which originate from the occupied territories. The unlawfulness of the occupation too, has been affirmed by the ICJ in the 'Policies and Practices' advisory opinion. On the other hand, Ulfstein suggests that Gaza and the West Bank are different and therefore the court's opinion in the *Wall Case* might not apply to prevent Israel from claiming this right.

Although it was concluded that the question of self-defence is one that has to be justified on moral grounds and not an aspect that the law can cover, what can be determined at this point is that the State of Israel has not satisfied the legal requirements for proportionality. This is especially true through the sheer and disproportionate number of casualties and the lack of an end in sight. Further, it was finally stated by the author that such a claim of self-defence was unlikely to be valid in the near future as well.

Thus, to summarise and conclude on the question of proportionality as subjectively approached by Milanovic, it could be seen that of the three approaches available, two are entirely subjective in nature (Tit for Tat and Ends means) and are, as a result, difficult to make an analysis upon. Further, the third (Narrow) approach is one that has not been tested or academically peer-reviewed and too, forms an unreliable outcome. However, it is one that still forms a more objective standard for assessing a right to self-defence and thus, will be examined. When assessing the third aspect of the Narrow approach to proportionality, it could be concluded that the State of Israel is unlikely to satisfy this standard owing to the fact that such proof is yet to be evidenced and thus, *prima facie* proving the State of Israel to not have a valid right to self-defence for having not satisfied the only objective test that could have been utilised.

Upon assessing proportionality by objective standards, it has been established that Israel breached International Humanitarian Law by way of indiscriminate attacks, defined under the Additional

Protocol to the Geneva Convention³⁷. In addition, Israel has been credibly accused of genocide, which if proven would establish that its actions have exceeded proportionality. Therefore, it would be appropriate to conclude that Israel does not satisfy the requirement of proportionality and by extension, cannot claim self-defence.

³⁷ Protocol I (n 33).

**THE AI-DRIVEN EROSION OF INTERNATIONAL HUMANITARIAN
LAW: A CRITICAL EXAMINATION OF ISRAEL'S USE OF
AUTONOMOUS WEAPONS SYSTEMS AND ARTIFICIAL
INTELLIGENCE IN THE GAZA CONFLICT**

Amisha De Alwis

ABSTRACT

Following the rapid escalation of tensions in the Occupied Palestinian Territories, significant concerns have been raised regarding the development and integration of artificial intelligence (AI) into military operations and armed conflict, and on the current regime of international humanitarian law (IHL). This Article will provide a critical examination of the Israeli Defence Forces' use of AI in the ongoing Gaza conflict, and how this has contributed to the erosion of key principles of IHL. This Article will specifically focus on the challenges posed by Lethal Autonomous Weapons Systems (LAWS) and other AI-powered military technologies to the general principles of IHL. This Article will argue that, under the current framework of IHL, principles such as proportionality, precaution, and human accountability in armed conflict necessitate context-specific judgement and decision-making that current AI technology cannot adequately perform. This Article thus illustrates that the responsibility for IHL compliance remains and must remain a human prerogative. This Article will portray the profound impact of Lethal Autonomous Weapons Systems, such as "Gospel," "Lavender," and "Where's Daddy?", in how these technologies have expedited targeting processes and removed human responsibility, contributing to increased civilian casualties and extensive destruction of homes, infrastructure, and essential services in the Gaza Strip. This Article will further argue that the implications of Israel's use of AI in Gaza extend far beyond this particular conflict. The inadequacy of IHL principles as highlighted by AI integration in warfare necessitates the creation of robust ethical frameworks and legal instruments to govern these technologies. This Article will echo international calls for banning specific AI-powered weapons and establishing clear mechanisms for human responsibility, control and transparency. This Article will conclude that the situation in Gaza highlights the urgent need to address the AI-driven erosion of IHL and ensure that emerging military technologies adhere to the principles of humanity, dignity, and civilian protection which remain central to IHL.

1. INTRODUCTION

The scope and application of international law, specifically International Humanitarian Law (IHL), has faced a multitude of challenges since the dawn of the 21st century; one such challenge has taken place due to the rapid development of technology and the use of such technological advancements in times of war. A key facet of such technological developments has been the resurgence of the focus placed on artificial intelligence (AI) systems. The rapid development of lethal autonomous weapons systems (LAWS) and AI technologies has significantly challenged the existing framework of IHL. As these advanced technologies are increasingly integrated into military operations, fundamental IHL principles, such as distinction, proportionality, and accountability, face scrutiny and ambiguity in their application. The reliance on AI can diminish human oversight, complicating accountability for IHL violations. These challenges underscore the urgent need for a robust regulatory framework that ensures human responsibility remains central to military operations and that compliance with IHL is upheld. Without such a framework, the potential misuse of LAWS could exacerbate civilian suffering and undermine the principles IHL seeks to protect.

2. HISTORIC DEVELOPMENTS AND CURRENT DEFINITIONAL CHALLENGES

Though the birth of AI systems was seen as early as the 1950s, with the presentation of The Logic Theorist by Allen Newell, Cliff Shaw and Herbert Simon at the 1956 Dartmouth Summer Research Project on Artificial Intelligence¹, a resurgence of AI research and development was brought about by advancements in machine learning, data availability and computational power in the 21st century.² This resurgence was underscored by the development of AI programmes which put a greater focus on solving specific challenges than on the initial objective of building adaptable, entirely intelligent robots.³ Much discourse has surrounded the exact definitions of AI, though such

¹ Lawrence Livermore National Laboratory, 'The Birth of Artificial Intelligence (AI) Research | Science and Technology' (*st.llnl.gov*) <<https://st.llnl.gov/news/look-back/birth-artificial-intelligence-ai-research>> accessed 19 July 2024.

² Rockwell Anyoha, 'The History of Artificial Intelligence' (*Science in the News* 28 August 2017) <<https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/>> accessed 19 July 2024.

³ IBM, 'What Is Machine Learning?' (*IBM* 2023) <<https://www.ibm.com/topics/machine-learning>> accessed 19 July 2024.

systems can be loosely categorised into 3 types⁴; Artificial Narrow Intelligence (ANI) refers to intelligent systems designed to perform specific tasks, such as facial recognition and playing games. These agents are programmed for particular functions, and cannot independently identify and undertake unknown tasks, lacking self-awareness. Artificial General Intelligence (AGI) is a concept not uniformly defined among AI scientists but generally refers to agents with intelligence comparable to humans, equivalent to Human-Level Intelligence (HLI).⁵ Artificial Super Intelligence (ASI), as introduced by Bostrom⁶, includes three types: Speed ASI, which operates faster than humans; Collective ASI, which mirrors the decision-making abilities of a human group; and Quality ASI, capable of performing tasks beyond human abilities. Recent classifications have distinguished HLI from AGI, suggesting that human-imposed assumptions and limitations in machine computations may restrict AGI's problem-solving scope. These inherent human constraints could potentially downgrade the generalisation capabilities of AGI, preventing it from addressing a broader range of problems.⁷ However, this article is primarily concerned with the inclusion of such systems of AI in Lethal Autonomous Weapon Systems (LAWS). Such systems lack a singular definition but have been described as 'weapon systems that, once activated, can identify, select, and engage targets with lethal force without further intervention by an operator'⁸, conveying that a key feature of LAWS is a lack of human intervention and control. Such weapons systems are able to operate with a great deal of autonomy, allowing such systems to identify and engage military targets with no human intervention whatsoever. These systems use artificial intelligence (AI) technology to improve their capacity for making decisions. As a result, they are able to handle huge quantities of data and carry out tasks more quickly and precisely than traditional systems.⁹ While the inclusion of AI is not a prerequisite for the operation of LAWS, a number of

⁴ AM Saghiri, 'A Survey on Challenges in Designing Cognitive Engines' [2020] 6th International Conference on Web Research (ICWR) <<https://ieeexplore.ieee.org/abstract/document/9122273/authors#authors>> accessed 19 July 2024.

⁵S Legg, 'Machine Superintelligence' [2008] University of Lugano <<https://sonar.ch/usi/documents/317954>> accessed 19 July 2024.

⁶ N Boström, 'Superintelligence: Paths, Dangers, Strategies' [2014] Oxford University Press <<http://denik-knihy.cz/pdf/13-17.pdf>> accessed 19 July 2024.

⁷ibid.

⁸ Implementation Support Unit of the Convention on Certain Conventional Weapons, 'Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects' (2023) <[https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_on_Lethal_Autonomous_Weapons_Systems_\(2023\)/CCW_GGE1_2023_CR_P.1_0.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_on_Lethal_Autonomous_Weapons_Systems_(2023)/CCW_GGE1_2023_CR_P.1_0.pdf)> accessed 19 July 2024.

⁹ Federico Borsari, 'Between Killer Robots and Flawless AI: Reassessing the Military Implications of Autonomy' (CEPA22 November 2023) <<https://cepa.org/article/between-killer-robots-and-flawless-ai-reassessing-the-military-implications-of-autonomy/>> accessed 21 July 2024.

current military operations nevertheless have begun to include elements of AI technologies in such systems.¹⁰

LAWS have most commonly been employed in the creation of defensive systems, such as antivehicle and antipersonnel mines which operate autonomously based on trigger mechanisms. More recently developed systems, however, have begun to employ more advanced technology, such as sentry systems and missile defence systems, which are able to independently identify, engage, and warn against threats.¹¹ Additional instances include loitering munition, commonly referred to as suicide, kamikaze, or exploding drones. These weapons have a built-in warhead and linger over a designated region until an operator on the ground or an automated sensor detects the target. At that point, they would then launch an offensive attack.¹² These systems were originally introduced in the 1980s, but since then, their functions have advanced, due in large part to the integration of artificial intelligence (AI) technology.

3. LEGAL AND ETHICAL IMPLICATIONS OF THE USE OF LAWS/AI WEAPONRY UNDER THE CURRENT REGIME OF IHL

The development and increased use of such autonomous systems has led to debates about the ethical and legal implications surrounding these systems. These debates often focus on the necessity for human oversight and responsibility in military decision-making processes.¹³ However, a lack of consensus by the international community on how such responsibilities should be interpreted and enforced means that the topic remains contentious.

Since 2018, the Secretary-General of the United Nations, António Guterres, has argued that autonomous weapons systems with the capacity to kill are ethically and politically reprehensible, and has urged for their outlawing under international law.¹⁴ The Secretary-General echoed this call

¹⁰ United Nations Office for Disarmament Affairs, 'Background on LLAWS in the CCW – UNODA' (*United Nations*2023) <<https://disarmament.unoda.org/the-convention-on-certain-conventional-weapons/background-on-LLAWS-in-the-ccw/>> accessed 21 July 2024.

¹¹ *ibid.*

¹² *ibid.*

¹³ David Adam, 'Lethal AI Weapons Are Here: How Can We Control Them?' [2024] *Nature* <<https://www.nature.com/articles/d41586-024-01029-0#:~:text=It>> accessed 21 July 2024.

¹⁴ United Nations Office for Disarmament Affairs, 'Background on LLAWS in the CCW – UNODA' (*United Nations*2023) <<https://disarmament.unoda.org/the-convention-on-certain-conventional-weapons/background-on-LLAWS-in-the-ccw/>> accessed 21 July 2024.

in his 2023 New Agenda for Peace, recommending that States draft a legally binding instrument by 2026 that would regulate all other types of autonomous weapons systems and forbid lethal autonomous weapons that operate without human oversight or control and cannot be used in accordance with international humanitarian law.¹⁵ He pointed out that the design, development, and use of these systems create ethical, legal, security, and humanitarian problems, and they directly threaten fundamental freedoms and human rights in the absence of a specific regime of global rules. Concerns about dangerous autonomous weapons systems have also been raised by independent analysts from the United Nations. In a 2023 report to the Human Rights Council, Fionnuala Ní Aoláin, the UN Special Rapporteur on counterterrorism and human rights, echoed the Secretary-General's demand for an international ban on deadly autonomous weapons systems.¹⁶

As of now, only very few international instruments which aim to govern the use of LAWS and AI in military circumstances exist. However, existing facets of international humanitarian law (IHL), which is the facet of international law tasked with ensuring human dignity is upheld during times of armed conflict, can be used, at least to an extent, to provide a basic framework on the regulation and limitation of LAWS. The creation and usage of such systems necessitate the completion of three criteria in order for LAWS to be compliant with IHL regulations¹⁷: The first would be the capacity to accurately predict if a LAWS's effects might, under some or all conditions, violate particular or general prohibitions and limits on weapons, tactics, and combat. It is likely to be illegal to utilise a LAWS whose conduct, operation, and consequences cannot be accurately predicted. Second would be the capacity to administer an LAWS's operations in a way that complies with the regulations controlling the conduct of hostilities. This would prohibit the use of LAWS which cannot be limited according to the foundational principles of IHL as such weapons would likely be considered to be unlawful. Thirdly would be the capacity to link the appropriate human agent(s) to the operation, performance, and outcomes of LAWS. The use of a LAWS that is not sufficiently attributable, discernible, or scrutinisable would make it impossible to determine and impose criminal culpability on the part of the state or of individuals for infractions of IHL.

A core tenet of IHL is the principle of distinction, as embodied in the Fourth Geneva Convention of 1949, titled the 'Geneva Convention Relative to the Protection of Civilian Persons in Time of

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ L Bruun, N Goussac and V Boulanin, 'Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human–Machine Interaction' (SIPRI June 2021) <<https://www.sipri.org/publications/2021/policy-reports/autonomous-weapon-systems-and-international-humanitarian-law-identifying-limits-and-required-type>> accessed 21 July 2024.

War'.¹⁸ According to the principle of distinction, parties of a war are required to distinguish between combatants and civilians, and to safeguard civilian populations that may suffer harm as a result of military activities in the areas where they reside.¹⁹ It defines a civilian as individuals who are not actively engaged in hostilities, and further stipulates that military actions cannot be undertaken with the goal of injuring or involving civilians. In order to effectively identify and engage military targets while minimising injury to civilians, LAWS must be developed and operated in accordance with this principle. The difficulty lies in ensuring that the algorithms that control LAWS can apply this principle in dynamic combat scenarios where the lines of distinction may not always be clear. Another core tenet of IHL are the principles of proportionality and necessity, which have been cemented as crucial requirements for any legal use of force, such as in cases of self-defence. Thus, such principles ensure that any military action will not cause excessive civilian harm in relation to the anticipated military advantage. However, perhaps the most crucial component of the current debate surrounding LAWS and IHL is ensuring that humans remain accountable for their decisions when utilising such weaponry systems. The Geneva Conventions and other International Humanitarian Law treaties underscore that responsibility for actions performed during armed conflict must lie with humans, and cannot be delegated to any form of technology. Questions have been raised about the level of human oversight required in the operation of LAWS. The Group of Governmental Experts (GGE) concluded that human intervention is required to guarantee that IHL is followed²⁰; however, the precise type and degree of this intervention are still contested, and requires further research and further development of the law. The fact that LAWS needs to be configured to consider these aspects raises the question of how sophisticated a decision-making machine can really be.²¹

Additionally, under IHL, other specific rules would result in any weapons or method of warfare, including LAWS, to be deemed unlawful if the weapon is found to be in contravention of the rules. For example, LAWS would be prohibited if;

¹⁸ American Red Cross, 'Summary of the Geneva Conventions of 1949 and Their Additional Protocols' (2011) <https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf> accessed 2 July 2023.

¹⁹ *ibid.*

²⁰ Laura Bruun, 'Autonomous Weapon Systems: What the Law Says – and Does Not Say – about the Human Role in the Use of Force' (*Humanitarian Law & Policy Blog* 11 November 2021) <<https://blogs.icrc.org/law-and-policy/2021/11/11/autonomous-weapon-systems-law-human-role/>> accessed 21 July 2024.

²¹ L Bruun, N Goussac and V Boulanin, 'Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human–Machine Interaction' (*SIPRI* 1 June 2021) <<https://www.sipri.org/publications/2021/policy-reports/autonomous-weapon-systems-and-international-humanitarian-law-identifying-limits-and-required-type>> accessed 21 July 2024.

- There already exists a particular convention that forbids the use of the weapon (or its mechanism of damage), such as those that forbids the use of poison, chemical, or biological agents;²²
- The weapon is designed to inflict superfluous harm or suffering;²³
- The weapon is indiscriminate by nature, which implies that it cannot be aimed at a particular military purpose or have its effects restricted as required by IHL.²⁴ As a result, it can attack both civilian and military targets without making a distinction;
- The weapon is designed to cause extensive, persistent, and serious harm to the environment, or it may be predicted to do so.²⁵

Thus, specific provisions of IHL can also be used to create a framework of the limits and prohibitions placed on the development and use of LAWS. However, in order to handle the special capabilities and difficulties presented by autonomous systems, more clarity and perhaps new rules are required as the current IHL framework does not offer direction on how and to what extent LAWS should be regulated by these principles.²⁶

A select few attempts have been made in order to specifically address the use of LAWS and AI in the development of weapons and methods of warfare. One notable attempt is the *Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy*²⁷, spearheaded by the United States Bureau of Arms Control, Deterrence, and Stability in 2023, which aims to provide a normative framework addressing the standards of behaviour surrounding the development, deployment and use of military AI. The Declaration aims to build international consensus on the matter and lays down several key measures; while the declaration has been endorsed by a number of states and is a hopeful sign of LAWS regulation, it lacks the support of

²² For example: Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, signed 17 June 1925, entered into force 8 Feb. 1928.

²³ Protocol I Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 Dec. 1977, entered into force 7 Dec. 1978, Article 35(2).

²⁴ The use of indiscriminate weapons is prohibited in all circumstances under customary IHL, c.f. the IHL prohibition of indiscriminate attacks, see Additional Protocol I (note 11), Article 51(4)(b) and (c).

²⁵ Additional Protocol I (note 11), articles 35(3) and 55.

²⁶ L Bruun, N Goussac and V Boulanin, 'Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human-Machine Interaction' (SIPRI June 2021) <<https://www.sipri.org/publications/2021/policy-reports/autonomous-weapon-systems-and-international-humanitarian-law-identifying-limits-and-required-type>> accessed 21 July 2024.

²⁷ BUREAU OF ARMS CONTROL, DETERRENCE, AND STABILITY, 'Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy' (United States Department of State 9 November 2023) <<https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy-2/>> accessed 26 July 2024.

the international community. However, it can be recognised as a solid foundation for the development of a specific and comprehensive legal framework on the matter.

4. THE USE OF LAWS/AI WEAPONRY BY THE ISRAELI DEFENCE FORCES IN THE ONGOING GAZA CONFLICT

A conflict which has brought the debate on the use of LAWS and AI in a military context to the forefront has been the ongoing conflict between the state of Israel and the Palestinian Territories, which have seen recent escalations following the tragic and horrific events of 7th October of 2023. The ensuing conflict has had a devastating humanitarian impact, with increasingly urgent warnings being issued in regard to the risks of famine and dire health emergencies²⁸ in the Gaza Strip and growing condemnations of Israel's actions by the international community. Though Israel has historically seen unconditional support from many Western superpowers, many members of the international community have begun to be critical of Israel, specifically over its 'indiscriminate' military campaign in the Gaza Strip²⁹ and, more recently, in Lebanon.³⁰ Experts have described the conflict as one of the 'most relentless and deadliest' campaigns in modern history, which has been attributed, in large part, to the use of LAWS and AI systems. In less than 3 months after the conflict escalated following October 7th, more damage has been caused by the offensive attacks than by the Allied bombing of Germany during World War II or the devastation of Mariupol in Ukraine, or the destruction of Aleppo in Syria between 2012 and 2016.³¹

In 2021, under the pen name "Brigadier General Y.S.", a book titled "The Human-Machine Team: How to Create Synergy Between Human and Artificial Intelligence That Will Revolutionize Our World" was published. The author, who was later confirmed to be the current commander of the elite Israeli intelligence unit 8200, argued for the creation of a unique device that could rapidly

²⁸ Tamila Varshalomidze, Virginia Pietromarchi and Mersiha Gadzo, "Immediate" Ceasefire Needed to Stop Polio in Gaza, Health Officials Warn' (*Al Jazeera*2024) <<https://www.aljazeera.com/news/liveblog/2024/7/30/israels-war-on-gaza-live-ceasefire-needed-to-stop-polio-who>> accessed 30 July 2024.

²⁹ Al Jazeera, 'Biden Warns Israel Risks Losing Support over "Indiscriminate" Gaza Bombing' (*Al Jazeera*2023) <<https://www.aljazeera.com/news/2023/12/12/biden-warns-israel-losing-support-over-indiscriminate-gaza-bombing>> accessed 30 July 2024.

³⁰ United Nations Office of the High Commissioner of Human Rights, 'UN Experts Alarmed by Israel-Lebanon Conflict, Strongly Condemn Escalation and Urge Immediate Protection for Civilians' (*OHCHR*2024) <<https://www.ohchr.org/en/press-releases/2024/09/un-experts-alarmed-israel-lebanon-conflict-strongly-condemn-escalation-and>> accessed 30 October 2024.

³¹ Al Jazeera, 'Israel's Relentless Bombardment Destroyed over 70% of Gaza Homes' (*Al Jazeera*2023) <<https://www.aljazeera.com/news/2023/12/31/israeli-bombardment-destroyed-over-70-of-gaza-homes-media-office#:~:text=The%20Israeli%20military%20campaign%20in>> accessed 30 July 2024.

process enormous volumes of data and produce thousands of possible ‘targets’ for military strikes in the midst of a conflict. He claims that the "human bottleneck for both locating the new targets and decision-making to approve the targets" will be eliminated by such technology.³² A later 2024 report by Israeli newspapers Local Call and +972 Magazine revealed this ‘special machine’ was no longer simply a myth but now a reality.³³

Though Israel’s use of defensive forms of LAWS and AI have been seen in the last few years, such as in the use of the Iron Dome as well as its extensive surveillance of Palestinians in the Occupied Territories³⁴, of greater concern is the utilisation of such systems in its more recent offensive attacks.

One of the systems is known as ‘Lavender’, an advanced AI system developed by an elite intelligence unit of the IDF. According to reports, the Lavender system identifies suspected members of Hamas and Palestinian Islamic Jihad (PIJ) as possible targets for bombings, including low-ranking operatives.³⁵ The program analyses information gathered from the extensive monitoring of the majority of Gaza’s 2.3 million residents, rating and analysing the possibility that each individual is associated with PIJ or Hamas, following which, individuals are ranked from 1 to 100 based on how likely they are to be militants. Lavender evaluates the traits of PIJ and Hamas operators and applies these evaluations to identify similar traits in the broader community. Higher ratings are given to those who have several incriminating characteristics, which thus makes them possible assassination targets.³⁶ In the initial weeks of the conflict, the system identified 37,000 Palestinians as possible targets, and between October 7 and November 24, it was employed in the assault of Gaza, resulting in at least 15,000 deaths.³⁷ Lavender’s parameters allow for the killing of one hundred victims in an attack intended to kill a single senior Hamas or Islamic Jihad figure.³⁸ The system is set up to attack the target at night and while they are at home, increasing the

³² Yuval Abraham, “‘Lavender’: The AI Machine Directing Israel’s Bombing Spree in Gaza” (+972 Magazine 3 April 2024) <<https://www.972mag.com/lavender-ai-israeli-army-gaza/>> accessed 30 July 2024.

³³ *ibid.*

³⁴ Mehul Reuben Das, ‘Modern Warfare: How Israel Is Neutralising and Pushing out Hamas Using AI’ (Firstpost 10 October 2023) <https://www.firstpost.com/tech/news-analysis/modern-warfare-how-israel-is-neutralising-and-pushing-out-hamas-using-ai-13227072.html#google_vignette> accessed 30 July 2024.

³⁵ Wion News, ‘Explained: Israeli Military’s Use of AI Tool “Lavender” to Generate Kill Lists’ (WION 4 April 2024) <<https://www.wionews.com/world/explained-israeli-militarys-use-of-ai-lavender-to-generate-kill-lists-707558>> accessed 30 July 2024.

³⁶ *ibid.*

³⁷ Manuel G Pascual, ‘Lavender, Israel’s Artificial Intelligence System That Decides Who to Bomb in Gaza’ (EL PAÍS English 17 April 2024) <<https://english.elpais.com/technology/2024-04-17/lavender-israels-artificial-intelligence-system-that-decides-who-to-bomb-in-gaza.html>> accessed 30 July 2024.

³⁸ *ibid.*

likelihood that not only will the target be there but also that their neighbours and family, who could potentially die alongside them. The AI machine's outputs were regarded "as if it were a human decision," according to six Israeli intelligence personnel participating in the development of the purported program.³⁹ It was also claimed that the human evaluation of the proposed targets was, at most, cursory. It is said that roughly two weeks into the battle, the order "to automatically adopt Lavender's kill lists" was granted.⁴⁰ It was only considered an "auxiliary tool" prior to that.

Lavender is complemented by two other programmes, both of which also are forms of LAWS; "The Gospel" and "Where's Daddy."⁴¹ "Where's Daddy?" is an artificial intelligence tool designed to monitor individuals who have been flagged as targets by the Lavender system and assist in bombing them while they are at home. Israel intended for the technology to be used to target specific operatives while they were at home with their families. According to one intelligence officer "We were not interested in killing operatives only when they were in a military building or engaged in military activity. On the contrary, the IDF bombed them in homes without hesitation as a first option. It's much easier to bomb a family's home. The system is built to look for them in these situations."⁴² Additionally, based on information regarding Hamas activities, "The Gospel" serves as a decision support system to assist military planners in choosing specific buildings as targets for strikes. It uses extensive data analysis to suggest targets, such as command centres or weapon storage sites that are deemed to be utilised for military objectives. The system places targets into one of four categories; Tactical targets, underground targets, the family homes of Hamas commanders, and 'power targets'.⁴³ 'Power targets' refer to residential and high-rise buildings which are generally home to a number of Palestinian civilians. Such targets usually have no direct military connection but are targeted in order to 'exert civil pressure on Hamas'. Within just the first 5 days of the conflict after October 7th, reports suggest that half of all targets identified by The Gospel were the so-called 'power targets', an estimated 1329 out of a total 2687.⁴⁴

³⁹ Yuval Abraham, "'Lavender': The AI Machine Directing Israel's Bombing Spree in Gaza" (+972 Magazine 3 April 2024) <<https://www.972mag.com/lavender-ai-israeli-army-gaza/>> accessed 30 July 2024.

⁴⁰ *ibid.*

⁴¹ Manuel G Pascual, 'Lavender, Israel's Artificial Intelligence System That Decides Who to Bomb in Gaza' (EL PAÍS English 17 April 2024) <<https://english.elpais.com/technology/2024-04-17/lavender-israels-artificial-intelligence-system-that-decides-who-to-bomb-in-gaza.html>> accessed 30 July 2024.

⁴² Democracy Now!, 'Lavender & Where's Daddy: How Israel Used AI to Form Kill Lists & Bomb Palestinians in Their Homes' (YouTube 5 April 2024) <<https://www.youtube.com/watch?v=4RmNJH4UN3s>> accessed 30 July 2024.

⁴³ Vox, 'How AI Tells Israel Who to Bomb' (YouTube 7 May 2024) <<https://www.youtube.com/watch?v=xGqYbXL3kZc>> accessed 26 June 2024.

⁴⁴ *ibid.*

Of particular concern is the lack of human oversight and accountability. These LAWS's evaluations did not need to be independently reviewed by officers, with saving time and allowing for the unhindered mass manufacture of lists of human targets being cited as the reasons. Internal checks revealed that Lavender's computations were only judged to be accurate 90% of the time, implying that 10% of targeted individuals had no affiliation with the military wing of Hamas,⁴⁵ yet this lack of oversight was nevertheless allowed. Sources revealed, for instance, that on occasion, the Lavender machine misidentified people whose methods of communication resembled those of known PIJ or Hamas operatives.⁴⁶ These people included civil defence and law enforcement personnel, relatives of militants, locals whose names and nicknames coincided with those of operatives, and Gazans using equipment that had previously belonged to a Hamas operative. Each of these mistakes made by the systems are those which were preventable, had a more comprehensive system of human review been implemented.

The IDF has rejected claims that the majority of human responsibility is delegated to the LAWS; however, contradictory reports indicate that the only human supervision protocol in place prior to bombing the houses of suspected "junior" militants marked by Lavender was to conduct a single check, which was done to ensure that the AI-selected target is male rather than female.⁴⁷ Due to the fact that there are no women in the ranks of Hamas and PIJ's armed branches, it was assumed that if the target was a woman, the machine had likely made a mistake.

The use of the aforementioned LAWS have resulted in a number of tragic attacks, each of which are considered to be disproportionate under IHL and illegal under the ILAWS prohibiting indiscriminate attacks⁴⁸ wherein civilians have been sacrificed as collateral damage.

5. POTENTIAL ETHICAL AND LEGAL VIOLATIONS OF IHL BY ISRAEL IN THE USE OF LAWS/AI WEAPONRY

The IDF's use of such LAWS such as "Lavender", "Where's Daddy" and "The Gospel", among others, has raised serious concerns in regards to the legal and ethical implications of using such systems in times of armed conflict. For instance, the principles of IHL mandate that distinctions

⁴⁵ Yuval Abraham, "'Lavender': The AI Machine Directing Israel's Bombing Spree in Gaza" (+972 Magazine 3 April 2024) <<https://www.972mag.com/lavender-ai-israeli-army-gaza/>> accessed 30 July 2024.

⁴⁶ *ibid.*

⁴⁷ Vox, 'How AI Tells Israel Who to Bomb' (YouTube 7 May 2024) <<https://www.youtube.com/watch?v=xGqYbXL3kZc>> accessed 26 June 2024.

⁴⁸ Additional Protocol I (note 11), articles 35(3) and 55.

must be made between combatants and civilians; however, the generated lists of potential targets by systems such as Lavender is in violation of this principle, as the evidence suggests that a number of the strikes initiated by this system has resulted in several indiscriminate attacks, resulting in the deaths of civilians. Concerns over proportionality are raised when AI programs, such as "Where's Daddy?", are used to track people to their houses in preparation for bombing, particularly since these operations may cause a large number of civilian deaths. According to reports, the IDF has allegedly destroyed homes without confirming that they are indeed genuine military targets, causing disproportionate and unnecessary injury to civilians.⁴⁹ Crucially, the use of LAWS and AI weapons has minimal human control; according to some sources, military officers reviewed AI-generated targets for approval for attacks in a matter of seconds. This creates questions about accountability since AI-generated assessments lack the human judgement needed to guarantee IHL compliance.⁵⁰ Although proponents contend that humans maintain control, their readiness to accept AI recommendations with little examination essentially replaces human decision-making, expanding the array of possible targets and causing more harm. AI systems that automate targeting have the potential to dehumanise combat by replacing human decision-making with computers that make instantaneous conclusions about life and death.⁵¹ This change prompts moral reflection on the worth of human life and the moral ramifications of waging war using such technology. Furthermore, there is frequently a lack of transparency regarding the use of AI systems in military operations, which makes it challenging for outside observers to evaluate adherence to legal and ethical norms. This opacity can impede efforts to hold military operations accountable and ensure the adherence to humanitarian principles.⁵²

It is possible to program AI systems that prioritise civilian safety ahead of military objectives, but doing so poses an array of difficulties. Artificial intelligence has the capability to examine large datasets and detect trends that might assist in minimising civilian casualties in urban conflicts.⁵³ For example, by mapping vital civilian facilities like hospitals, power plants, and water supplies,

⁴⁹ Natasha Karner, 'Israel Accused of Using AI to Target Thousands in Gaza, as Killer Algorithms Outpace International Law' (*The Conversation* 11 April 2024) <<https://theconversation.com/israel-accused-of-using-ai-to-target-thousands-in-gaza-as-killer-algorithms-outpace-international-law-227453>> accessed 30 July 2024.

⁵⁰ *ibid.*

⁵¹ Embassy of the Czech Republic in Singapore, 'Israeli Forces Display Power of AI, but It's a Double-Edged Sword' (*mzv.gov.cz* 24 April 2024) <https://mzv.gov.cz/singapore/en/culture_and_education/israeli_forces_display_power_of_ai_but.html> accessed 30 July 2024.

⁵² *ibid.*

⁵³ Larry Lewis and Andrew Ilachinski, 'Leveraging AI to Mitigate Civilian Harm' (*www.cna.org* 2022) <<https://www.cna.org/reports/2022/02/leveraging-ai-to-mitigate-civilian-harm>> accessed 30 July 2024.

AI systems can assist the military in better understanding the civilian aspect of the terrain during the planning phase. The interconnectivity of these infrastructures could potentially be mapped using these technologies, which is a significant advancement in lessening the impact on citizens and their livelihoods and effectively distributing resources when damage occurs.⁵⁴ However, opponents contend that the use of AI in the military may be indiscriminate by nature and incapable of telling the difference between legitimate military targets and civilians. Regardless, no progress can be made if international consensus is not reached in regards to the limitations and scope of LAWS under IHL.

6. THE NECESSITY FOR A COMPREHENSIVE FRAMEWORK ON THE USE AND LIMITS OF LAWS/AI WEAPONRY

In order for a comprehensive legal framework which can govern the use of LAWS and AI in armed conflict, the importance of state responsibility and individual criminal responsibility is central, portraying the key criticism of LAWS which is the delegation of human responsibility and accountability to a machine. It is necessary to assign, consider, and examine responsibility through a number of frameworks simultaneously. The legal frameworks pertaining to state and individual accountability support the structure of adherence to IHL regulations, prevent impunity for IHL violations, and maintain public confidence in the IHL regime. A key question in regards to accountability is thus whether IHL demands that a single person be held responsible or whether the responsibility lies with multiple persons, in regards to the use of LAWS.⁵⁵ This is a pertinent question as an LAWS is pre-programmed, thus its effects are assumed to be decided upon not only by engineers and technicians during the development phase, but also by many users at different levels of the military command-and-control chain, including weapon operators. IHL as it stands provides no clear answer; however, 2 interpretations have been presented during the course of the GGE debate. One interpretation is that only a single person should have the authority to choose whether or not to employ and administer an LAWS. According to this interpretation, the person in charge of approving the activation and launch of an LAWS as well as overseeing its management is in charge of exercising and putting into effect legal agency in relation to the LAWS, including

⁵⁴ Anna Rosalie Greipl, 'Artificial Intelligence for Better Protection of Civilians during Urban Warfare - Lieber Institute West Point' (*Lieber Institute West Point* 26 March 2024) <<https://lieber.westpoint.edu/artificial-intelligence-better-protection-civilians-urban-warfare/>> accessed 30 July 2024.

⁵⁵ L Bruun, N Goussac and V Boulanin, 'Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human–Machine Interaction' (*SIPRI* 1 June 2021) <<https://www.sipri.org/publications/2021/policy-reports/autonomous-weapon-systems-and-international-humanitarian-law-identifying-limits-and-required-type>> accessed 21 July 2024.

by making the value judgements required by the IHL regulations controlling the conduct of hostilities. This individual in charge has the final say in all matters, even if decisions may be partially carried out by subordinates, such weapon operators, and may even be based on directives from higher-ranking officials or automated systems, and thus, remains responsible in cases of non-compliance. Another interpretation is that different individuals, and possibly even systems of individuals, in the command-and-control chain may be in charge of exercising and implementing legal agency, including by conducting the assessments required by the principles of distinction, proportionality, and precautions.⁵⁶ Opponents contend that a sharing of accountability might lead to blame avoidance or reduction. Advocates of this model, however, contend that multi-layered decision-making structures are already common in contemporary military decision-making and operations, and that they pose no problems as long as the command-and-control chain is transparent about the interactions between individual decisions and allows for the ability to predict an LAWS's effects, manage an LAWS continuously, and track who made what decisions about using an LAWS.⁵⁷

A number of other proponents of IHL have played substantial roles in bringing focus to the need for human control and responsibility in the use of LAWS and AI weapons. For instance, Human Rights Watch (HRW) in its 2018 report titled 'Heed the call: A moral and legal imperative to ban killer robots', stated that "Unlike humans, these robots would be unable to fully appreciate the value of a human life and the significance of its loss. They would make life-and-death decisions based on algorithms, reducing their human targets to objects. Fully autonomous weapons thus violate the principles of humanity on all fronts."⁵⁸ Opponents of LAWS have further asserted that such systems are in violation of public morality, citing the moral discontent expressed by various governments, experts, and members of the public regarding the possibility of machine processes making the decision to use force, especially against human beings, even with highly advanced

⁵⁶ Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, 'REFLECTIONS by the BOLIVARIAN REPUBLIC of VENEZUELA on EMERGING TECHNOLOGIES in the AREA of LETHAL AUTONOMOUS WEAPONS SYSTEMS (LLAWS) and the MANDATE of the GROUP of GOVERNMENTAL EXPERTS (GGE)' (2020) <<https://documents.unoda.org/wp-content/uploads/2020/09/20200901-Venezuela.pdf>> accessed 31 July 2024.

⁵⁷ Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, 'Australia's System of Control and Applications for Autonomous Weapon Systems' (2019) <[https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_\(2019\)/CCWGGE.12019WP.2Rev.1.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_(2019)/CCWGGE.12019WP.2Rev.1.pdf)> accessed 31 July 2024.

⁵⁸ Bonnie Docherty, 'Heed the Call: A Moral and Legal Imperative to Ban Killer Robots' [2018] Human Rights Watch <<https://www.hrw.org/report/2018/08/21/heed-call/moral-and-legal-imperative-ban-killer-robots#:~:text=Unlike%20humans%2C%20these%20robots%20would>> accessed 31 July 2024.

technologies.⁵⁹ Ultimately, though a number of caveats exist which have not yet been comprehensively addressed, human responsibility is a necessity for IHL compliance and the plausible deniability which LAWS grants its users must be deemed to be unacceptable under international law.

The next steps to be taken in order to create a more robust and specific framework which can effectively deal with the use of LAWS and AI weapons, though crucial, are uncertain. However, what can be said for certain is the absolute need for such an instrument; the preservation of human moral agency is a fundamental need for compliance with international humanitarian law, and developing an international consensus on these requirements is imperative. Furthermore, it is critical to create operational definitions for both "fully" and "partially" LAWS, given the absence of a single, widely-accepted definition of what constitutes an LAWS and the recognition that autonomy in this respect exists on a spectrum.⁶⁰ Additionally, it is imperative that human oversight be maintained throughout the LAWS deployment process in order to uphold both legal compliance and human moral agency. The process of evaluating a system's level of human control and establishing a minimum level of human involvement involves taking into account a number of intricate considerations, including the system's complexity and transparency, operator training, and physical aspects like the system's deployment date, location, and duration.⁶¹ Nevertheless, such a process must be established in order to ensure compliance. The risks present in current AI systems, along with their increased escalatory risk, are especially concerning in the context of nuclear command and control. When employing AI, decision-making occurs quickly, which might result in heightened tension, miscommunication, and misinterpretation. Furthermore, an AI tool may have its training data compromised, its outputs misinterpreted as truth when they are only statistical correlations, or it may be hacked, all of which could have disastrous results.⁶² Therefore, the use of

⁵⁹ Open Roboethics Initiative, 'The Ethics and Governance of Lethal Autonomous Weapons Systems: An International Public Opinion Poll' (2015) <https://www.openroboethics.org/wp-content/uploads/2015/11/ORi_LLAWS2015.pdf> accessed 31 July 2024.

⁶⁰ House of Lords AI in Weapon Systems Committee, 'Aspiration vs Reality: The Use of AI in Autonomous Weapon Systems' (*ukparliament.shorthandstories.com* 1 December 2023) <<https://ukparliament.shorthandstories.com/AI-in-weapons-systems-lords-report/>> accessed 31 July 2024.

⁶¹ L Bruun, N Goussac and V Boulanin, 'Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human-Machine Interaction' (*SIPRI* 1 June 2021) <<https://www.sipri.org/publications/2021/policy-reports/autonomous-weapon-systems-and-international-humanitarian-law-identifying-limits-and-required-type>> accessed 21 July 2024.

⁶² Lord Lisvane, 'AI in Weapon Systems: Proceed with Caution' (*Wavell Room* 8 December 2023) <<https://wavellroom.com/2023/12/08/proceed-with-caution-artificial-intelligence-weapon-systems-ai/>> accessed 31 July 2024.

LAWS or AI for nuclear command, control, and communications must be completely prohibited in any and all discussions or frameworks intended to regulate the use of LAWS.⁶³

7. **CONCLUDING REMARKS**

In conclusion, the pressing need for a robust framework governing the use of autonomous weapons systems and artificial intelligence in military contexts under International Humanitarian Law has never been more critical. As the ongoing conflict in Gaza exemplifies, the integration of AI technologies into military operations poses significant challenges to the principles of distinction, proportionality, and accountability that underpin IHL. The current reliance on AI systems, such as "Lavender," "The Gospel," and "Where's Daddy?", has led to a concerning erosion of human oversight and responsibility, with automated decision-making processes potentially resulting in widespread civilian harm and violations of legal norms.

To ensure that human responsibility and control remain central to military operations involving AI, it is essential to develop comprehensive regulations that specifically address the unique characteristics and implications of LAWS. Such a framework should include clear guidelines on the ethical use of AI, mechanisms for accountability, and rigorous oversight to prevent the dehumanisation of warfare. Furthermore, it is imperative that these systems are not only designed to enhance military efficiency but also to prioritise the protection of civilians and adherence to humanitarian principles.

The situation in Gaza highlights the urgent need for accountability mechanisms to address the mass suffering caused by the use of these technologies. Establishing a legal and ethical framework that governs LAWS and AI in military contexts will not only serve to hold Israel accountable for its actions but also set a precedent for responsible military conduct globally. By prioritising human oversight and accountability in the deployment of AI systems, the international community can work towards mitigating the devastating impacts of armed conflict on civilian populations and upholding the fundamental tenets of human rights and dignity.

⁶³ House of Lords AI in Weapon Systems Committee, 'Aspiration vs Reality: The Use of AI in Autonomous Weapon Systems' (ukparliament.shorthandstories.com 1 December 2023) <<https://ukparliament.shorthandstories.com/AI-in-weapons-systems-lords-report/>> accessed 31 July 2024.

LAW AND ARTIFICIAL INTELLIGENCE

REGULATING ARTIFICIAL INTELLIGENCE FOR A BALANCED FUTURE: ADDRESSING NEGATIVE IMPACTS WHILE PRESERVING INNOVATION AND ETHICS

Waruni Batugahage | Shenya Chandrasiri | Venuki Wickramaarachchi

ABSTRACT

Technology and mankind are inseparable today. Humans are depending on technology to invent new tools and methods to make tasks easier and efficient. Latest addition to this technology is products and services based on artificial intelligence (AI). One of the biggest technology threats to mankind so far could be identified as AI, despite it being an incredible innovation. AI possesses both positive and negative outcomes. It has resulted in loss of job opportunities around the world due to human automation, AI related tools such as ChatGPT and Microsoft CoPilot affect academic integrity and intellectual property rights of humans, AI based Deepfakes affect copyrights and privacy of people etc. Use of unmanned armed drones reflect the threat of AI terrorism. Developed countries are vigilantly strengthening their legal rules while developing countries have not even thought about the need for it. The authors of this article aim to elaborate on the concept of AI, its negative impacts, the countries that have regularised AI thus far and the need for AI to be regulated without affecting its positive outcomes.

1. INTRODUCTION

“AI may be the biggest risk humanity has ever faced.” – Elon Musk

Technology is a concept that has no limits and develops faster than the blink of an eye in this new millennium. Law is a subject that should simultaneously develop with all the other developments in the world in order to protect the society. This is why we have encountered motor traffic laws, space laws, aviation laws etc. As a result, the legal system of a country cannot be silent or be ignorant with no response to this new technology called Artificial Intelligence (AI). It is the duty of the legislature of the country to identify the need of regulating AI if it is negatively affecting anyone else in the society, or if it has become a threat to another person or body, or if it is conflicting with other rights and duties recognised by law already. Hence, while Elon Musk invents things using AI, the duty of the legislators is to develop laws to regulate the use of AI. The authors are interested in evaluating the need for such protection through law.

2. WHAT IS AI?

Artificial intelligence is a mechanism that is used by machines for cognitive processes like human intelligence. Therefore, an electronic device is able to think, analyse, reason out and compare like a human brain.¹ These devices are capable of responding to the environment they are in and rationally adopt the data they have with some self-reliance and produce a result. These machines can even be creative like human minds and use the language ability and speak like a human.

According to European Union's draft AI Act, Artificial Intelligence system² means, "...software that is developed with [specific] techniques and approaches [listed in Annex 1] and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with."³

The term 'Artificial Intelligence' was produced by John McCarthy in 1950. Though society is now concerned about AI, unknown to us, we all started to live with it when Siri and Alexa started giving voice aid. However, AI did not stop from Siri and Alexa, it is now in use in many other forms and in many other industries such as, transportation, education, healthcare, finance, marketing, entertainment etc.

3. HOW DOES AI WORK?

As mentioned earlier, AI is not a new concept, it has been there for a long time and mankind has been using AI all these years. Nevertheless, AI has evolved over the past few decades and ultimately it has come to a position where it exceeds human intelligence. AI can be classified into three stages when considering how it has evolved in the past, and its future predictions.⁴ They are: the first wave, Symbolic artificial intelligence; the second wave, Data driven artificial intelligence; and finally, the speculative wave towards artificial super intelligence.⁵

¹ 'What is Artificial Intelligence and how is it used?' (*European Parliament*, 4 September 2020) <<https://www.europarl.europa.eu/topics/en/article/20200827STO85804/what-is-artificial-intelligence-and-how-is-it-used>> accessed 12 August 2024.

² This definition has been subjected to many criticisms and those are addressed at the end of this article.

³ European Commission, 'Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (Proposal)' COM (2021) 206 final, art 3(1).

⁴ Philip Boucher, 'Artificial intelligence: How does it work, why does it matter, and what can we do about it?', (*European Parliament*, June 2020)

<[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641547/EPRS_STU\(2020\)641547_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641547/EPRS_STU(2020)641547_EN.pdf)> accessed 27 August 2024.

⁵ *ibid.*

Symbolic artificial intelligence or classic artificial intelligence is a result of a human expert who has encoded the expert knowledge into a symbolic command that will ultimately allow the machine to execute a decision. Under this, classic AI human expert has the control and the machine does not possess the autonomy of making a decision by itself. This system was the start of AI in the 1950s.

Data driven artificial intelligence is much more advanced than symbolic AI. Under the data driven AI there is a degree of autonomy in the hands of the machine. Under this system a machine is not trained to arrive at a decision, or a machine is not programmed to arrive at a final outcome, but with all the data available the machine is capable of creating an algorithm and then teach itself to arrive at a decision. There is very little human engagement here. After data is fed to the machine, it is the machine who creates the algorithm with the given data and decides on the end result, devoid of human intervention. Therefore, under data driven, there is one or more hidden layers where no human touch is involved. Machines use their own deep learning on data and produces the end result. For example, Facebook uses face recognition from the data already available, AI can produce audio transcripts to an article. AI can even produce a visual with lip-sync for an audio clip. With the help of this technique, highly realistic videos are made today, and these are called deepfakes. This mechanism was used by the Softlogic Company for their insurance advertisements which was produced with all the famous deceased artists in Sri Lanka.

Towards artificial super intelligence: This type of AI is not yet in existence, and it covers a possible development of AI which can take place in the future. Experts in the field of AI predict that this wave can exceed the general intelligence of a human being. This article will not explain this area further as it is more technical than legal. However, if anyone is interested in delving into this area, they can refer to Philip Boucher's report.⁶

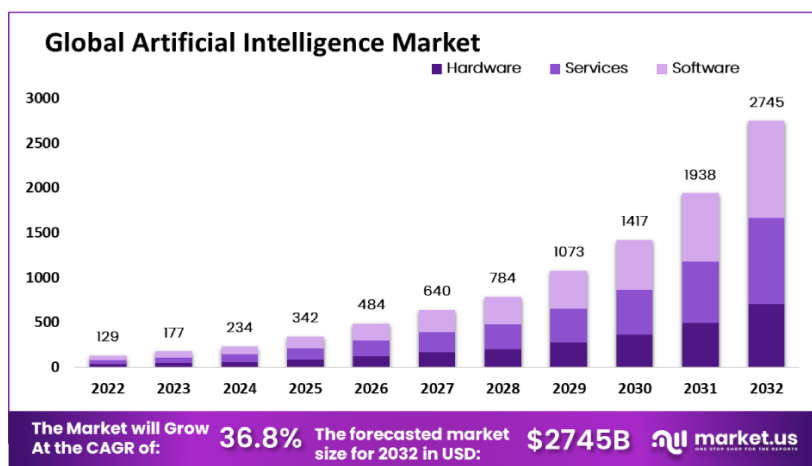
4. UPRISE OF AI AT PRESENT

Present statistics show that the usage of AI is increasing rapidly with time. According to Grandview Research, global artificial intelligence market size will grow at a Compound Annual Growth Rate of 36.6% within the next 6 years, which is comparatively a faster growth rate.⁷ As an example, it

⁶ *ibid.*

⁷ 'Artificial Intelligence Market Size, Share & Trends Analysis Report By Solution, By Technology (Deep Learning, Machine Learning, NLP, Machine Vision, Generative AI), By Function, By End-use, By Region, And Segment Forecasts, 2024 - 2030' (*Grand View Research*) <<https://www.grandviewresearch.com/industry-analysis/artificial-intelligence-ai-market>> accessed 15 August 2024.

only took 5 days for ChatGPT to reach 1 million users, whereas other famous applications like Twitter and Facebook took 2 years and 10 months respectively, to reach the same target. Also, it is worth noting that countries like India (59%), UAE (58%), Singapore (53%) and China (50%) have recorded a high usage of AI.



(Source: <https://market.us/wp-content/uploads/2023/02/Artificial-Intelligence-market-size.png>)

According to the above statistics, it is crystal clear that the world is inclined towards the AI market. Not only in developed countries, but even in Sri Lanka, facts show that AI will be used in many different fields in the future. Studies have revealed that many Sri Lankan students who are pursuing IT and Engineering Degree programmes have developed AI solutions after graduating with the foundational knowledge with regard to AI. Also, it is noteworthy that students are more interested in studying AI related topics for their final theses at Bachelor's or Master's levels. Furthermore, the Sri Lankan government has understood the necessity of accelerating and empowering AI innovations. As a result, they have formulated a five-year National AI strategy, and the government has allocated LKR 1.5 billion from the National budget of 2024. As per the Government AI Readiness Index, Sri Lanka is ranked 95th out of the 193 countries.⁸ Therefore, to provide safer and reliable AI program, it is vital to regularise AI systems.

From 2003 – 2013, with the help of the World Bank, Sri Lanka digitised many fields. Thereafter, many laws such as Electronic Transactions Act 2006, Computer Crimes Act 2007, Intellectual

⁸ Emma Hankins and others, 'Government AI Readiness Index 2023' (*Oxford Insights*, 20 December 2023) <<https://oxfordinsights.com/ai-readiness/ai-readiness-index/2023-government-ai-readiness-index-2-2/>> accessed 24 July 2024.

Property Act 2003 etc. were established to protect citizens.⁹ Similarly, it appears that Sri Lanka also needs to regularise AI to prevent crimes and protect citizens.¹⁰

5. NEGATIVE IMPACTS OF AI

Despite the positive impacts of AI, there are so many negative impacts of this marvellous invention. As mentioned before, this paper will discuss the needs to regulate AI due to these negative impacts. Apart from basic negative impacts such as threats to the labour market, making humans lazy and less emotional, it is imperative that legislators keep an eye on the negative impacts AI may have on legal rights and human civilization.

Therefore, it is essential to grasp how AI affects society in numerous ways. Geoffrey Hinton, the ‘Godfather of AI,’ left Google in 2023 to talk about the dangers of AI as per his post on Twitter on the 1st of May, 2023.¹¹ The negative impacts of AI can be identified as, loss of human job opportunities due to automation,¹² deep fakes,¹³ spoiled algorithmic decision making, algorithmic trading causing market volatility, violations on academic integrity, violations on security due to AI powered weapons/AI terrorism, social manipulation through data and threats on religious and cultural beliefs. Some of these impacts will be discussed below.

⁹ ‘Legal – elaws and policies’ (Govt.lk) <<https://www.gov.lk/sri-lanka1/legal?#:~:text=The%20basis%20of%20the%20Computer.authority%20to%20access%20the%20computer>> accessed 24 July 2024.

¹⁰ Committee on Formulating a Strategy for Artificial Intelligence, *Artificial Intelligence in Sri Lanka* (White paper, March 2024) <<https://mot.gov.lk/assets/files/AI%20White%20Paper%20March%202024-c09aa49f7990358ad1442103b804511d.pdf>> accessed 24 July 2024.

¹¹ @geoffreyhinton, ‘In the NYT today, Cade Metz implies that I left Google so that I could criticize Google. Actually, I left so that I could talk about the dangers of AI without considering how this impacts Google. Google has acted very responsibly.’ (Twitter, 1 May 2023) <<https://twitter.com/geoffreyhinton/status/1652993570721210372>> accessed 19 August 2024.

¹² Mike Thomas, ‘4 Risks and Dangers of Artificial Intelligence (AI)’ (Builtin.com, 25 July 2024) <<https://builtin.com/artificial-intelligence/risks-of-artificial-intelligence>> accessed 19 August 2024.

; Chiara Arena, ‘7 Disadvantages of Artificial Intelligence Everyone Should Know About’ (Liberties, 14 June 2022) <<https://www.liberties.eu/en/stories/disadvantages-of-artificial-intelligence/44289>> accessed 17 August 2024.

¹³ With the generative artificial intelligence visuals and audio content are created with facial expressions and emotions that looks so real. So, a video can be produced as if someone did or said something, but actually he or she has not done or said that thing at all. This is done through the concept of machine learning which is explained earlier in this research paper.

5.1 Loss of job opportunities

China's Dongguan factory city has the first ever robot-only factory in the world. Chen Zingui, Chairman of the factory, states the Shenzhen Evenwin Precision Technology used at the factory aims to reduce the present-day manpower of 1,800 by 90%.¹⁴

AI puts not only factory workers at risk, but also office workers due to automation. The Sutton Trust, United Kingdom, five years ago has warned that UK's labour market is at threat due to AI.¹⁵ According to the research conducted by The Sutton Trust, the administrative jobs that need more soft skills such as communication and confidence are at risk. So, it is not only the UK labour market that faces this threat, but also the global labour market as a whole. AI is now more advanced than a mere robot who can carry out a labour job. AI, in this machine learning era, is capable of making accurate and fast decisions, way beyond what a pre-programmed robot is capable of. Therefore, a human can easily be replaced by AI for low skilled jobs, such as white-collar jobs, logistical service and construction.¹⁶

Today in health care, AI is used to automate many jobs within the administrative sphere. Claims processing, appointment fixing, appointment rescheduling and data entry are mostly automated today.¹⁷ This has cut down huge amounts of human labour. Additionally, AI has tools that can examine the medical history and arrive at decisions and decide what the best care for the patient is, most notably, regarding diseases like cancer. This AI-based decision making will undoubtedly put even professional jobs in health care at risk. Moreover, as per the research by Gartner, it was discovered that 2 in 5 medical professions make diagnoses with the assistance of computer systems. In many developed countries such as the USA and the UK, robots are being used to conduct surgeries, and it has been found that they are far quicker than humans in stitching blood vessels

¹⁴ Jane Wakefield, 'Intelligent Machines: The jobs robots will steal first' (*BBC*, 14 September 2015) <<https://www.bbc.com/news/technology-33327659>> accessed 17 August 2024.

¹⁵ James Vincent, 'Robots and AI are going to make social inequality even worse, says new report' (*theverge.com*, 13 July 2017) <<https://www.theverge.com/2017/7/13/15963710/robots-ai-inequality-social-mobility-study>> accessed 14 August 2024.

¹⁶ Chiara Arena, '7 Disadvantages of Artificial Intelligence Everyone Should Know About' (*Liberties.eu*, 14th June 2022) <<https://www.liberties.eu/en/stories/disadvantages-of-artificial-intelligence/44289>> accessed on 2nd September 2023.

¹⁷ Steve Barth, 'AI in Healthcare' (*ForeSee Medical*) <<https://www.foreseemed.com/artificial-intelligence-in-healthcare>> accessed 17 August 2024.

connecting donor kidneys.¹⁸ So, it is not so far that a patient may demand to consult a robot for medical treatments over a human doctor, who is capable of making human errors.

The report published on 26th March 2023 by Goldman Sachs titled, “Global Economics Analyst the Potentially Large Effects of Artificial Intelligence on Economic Growth (Briggs/Kodnani)” mentioned that two thirds of current work are already exposed to AI and therefore, 300 million jobs could be automated due to generative AI (Generative AI is understanding the algorithm with the data available and producing something new such as generating new text, images or other media).¹⁹

According to Forbes, jobs in the finance and banking, media and marketing and legal services are almost automated and at threat.²⁰ According to Cambridge Centre for Alternative Finance and the World Economic Forum, majority of banks in the world have already implemented AI in risk management, and to generate revenue through automated processes and mechanisms.²¹

Once Morgan Stanley Wealth Management started using Open AI’s GPT-4 technology, Jeff McMillan, Head of Analytics, Data & Innovation for Morgan Stanley Wealth Management has stated, “You essentially have the knowledge of the most knowledgeable person in Wealth Management—instantly. We believe that is a transformative capability for our company.” Millions of information regarding wealth management owned by Morgan Stanley is now connected with Open AI chatbots, which will in turn help to provide financial advice to its clients.²² These are a few examples that illustrate how AI could be a threat to jobs in the banking and finance sector.

Another field that is severely at threat is the media and marketing area. Many new AI tools are used today to write reports, news and stories. ChatGPT and paraphrasing tools are the number one AI technologies that are used in this industry. Human journalists can be replaced easily with these AI technologies. For a recent example in Sri Lanka, Rupavahini Corporation used AI tools to replicate

¹⁸ *ibid.*

¹⁹ Jan Hatzius and others, ‘Economic research; Global Economics Analyst The Potentially Large Effects of Artificial Intelligence on Economic Growth (Briggs/Kodnani)’ (*Goldman Sachs*, 26 March 2023) <[https://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst -The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf](https://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst-The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf)> accessed 17 August 2024.

²⁰ Arianna Johnson, ‘Which Jobs Will AI Replace? These 4 Industries Will Be Heavily Impacted’ (*Forbes*, 31 March 2023) <<https://www.forbes.com/sites/ariannajohnson/2023/03/30/which-jobs-will-ai-replace-these-4-industries-will-be-heavily-impacted/?sh=61211bd45957>> accessed 2 September 2023.

²¹ Eleni Digalaki, ‘The impact of artificial intelligence in the banking sector & how AI is being used in 2022’ (*Business Insider*, 3 February 2022) <<https://www.businessinsider.com/ai-in-banking-report>> accessed 2 September 2023.

²² ‘Morgan Stanley’ (*OpenAI*) <<https://openai.com/customer-stories/morgan-stanley>> accessed 2 September 2023.

two famous news anchors to present news.²³ The software named ‘Quill’, owned by company named Narrative Science, is capable of using data and producing reports that are understandable.²⁴ German publisher Axel Springer informed the world that they are ready to fully transform into a digital company which is more cost effective due to automated jobs.²⁵

Further, the legal field, one of the most prestigious jobs in the world, is now at risk thanks to AI. With the release of ChatGPT by Open AI, legal firms and legal tech companies are eagerly interested in using this new generative AI technology to create legal documents.²⁶ ChatGPT can undertake legal research, document generation, legal information, and legal analysis in the field of law, which were done by qualified human beings until Open AI introduced this new technology.²⁷ Today, there are law firms in the world who have already implemented the technology of AI to read and review contracts with predefined tailor-made policies of the client, which is faster and more accurate than a human.²⁸ This technology of ‘Contract Review Automation’ is an invention of the law firm called Lawgeex. Basically, this AI technology has the knowledge to answer to justice questions. This can, in turn, be used by the people who cannot afford human legal services, as well as others in general. The job role of a skilled, experienced, intellectual legal profession can easily be replaced by automation in the near future.

5.2 Deepfakes

Despite the fact that Apple has obtained the patent for technology of Deepfakes in the USA,²⁹ deepfakes have largely been a threat to copyright and many human rights. Deepfake is widely used to harass women, celebrities and to sling mud on politicians. The world has recorded incidents

²³ ‘Rupavahini expands AI technology with Tamil news telecast’ (*Daily News*, 13 May 2024) <<https://www.dailynews.lk/2024/05/13/local/535976/rupavahini-expands-ai-technology-with-tamil-news-telecast/#:~:text=The%20Rupavahini%20using%20AI%20technology,AI%20technology%20to%20the%20audience>> accessed 25 July 2024.

²⁴ *ibid.*

²⁵ Adib Sisani, ‘Axel Springer presents future strategy for BILD and WELT’ (*Axel Springer*, 28 February 2023) <<https://www.axelspringer.com/en/ax-press-release/axel-springer-presents-future-strategy-for-bild-and-welt>> accessed 2 September 2023.

²⁶ Chris Morris, ‘A Major International Law Firm Is Using an A.I. Chatbot to Help Lawyers Draft Contracts: ‘It’s Saving Time at All Levels’ (*Fortune*, 25 February 2023) <<https://finance.yahoo.com/news/major-international-law-firm-using-154043402.html>> accessed 17 August 2024.

²⁷ Andrew Perlman, ‘The Implications of ChatGPT for Legal Services and Society’ (2022) Suffolk University Law School Research Paper No. 22-14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197> accessed 2 September 2023.

²⁸ ‘Lawgeex’ <<https://www.lawgeex.com/>> accessed 17 August 2024.

²⁹ Clive Thorne, ‘Deepfakes and Intellectual property rights’ (*The Trademark Lawyer*, 10 November 2022) <<https://trademarklawyermagazine.com/deepfakes-and-intellectual-property-rights/>> accessed 2 September 2023.

where faces of actresses were used in pornographic videos made with AI.³⁰ In India an incident was reported where two videos of bilingual appeal were made by an Indian politician for votes for the then upcoming election in 2020. Both those videos were fake.³¹ In 2020 a group of activists created a fake speech of the Belgian Prime minister talking about Covid-19.³²

In 2023, a video of a deceased person delivering a speech was created with AI and she was the daughter of the LTTE chief. Very recently, a video of two Bollywood stars criticising the present government of India was shared, which was a deepfake created without their consent.³³ As many people were excited about the 2024 Paris Olympics, scammers used this opportunity to persuade investors to invest in Initial Coin Offering (ICOs), promising them higher returns on “Olympic tokens.” The campaigns for these were done using AI generated images and videos of fake investors.³⁴

Also, Microsoft Threat Analysis centre had warned the International Olympic Committee (IOC) regarding malign disinformation campaigns using AI to deprecate the reputation of the Olympics,³⁵ and a fake, AI generated audio impersonating the famous actor Tom Cruise was used to belittle the IOC leadership.³⁶ This reflects the danger of deepfakes, which can be used to harass, intimidate and degrade people, commit fraud and spread misinformation.³⁷ Development of AI has made

³⁰ Oscar Schwartz, ‘You thought fake news was bad? Deep fakes are where truth goes to die’ (*The Guardian*, 12 November 2018) <<https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth>> accessed 17 August 2024.

³¹ Regina Mihindukulasuriya, ‘Why the Manoj Tiwari deepfakes should have India deeply worried’ (*The Print*, 29 February 2020) <<https://theprint.in/tech/why-the-manoj-tiwari-deepfakes-should-have-india-deeplyworried/372389/>> accessed 17 August 2024.

³² Chiara Arena (n 17).

³³ ‘Deepfake video of Ranveer Singh criticising government goes viral’ (*Times of India*, 24 August 2024) <<https://timesofindia.indiatimes.com/technology/social/deepfake-video-of-ranveer-singh-criticising-government-goes-viral-watch-the-original-clip/articleshow/109406802.cms>> accessed 17 August 2024.

³⁴ ‘Scammers Spotted Promoting Fake Olympics Cryptocurrency With AI Generated Imagery’ (*The Cyber Express*, 27 June 2024) <<https://thecyberexpress.com/scammers-promoting-fake-olympics-coin-icos/>> accessed 24 July 2024.

³⁵ Clint Watts, ‘How Russia is trying to disrupt the 2024 Paris Olympic Games’ (*Microsoft*, 2 June 2024) <<https://blogs.microsoft.com/on-the-issues/2024/06/02/russia-cyber-bots-disinformation-2024-paris-olympics/>> accessed 24 July 2024.

³⁶ Seb Starcevic, ‘AI ‘Tom Cruise’ joins fake news barrage targeting Olympics’ (*Politico*, 10 November 2023) <[³⁷ Kaeli Britt, ‘How are deepfakes dangerous?’ \(*Nevada Today*, 31 March 2023\) <\[491\]\(https://www.unr.edu/nevada-today/news/2023/atp-deepfakes#:~:text=They%20can%20be%20designed%20to,where%20women%20are%20disproportionately%20harmmed.> accessed 3 September 2023.</p>
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cyberbullying much simpler since photos and videos can be altered using AI. It was reported that in Spain, teenage girls were cyberbullied using photos that were altered using AI.³⁸

Financial companies are using voice identification as the password to unlock accounts, while some other companies are using face detection. All these can be circumvented with this technology, as per Haywood Talcove, Chief Executive of LexisNexis Risk Solutions' Government Group.³⁹ There are incidents reported by the FBI, where deepfake was used by scammers to impersonate job candidates at interviews for remote positions.⁴⁰

Therefore, the life of a normal civilian and the truth of the world are at danger in the future if deepfakes are easily accessible and affordable. If this technology is accessible to a person with malicious intent, then they can manipulate anything and deceive the society for their benefit by spreading false information and conducting fraudulent acts. Deepfake has taken cyberattack to the next level.⁴¹

5.3 Spoiled algorithmic decision making

Algorithmic decision making (ADM) helps to make decisions without human bias. Machines that learn through patterns make these decisions. This decision-making mechanism is used to detect diseases, predict crime, determine whether a particular candidate should be hired for a job or not, and by public authorities to decide whether a person is in need of welfare support or not etc.⁴²

The accuracy, reliability and ethical nature of these decisions, however, are questionable. Though ADM is a method to avoid human bias, there are so many flaws identified in this system. Since the decisions are made based on the data, if data is spoiled and biased, the decision will also be the same. Therefore, in some incidents, the social inequalities that currently exist in the society can be reflected even through AI. For instance, a crime prediction tool is more likely to decide a black

³⁸ 'Spanish prosecutor to probe AI-generated images of naked minors' (*Reuters*, 26 September 2023) <<https://www.reuters.com/world/europe/spanish-prosecutor-probe-ai-generated-images-naked-minors-2023-09-25/>> accessed 17 August 2024.

³⁹ Jon Healey, 'Real-time deepfakes are a dangerous new threat. How to protect yourself' (*Los Angeles Times*, 11 May 2023) <<https://www.latimes.com/business/technology/story/2023-05-11/realtime-ai-deepfakes-how-to-protect-yourself>> accessed 3 September 2023.

⁴⁰ Michael Kan, 'FBI: Scammers are interviewing for remote jobs using deepfake tech' (*Mashable*, 1 July 2022) <<https://mashable.com/article/deepfake-job-interviews-fbi>> accessed 3 September 2023.

⁴¹ David Wollmann, 'The real danger of deepfakes' (*NTT Data*, 13 November 2019) <<https://services.global.ntt/es-es/insights/blog/the-real-danger-of-deepfakes>> accessed 17 August 2024.

⁴² Anna Ackermann, 'Are Decision-Making Algorithms Always Right, Fair and Reliable or Not?' (*Liberties*, 25 March 2022) <<https://www.liberties.eu/en/stories/decision-making-algorithm/44109>> accessed 3 September 2023.

person to be a criminal than a white⁴³ person.⁴⁴ The AI recruiting tool used by Amazon has reflected the bias towards men due to the fact that the data used in resumes submitted to the company span over a 10-year period.⁴⁵ The facial recognition tool used in Google photos has once labelled two black men as gorillas.⁴⁶

How fair is this ADM in a democratic society? In a just and fair society, a decision is based on reasoning, and the person is free to challenge any unfair decision. So, a reasoning should always be available, for example, if a bank has rejected the loan application of a person, or if the police have detected a criminal, or if the public prosecution has prosecuted a person for a crime.

5.4 AI terrorism

There are many AI driven weapons developed today. These autonomous weapons are leading to another world war. The United Nations addressed this point recently and decided to ban ‘killer robots’ worldwide. Armed drones are now used in war. There are drone-on-drone attacks in war today.⁴⁷ In the Ukraine-Russia war, Yemen, Syria and Iraq saw a significant increase in the use of military drones. An unmanned combat aerial vehicle named ‘Taranis drone’ will be ready by 2030 in UK, and it is capable of replacing human-piloted Tornado GR4 fighter planes.⁴⁸ South Korea uses a Samsung SGR-A1 sentry gun that is supposedly capable of firing autonomously to police its borders.⁴⁹ Armed drones are not yet regularised under International Law, and the risks on humanity posed from these devices must be regularised before it is too late.

⁴³ ‘How has the law been pushed aside in the age of AI?’ (*University of Birmingham*) <<https://www.birmingham.ac.uk/research/quest/emerging-frontiers/ai-and-the-law.aspx>> accessed 3 September 2023.

⁴⁴ Julia Angwin and others, ‘Machine Bias’ (*ProPublica*, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> accessed 3 September 2023.

⁴⁵ Jeffrey Dastin, ‘Amazon scraps secret AI recruiting tool that showed bias against women’ (*Reuters*, 11 October 2018) <<https://www.reuters.com/article/us-amazon-com-jobs-automationinsight/%20amazon-scraps-secret-ai-recruiting-tool-that-showed-biasagainst-%20women-idUSKCN1MK08G>> accessed 3 September 2023.

⁴⁶ ‘Google’s solution to accidental algorithmic racism: ban gorillas’ (*The Guardian*) <<https://www.theguardian.com/technology/2018/jan/12/google-racism-ban-gorilla-black-people>> accessed 3 September 2023.

⁴⁷ Jason Sherman, ‘Drone-on-Drone Combat in Ukraine Marks a New Era of Aerial Warfare’ (*Scientific American*, 3 April 2023) <<https://www.scientificamerican.com/article/drone-on-drone-combat-in-ukraine-marks-a-new-era-of-aerial-warfare/>> accessed 4 September 2023.

⁴⁸ Benard Marr, ‘Weaponizing Artificial Intelligence: The Scary Prospect Of AI-Enabled Terrorism’ (*Bernard Marr & Co.*) <<https://bernardmarr.com/weaponizing-artificial-intelligence-the-scary-prospect-of-ai-enabled-terrorism/>> accessed 4 September 2023.

⁴⁹ *ibid.*

Small civilian drones are affordable and readily available, and these drones can be easily converted to an armed drone with just a few modifications. Though it may not be so sophisticated and highly technical, it can still be used to harm another. Therefore, AI can be a threat to international peace and security. It is rather useless to expect ethical decisions from a device with AI.⁵⁰ A device which is fully automated will have no heart to decide certain things that must be decided on humanitarian grounds. This will lead to a moral dilemma. What if an evil regime uses this heartless technology on their own people?

With the digitalisation of the world, armed battles have converted to online wars where extremists use social media and other platforms to spread radical ideas for recruitment and funding. AI is used by terrorists to create deepfake videos, personalised messages and audios with the intention of influencing others to terrorism by exploiting cognitive biases, beliefs and emotions of individuals using algorithms. Terrorists have started to identify individuals who have extremist ideologies or vulnerable classes of people who can easily be drawn into terrorism using AI and recruit them to terrorist groups.⁵¹ It was discovered that AI is used even for interactive recruitments by terrorists. In 2021, a boy tried to assassinate Queen Elizabeth II and it was later revealed that he was motivated by his girlfriend who was an AI generative Chatbot. The Chatbot was developed by himself, and he wanted to take revenge from the Queen. This shows that Chatbots can be developed to spread or spur individuals to stimulate or give rise to terrorist or violent ideals and thoughts.⁵² AI is even used to conduct online seminars and to circulate similar messages with their propaganda to increase their reach and engagement. Studies have found that when the same or identical message is viewed several times, the mind can be manipulated. It is widely known and accepted that AI generated speeches or content are more impressive and informative than a speech made by a human. Similarly, terrorists use AI to make visually appealing, credible content and speeches to lure people. With the help of AI, extremists have taken great care in making content more authentic as people are attracted to authenticity.⁵³ This also enables terrorist ideologies and extremist views to spread

⁵⁰ Sandra Krähenmann and George Dvaladze, 'Humanitarian Concerns raised by the Use of Armed Drones' (*Geneva Call*, 16 June 2020) <<https://www.genevacall.org/news/humanitarian-concerns-raised-by-the-use-of-armed-drones/>> accessed 4 September 2023.

⁵¹ 'AI and Violent Extremism' (*digwatch*) <<https://dig.watch/topics/violent-extremism#:~:text=AI%20for%20recruitment%20and%20radicalisation&text=Extremists%20can%20use%20AI%20to,andsigns%20of%20possible%20radicalisation>> accessed 23 July 2024.

⁵² Tom Singleton, Tom Gerken and Liv McMahon, 'How a chatbot encouraged a man who wanted to kill the Queen' (*BBC*, 6 October 2023) <<https://www.bbc.com/news/technology-67012224>> accessed 23 July 2024.

⁵³ Mariam Shah, 'The Digital Weaponry of Radicalisation: AI and the Recruitment Nexus' (*Global Network on Extremism and Terror*, 4 July 2024) <<https://gnet-research.org/2024/07/04/the-digital-weaponry-of-radicalisation-ai-and-the-recruitment-nexus/>> accessed 24 July 2024.

like wildfire in this digital era, unlike in the past where leaders had to organise physical meetings. There is also a possibility for terrorists to make more accurate and efficient plans with the help of AI. The threats stemming from AI seem to be adverse, since an individual can turn into a terrorist unknowingly and without physically meeting terrorists or extremists.

5.5 Threats on religious and cultural beliefs

Recently, a distorted version of *Karaneeya Meththa Sutraya*, a valuable discourse of Lord Gautama Buddha was generated using AI and circulated on social media. This act can be considered disrespectful to the culture and the religion of relevant countries, since it is one of the most respected and recited discourses to get blessings.⁵⁴ This issue was raised by the Ministry of Budhdhasasana, Religious and Cultural Affairs of Sri Lanka on 20th June 2024.

5.6 The Violation of Academic Integrity by AI

AI has revolutionised the academic sector by introducing new methodologies to enhance the student learning experience. However, improper usage of AI has led to occurrence of significant risks to academic integrity. The Centre for Democracy and Technology (CDT) survey records that 52% of the teachers had complained that AI generative tools has made them doubtful as to if the students' work were done by themselves. Also, this issue of distrust has led to other problems which affect the healthy relationship between teachers and students.⁵⁵ Although ChatGPT has saved time for students and researchers, factors such as peer influence and concerns over maintaining academic integrity were found to have a negative impact on the adoption and usage of ChatGPT.⁵⁶

6. POSITIVE IMPACTS OF AI

An innovation always has positives, regardless of the negatives. AI too has many positives, though there are concerns of ethics. AI has made day-to-day life easier for human beings and new opportunities have been formed too. Humans, unlike machines, are not able to function around the clock and throughout the year. They require breaks and rest time. For example, online chatbots are

⁵⁴ 'AI powered Karaneeya Metta Sutta distortion to be probed' (*Daily Mirror*, 2 June 2024) <<https://www.dailymirror.lk/front-page/AI-powered-Karaneeya-Metta-Sutta-distortion-to-be-probed/238-285448>> accessed 25 July 2024.

⁵⁵ <<https://news.syr.edu/blog/2024/04/11/navigating-the-intersection-of-ai-and-academic-integrity-education-expert-weighs-in/>> accessed on 25th July 2024.

⁵⁶ Christopher Munoz, 'Navigating the Intersection of AI and Academic Integrity: Education Expert Weighs In' (*Syracuse University*, 11 April 2024) <<https://www.sciencedirect.com/science/article/pii/S0160791X23001756>> accessed 17 August 2024.

able to function as customer support 24 hours a day. Therefore, AI is able to provide alternate assistance to bridge the gap between the hours humans are able to function. By 2030, it is predicted that there will be an increase in self-driving cars. One in every 10 cars will be self-driven with AI. More than 60% of people use AI to increase the productivity of their business. This has become a major solution for the labour shortage in certain fields.

AI is used to detect security threats due to the abilities of smooth monitoring and analysing data. AI tools are capable of detecting the slightest differences or identifying unusual behaviour, as well as the real time threats, beyond the capabilities of even a well-trained human being.

Moreover, in the health sector, AI is used frequently for diagnosing of diseases. Most notably, it is being used to diagnose cancers today.⁵⁷ It is predicted that in the future, patients will be able to receive medical treatments without leaving the house as a result of virtual presence technology. Doctors will be able to do check-ups remotely, using robots. This will definitely have a positive impact on certain classes of patients, especially ones who are immobile due to various reasons.⁵⁸ Not only healthcare, even the agricultural sector will see benefits, as AI could be used to predict the suitable planting seasons and the resource utilisations more accurately by analysing the soil composition, plant-health and weather patterns using AI algorithms.⁵⁹ Scientists have also started using AI to predict natural hazards which cause natural disasters. Seeing as a staggering total of 1.23 million deaths were caused due to Natural disasters from 2000 to 2019, with 4.03 billion people being affected in general,⁶⁰ if natural disasters can be predicted in advance, these tragedies can be mitigated by taking precautions beforehand.⁶¹

7. **THE NEED TO REGULATE AI**

It is clear from the discussions so far that AI is very much a double-edged sword. Based on how and who it is used by, there are both positive and negative impacts. As discussed above, while AI

⁵⁷ Dhaval Dave, 'AI-powered Healthcare: Breaking Barriers and Transforming Lives' (*Radix*, 2 October 2023) <<https://radixweb.com/blog/how-ai-is-transforming-healthcare>> accessed 24 July 2024.

⁵⁸ Soumyajit Chakraborty, 'AI and Society: A Case Study on Positive Social Change' (*TechUK*, 26 February 2024) <<https://www.techuk.org/resource/ai-and-society-a-case-study-on-positive-social-change.html>> accessed 24 July 2024.

⁵⁹ Tanha Talaviya and others, 'Implementation of artificial intelligence in agriculture for optimisation of irrigation and application of pesticides and herbicides' (2020) 4 *Artificial Intelligence in Agriculture* 58.

⁶⁰ 'Human Cost of Disasters' (*UN Office for Disaster Risk Reduction*) <<https://www.undrr.org/media/48008/download?startDownload=20240725>> accessed 24 July 2024.

⁶¹ Saeed Awadh Bin-Nashwan, Mouad Sadallah and Mohamed Bouteraa, 'Use of ChatGPT in academia: Academic integrity hangs in the balance' (2023) 75 *Technology in Society* <<https://doi.org/10.1016/j.techsoc.2023.102370>> accessed 17 August 2024.

can be extremely useful in some scenarios, it can even be used as a weapon with which to destroy mankind. The disadvantages explained above clarify the need for AI to be regulated. AI affects human life both socially and legally; AI can discriminate against a human with algorithm-based decision making, violates intellectual property rights, especially copyright laws, with chatbots and deepfakes. Further, it can affect the privacy of people with automatic face recognition, deepfakes, and automated drones. Moreover, AI can be exploited by terrorists to spread extreme ideas, recruitments, and also to increase social inequality. Additionally, the threat it causes to the labour market is also an increasingly problematic matter. Therefore, it is time to regulate AI,⁶² at national level and globally, to prevent or minimise the negative consequences. Though there are many risks to using AI, the benefits of adopting AI are simply too significant to be ignored. If AI is used appropriately, it can strengthen and empower humans and improve their quality of life. AI has the potential to bring major developments to the health, agriculture, education sectors, as well as the business world. Many IT jobs are, and will continue to be, introduced at the cost of traditional jobs. However, it is imperative that the world as a whole take immediate steps to regularise AI before it becomes humankind's downfall.

8. JURISDICTIONS THAT HAVE REGULATED AI

USA and UK are both continuing to have discussions on implementing regulations within their territory to control AI. The Organisation for Economic Co-operation and Development (OECD), European Union (EU), Council of Europe and United Nations Educational, Scientific and Cultural Organization (UNESCO) are some of the international organisations that are currently discussing the regulation of AI.

While many developed countries and international organisations are still debating on how AI should be regulated, China marks the first country to implement the Generative Artificial Intelligence Law on the 15th of August 2023.

China aims to develop AI only according to their 'core socialist value and with legitimate data sources.' They have not restricted the development of AI, as it is essential for their development as a nation. Therefore, there are limited restrictions on using AI for research purposes. In 2024, China

⁶² Adrien Book, 'Should AI be Regulated? The Arguments For and Against' (*We Are Developers*, 14 July 2023) <<https://www.wearedevelopers.com/magazine/eu-ai-regulation-artificial-intelligence-regulations#:~:text=Safeguarding%20Human%20Rights%20and%20Safety,spread%20misinformation%20or%20create%20deepfakes.>> accessed 4 September 2023.

drafted a new Artificial Intelligence Law which is known as Draft Scholars' suggestions. In this drafted law, more weight is given to the upliftment of industries using AI rather than protection of users and AI systems. This indicates that China is using AI to improve their economy.⁶³

Though Australia has not proposed any strict regulations or laws to govern AI, the National Artificial Intelligence Ethics Framework is functioning to ensure the AI systems developed or used in Australia are ethical.⁶⁴

In April 2021, the European Commission put forward the draft EU Regulatory Act. The European Parliament stressed that AI systems must be overseen by people, rather than being fully automated. This draft regulation has defined 'AI system' broadly.⁶⁵ This definition covers many systems that are used today to develop AI, such as statistical approaches, machine learning, and logic and knowledge-based systems. This broad definition has been developed to cover AI alone or as a component embedded in a product.

To combat fundamental Human Rights violations and the security threat posed by AI, the EU Parliament developed a risk-based rules system. For example, a fourfold classification took place; unacceptable risk, high risk, generative AI and low risk.⁶⁶ AI which poses an unacceptable risk will be banned. This includes products that can manipulate cognitive behaviour, decision making based on behaviour, social economic status or characteristics. Products which possess a high risk are banned from the EU market, as well as to use within the EU. Therefore, biometric surveillance, emotion recognition, predictive policing will be fully banned in the EU. AI with high risk will be checked before being put into the market. Ministers of the European Parliament decided that AI that affects human health, safety, fundamental rights and environment are at high risk. As a result, real time Face Recognition technologies at publicly accessible places are categorised under high risk, with some exceptions under public security reasons and border control reasons.

⁶³ Johanna Costigan, 'China's New Draft AI Law Prioritizes Industry Development' (*Forbes*, 22 March 2024) <<https://www.forbes.com/sites/johannacostigan/2024/03/22/chinas-new-draft-ai-law-prioritizes-industry-development/>> accessed 25 July 2024.

⁶⁴ 'National framework for the assurance of artificial intelligence in government' (*Australian Government*, 11 June 2024) <<https://www.finance.gov.au/sites/default/files/2024-06/National-framework-for-the-assurance-of-AI-in-government.pdf>> accessed 25 July 2024.

⁶⁵ European Commission (n 3).

⁶⁶ 'EU AI Act: first regulation on artificial intelligence' (*European Parliament*, 8 June 2023) <<https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>> accessed 4 September 2023.

Generative AI such as Chatbots and deepfakes are categorised under limited risk and they must be transparent. Therefore, it must indicate that the relevant content was AI generated.

These proposals from the draft AI Act have been criticised by the EU parliament, council,⁶⁷ stakeholders and academics. Academics criticised the definition produced by the commission, stating that it is too vague and therefore, a legal uncertainty could be created.⁶⁸ Risk based approach also has been criticised by many others, and the European Parliament has agreed and disagreed on certain measures, while council holds a different opinion on these draft terms.

On 13th March 2024, the world's first AI Act was passed by the European Parliament. The Act will be effective from the 2nd of August 2026. As this is a regulation, this Act will be binding on all 27 EU member states.⁶⁹ The EU tries to encourage innovations and to improve the internal market functions. The Act intends to safeguard fundamental rights, democracy and health of the EU citizens. The EU expects to make AI a human centric technology with the assistance of the law, so that it can be used to serve people and increase the quality of life.⁷⁰

Not only the EU, but even the United Nations has passed a non-binding resolution with the expectation of protecting human rights, personal data and to reduce the negative impacts and risks of AI.⁷¹ The purpose of this resolution is to identify the safe, secure, and trustworthy AI systems and to use them to achieve sustainable development goals. The UN resolution expressly requires AI systems to be human-centric and to be sustainable development oriented. UN points out that AI systems need to protect human rights and privacy, while being inclusive and ethical.⁷²

⁶⁷ Council of the European Union, 'Artificial Intelligence Act: Council calls for promoting safe AI that respects fundamental rights' (6 December 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/12/06/artificial-intelligence-act-council-calls-for-promoting-safe-ai-that-respects-fundamental-rights/>> accessed 17 August 2024.

⁶⁸ Ruben Cano, 'A Proposal for (AI) Change? A succinct overview of the Proposal for Regulation laying down harmonised rules on Artificial Intelligence' (*IPLens*, 11 May 2021) <<https://iplens.org/2021/05/11/a-proposal-for-ai-change-a-succinct-overview-of-the-proposal-for-regulation-laying-down-harmonised-rules-on-artificial-intelligence/>> accessed 17 August 2024.

⁶⁹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence [2024] OJ L, 2024/1689.

⁷⁰ *ibid*.

⁷¹ Alexandra Alper, 'UN adopts first global artificial intelligence resolution' (*Reuters*, 22 March 2024) <<https://www.reuters.com/technology/cybersecurity/un-adopts-first-global-artificial-intelligence-resolution-2024-03-21/>> accessed 25 July 2024.

⁷² UNGA, 'Draft Resolution on Seizing the opportunities of safe, secure and trustworthy artificial intelligence systems for sustainable development' (11 March 2024) UN Doc. A/78/L.49 <<https://documents.un.org/doc/undoc/ltd/n24/065/92/pdf/n2406592.pdf>> accessed 11 September 2024.

9. CONCLUSION

Due to the numerous disadvantages like loss of job opportunities, violation of human rights, impact on intellectual property rights and threat to privacy and security, AI must be regularised. This should be done carefully without affecting future innovations which are safe for mankind. Nevertheless, AI should not be given any opportunity to dominate human intelligence. Hence, it is time for academics and legislators to get together and identify the risks of AI on mankind, as Elon Musk pointed out, and find a balance with its many advantages, to regulate it properly, before it is too late. AI needs to be regulated, not feared.

ARTIFICIAL INTELLIGENCE: THE DEVELOPMENT OF LAWS IN VARIOUS JURISDICTIONS AND ITS INFLUENCE ON SRI LANKA'S LEGAL REGIME

Kishali Jayatilake

ABSTRACT

This article deals with the history of Artificial intelligence (AI), and the myriad AI tools that have been developed over the years. Given the rapid advancement in AI technology, it is crucial to ensure that robust regulations are in place for the safe use of AI applications that will be created in the future. The Article seeks to compare the development of laws, regulations, frameworks, and guidelines in different parts of the world and their influence on the regulatory framework contemplated by Sri Lankan authorities to combat the irresponsible use of AI which includes safeguarding the privacy of its citizens.

1. INTRODUCTION

AI is a new trend that has gained a great amount of popularity across the globe. AI advancement is moving at an unprecedented pace and tools are being developed which consist of different functions in various types of industries. Moreover, if we consider the relationship between law and AI, the laws surrounding this interesting field is quite scarce and inadequate. However, given that it is the newest trend all over the world, many countries especially the European Union (EU) have taken the initiative in developing and passing new laws to offer a form of guidance to follow when using AI. Sri Lanka can take advantage of the laws and guidelines developed in these countries to form a comprehensive governance mechanism to help our businesses, industries, government entities, and society function within a safe and regulated AI environment. Similar to how these countries have developed Data Protection laws to protect personal data, the AI sphere can also be regulated in a similar fashion. The Personal Data Protection Act, No. 9 of 2022 which was passed in Sri Lanka recently, was created in line with the European Union's General Data Protection Regulation (GDPR), which is considered as the highest standard of data protection laws around the world. This regulation has helped Sri Lanka mimic EU regulations into its own laws and improve the protection of the personal information of local consumers. Thus, the question is whether the same could be developed for AI.

2. WHAT IS ARTIFICIAL INTELLIGENCE?

In a global sense, “Artificial intelligence is a technical and scientific field devoted to the engineered system that generates outputs such as content, forecasts, recommendations or decisions for a given set of human-defined objectives”¹ This would also include the ability to perform tasks which would require the application of human intelligence or greater, especially in instances including; translation of languages, retina scans, voice recognition, assisting in determining facts in order to make accurate decisions, and so on. The Artificial Intelligence Act (AI Act) of the European Union which was signed on the 13th of June 2024; came into effect on 1st August 2024, making it the first Act of its kind to be passed anywhere in the world.

“AI system’ means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments”.²

The concept of AI was initially thought of during the 19th century based on the invention of the “**difference engine**” or in other words the “**World’s First successful automatic calculator**” by Charles Babbage. Moreover, it can be said that the idea of AI became a possibility during the 1950s, when British code-breaker Alan Turing, introduced the ‘Turing test’. This test was introduced in order to determine whether the technology was capable of thinking on its own, by which its behaviour would be identical to that of humans and be more accurate and less fallible than a human. Due to such events, Alan Turing was acknowledged as the ‘**father of AI**’ due to his contributions to the Allies’ intelligence arsenal as well as other feats during World War II.

From this moment onwards AI technology has continued to develop itself through the efforts of influential figures such as John McCarthy, Marvin Minsky, Yoshua Bengio, Yann LeCun, , based on the machine’s or computer’s capability to store information. However, as AI technology along with its ideas became more advanced, computer technology at the time was not capable of keeping up as its potential was limited. This would mean that AI technology was unable to move even

¹ <https://www.iso.org/artificial-intelligence/what-is-ai> accessed 28 September 2024.

² Regulation (EU) 2024/... laying down harmonised rules on artificial intelligence PE-CONS 24/24 AD/DOS/di (2024) art 3(1) <https://data.consilium.europa.eu/doc/document/PE-24-2024-INIT/en/pdf> accessed 19 August 2024.

further because the computer technology at the time was incapable of storing more information or it would not be able to process such information in an expeditious manner.

Yet, during 1980 this was no longer an issue since certain changes were brought to computers and including; “an expansion of the algorithm toolkit and increase in funding”. Consequently, this allowed AI technology to become more advanced.

“...here are some key events and milestones in the history of artificial intelligence:

- 1950: Alan Turing publishes the paper “Computing Machinery and Intelligence”, in which he proposes the Turing Test as a way of assessing whether or not a computer counts as intelligent.
- 1956: A small group of scientists gather for the Dartmouth Summer Research Project on Artificial Intelligence, which is regarded as the birth of this field of research.
- 1966-1974: This is conventionally known as the “First AI Winter”, a period marked by reduced funding and progress in AI research due to failure to live up to early hype and expectations.
- 1997: Deep Blue, an IBM chess computer, defeats world champion Garry Kasparov in a highly publicized chess match, demonstrating the fabulous potential of AI systems. In the same year, speech recognition software, developed by Dragon Systems, was implemented on Windows.
- 2011: In a televised Jeopardy! contest, IBM’s Watson Deep QA computer defeats two of the quiz shows’ all-time champions, showcasing the ability of AI systems to understand natural language.
- 2012: The “deep learning” approach, inspired by the human brain, revolutionizes many AI applications, ushering in the current AI boom.
- 2016: Developed by a Google subsidiary, the computer program AlphaGo captures the world’s attention when it defeats legendary Go player Lee Sedol. The ancient board game “Go” is one of the most complex ever created.
- 2017 to date: Rapid advancements in computer vision, natural language processing, robotics, and autonomous systems are driven by progress in deep learning and increased computational power.

- 2023: The rise of large language models, such as GPT-3 and its successors, demonstrates the potential of AI systems to generate human-like text, answer questions, and assist with a wide range of tasks.
- 2024: New breakthroughs in multimodal AI allow systems to process and integrate various types of data (text, images, audio, and video) for more comprehensive and intelligent solutions. AI-powered digital assistants are now capable of engaging in natural, contextual conversations as well as assisting with a wide variety of tasks”³

As mentioned in the above events during 2023 & 2024, it can be observed that due to the several upgrades to which technology was subjected over the years, AI has now become a main part of human lives, especially in their day-to-day activities and interactions with each other. This would also include individuals using AI to increase productivity levels within the work environment. For example, developers such as ‘OpenAI’ have introduced a model which functions on the principles of AI which we all know as ‘ChatGPT’ which has provided its assistance in many aspects including areas such as coding and data analysis/.

Furthermore, ChatGPT has been described as a model that performs its tasks in the form of a conversation. Moreover, as per OpenAI, it has been stated that “the dialogue format makes it possible for ChatGPT to answer follow-up questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests. ChatGPT is a sibling model to InstructGPT, which is trained to follow an instruction in a prompt and provide a detailed response. We trained this model using Reinforcement Learning from Human Feedback (RLHF), using the same methods as InstructGPT, but with slight differences in the data collection setup. We trained an initial model using supervised fine-tuning: human AI trainers provided conversations in which they played both sides—the user and an AI assistant. We gave the trainers access to model-written suggestions to help them compose their responses. We mixed this new dialogue dataset with the InstructGPT dataset, which we transformed into a dialogue format”.⁴

Consequently, it can be observed that the creation of ChatGPT in a dialogue format has in fact made it a lot easier for users today, especially in their research which may involve the search for an answer that may assist in their tasks. For example, ChatGPT would provide its assistance in

³ ‘What is artificial intelligence (AI)?’ (ISO) <https://www.iso.org/artificial-intelligence/what-is-ai#toc9> accessed 19 July 2024.

⁴ OpenAI, ‘Introducing ChatGPT’ (30 November 2022) <<https://openai.com/index/chatgpt/>> accessed 21 July 2024.

fixing a code that is not working according to an individual's expectations or would provide assistance to students such as law students on how to write their essays in a more attractive manner and write emails more effectively, which would not be made possible with a regular search engine such as Google or Safari. Thus, it can be concluded that OpenAI has greatly promoted AI through ChatGPT to the public freely at large.

Yet, it can be said that OpenAI was not the only developer in the technological industry to base their models on AI. For example, we can make reference to 'Siri' the virtual assistant, which is considered as an application of AI. "In 2007 SRI researchers Kittlaus, Tom Gruber, and Adam Cheyer created their own start-up called 'Siri' to commercialize the tech that they had created. 'Siri' was first released as an app on Apple's App Store in February 2010 but was soon acquired by Apple, reportedly for more than \$200 million. In October 2011 Apple debuted the beta version of 'Siri' with the iPhone 4S".⁵ Moreover, it can be observed that 'Siri' similar to ChatGPT would be able to perform similar tasks, but it would not be as advanced as ChatGPT, when it comes to AI applications. This is because, unlike ChatGPT, 'Siri' lacks LLM (Large Language Model) capabilities, thus, it would not be able to answer any complex questions such as a solution to fix an error in coding and it would be able to perform simple tasks such as calculation, simple research, opening apps and so on.

Further, Apple intends to roll out new features (Apple intelligence) through the iOS software update 18.1, for which the public beta⁶ version has been released in September this year, as a result, 'Siri' will no longer be the only AI tool in the Apple universe, once Apple Intelligence is introduced.⁷ Moreover, Apple has gone so far as to integrate ChatGPT into 'Siri' and 'Writing tools' and by doing so this will help AI tools such as ChatGPT to become freely accessible to the general public.⁸ Similar to Apple, Samsung also introduced AI tools to which they are referred to as 'Galaxy AI', in July 2024.⁹

Besides the application of AI in the technological industry, AI has also penetrated other industries such as healthcare, automobile, cosmetics, entertainment, and so on. For example, in the

⁵ Michael McDonough, 'Siri' (Britannica) <<https://www.britannica.com/technology/Siri>> accessed 22 July 2024.

⁶ However, users are required to join a waiting list to access the features via the beta version of Apple Intelligence.

⁷ <https://www.business-standard.com/technology/tech-news/apple-releases-ios-18-1-public-beta-with-waitlist-for-apple-intelligence-124092000406_1.html> accessed 28 September 2024.

⁸ Apple, 'Apple Intelligence, AI for the rest of us' <https://www.apple.com/apple-intelligence/> accessed 13 July 2024.

⁹ Samsung, 'Galaxy AI is here' <<https://www.samsung.com/us/galaxy-ai/>> accessed 13 July 2024.

healthcare industry, we can refer to how the National University Hospital of Singapore (NUH) has made use of AI to improve the lives of its patients. “NUH is at the forefront of deploying RapidAI, an AI-based neuroimaging software, to expedite the identification of stroke patients who could potentially benefit from endovascular treatment. RapidAI can process large volumes of raw data from computerised tomography (CT) scans in less than a minute to generate easy-to-interpret images providing objective information — a vast improvement over the traditional 20-minute manual processing. Besides post-processing, it also facilitates the instantaneous dispersal of this vital information to all the stakeholders (senior physicians who make the therapeutic decisions), directly into their secured email inboxes. This improvement in workflow has already benefitted over 400 patients, dramatically enhancing the efficiency of their treatment”.¹⁰

Then when we move on to considering the effects of AI in the automobile industry, it has been found that “Audi is implementing the AI-based chatbot ChatGPT via Microsoft Azure OpenAI Service in its infotainment system to enhance its vehicles' voice control capabilities. From July this year, owners of around two million Audi models made since 2021 and equipped with the third-generation modular infotainment system (MIB 3) will be able to interact with their car using natural language and listen to the information they would like to know while driving”.¹¹ This shows that even in the automobile industry, it is possible for users nowadays to have smarter cars that would function similarly to a smartphone. This closely resembled a TV programme that was produced in the early 1980s called ‘Knight Rider’. One of the lead characters in this programme was an indestructible supercar named ‘Kitt’, which was a combination of the AI technology being developed at present.

Thus, it can be said that AI is an area that is not only restricted in the technological industry but is necessary for various functions in every industry. Furthermore, besides ChatGPT, AI also consists of different tools that consist of different functions which have been tailored for individuals to perform different tasks. For example, in terms of analysing data, data analysts commonly use the AI tool known as ‘Julius AI’.¹² As another example, we can refer to ‘Chat PDF’ which is an AI

¹⁰ NUH, ‘Virtual eyes and neural networks’ (1 June 2023) <https://www.nuh.com.sg/health-resources/newsletter/envisioninghealth---changing-lives-one-idea-at-a-time/virtual-eyes-and-neural-networks> accessed 19 August 2024.

¹¹ ‘Audi enhances voice control in current and future models with ChatGPT’ (27 June 2024) <<https://www.audi-mediacycenter.com/en/press-releases/audi-enhances-voice-control-in-current-and-future-models-with-chatgpt-16068>> accessed 16 July 2024.

¹² Julius.ai <<https://julius.ai>> accessed 16 July 2024.

tool that makes it easier for users to read very long documents and even pinpoint certain points within the document by which the user is specifically looking for.¹³

3. HOW HAVE OTHER COUNTRIES BESIDES SRI LANKA ADAPTED TO THE CONCEPT OF AI IN THEIR LAWS?

Now that we know in brief as to what is meant by AI, we will then move on to the topic of how AI has contributed towards the creation of legislation. In order to determine this, we can observe the different types of AI laws created across the globe and we would also be able to observe how each part of the world has adapted its laws towards AI. In view of this, we can consider the various perspectives that each continent has taken into consideration in relation to AI.

For example, in certain African countries, AI regulation is not currently present, but in most countries, they may be able to rely on the provisions within their data protection and communications acts to govern AI. Egypt has taken steps to improve their Data Protection laws to ensure compliance for AI systems which are processing personal data. South Africa is in the process of creating laws and guidelines as to how AI should be used and hence it can be observed that South Africa is willing to accept the importance of AI and adapt it into its current laws. Asia views AI in a more diverse perspective especially when it comes to legislation. Additionally, Asian countries such as China have taken great initiatives by implementing several laws and regulations that are specifically targeted towards AI. Such laws and regulations would include guidelines and recommendations for developers on how to use certain algorithms. They would outline standards that should be followed when creating AI models. However, Japan focusses on a different aspect which is ‘human-centric AI’ and they would put forward their AI specific guidelines for businesses more than for individuals.

When we move onto Europe, it can be observed that in terms of AI legislation they have made significant progress, coming up with the world’s first AI Act as mentioned previously earlier this year in 2024. The EU AI Act consists of classifying of AI systems into different risk categories and imposing certain responsibilities on developers and deployers accordingly. When we move onto Latin America, it can be observed that countries such as Brazil have made it clear that they too are keen on introducing guidelines in relation to AI development and this would be based on the Brazilian Artificial Intelligence Strategy and Bill no. 2338/2023.

¹³ ‘ChatPDF’ <https://www.chatpdf.com> accessed 16 July 2024.

North America as well has suggested specific AI laws and regulations such as Canada's draft Artificial Intelligence and Data Act. However, the United States is yet to introduce or pass specific AI laws similar to the EU that will apply in general to everyone and thus, this has resulted in different federal agencies coming up with their own guidelines and suggestions that would differ from state to state. Also, according to Lex Mundi it has been found that Mexico would rely on its Personal Data Protection laws, in terms of AI related matters

Then in terms of the perspectives of the Middle East, "Oman's AI focus lies in economic diversification and ethical considerations. Saudi Arabia currently leans on existing laws around data privacy, IP, and cybersecurity, while also providing AI development guidance through their national strategy and principles. Qatar has also made strides in AI regulation. In Latin America and the Caribbean, AI regulation is largely undeveloped, with several countries lacking specific legislation or regulatory agencies for AI. Brazil has made clear its intent to guide AI development and use through the Brazilian Artificial Intelligence Strategy and Bill No. 2338/2023. Additionally, Peru has specific legislation promoting the use of AI for economic and social development".¹⁴

Singapore, does not have proper laws like the EU to govern AI, but articles suggest that they have introduced certain guidelines for businesses in different industries on how to use AI responsibly. With this in mind, the 'Infocomm Media Development Authority' (IMDA) has introduced the launch of the 'AI Verify Foundation'. This foundation will aim to do the following; create a community that would provide support in the use and development of AI testing frameworks, code base, standards, and so on, then creation of a neutral place where you would be able to form collaborations and share ideas on AI testing as well as governing AI and create a network of advocates who would adopt AI testing through either education and outreach. Moreover, research further shows that 'AI Verify' which is a single integrated software toolkit has provided certain organisations consisting of an AI Governance Testing Framework and Toolkit to ensure the reliability of their AI systems. Since 'AI Verify' is flexible this would allow the integration of further sector-specific governance frameworks.¹⁵

¹⁴ Lex Mundi, 'Introducing the Lex Mundi AI Legislative Guide' (7 May 2024) <<https://www.lexmundi.com/news/2024/05/introducing-the-lex-mundi-ai-legislative-guide/#:~:text=In%20this%20context%2C%20the%20Lex,tasked%20with%20regulating%20these%20laws>> accessed 24 July 2024.

¹⁵ Rajesh Sreenivasan, Regina Liew, Larry Lim, Steve Tan, Benjamin Cheong, Lionel Tan, Tanya Tang, and Justin Lee (Rajah & Tann Singapore LLP), 'Responsible Use of AI – Guidance from a Singapore Regulatory Perspective' (NUS, October 2023) <https://law.nus.edu.sg/trail/responsible-use-of-ai/> accessed 20 July 2024.

In relation to the governance framework as of 23rd January 2019, Singapore introduced its first edition of the ‘Model AI governance Framework’ which provided detailed and user-friendly guidelines for private-sector organisations in order to address the challenges of AI when AI solutions have been introduced. They aim to achieve this by explaining the process of how AI systems work, creating open and transparent communications, and building good data accountability practices as doing so would increase trust and understanding of the public in terms of technologies. Thereafter, on the 21st of January 2020, Singapore introduced the 2nd edition of the ‘Model AI Governance Framework’ and this would be considered as a broader version of the 1st edition.

Additionally, to attract awareness about the benefits and challenges of AI which would be based on ethical and legal issues, “IMDA is engaging key stakeholders including the government, industry, consumers, and academia to collaboratively shape the government’s plans for the AI ecosystem in Singapore. Such discourse will inform the government’s plans to support Singapore as a hub for AI development and innovation, and help Singapore effectively respond to global developments”.¹⁶ This would also enable Singapore to come up with more permanent laws in order to govern AI and its developments.

However, although Asia unlike South Africa has adapted more in terms of AI by passing various guidelines, it can be observed that certain Asian countries such as Singapore and Japan do not currently possess permanent laws and regulations which would be applied in general and that it would instead be based on specific aspects such as businesses of various sectors. Hence, one could suggest that Asia still has not achieved the level of developing AI laws that are of the same standard as other domestic laws =. Furthermore, it can be observed that out of all of the continents, the EU has made an immense contribution to the AI world by introducing the AI Act. Therefore, similar to their EU Regulation of the General Data Protection Regulation (GDPR), everyone across the globe would follow the provisions of the AI Act as it is currently the highest standard to base domestic laws upon.

4. ARE THERE EXISTING LAWS IN SRI LANKA?

Similar to the other Asian countries mentioned above, Sri Lanka too does not have any laws and regulations to govern AI, but according to the ‘Ministry of Technology’ Sri Lanka has shown

¹⁶ ‘Artificial Intelligence in Singapore’ (IMDA) < <https://www.imda.gov.sg/about-imda/emerging-technologies-and-research/artificial-intelligence> > accessed 20 July 2024.

interest in creating such laws, since the Committee has developed an official document which is released by the Parliament (White paper) on ‘Formulating a Strategy for Artificial Intelligence’ (CFSAI) as of March 2024. Furthermore, this white paper will include information, proposals, or policies towards AI and through this white paper, Sri Lanka aims to ensure safe, and reliable AI systems that are capable of protecting privacy. In relation to this, research suggests that Sri Lanka is still in the process of putting out a legal and regulatory framework, but they have expressed as to what this framework would consist of.

Through this Framework it has been specified that Sri Lanka is looking to introduce several policies and laws in order to govern AI. For example, they hope to pass a law that will be “both specific and adaptable to technological advancements”¹⁷, but that it should also take into account the interests and concerns of the public who will then place their trust in AI applications. Also, due to the fact that AI can be used in different aspects or different industries, it would be necessary to create a ‘multi-stakeholder governance model’. They also aim to create AI laws and policies that can keep up with various technological developments. To do so, they would need to update all legislative aspects of Sri Lanka and AI training would be necessary, especially for the judiciary.

Additionally, the White paper also includes the steps taken by the Sri Lanka Personal Data Protection Act of 2022 (SLPDPA) for introducing certain elements which are addressed towards ‘Automated Decision Making’ (ADM), but it has also been mentioned that this is yet to be implemented and that it is still in the early stages. This white paper has also made reference to Singapore’s ‘Model AI Governance Framework’ which offers specific guidelines that balance innovation along with ethical considerations, showing how the framework can be used in line with ethical considerations which also demonstrates how it is possible for this framework to adapt to technological advancements and expectations of society. This further makes reference to the fact that the Singapore government has also taken the initiative in reducing certain obstacles with regards to responsible AI development. For example, as mentioned previously this was made possible through the joint development and launching of the AI verification programme by IMDA and their Personal Data Protection Commission (PDPC). The White paper has also made further reference to the EU AI Act and therefore, it can be assumed that the White paper is suggesting that Sri Lanka would be able to form its laws and regulations in line with the EU AI Act and Singapore’s ‘Model AI Governance Framework’.

¹⁷ Ibid.

Moreover, “It is also important that the National AI Strategy is aligned with Sri Lanka’s Cybersecurity Policy and Cyber Security Strategy, as well as the upcoming Cybersecurity Bill (2024), which deals with the implementation of Cyber Security Strategy and protection for critical information infrastructure. Sri Lanka’s approach to the legal and regulatory framework for AI should first and foremost place primacy on protecting individual rights and freedoms and ensure alignment with the existing constitutional framework for Sri Lanka”. The White paper would also include possible guidelines for responsible AI development and public and civil society engagement.

In terms of responsible AI development, it has been observed that sectors such public services, healthcare, and autonomous driving, would face obstacles including; black box problems, accountability, and reliability in terms of AI application. Therefore, in order to address such AI-related concerns, it was suggested within the White paper to introduce regulations and ethical practices that are effective and which also consist of a diverse group of stakeholders, as it would be necessary to create specific guidelines. Furthermore, this white paper has also taken into consideration the option of pairing this framework with international frameworks such as OECD’s AI principles and UNESCO’S recommendations on the ethics of AI, as it was viewed to be necessary to ensure that AI would still be considered as something that is still relevant across the globe and is responsible towards growth and human rights. These guidelines would also include clauses similar to the EU AI Act, which would place an obligation on developers and deployers to conduct regular audits and impact assessments of their AI systems and so on.

In terms of public and civil society engagement, articles suggest that this would consist of guidelines that promote the engagement of the general public with AI governance and this would involve “.... organizing consultations, workshops, and public forums to gather input and feedback on AI-related initiatives, policies, and regulations. By actively involving citizens, non-governmental organizations (NGOs), experts, and other stakeholders in decision-making processes related to AI in Sri Lanka, we can enhance transparency, build trust, and promote ownership of AI developments. Collaboration between government, civil society, academia, and industry is essential for addressing the multifaceted challenges associated with AI governance. Sri Lanka must

foster partnerships and networks that bring together diverse stakeholders to exchange knowledge, share best practices, and collaborate on AI projects”.¹⁸

Based on the above-mentioned facts, it can be observed that although Sri Lanka does not have set laws or guidelines on the use of AI, a white paper was developed by the Committee on Formulating a Strategy for Artificial Intelligence. This white paper discussed the development of a framework for the creation of a national AI centre, the formulation of sector specific guidelines, among others. The white paper also highlights challenges that may be faced in the implementation stage.

5. CONCLUSION

This article shows the past, present and future of AI and its rapid evolution in today’s society, where it has become a valuable component in everyday life. Moreover, due to its growing importance across various sectors, it has brought about the need for extensive regulatory frameworks to protect public interests as well as upholding ethical standards. In order to achieve this, many countries across the globe, have taken steps to accommodate AI into their regulatory frameworks especially the European Union, with its AI Act. Although in Sri Lanka comprehensive AI legislation is currently lacking, efforts however have been made to bring forth a framework as seen in the recent white paper on AI strategy. When forming its legal framework, Sri Lanka can develop one that includes the engagement of stakeholders and align with data protection and cybersecurity policies, which will be essential to establish a transparent and accountable AI ecosystem.

¹⁸ Ministry of Technology, ‘Artificial Intelligence in Sri Lanka, White Paper developed by the Committee on Formulating a Strategy for Artificial Intelligence (CFSAI)’ (March 2024) <<https://mot.gov.lk/assets/files/AI%20White%20Paper%20March%202024-c09aa49f7990358ad1442103b804511d.pdf>> accessed 26 July 2024.

LAW AND EQUALITY

WOMEN'S RIGHT TO PRIVACY AND REPRODUCTIVE AUTONOMY
IN THE CONTEXT OF ABORTION: AN ANALYSIS OF THE IMPACT
OF ROE V. WADE AND CONSIDERING LEGALISATION OF
ABORTION IN SRI LANKA

Yashodhara Rathnayake

ABSTRACT

This article assesses a woman's decision to get an abortion as a woman's constitutional right to privacy, which was recognised and established in the landmark case of *Roe v. Wade* by the Supreme Court of the United States in 1973. *Roe v. Wade* recognised the concept of making choices and decisions about a woman's own body as one of the fundamental rights to privacy that the state should not interfere with. However, the US Supreme Court has overturned the decision in *Roe v. Wade* in June 2022, suspending the constitutional right to abortion in the United States. This article examines the legal framework established by the courts in recognising abortion as a right to privacy and reproductive autonomy. This article further analyses Sri Lankan law in relation to abortion and suggests that Sri Lanka should recognise abortion as a right of privacy in limited circumstances balancing the state's interest in protecting potential life and a woman's right to make choices regarding her reproductive health.

1. INTRODUCTION

The concept of right to privacy means that individuals are entitled to control their personal lives which include their bodies, personal information, and intimate relationships thereby allowing a separate sphere where individuals are able to make decisions of their own and exercise personal freedom without unwanted interference of other individuals, organisations or the government. Jed Rubenfeld in his article states that many believe the constitutional right to privacy is a right that has little to do with privacy and nothing to do with the constitution.¹ However, he admits that the right to privacy has everything to do with delineating the legitimate limits of governmental power.² In most constitutions, even though the right to privacy has not been expressly stated, it has been impliedly recognised as a fundamental right. Individuals have always relied on the judiciary to

¹ Jed Rubenfeld, 'The Right of Privacy' (1989) 102 HLR 737.

² *ibid.*

assess and determine instances where the government has enacted laws impeding such implied right to privacy.

In the landmark case of *Roe v. Wade*,³ the United States Supreme Court in 1973 recognised women's right of access to abortion as an implicit constitutional right of privacy in making decisions about her reproductive health which was deemed to be contained in the due process clause of the Fourteenth Amendment (“...nor shall any state deprive any person of life, liberty, or property, without due process of law”) . However, recently, in the case of *Dobbs v. Jackson Women's Health Organization*,⁴ the courts by a 5/4 decision have overturned the judgement in *Roe v. Wade* thereby removing the constitutional rights concerning reproductive choice including abortion. The consequences of this are that several states have since adopted laws that drastically limited the availability of abortion within their jurisdiction.

A reasonable doubt arises as to whether overturning *Roe v. Wade* which recognised the right to privacy allowing abortion was the right choice to make. This article highlights that the right to privacy must be considered as a fundamental human right which is essential for the preservation of personal autonomy, individual dignity, and personal freedom. This protects individuals from unnecessary intrusions when making decisions that relate to their personal lives without unwanted fear and restriction. However, it is to be noted that this right is not an absolute one. It is often subjected to certain limitations and restrictions especially when there exists a compelling public interest. However, it is necessary to draw the line where the right of privacy contravenes with that of public interest without unnecessarily blurring it.

This article will first explore the legal framework established by the case of *Roe v. Wade* allowing abortion as a right to women's privacy and reproductive autonomy, the case of *Casey* which introduced the 'undue burden' standard providing comprehensive analysis of the court's reasoning in both cases. The article will further discuss the case of *Dobbs v. Jackson's Women's Health Organization* which overturned the judgement in *Roe v. Wade* thereby banning abortion and its impact in the US in relation to abortion cases. Furthermore, the article will discuss the possible impact and relevance across the globe, where reforms are being attempted to legalise abortion. This article also deals with the concept of abortion as a basic human right, examines other legal frameworks which allow abortion as a human right and examines the other regional, international

³ (1973) 410 US 113.

⁴ (2022) 597 US 215.

legal frameworks and decisions of the European Court of Human Rights which allows abortion as a human right. Moreover, the article will evaluate the prevailing Sri Lankan legal framework in relation to abortion, the proposed reforms to legalise abortion, and discusses whether abortion should be legalised in Sri Lanka under special circumstances so as to preserve women's right to privacy. Further, this article discusses competing interests of the state in protecting potential life against the interests of the protection of the mother and her right to privacy that regulates abortion procedures as well as the concept of viability.

2. RIGHT TO PRIVACY AND REPRODUCTIVE AUTONOMY

2.1 *Roe v. Wade*: Recognising Abortion as a Right to Privacy

The facts of the case *Roe v. Wade* are as follows. The case was filed by Norma McCorvey in the legal pseudonym of Jane Roe who was pregnant with her third child. Even though she wanted to opt for an abortion the then prevailing law on abortion in Texas, USA allowed abortion only in the circumstance where the pregnancy endangers the mother's life. Her lawyers filed a lawsuit against her local district attorney claiming that this law violated her constitutional rights. US District Court for the Northern District of Texas decided in her favour. However, upon appeal by the parties to the Supreme Court, the court decided in McCorvey's favour in 1973 relying on the Due Process Clause of the Fourteenth Amendment to the US Constitution which recognised a fundamental right to privacy thereby allowing abortion. Justice Blackmun in *Roe v. Wade* stated that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy".⁵

However, the Supreme Court further acknowledged that the Government or the State has a legitimate interest in protecting the interests of the potential life of a foetus and to also ensure the life, health, and safety of the pregnant mother. The Court applied a 'trimester framework' to assist the judiciary and legislators in resolving the conflict of interests in the mother's health and the viability of the foetus under any circumstance. The Court stated that before the end of the first trimester, pregnant women have the absolute right to undergo abortion without any intervention or restrictions by the state. During the second trimester, the state can intervene provided that the mother's health is at risk. However, it has been established that in the third trimester, the foetus becomes viable which means that the foetus has the ability to live outside the mother's womb usually between the 24th and 28th week after conception. Therefore, the Court ruled that if the foetus

⁵ *Roe* (n 3).

is viable, the right to abortion may be highly restricted. An exception was provided in the event where the life of the mother is in danger. However, there seems to be a confusion between the concept of the trimester framework and the viability of the foetus.

Two Justices, William Hubbs and Byron White in dissenting to the judgement stated that the political process was the proper mechanism for seeking reform instead of allowing the judiciary to resolve the competing issue of who should be given priority, whether it is the interests of the foetus or the right to privacy of the mother. Furthermore, Justice Warren Earl Burger was of the view that when agreeing to the woman's request for an abortion, the guidance of two physicians would be more appropriate than opting for that of one physician.

Even though this case provided a significant impact on the reproductive rights of women and recognising women's right to privacy, it has been a magnet of political and legal controversies. Following several attempts to overturn *Roe v Wade*, it finally succeeded in the recent case of *Dobbs v. Jackson Women's Health Organization, Planned Parenthood v. Casey*: "Undue Burden" Standard.

*Planned Parenthood v. Casey*⁶ is another landmark case where the Supreme Court of the United States upheld the right of access to abortion as a constitutional right following the judgement in *Roe v. Wade*. The courts have further gone on to provide a modification to the legal framework pertaining to the concept of abortion. This case posed a challenge to certain provisions of the Pennsylvania Abortion Control Act of 1982 which required a waiting period, spousal notice, and parental consent for minors before the commencement of the abortion procedure. In the majority judgement, the Court upheld the proposition undertaken in *Roe v. Wade* as the Due Process Clause of the Fourteenth Amendment ensured a right to access abortion before the foetus becomes viable.

However, the Court rejected the trimester framework introduced in *Roe v. Wade* replacing that with the viability concept and criticised its strict scrutiny standard of review. The Court introduced a new standard of review, the "undue burden" standard stating that it would be unconstitutional for the state to impose abortion restrictions when they were enacted for the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable foetus".⁷ This means that the states are allowed to regulate the process of abortion until and unless these regulations do not pose an undue burden on a woman's right to bodily autonomy. Hence, even

⁶ (1992) 505 US 833.

⁷ *ibid.*

though the Court upheld four provisions in the Pennsylvania law, it expressly rejected the spousal notification prior to abortion. Therefore, as per the opinion of scholar Jamel Greene, the decision whether to terminate a pregnancy prior to viability must remain with the woman, not for the reason that it is none of the state's business but for the reason that it is so very much hers.⁸ This was embodied in the joint opinion of *Casey* stating, "the destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society".⁹ However, other than rejecting the requirement of spousal notification, even the case of *Casey* is silent on the right to privacy.

3. IMPACT OF DOBBS ON WOMEN'S RIGHT TO ABORTION

3.1 *Dobbs v. Jackson Women's Health Organization* Overturns *Roe v. Wade*

In this landmark case, the Supreme Court of the United States overturned the judgements in *Roe v. Wade* and *Planned Parenthood v. Casey* stating that the Constitution does not recognise a right to abortion. This case relates to the abortion law in the State of Mississippi which prohibited abortion if the pregnancy period exceeds 15 weeks.¹⁰ The Jackson Women's Health Organization which was the only abortion clinic in Mississippi filed a lawsuit against Thomas E. Dobbs, State Health Officer challenging the constitutionality of that prevailing law. Lower courts had decided following the cases of *Roe v. Wade* and *Planned Parenthood v. Casey*¹¹ where the abortion was allowed before the foetal viability during the first 24 weeks of pregnancy.

However, the State of Mississippi argued that the prevailing state law should be upheld and requested the court to revise the judgement and the legal framework established in *Roe v. Wade*. Eventually, the Supreme Court revised the lower court's judgement by a majority of six judges and three dissenting judges. The majority justices of the Supreme Court thereby held that there is no available constitutional right or fundamental right to abortion entailed in the US Constitution. Justice Samuel Alito stated, "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."¹² He formulated his opinion considering the case of *Washington v. Glucksberg*¹³ where it held the view that a right should be "deeply rooted" in the nation's history and tradition for it to be recognised as a right. He further went on to write

⁸ Jamel Greene, 'The So-Called Right to Privacy' (2010) 43 UC Davis Law Review 715.

⁹ *Casey* (n 6) 852.

¹⁰ Gestational Age Act of 2018.

¹¹ *Casey* (n 6) 852.

¹² *ibid.*

¹³ (1997) 521 US 702.

that the decision in *Roe* was ‘egregiously wrong’ from its conception because its reasoning was ‘exceptionally weak’. Even though the Chief Justice adhered to the fact that the Mississippi state law should be upheld, he did not express any opinion as to overrule the case of *Roe v. Wade*.

However, Justices Thomas and Kavanaugh expressing concurrent opinion wrote that it would be unconstitutional to ban a woman from travelling to another state to pursue an abortion given the right to travel and further, it would be against the constitutional rights to punish all the abortions which were done before the decision in *Dobbs* retroactively given that they were performed legally as per then prevailing ruling under *Roe* and *Casey*. Moreover, Justice Robert was of the opinion that the regulations concerning abortion must be “extended far enough to ensure a reasonable opportunity to choose but need not to be extended any further.”¹⁴ He was doubtful as to whether completely banning abortion from the moment of conception should be considered constitutionally equivalent to a ban on abortion after 15 weeks from the conception. Since the Mississippi State argued to uphold its law which prohibited abortion after 15 weeks of conception, this author agrees with the above opinion considering it unnecessary to restrict abortion entirely and justify the opinion that a reasonable opportunity should be given to choose to terminate the pregnancy or to continue with it.

Moreover, dissenting to the majority opinion, Justices Breyer, Sotomayor, and Kagan expressed their joint opinion that the right which was established in the cases of *Roe* and *Casey* did not stand alone as the courts have already connected those rights to other rights and freedoms for almost half a century. They were of the view that the right to terminate pregnancy has a clear connection to the right to access and use of contraception. Therefore, the majority view can be seen as ‘hypocrisy’ and stated that other additional constitutional rights are also endangered by this decision.

In dissent, they further stated that the majority opinion to entirely ban abortion from the moment of conception was because they did not consider forced childbirth an infringement on women’s right to equality and freedom. Moreover, they did not consider “anything of constitutional significance attached to a woman’s control of her body and the path of her life.”¹⁵ Hence, they were against the view that forcing a woman to bring a pregnancy to term at the steepest personal and familial costs. Moreover, they wrote that the court’s judgements on bodily autonomy, sexual, and familial relations are all ‘interwoven’ and thereby, the same fabric of the constitution which

¹⁴ *Dobbs* (n 4).

¹⁵ *ibid*.

embodies the essence of life which includes the right to self-determination especially considering women. They were grieved on behalf of the millions of American women who were deprived of their fundamental constitutional protection through this majority judgement.

3.2 Post-Dobbs Impact in the US

The Court's judgement in *Dobbs* could be considered as a 'devastating blow' to the then prevailing constitutional right which granted women the autonomy to terminate their pregnancy without state interference.¹⁶ As a result of this judgement, abortion was subjected to be completely restricted by majority of the states in the US leaving no space for women to their bodily autonomy. Moreover, trigger laws to restrict abortion have been initiated. Indiana could be considered to be the first state in the US that was able to pass the abortion ban after the decision in *Dobbs*. Furthermore, many other states that already had abortion bans but withheld them from being enacted as a result of *Roe* had re-enacted those abortion laws. Moreover, attention must be drawn to the abortion law in Ohio which restricts abortion after the cardiac function of the foetus is identifiable and it leaves no exceptions for victims of rape or incest. Even though this law was passed in 2019, it was withheld by an injunction. However, the judgement in *Dobbs* caused this injunction to be lifted. Gradually, by 2023, in majority of the states in the US, abortion became illegal, leaving no exceptions for even the victims of rape or incest. It is unfortunate that a complete ban on abortion without exceptions for victims of rape or incest would result in forcing individuals to carry a pregnancy against their will. This view is supported by the UN High Commissioner for Human Rights Michelle Bachelet restating the urge to have human rights protections for abortion and the impact of the decision on many people belonging to low-income groups and ethnic minorities.¹⁷

Furthermore, two bills have been introduced by the Congress in relation to abortion rights; one, Women's Health Protection Act of 2022 and two, Ensuring Access to Abortion Act of 2022. The former was introduced to prevent states from banning abortions before the stage of viability of the foetus; and the latter was aimed to prevent states from restricting travelling to other states to pursue abortion. However, it is highly doubted that these two bills would be able to reach the Senate

¹⁶ R Kaufman and others, 'Global impacts of *Dobbs v. Jackson Women's Health Organization* and abortion regression in the United States' (*National Institute of Health*, 2022)

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9673802/>> accessed 16 August 2024.

¹⁷ Michelle Bachelet 'US ruling on *Dobbs v Jackson Women's Health Organization*' (*United Nations Human Rights Office of the UN High Commissioner*, 24 June 2022)

<<https://www.ohchr.org/en/statements/2022/06/bachelet-us-ruling-dobbs-v-jackson-womens-health-organization>> accessed 16 August 2024 .

approval. Through the Executive Orders issued by President Joe Biden aimed at improving women's reproductive health and safeguarding women seeking abortions in other states, there seems to be a fragment of hope that in the near future, states would shed some light on the despair of women who are continuously compelled to undergo childbirth, especially the victims of rape or incest.

3.3 Global Impact of *Dobbs*

The landmark judgement of *Roe v. Wade* has been cited and considered as a persuasive judgement across the globe in recognising a gender-neutral right to privacy and bodily autonomy granting abortion access to women. Therefore, overruling *Roe v. Wade* is assumed to have a significant impact on abortion cases. Some believe that this judgement will not reverse this global tide.¹⁸ However, this decision exerts influence in two ways. First, anti-equality governments and NGOs who undermine the human right protection and sexual and reproductive health and rights are using this judgement to confront that abortion rights have no legitimacy in the process of negotiating UN resolutions, similar to the implications seen under the Mexico City Policy¹⁹, which restricts U.S funding for international organizations that provide or promote abortion. The second impact is that the US Government curtailing abortion access domestically, it risks losing its leadership role in promoting global reproductive health rights, particularly given its historical reluctance to ratify instruments like CEDAW and considering that they restrict abortion in their domestic context. Reconsider this paragraph in light of the Mexico City Policy and the non-ratification of CEDAW by the US – one of the reasons given is concerns that reproductive rights in CEDAW covers abortion

4. ABORTION AS A HUMAN RIGHT

4.1 Regional Standards

In the Protocol on the Rights of Women in Africa²⁰ which was adopted by the African Union recognised medical abortion, especially in the cases of sexual assault, rape, incest, and continued pregnancy endangered the mental and physical health of the mother or the life of the mother or the fetus.²¹ This protocol could be considered as the only legally binding human right instrument

¹⁸ (n 16).

¹⁹ <https://www.plannedparenthoodaction.org/communities/planned-parenthood-global/end-global-gag-rule>

²⁰ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

²¹ *ibid*, Art. 14 (2)(c).

which has expressly addressed the issue of abortion recognising abortion as a human right and that women's reproductive rights are human rights too.²² Even though 20 African countries have ratified this protocol, its application is only limited to the African region.

Another important pronouncement was made in the Parliamentary Assembly of the Council of Europe in 2008 where the majority number of parliamentarians adopted a report issued by the Committee on Equal Opportunities for Men and Women which entailed access to safe and legal abortion in Europe.²³ This report requires the member states to decriminalise abortion and guarantee the right to safe and legal abortion. It further highlighted the importance of initiating reproductive health policies that provide access to contraception at a reasonable price. However, this pronouncement is not legally binding. Nonetheless, this could be considered as the most progressive pronouncement on the right to abortion according to the opinion of scholars Christina Zampas and Jaime M. Gher.²⁴

4.2 International Parameters

Even though the Convention on the Elimination of all Forms of Discrimination Against Women of 1979 (CEDAW) did not expressly address abortion, the CEDAW committee has addressed the issues of abortion and its impact on women's reproductive health and life which ultimately deprive women of their equality. It is of the view that conducting necessary reproductive health services is essential to maintain women's equality and refusing to conduct such services legally would be discriminatory in nature. Moreover, the CEDAW committee has recognised that maternal mortality would increase as a result of unsafe abortion procedures, which thereby paved the path to violate women's right to life.²⁵

The United Nations Convention on the Rights of the Child (1989) (UNCRC) addressed the protection of children's right to life and survival.²⁶ The Committee on the Right of the Child (CRC) has raised repetitive concerns regarding the importance of providing access to safe abortion services for adolescent girls by the state parties.²⁷ Moreover, it emphasises the state parties'

²² C Zampas and JM Gher, 'Abortion as a Human Right – International and Regional Standards' (2008) 8 HRLR 249.

²³ PACE Res 1607 (16 April 2008).

²⁴ (n 21).

²⁵ Concluding Observations of CEDAW.

²⁶ United Nations Convention on the Rights of the Child (1989), Art. 6.

²⁷ OHCHR, 'Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) General Comment No. 4.

contribution to sexual and reproductive health services. This highlights the urge to protect and promote the rights of adolescent girls to make informed decisions regarding their reproductive health in cases of unwanted pregnancies. This was mainly due to the concern that unsafe abortion procedures have caused high maternal mortality rates.

4.3 European Court of Human Rights Decisions

As per the European Convention on Human Rights (ECHR), there prevails procedural and substantive rights to life.²⁸ Many argue that there exists a right to life that belongs to the foetus under the ECHR. However, in the case of *Paton v. United Kingdom* it was held that the term ‘everyone’ in Article 2 of the ECHR does not formulate to include the right to life of the foetus. In this case, the husband argued that his pregnant wife should be restricted from terminating the pregnancy based on the foetus right to life under Article 2 of the ECHR. However, the ECHR proceeded to state that the potential right to life of the foetus does not outweigh the interests of the pregnant woman and thereby dismissed the complaint. The reasoning was that the foetus is linked with the life of the pregnant woman and it cannot be isolated from her.²⁹ This is because if Article 2 of the ECHR covers the right to life of the foetus, then an abortion would be prohibited even in the event where the life of the pregnant woman is at risk. This would make an implication that the life of the foetus is of higher regard than that of the life of the mother. This decision has paved the way to establish the principle that under any circumstance, the rights and interests of the woman’s right to life preceded over the right of the foetus.

A similar decision was undertaken by the European Court of Human Rights (ECtHR) in the case of *Boso v. Italy*.³⁰ In this case, the ECtHR decided that abortion was not in breach of Article 2 of the ECHR.³¹ The contested abortion was pursued under Italian law which allowed an abortion during the initial 12 weeks of pregnancy in order to safeguard the physical and mental health of the pregnant woman. Here, the court rejecting the applicant’s claim ruled that Italian law on abortion indeed protected the health of the pregnant woman. This Italian law was a good example where the appropriate balance of interest of the woman and the interest of the state in protecting the foetus are met.

²⁸ European Convention on Human Rights, Art. 2.

²⁹ *Paton v. United Kingdom (X v. United Kingdom)* (1980) 19 DR 244; (1981) 3 EHRR 7, 9, 23, 48.

³⁰ 2002 – VII ECtHR 99.

³¹ (2005) 40 EHRR 12.

Moreover, in the case of *Vo v. France*, the ECtHR was required to clarify whether the foetus enjoys the right to life under Article 2 of the ECHR. However, ECtHR did not proceed to directly answer the question posed. Instead went on to say that the ‘unborn child’ is not regarded as a person directly protected by Article 2 of the ECHR and if the unborn child does have a right to life, then it is subjected to the rights and interests of the mother. So basically, what it meant was that an unborn child or foetus could enjoy its right to life as long as the mother’s right to life is not infringed, thereby prioritising the mother’s life and health.

5. SRI LANKAN LAW ON ABORTION

5.1 Prevailing Law on Abortion

Abortion is rendered illegal in the Sri Lankan context under the provisions of the Penal Code (Ordinance No. 2 of 1883). Article 304-307 of the Penal Code (Ordinance No. 2 of 1883) provide that abortion is illegal and only allowed in the circumstances where it is performed to save the life of the woman.³² Article 303 of the Penal Code (Ordinance No. 2 of 1883) deals with causing of miscarriage. It further states that whoever voluntarily causes miscarriage not with good faith to save the life of the woman, shall be punished with imprisonment of either description for a term which extends to three years or a fine or both. It further states that if the woman is quick with child imprisonment, the term extends to seven years with a fine. Article 304 of the Penal Code (Ordinance No. 2 of 1883) deals with causing miscarriage without the consent of the woman. It states that disregarding whether the woman is quick with a child or not, if an act is committed to miscarry the child without the woman’s consent, such person is punished with imprisonment for a term extending to twenty years including a fine.

Moreover, Article 305 of the Penal Code (Ordinance No. 2 of 1883) deals with death caused by an act done with intent to cause miscarriage and the person who causes such an act will be punished with imprisonment extending to twenty years with a fine. Thereafter, Article 306 of the Penal Code (Ordinance No. 2 of 1883) considers an act done with intent to prevent a child from being born alive or cause it to die after birth shall be punished with imprisonment extending to ten years or a fine or both if such act is not committed in good faith to save the life of the mother. Article 307 of the Penal Code (Ordinance No. 2 of 1883) states that causing the death of a quick unborn child by an act amounting to culpable homicide.

³² Penal Code (Ordinance No. 2 of 1883), Art. 304-307.

Considering the Sri Lankan law, it is evident that any act done to cause a miscarriage with or without the consent of a pregnant woman is considered illegal and punishable with imprisonment, until and unless it has been done with good faith for the purpose of saving the life of the mother. Therefore, the only legal exception to abortion rights in Sri Lanka is in the circumstances where the mother's life is at risk. However, as per the Attorney General's opinion, even though abortion is highly restricted, the medical personnel are not under a legal obligation to report if a patient arrives after an illegal abortion procedure.³³ The National Guidelines on the post-abortion case introduced by the Ministry of Health in 2015 is considered as a remarkable development concerning the area of abortion in Sri Lanka. It provides the directions for the health care service providers to offer post-abortion treatment facilities for patients who have undergone incomplete abortions. Such health officers are restricted from withholding themselves from treating such patients adhering to their personal, moral, or religious perceptions.³⁴

5.2 Whether Abortion Should be Legalised in Sri Lanka Subjected to Limitations

Despite the extensive legal restrictions concerning abortion, illegal and unsafe abortion procedures are undertaken throughout the country. As a result of unsafe abortion maternal mortality rate has increased as per the analysis of recent mortality data from the Family Health Bureau of Sri Lanka. It appears that criminalising abortion without proper standard services to protect women has increased the risk of unsafe abortions. Research conducted in 2015 revealed that 10-13% of maternal deaths are caused by unsafe abortion procedures in Sri Lanka and it was considered as the third most common cause of death during pregnancy.³⁵ However, credible data is not available since these procedures are conducted illegally. In 2016, it was estimated by the Health Ministry that 658 abortions are conducted every day in Sri Lanka.³⁶

Moreover, the fear of the risk of prosecution has refrained women from seeking post-abortion care. A study conducted among 56 women who sought post-abortion care revealed that they delayed getting treatment in the government hospital in fear of getting reported to the police.³⁷ As a result,

³³ IW De Silva and others, 'Back to Square One: Attempted Legal Amendments and Abortion Practices in Sri Lanka' (2023) 46 Asian Journal of Education and Social Studies, 23-33.

³⁴ 'Fact Sheet: Laws, Policies and Practices on Abortion in Sri Lanka' (Center for Reproductive Rights) <<https://reproductiverights.org/wp-content/uploads/2024/07/Sri-Lanka-abortion-fact-sheet.pdf>> accessed 26 August 2024.

³⁵ Meenakshi Ganguly, 'Reform Sri Lanka's draconian abortion law' *The Morning* (Colombo, 10 March 2022) <<https://www.themorning.lk/articles/193037>> accessed 16 August 2024.

³⁶ Saira Meyler, 'Abortion – Where is Sri Lanka On the Spectrum?' (*Groundviews*, 2 September 2018) <<https://groundviews.org/2018/09/02/abortion-where-is-sri-lanka-on-the-spectrum/>> accessed 16 August 2024.

³⁷ Ramya Kumar, 'Abortion in Sri Lanka: The Double Standard' (2013) 103 American Journal of Public Health.

women are subjected to exploitation physically, mentally, and financially. This might even lead to their death if they are unable to get a safe abortion or if there is a delay in getting post-abortion care.

Moreover, depriving women of their right to essential reproductive health services which includes legal and safe abortions, standardised post-abortion care, and affordable contraceptive and family planning methods would infringe various human rights aspects such as the right to life, right to privacy and bodily autonomy, right to health, and freedom from cruel, inhumane, and degrading treatment. Therefore, a reform in abortion law in Sri Lanka is in dire need, even if it is allowed in special circumstances such as when such pregnancy endangers women's physical and mental health, the woman is a victim of rape or incest, child pregnancies, foetal impairments and due to socio-economic reasons. Furthermore, certain guidelines could be adhered to conduct abortion within a certain time period before the foetus is viable thereby balancing the rights and interests of the woman and the state's interest in protecting a potential life.

5.3 Proposed Reforms on Abortion Law in Sri Lanka

In 2013, the Law Commission of Sri Lanka introduced proposals to legalise abortion in cases of rape and foetal impairment. However, the above proposal has not been able to reach the necessary stage thereby failing to bring new legislation. Moreover, in 2022, almost after a decade, the Minister of Justice in Sri Lanka stated in the parliament that it is critical to amend the existing legislation regarding abortions to formulate a conducive environment for pregnancy and to mitigate the hardships, stigma, and harassment faced by pregnant women, especially for the victims of rape and incest.³⁸ Even though the discussions for the amendments were conducted in numerous meetings, it was unsuccessful following the political and economic instability of the country. Therefore, a call to action is needed besides the never-ending discussions.

6. CONCLUSION

On a concluding note, it is commendable that the landmark cases of *Roe v. Wade* and *Planned Parenthood v. Casey* have affirmed a woman's right to privacy and reproductive autonomy as a constitutional right in deciding to pursue an abortion. Even though the case of *Dobbs* has overruled the above cases, the impact they had on the jurisprudence across the globe is still continuing to

³⁸ 'Giving life to abortion law reform,' *The Morning* (Colombo, 9 March 2022) <<https://www.themorning.lk/articles/192888>> accessed 16 August 2024.

create an impact in the context of abortion. When dealing with legalising abortion, though a competing interest exists between the protection of the rights of the pregnant woman and the state's responsibility to protect a potential life, the state must adhere to certain standards and guidelines to strike a balance between those compelling interests. Amidst the strict regulations, illegal and unsafe abortions are conducted across the world which results in high maternal deaths. Hence, women's right to life, health, privacy, and bodily autonomy must be respected given such rights are basic human rights. Therefore, this article highlights that women's right to access abortion is always at risk and advocates must contribute to legalise abortion even if it is under specific circumstances that involve rape, incest, and foetal impairment. Hence, the Government of Sri Lanka must also consider taking proper action to reform the current law on abortion to ensure that Sri Lankan women are granted with better reproductive rights.

EMPOWERING HER: UNFOLDING WOMEN'S RIGHTS IN SRI LANKA

Amandhi Dissanayake | Nihinsa Ariyaratne | Thepulma Jayatissa

ABSTRACT

This article provides a comprehensive analysis of the challenges Sri Lankan women have encountered in securing their rights. It explores the evolution of women's rights in Sri Lanka over recent years, focusing on key areas such as women's empowerment in socio-economic development, including employment and pay disparities. The article also examines issues related to gender rights, parenthood, marriage, and gender-based violence, such as rape and domestic abuse. By addressing these obstacles through legal frameworks, social attitudes, and policy implementations, the article aims to shed light on the multifaceted difficulties women face in their daily lives.

1. INTRODUCTION

Over the years, women have endured a series of ups and downs in their daily lives. Whether in their workplace, household or generally in society, tackling these vital issues may significantly advance the improvement of women's rights in any country.

In Sri Lanka, it can be distinguished that there seems to be a growing effort to address these issues by way of gender equality and women empowerment originated by activists, organisations and movements. Compared to other South Asian countries, Sri Lanka is known to be more advanced when it comes to certain situations regarding women. Sri Lankan women exhibit more of a notable high literacy rate, a low child mortality and maternal rates indicate that there seems to be favourable health indicators as well. In addition, the life expectancy being 67 years reflects the favourable health outcomes.¹ Despite some of these notable advancements, Sri Lankan women also continue to face significant limitations in their influence over social, political, and economic rights.

According to Kumari Jayawardena, a well-known Sri Lankan feminist researcher, "wages between men and women are unequal [in agriculture], while in other fields women are given the less skilled jobs."² This underrepresentation not only highlights the economic challenges women face but also reflects

¹ 'Human Rights Briefs: Women in Sri Lanka' (*Refworld*, 1 December 1993)
<<https://www.refworld.org/reference/countryrep/irbc/1993/en/21978>> accessed on 28 July 2024.

² *ibid.*

broader systemic restrictions in other aspects of life. Additionally, personal laws further exacerbate discrimination against women, undermining their rights and freedoms. Sri Lanka has been urged to eliminate discriminatory laws related to customary and family perspectives and to implement policies that address these issues. According to CEDAW, such discriminatory practices extend beyond economic factors, deeply affecting legal frameworks and women's access to justice and equality. This nuanced understanding highlights how entrenched societal norms continue to restrict women's roles and opportunities in Sri Lanka.

As a result, organisations such as the Ministry of Women, Child Affairs, Social Empowerment and the Women's Charter strive to possibly eliminate all sorts of discrimination against women and gain gender equality. The fact that women can gain equal rights just as men can, in all sectors, is an important milestone for the journey towards gender equality.

Thus, through this article, we aim to scrutinise the extent on whether the implementation and the evolution of these measures had advanced or hindered women's rights over the years in Sri Lanka.

2. GENDER EQUALITY AND WOMEN'S EMPOWERMENT IN SOCIO-ECONOMIC DEVELOPMENT

2.1 Education

Sri Lanka proudly commemorates the achievement of Sirimavo Bandaranaike as the world's first female Head of State following a landslide victory making her a symbol of women's leadership. This pivotal event marked a significant shift in Sri Lanka's societal landscape, gradually dismantling deep-rooted patriarchal systems and advocating for increased gender equality and in developing women's rights.

Realisation of one's such rights and aspirations begin with one's education, which is recognised under Article 27(2) of Sri Lanka's constitution to be equally accessible for all,³ as one's secondary education has potential to open up further opportunities. The Gender Inequality Index (GII) of 2022 identifies that there is only a 2.6% gender gap amongst males and females in the populace in regard with such secondary education.⁴

³ The Constitution of the Democratic Socialist Republic of Sri Lanka (as amended up to 31st October 2022).

⁴ 'Gender Inequality Index (GII)' (UNDP) < <https://hdr.undp.org/data-center/thematic-composite-indices/gender-inequality-index#/indicies/GII> > accessed 16 July 2024.

Moreover, the Women's Charter of 1993 mandates that the government safeguard women's rights to education and training; this includes ensuring access to all levels of education, scholarships, quality facilities, and career guidance. The Charter also targets the removal of gender biases from educational materials and offers support programmes for girls and women who leave school prematurely. As a result, Sri Lanka boasts one of the highest literacy rates in South Asia, with 93% for males and 91.6% for females, indicating a minimal gender gap in literacy.⁵

With relation to the Charter, it would not be the only policy that has a justiciable or a persuasive value, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) would also be considered. Since Sri Lanka does not have a grounded legal instrument that would exclusively deal with women's rights as of now, the use of CEDAW would always be considered signatory in Sri Lanka. The CEDAW principles would aim to safeguard women's rights, including efforts to equalise wages and ensure workplace equality (also outlined in the Women's Charter of Sri Lanka). Such legislation includes the Factories Ordinance No. 45 of 1942 and the Employment of Women, Young Persons and Children Act No. 47 of 1956.

2.2 Closing the Gender Pay Gap: Challenges and solutions in today's workplace

Achieving gender equality in the workplace remains a critical objective for Sri Lanka, reflecting its constitutional commitment and membership in the International Labour Organization (ILO). By adhering to the ILO's principles, Sri Lanka strives to create a work environment that supports both men and women, enhancing productivity and job security. The ILO's Decent Work Agenda emphasises the importance of productive employment and decent work as crucial elements in advancing fair globalisation and reducing poverty. These efforts are pivotal in addressing and overcoming the challenges of closing the gender pay gap in today's workplaces. In Sri Lanka, there is a noticeable disparity in workforce participation between men and women. As of 2019, the participation rate for women stood at 40%, while for men it was 80%.⁶

This enduring gap has persisted over the years and is often attributed to factors such as women leaving their jobs due to childbirth. However, among workers with higher education levels, the gender gap tends to be narrower.

⁵ 'The World Factbook' <<https://www.cia.gov/the-world-factbook/countries/sri-lanka/>> (CIA) accessed 16 July 2024.

⁶ International Labour Organization, *The Gender Pay Gap in Sri Lanka: A statistical review with policy implications*, (International Labour Office 2024).

The uncertainty regarding what qualifies as “managerial” according to such Section 2B(a), and the comprehensive scope of the definition of “industrial undertaking” in the Employment of Women Act, could potentially restrict female employees from effectively contesting any infringements of their rights under this legislation. The goal of such laws is to protect women, but it can also limit their employment opportunities, particularly in sectors not covered by exceptions like altruistic services.

2.3 Pay

In Sri Lanka, gender disparities in pay persist despite legislative efforts and international standards advocating for equal pay for work of equal value. Women tend to dominate sectors such as manufacturing, education, and public administration but often find themselves in lower-wage positions compared to men. In 2019, women earned an average of 27% less per hour than their male counterparts, a gap exacerbated among informal economy workers and those with lower education levels.⁷

Kumari Jayawardena, a prominent Sri Lankan feminist, highlights that in agriculture men and women receive unequal wages, with women often relegated to less skilled positions in other fields. Sri Lanka has ratified various international agreements and conventions aimed at reducing the gender pay gap (GPG), such as the ILO Equal Remuneration Convention No. 100 of 1951. This sets out a standard for fair pay, but the principle goes beyond equal pay for similar work to include comparing jobs of different types that are of equal value. Despite ratifying this convention in 1993, Sri Lanka has yet to fully implement these standards. In contrast, Nepal has made strides by allowing women to work night shifts and mandating equal pay for work of equal value under its 2017 Labour Act, demonstrating a progressive approach in this regard.⁸

The Constitution of Sri Lanka prohibits sex-based discrimination, and this principle is reiterated in labour laws and other legislation. Policies and action plans are also in place to promote female empowerment and participation in the workforce. The Maternity Benefits Ordinance No. 32 of 1939, and its amendments under Section 10A, prohibits terminating a woman’s employment due to pregnancy or childbirth.⁹ However, despite this amendment, the reality remains different. Even today, employers are often reluctant to hire a woman who is pregnant or likely to become pregnant soon. Further, Section 10B requires that if a woman notifies her employer of an expected childbirth within three months, she must not be given any work that could harm her or her child. However, some existing regulations, like

⁷ International Labour Organization (n 6).

⁸ The Labour Act 2017 (Nepal).

⁹ Maternity Benefits (Amendment) Act No. 15 of 2018.

restrictions on night work for women and employer-paid maternity leave costs, unintentionally hinders a woman's career opportunities.

It's important to also highlight the stories of local mothers from both privileged and underprivileged backgrounds who navigate these difficulties.

For instance, women like Sarala, a single mother from a rural area, manage to run a small business while caring for her children, showcasing resilience despite limited resources. On the other hand, mothers from more affluent backgrounds, like Shalini, often have access to better support systems but still grapple with societal expectations that can hinder their professional growth. By recognizing both sides of this spectrum, we can better appreciate the diverse experiences of women striving to achieve their dreams in Sri Lanka. Otara Gunewardene who in 2013 topped the list of *Echelon's* 50 most powerful women in Sri Lanka, states that, "I felt I had a responsibility towards the women of Sri Lanka to show that we could compete in the business world, while still being devoted to our children."¹⁰

Examining policies aimed at promoting gender equality in Sri Lanka's labour market reveals that the country's legal framework includes provisions implicitly supporting equal pay. Legislation such as the National Minimum Wage of Workers Act No.16 of 2021 and the Wages Boards Ordinance No.27 of 1941 set minimum wage standards to ensure fair compensation and protect workers' rights, particularly those in vulnerable positions. However, there are challenges in implementing these laws fully and they may not effectively address gender disparities, especially for women concentrated in lower-wage sectors.

Although Sri Lanka has established a comprehensive legal framework addressing labour market inequalities amongst the genders, such policies have yet to demonstrate effective results in decreasing the disparities in practice. Crucial focus should be placed on pay equality, where Sri Lanka could eliminate legal barriers to women's employment. Opening more job opportunities to women could also address significant economic challenges like occupational segregation and the gender pay gap which persists across various sectors, formal and informal alike.

2.4 Participation in positions of power, empowering women and bridging the gap in political leadership

The elected leadership within Sri Lanka operates across national, local and provincial levels, where women are often viewed to have been facing significant challenges in achieving fair representation

¹⁰ 'Otara' < <https://otara.lk/timeline/> > accessed date 20 July 2024.

across all such areas of governance. Despite parliament using a proportional representation system to enhance inclusivity, as of the 2020 parliamentary election, only 5.3 percent of its members (12 out of 225) were women.¹¹

The absence of women in key political and decision-making roles highlights the need for proactive education and awareness campaigns. Despite the advancements in education, gender parity remains elusive in politics due to numerous institutional barriers. These include gender stereotypes, financial constraints, political violence, and party reluctance to nominate women. Most women who have held political office often hail from prominent political families, indicating a reliance on established political legacies rather than merit alone. This has perpetuated a cycle where political participation is frequently limited to those with existing connections and resources.

Efforts such as training programmes aimed at enhancing women's political understanding have been implemented, but the persistently low representation of women indicates broader issues within the political culture. A lack of meritocracy and gender-neutral practices within political parties contributes to the ongoing underrepresentation of women in political spheres. Thereby, the national Gender Equality and Women's empowerment strategies to support and empower Women Parliamentarians to address challenges hindering women's increased political participation and expand legislative quotas at national and provincial levels to enhance women's political participation.

Despite Sri Lanka producing the first female prime minister in 1960, women are known for their work in the domestic arena. This is because strong cultural norms which persist dictate what behaviours are considered as "suitable based on one's gender, often associating leadership and authority roles with masculinity customarily."¹²

¹¹ Shehara Athukorala and others, 'Women's Political Representation in Sri Lanka: Electoral System Analysis and Recommendations' (International Foundation for Electoral Systems, September 2021) <<https://www.ifes.org/publications/womens-political-representation-sri-lanka-electoral-system-analysis-and>> accessed 17 August 2024.

¹² Louise Morley and Barbara Crossouard, 'Women are held back from top academic careers in South Asia' (*The Conversation*, May 2014) <<https://theconversation.com/women-are-held-back-from-top-academic-careers-in-south-asia-25945>> accessed 17 August 2024.

3. MATTERS SURROUNDING THE ASPECTS OF GENDER RIGHTS AND SOCIAL DYNAMICS

3.1 Empowering women in marriage; rights and realities in Sri Lanka

In Sri Lanka, the institution of marriage would seem to be a fundamental principle followed for a societal viability. However, it also tends to be a struggle for gender equality. Even though certain laws and reforms had evolved significantly, women's rights within marriage have remained an unresolved issue to this day.

According to the general law of marriage in Sri Lanka, marriage consent would be granted at the minimum age of 18, unless it is a Muslim marriage. Without having an age limit for marriage consent would be considered detrimental as young girls may get forced into early marriages. Due to this issue, many risks would be undertaken by them such as abandonment or abuse. Therefore, setting an age limit for the consent for marriage would be important since it would safeguard the health, rights and the future of these young people without getting pressured into such commitments such as marriage. A legal marriage could be surveyed in three sections such as contracting a marriage, experiences that would arise from a marriage and divorce proceedings.¹³ This was mostly considered when marriage laws were proportionate to the Roman Dutch law in Sri Lanka.

Once married, a woman may also have to make certain compromises such as sacrificing the diminutive things in life that produced happiness for them. However, making these compromises may dismiss certain rights for women. Thus, prompting the question: "does she for example have the same opportunities to engage in economic activities which will generate the same type of income as is generated by her husband? Or does her role as caregiver of the children deprive her of those opportunities?"¹⁴

The Women's Charter in Sri Lanka of 1993 also "calls for gender equality and freedom from gender discrimination in recognition of Sri Lanka's obligations under its own constitution and international human rights law, notably CEDAW, although it has no enforcement mechanism."¹⁵ It also indicates the rights of a married woman as having the right to choose a spouse and the free will to determine whether

¹³ Sharya Scharenguivel, 'The Sri Lankan General Law Of Marriage: Dutch, Victorian, or Indigenous?' (University of Colombo, 2012) <<https://cmb.ac.lk/wp-content/uploads/THE-SRI-LANKAN-GENERAL-LAW-OF-MARRIAGE.pdf>> accessed 18 July 2024.

¹⁴ *ibid.*

¹⁵ UNFPA Sri Lanka, 'Protecting Women's Rights' (UNFPA, 2016) <<https://srilanka.unfpa.org/sites/default/files/pub-pdf/WomensRights.pdf>> accessed 19 July 2024.

to enter a marriage. Consequently, women would have the same equal rights as a man when deciding on their residence and domicile, and ownership, administration and transfer of property.

However, once a marriage goes erratic, the next best thing for the parties would be the option of divorce and this could be governed by the Marriage Registration Ordinance No. 19 of 1907. In Sri Lanka, divorce could be a challenging journey. Women may face societal expectations and traditional norms that may complicate their situation. Additionally, it may affect the scope of gender equality as well. Due to the conservative nature in Sri Lanka, women with strong religious belief may encounter significant stress during the divorce procedure.

Furthermore, “hundreds of underage Muslims girls are forcibly married by their parents or guardians at yearly stages of their life. Currently, a historic opportunity for reforming the Muslim Marriage and Divorce Act of Sri Lanka (MMDA) has presented itself. But once again, it is mired in counter-productive politics.”¹⁶ As per the MMDA, there seems to be several legal reform challenges faced for Muslim marriages and divorce due to certain ideological and political factors. Due to the lack of reforms many Muslim women had faced discrimination and unequal treatment within their Muslim communities. The restrictions imposed in Islamic law had further hindered women’s rights, justice and freedom compared to men and caused women to face obstacles when getting a divorce. Even through a Quazi Court System in Sri Lanka that handles the MMDA related issues had also been criticised for its issues in a whole and also for providing unfair treatment for women, who often face threats, criticisms and marginalisation in these courts as well. “Several observations were made of Quazis being partial as a consequence of being influenced by close relationships to the other party, not taking action against men who did not attend court or adhere to orders, taking the side of men, and taking bribes. These experiences seemed to lead to a common perception particularly amongst women of Quazis and the court system as unfair and unjust”.¹⁷

Therefore, it is possible to state that “divorce laws have been intimately bound with the rights of women, and their evolution mirrors the changing role of women in society. Whilst law reform has often been reactive – lurching from injustice to injustice – it can also be transformational. Divorce laws have

¹⁶ Nirasha Piyawadani and Gaea Katreena Cabico, ‘The right to get divorce (or the absence of it) in Sri Lanka and Philippines’ (*UN Women Asia and the Pacific*, August 2021)

<<https://asiapacific.unwomen.org/sites/default/files/FIELD%20Office%20ESEAsia/Docs/Publications/2021/08/ap-wa2j-The-right-to-get-divorce-or%20the-absence-of-it-in-Sri-Lanka-Philippines.pdf>> accessed 20 July 2024.

¹⁷ Ermiza Tegal and Hasanah Cegu Isadeen, ‘Inside The Quazi Courts of Sri Lanka’ (*Change Humanitarian Organization (MPLRAG)*, March 2021)

<<https://www.mmdasrilanka.org/wp-content/uploads/2022/06/Inside-the-Quazi-Courts-System-in-Sri-Lanka-by-CHANGE-Humanitarian-Organization-English.pdf>> accessed 23 October 2024

changed from women effectively being a chattel of their husband to being an autonomous part of a marital partnership, afforded great protection by law.”¹⁸

3.2 Navigating reproductive freedom; women’s rights on abortion in Sri Lanka

Mahatma Gandhi stated in his book *All Men Are Brothers: Autobiographical Reflections* that “it seems to be as clear as daylight that abortion would be a crime.”¹⁹ In Sri Lanka, the applicable abortion laws are considered to be the most confining and constrictive in the world. Through the Penal Code of Ordinance No. 2 of 1883²⁰, undergoing the process of an abortion would be regarded as a criminal offence where a woman could serve up to 3 years of life imprisonment. Unfortunately, even though abortion was criminalised, illegal abortions do materialise around the country.

It would be evident that in Sri Lanka only very few voices favour the idea of abortion and only very negligible support was contributed for abortion as a women’s right. Renuka Herath, who was the Former Minister of Health and Women’s Affairs, was quoted as saying “that care should be taken to ensure that such measures would not promote rape in society.” In addition, she defined the time limit during which abortion should be permitted as ‘before the foetus was transformed from a collection of cells into a child.’²¹ There were also certain proposals were considered and prescribed by the Law Commission in 2013 in order to legalise abortion especially in certain cases as rape. Further, the Committee on the Elimination of Discrimination against Women (CEDAW). had expressed concerns over the years for Sri Lanka’s restrictive laws on abortion laws. They also urged the Sri Lankan government to amend these laws at least when it came to the instances such as rape, incest and even when it came to risking the health of the mother. “In a survey published by the Ceylon Medical Journal in 2015, 65 percent of respondents said abortion should be legalised in cases of rape and 53 percent agreed that it should be legalised in cases of foetal abnormalities”.²²

Unfortunately, these attempts did not fully flourish as the government failed to bring in an improved legislation. In 2017, “the Justice Aluvihare Special Committee recommended that abortion be permitted in cases of serious foetal impairments, incest, rape and pregnancy of minors under age 16. But

¹⁸ John Oxley, ‘Divorce and Women’s Rights: A History’ (*Vardags*) <<https://vardags.com/family-law/divorce-and-womens-rights-a-history>> accessed 20 July 2024.

¹⁹ Mahatma Gandhi, *All Men Are Brothers: Autobiographical Reflections* (Columbia University Press 1958).

²⁰ The Penal Code of Ordinance No.2 of 1883

²¹ Sunila Abeyesekera, ‘Abortion in Sri Lanka in the context of women’s human rights’ (1997) 5 *Abortion: Unfinished Business* 87.

²² Sharanya Sekaram, ‘Where are We Now in the Abortion Debate: The Sri Lankan Spectrum (Part II)’ (*Bakamoono*, 8 May 2018) <<https://www.bakamoono.lk/en/article/2765/where-are-we-now-in-the-abortion-debate-the-sri-lankan-spectrum-part-ii>> accessed in 23 October 2024

legislation based on this proposal has since stalled, with some local media and activists citing religious groups' opposition as a key reason."²³ Further, more proposals to reform abortion laws were put forward to the Parliament of Sri Lanka, however, it did not succeed through parliamentary discussions as well. Due to there been no discussion, unsafe abortions may arise. In such cases like *Sheela Sinharage v Attorney General*, a death had occurred due to an unsafe septic abortion.²⁴ As per to the data gathered by the Annual Report of Family Health Bureau in 2004-2005, it stated that 11.7 percent of maternal deaths had occurred due to the unsafe septic abortions²⁵. "Research conducted in 2015 found that unsafe abortions are responsible for 10 to 13 percent of maternal deaths in Sri Lanka, making it the third most common cause of death during pregnancy"²⁶. As a result, due to these large numbers of unsafe abortions been performed in Sri Lanka, Sri Lankan government may need to reconsider the risks and issues surrounding this area.²⁷

As a result, it is important that the government acts swiftly in such cases and bring in reforms towards these draconian abortion laws brought about in Sri Lanka. Abortion has always remained a controversy, and this goes against women's rights. Considerably, "in this context, finding the means in law to take women into account in a way that acknowledges women's role as social and biological reproducers of society, and respects women's bodily integrity and sexual autonomy - and yet does not confine women because of their bodies - remains a fundamental challenge to activism in this arena."²⁸

3.3 Empowering women's property rights in Sri Lanka

Accordingly, in Sri Lanka, women's rights in acquiring property or assets would seem to be a critical and heavy challenge. Even though there seems to be certain rectifications towards gender equality, women would still have to face certain issues when attempting to own or inherit property or assets. As a result, it is important that a woman should also be able to enjoy this fundamental right just as a man in acquiring or inheriting land.

²³ Meghan Davidson Ladly, 'Sri Lanka's backstreet abortions: hundreds of women take daily risks with illegal terminations' (*The Telegraph*, 5 August 2020) <<https://www.telegraph.co.uk/global-health/women-and-girls/sri-lankas-backstreet-abortions-hundreds-women-take-daily-risks/>> accessed 18 July 2024.

²⁴ [1985] 1 SLR 1 (SC).

²⁵ Annual Report on Family Health Sri Lankan 2004 – 2005

²⁶ Meenakshi Ganguly, 'Reform Sri Lanka's Draconian Abortion Law: Legalize Abortion for Rape Survivors and Others' (*Human Rights Watch*, 10 March 2022) <<https://www.hrw.org/news/2022/03/10/reform-sri-lankas-draconian-abortion-law>> accessed on 23 October 2024

²⁷ Abeysekera (n 21).

²⁸ *ibid*.

According to the Land Development Ordinance of 1935 in Sri Lanka, it can be observed that there are certain limitations suffered by women with regard to the power of land ownership and inheritance. Through Schedule 3 of the Land Development Ordinance, it directs that inheritance would be given main priority to the male heirs over the female heirs. If a man were to remarry, the first wife may not be entitled to the land even though they had both put in the effort to cultivate it. Male relatives also have the possibility to remove the women from the land they were cultivating as well. As a result, for the longest time women were denied land ownership due to such limitations such as these. Due to these issues suffered by women, they may have less economic security and would be unable to apply for loans or gain any resources relating to agriculture and so on. “Because women’s land rights are not protected by the law, they are inadvertently vulnerable and unable to access formal institutions. They have to rely on informal credit institutions with higher interests, leading to higher debts for women,” Sathya Karunarathne, research executive at Advocata Institute, a policy think tank in Colombo, Sri Lanka, told *The Diplomat*,²⁹ “Sociologist Elisa Scalise also finds that the practice of dowries in South Asia is a major impediment to land ownership and inheritance for women. Families often view their daughter’s dowry, given to her husband and his family, as her inheritance.”³⁰

However, if women were to own property, it could serve as a shield that helps her navigate societal changes. This may often act as a status symbol for women. Fortunately, the Land Development Ordinance of 1935 was amended in 2022 as the Land Development (Amendment) Act No. 11 of 2022³¹ to cure the limitations suffered by women on land ownership. This amendment removed these limitations and ensured that women have equal rights to manage, inherit and own land as well. Just as men, women had the same right to transfer and negotiate land. As a result, this amendment eliminated all gender biases and ensured that women are also empowered in order to promote equitable access to land ownership and rights. The Married Women’s Property Ordinance, commenced in 1924, allows married women to own and dispose property with regard to movable and immovable property and unmarried women have the right to independently contract property as well.

3.4 Parenthood: women’s rights in Sri Lanka

Through the landscapes of Sri Lanka, the role of a woman within the realm of parenthood, would be undergoing a significant conversion. As per a women’s right as a caregiver or mother, Sri Lankan

²⁹ Bansari Kamdar, ‘Gendered Land: Sri Lankan Women Battle Unequal Access to Resources, A variety of legal and social hurdles stand in the way of land ownership by Sri Lankan women’ (*The Diplomat*, 9 March 2021) <<https://thediplomat.com/2021/03/gendered-land-sri-lankan-women-battle-unequal-access-to-resources/>> accessed 24 July 2024.

³⁰ *ibid.*

³¹ Land Development (Amendment) Act No. 11 of 2022

women still face certain barriers. The journey of motherhood would seem to be many sided and complex with regard to many issues on healthcare, maternity leave and legal protection. In Sri Lanka, getting married and gaining motherhood is considered to be a highly esteemed part of a woman's life.

As for single mothers in Sri Lanka, they may encounter certain challenges such as financial constraints and societal expectations that may lead to a limited access of childcare and support services. Unfortunately, in Sri Lanka, single mothers are excluded from any state support and they have been discriminated against by gender norms such as getting a low pay grade. Therefore, it could be exhibited that, as for parenthood, single mothers in Sri Lanka do face certain regional and social disparities.

A woman may also gain single motherhood by being divorced or widowed. Society may consider them to be disgraceful on the mother's part. "The Sri Lankan anthropologist Obeyesekere describes how fear of shame or 'shame-fear' ('*lajja-baya*' in Sinhala) related to sexuality and norms of proper behaviour is internalized in children from an early age."³²

Women were also said to be afraid of how society would observe them as they tend to face difficulties from trying to gain societal acceptance and survive financially. "The women facing single motherhood expressed awareness of having trespassed norms of sexuality through self-blame, victimhood and obedience, and by considering or attempting suicide."³³

In recent years, Sri Lanka had undertaken certain advancements in establishing legal rights for mothers such as granting them maternity leave and workplace protections. According to the statistics under the Family Health Bureau, the postpartum mothers receiving Vitamin A megadose was significantly high at 92.2 percent in 2023 and also in 2023, 99 percent of pregnant mothers were also protected from Rubella as well.³⁴ In rural areas, the access to maternal facilities and healthcare facilities would still be less accessible. However, with implementations of the use of visitations of midwives health workers may have considerably helped women as well. Through the Family Health Bureau statistics, the percentage of pregnant mothers visited at least once at home by a public health midwife in 2023 was 97.5 percent.³⁵

³² Malin Jordal, Kumudu Wijewardena and Pia Olsson, 'Unmarried women's ways of facing single motherhood in Sri Lanka – a qualitative interview study' (2013) 13 *BMC Women's Health* <<https://doi.org/10.1186/1472-6874-13-5>> accessed 17 August 2024.

³³ *ibid.*

³⁴ Family Health Bureau Ministry of Health Sri Lanka <<https://fhb.health.gov.lk/statistics/>> accessed on 23 October 2024.

³⁵ *ibid*

3.5 Challenging gender stereotypes in Sri Lanka

It is a well-known reality that the issue of gender stereotyping is pervasive worldwide, especially in Sri Lanka. From the rural areas to the busy cities, gender stereotyping influence one's day to day life. Despite certain measures that had been taken to reform gender equality, women are still confined to societal and traditional norms that may limit their opportunities in many areas of the education and working system in Sri Lanka.

From a young age, both boys and girls are taught on how to behave a certain way around society and on what sort of interests or careers they could pursue according to their gender. Certain outdated ideas such as “a woman's job is to work at home and serve the family needs” or that “men are more suited for leadership positions” would also be reinforced. Thus, “women face multiple challenges to secure positions of leadership and even membership in trade unions, farmer's societies and fisheries cooperatives. Priority is not given to unions headed by women when distribution of welfare grants is given by the government.”³⁶

It is a contributing factor in violations of a vast array of rights such as the right to health, adequate standard of living, education, marriage and family relations, work, freedom of expression, freedom of movement, political participation and representation, effective remedy, and freedom from gender-based violence.³⁷

As a result, it is predominant, even at current times, that women should be more aware of these situations and give effect to bring about genuine modifications to the society, especially for their children. Around workplace conformity, it had been suggested by the United Nations Development Programme in Sri Lanka that certain reforms had been undertaken for women's rights to bring about a safe workplace environment without any exploitation and abuse done towards women. Therefore, organisations like the Ministry of Women, Child Affairs and Social Empowerment and the United Nations Population Fund had strived to locate these issues and bring about reforms and solutions to gender stereotyping in Sri Lanka.

³⁶ ‘Women's Rights Factsheet - Sri Lanka 3rd Cycle Universal Periodic Review’ (Civil Society Collective Sri Lanka, 2017) <https://upr-info.org/sites/default/files/documents/2017-10/women_s_rights_factsheet_srilanka_2017.pdf> accessed 18 July 2024.

³⁷ ‘Gender stereotyping’ (OHCHR) <<https://www.ohchr.org/en/women/gender-stereotyping>> accessed 22 July 2024.

3.6 Navigating the challenges and women's rights on women's health in Sri Lanka

Women's health includes a wide range of certain physical, mental and emotional issues and it is important that these issues be highlighted. Using certain tailored healthcare approaches, these issues suffered by women would need to be addressed so that it would match their unique needs and challenges that would come across throughout the different stages of their life.

When it comes to sexual and reproductive health care for women, they have the right to understand what their bodies are permeating and to access related services like contraception. Safe and stable healthcare facilities would be crucial for women's sexual and reproductive healthcare, especially for pregnant women and nutrition is an extreme need for both the mother and the foetus. However, the fertility rate seemed to be in a fluctuation as "the total fertility rate has dropped in recent decades, from 5.5 births per woman in 1960 to 2.0 births in 2017, 48 the latest data (2020) show a slight increase to 2.2 births per woman.⁴⁹ The adolescent fertility rate has declined from 95 births per 1000 women ages 15 to 19 in 1960 to 16 in 2021."³⁸

Sri Lanka's public health system has also been affected by shortages of medicine and equipment. Health workers providing maternal care told Amnesty International that they had to stop, delay or postpone non-essential surgeries and procedures. One doctor, who conveyed they have to ration drugs for emergency cases because future supplies are uncertain, told Amnesty International: "We have to see patients suffering and we cannot do anything."³⁹

4. GENDER BASED VIOLENCE IN SRI LANKA

Gender-based violence (GBV) remains a significant issue in Sri Lanka, profoundly ingrained in societal norms and cultural practices. Rape and domestic violence are widespread, but they are frequently not reported due to stigma and victim-blaming. Additionally, legal and institutional obstacles prevent justice for survivors. This article delves into the cultural and legal factors that perpetuate GBV in Sri Lanka, emphasising the ongoing battle for equality and justice.

Violence against women and girls is a widespread human rights violation that transcends social, economic, and national boundaries. It is estimated that one in three women will experience physical or

³⁸ Gender Equity Unit, 'Sri Lanka, A Gender Equity Report' (April 2023) <<https://genderhealthdata.org/wp-content/uploads/2024/04/Sri-Lanka-Gender-Report-website.pdf>> accessed 26 July 2024.

³⁹ Dinushika Dissanayake, 'Sri Lanka: Government must ensure access to adequate nutrition for all pregnant and breastfeeding women' (*Amnesty International*, 13 July 2023) <<https://www.amnesty.org/en/latest/news/2023/07/sri-lanka-government-must-ensure-access-to-adequate-nutrition-for-all-pregnant-and-breastfeeding-women/#>> accessed 26 July 2024.

sexual assault in their lifetime. According to the Women's Wellbeing Survey (2019) conducted in Sri Lanka, 20.4% of women have encountered intimate partner violence, and 24.9% have encountered such violence since the age of 15. The COVID-19 pandemic has exacerbated the situation by increasing the number of reported cases of gender-based violence. This is a result of the strain on health systems and the implementation of lockdowns, which has disrupted access to essential services and sanctuaries.⁴⁰

A study conducted with young, educated men in Sri Lanka employed focus-group discussions (FGDs) to investigate their perceptions of GBV and potential interventions. The participants emphasised the necessity of equal treatment for boys and girls, advocating for mixed-gender institutions and respectful, loving parental involvement in the upbringing of children. They suggested that life skills education be introduced at an early age, beginning in preschool and continued throughout the school year, with the assistance of parents and religious leaders. The participants recommended collective action as a safer method of reporting incidents to management in the context of workplace violence. They also emphasised the significance of interdisciplinary teams, which include physicians, social-care partners, and legal authorities, in order to provide comprehensive support for GBV victims. Additionally, it was suggested that posters and decals be employed to increase community awareness.

In terms of politics, the young males advocated for a greater number of women to be involved in government and emphasised the importance of women holding positions such as the Minister of Women's Affairs. They emphasised the significance of premarital counselling and early education in the prevention of violence and gender inequality. The research demonstrated a transition from conventional patriarchal beliefs to more egalitarian attitudes among male university students. Although patriarchal norms continue to exist, there is an increasing acknowledgement of women's rights and a rejection of GBV. The participants, who were employed in the health and management sectors, were perceived as potential prospective influencers who could influence the attitudes towards GBV in their professional environments. The study's qualitative approach offered a comprehensive understanding of the students' perceptions and experiences, emphasising a substantial change in attitudes among the younger generation.⁴¹

A recent study into the prevalence of sexual and gender-based violence (SGBV) and ragging in Sri Lankan state universities revealed alarming levels of abuse. The study indicates that more than half of the students are subjected to some form of ragging, which encompasses sexual harassment,

⁴⁰ 'Gender-Based Violence' (UNFPA Sri Lanka) <<https://srilanka.unfpa.org/en/topics/gender-based-violence-13>> accessed 28 July 2024.

⁴¹ Elisabeth Darj and others, '“Even though a man takes the major role, he has no right to abuse”: future male leaders' views on gender-based violence in Sri Lanka' (2017) 10(1) Global health action <<https://doi.org/10.1080/16549716.2017.1348692>> accessed 17 August 2024.

psychological, physical, and verbal abuse. The effects of ragging are not limited to the initial years of university; they continue to influence students throughout their academic careers. Furthermore, the investigation underscores substantial instances of SGBV among university personnel, suggesting a more extensive issue within the academic environment.

The necessity of a secure and nurturing learning environment is underscored by Senior Professor Sampath Amaratunge and UNICEF Representative Christian Skoog. The University Grants Commission (UGC) has implemented new regulations in response to these concerns, which include stringent penalties for violators and a mandate for students to sign a covenant against harassment. Continuous and comprehensive endeavours are required to address the underlying causes and effects of these detrimental practices, despite the implementation of these measures. UNICEF and the UGC are dedicated to enhancing the situation and will need to closely monitor the efficacy of these new regulations.⁴²

4.1 Domestic Violence against women

In Sri Lanka, domestic violence against women is a pervasive and severe issue that has a profound impact on both individuals and communities. Despite the increasing awareness and legal reforms, numerous women continue to experience abuse and are left with inadequate assistance. It is frequently challenging to disrupt the cycle of violence because traditional perspectives frequently obscure the movement towards gender equality. To resolve this matter, it is necessary to provide immediate assistance to survivors and to demonstrate a resolute dedication to altering the cultural and institutional norms that permit the continuation of such abuse. To establish a more supportive and secure environment for women, it is fundamental that all members of society collaborate.

Domestic violence falls under Section 23 of the Prevention of Domestic Violence Act No. 34 of 2005 (PDVA).⁴³ Under the PDVA, an individual may apply for a Protection Order if they are the victim of domestic violence. If an individual is accused of committing domestic violence through an action that is classified as an offence in the Penal Code, they may be prosecuted.⁴⁴

The PDVA 's primary objective is to defend victims through protection orders, rather than to address the offenders, with the exception of instances in which a protection order is violated. This approach is

⁴² UNICEF Sri Lanka, 'New Report on Ragging and Sexual and Gender Based Violence in Sri Lankan State Universities Highlights Grave Consequences' <<https://www.unicef.org/srilanka/press-releases/new-report-ragging-and-sexual-and-gender-based-violence-sri-lankan-state>> accessed 17 August 2024.

⁴³ Prevention of Domestic Violence Act No.34 of 2005 (PDVA), s 23.

⁴⁴ Harshana Nanayakkara and Mahesh Senaratne, *Hand Book on Law Relating to Women's Rights* (Bar Association of Sri Lanka 2019).

essential because it enables victims to seek protection without resorting to criminal proceedings, which they may be hesitant to do due to concerns about their abuser being prosecuted, particularly if they are financially dependent on the abuser. The PDVA does not establish a new domestic violence offence; therefore, existing Penal Code provisions must be implemented to prosecute offenders if necessary.

However, there are certain disadvantages for resorting to the individual offences in the Penal Code to prosecute acts of domestic violence. Firstly, the elements necessary to establish domestic violence would be distinct from those in current Penal Code offences, thereby more effectively confronting the distinctive circumstances of domestic violence victims. Secondly, emotional abuse is not currently addressed by criminal laws, which means that perpetrators of such abuse, regardless of the severity, cannot be prosecuted. Finally, the specifics of domestic violence cases may not be adequately addressed by adherence to Penal Code sentencing policies. The State's intolerance for such acts could have been demonstrated and deterred by the introduction of harsher penalties as a result of a distinct domestic violence offence.

Section 2(2) of the PDVA restricts petitions for protection orders to the aggrieved person or a police officer acting on their behalf, which can be problematic if the victim is unable to attend court due to injuries, trauma, financial constraints, or if they are hiding from the abuser. This issue could be mitigated, and the victim could receive the requisite support in these situations by permitting third parties to petition the court on their behalf.⁴⁵

However, it is fundamental to keep in mind that there are other implications when potentially incarcerating one's spouse. It can have an emotional impact on children where children may feel fear, confusion, and abandonment when a parent is incarcerated, leading to anxiety and behavioural challenges. Long-term, this can increase the risk of depression and make it harder for them to trust others. Further, there can be custodial challenges where if the incarcerated parent was the primary caregiver, custody arrangements may need to change, creating instability. Children may also face bullying and exclusion at school, which could lead to serious emotional struggles, including thoughts of suicide.

Furthermore, it must also be considered how to get financial support if one's partner has been incarcerated and if she is emotionally dependent on him. Then she can rely on the Maintenance

⁴⁵ Khyati Wikramanayake and Inshira Faliq, 'Legal Reform to Combat Sexual and Gender-Based Violence' (Centre for Policy Alternatives, November 2020) <<https://www.cpalanka.org/wp-content/uploads/2020/11/Law-Reform-to-combat-SGBV-PART-1-General-Centre-for-Policy-Alternatives.pdf#:~:text=URL%3A%20https%3A%2F%2Fwww.cpalanka.org%2Fwp>> accessed 17 August 2024.

Ordinance in the Magistrate Court. Section 2 of the Maintenance Ordinance primarily deals with the obligation to maintain a wife, children, or other dependents. It defines "maintenance" as the provision of necessary support for living, including food, clothing, lodging, and medical care, where applicable.

In *Fernando v. Fernando* (2007), the Sri Lankan Court upheld the husband's legal obligation to support his wife after separation, highlighting the importance of maintaining the wife's standard of living. In *Liyanage v. Liyanage* (2011), the Court enforced maintenance payments for children, penalizing the husband for non-compliance and ordering payment of arrears.

An alternative method is that one can go to the District Court and challenge under Divorce Law where the Plaintiff has to prove a fault of the defendant. In *Wickramasinghe v. Wickramasinghe* (2013), the plaintiff sought a divorce on grounds of desertion. The court found that the defendant had deserted the plaintiff without just cause, ruling in favour of the plaintiff. It also emphasized the need for clear evidence to prove the desertion.

Climate change in Sri Lanka is straining the economy and generating domestic violence, especially among farmers and women. Dry spells are generating crop failures and impoverishment, which makes men angry with their wives. Research links climate-induced stress to domestic violence, with men turning to violence due to conventional roles. The 2019 Women's Wellbeing Survey found that over 40% of women have been abused by their relationships, and Sri Lanka's 2023 climate policy shows a major increase in climate-related hazards. Climate change has made women more dependent on their husbands and more vulnerable to violence. To solve this problem, we must address economic hardship and establish social norms that induce violence. Climate change can be mitigated and women's safety improved by investing in climate-resilient agriculture and providing economic opportunities and education.⁴⁶

An alarming increase in domestic violence against women has been observed in Sri Lanka over the past 18 months of the COVID-19 pandemic. In comparison to other Asia-Pacific countries, there are fewer comprehensive measures in place, despite the presence of traditional 24-hour helplines. The *Colombo Telegraph* has reported that lockdowns have exacerbated this issue, resulting in a rise in violence as a result of confinement, job loss, and financial hardship. Women are left with inadequate assistance due to the overcrowding of assistance centres.

⁴⁶ 'Climate change fuelling domestic violence against women in Sri Lanka- report' (*Ada Derana*, 16 February 2024) <<https://www.adaderana.lk/news/97333/climate-change-fuelling-domestic-violence-against-women-in-sri-lanka-report>> accessed 17 August 2024.

The United Nations emphasises that domestic violence has increased during the crisis, describing it as a “shadow pandemic” that has been exacerbated by COVID-19. Gender inequality, poverty, substance misuse, and strict social norms are all contributing factors to this violence. The UNiTE campaign urges global action to address funding gaps, assure essential services, and enhance data collection. The objective of the International Day for the Elimination of Violence against Women on November 25th is to increase awareness and coordinate efforts to address this widespread issue.⁴⁷

Financial empowerment of women is frequently advocated by activists as a method of disrupting the cycle of domestic violence. Since 2010, the power dynamics between men and women in Sri Lanka have been altered as a result of enhanced access to resources and increased female employment. This has resulted in an increase in household conflict. Research suggests that women who are financially independent and educated are still susceptible to domestic violence and may opt not to report it. This underscores the complexity of household power dynamics and the necessity of multifaceted solutions.

There is a global body of research that examines the ways in which patriarchal ideology contributes to domestic violence. However, additional research is required to explore the intersection of patriarchy, marriage, and domestic violence. Furthermore, it is important to conduct a historical examination of family and marriage laws and their contribution to the perpetuation of unequal power dynamics. A comprehensive comprehension of the issue necessitates an understanding of the State’s role in either resolving or exacerbating these power imbalances.⁴⁸

4.2 Sexual Offences such as Rape against women

Women who have been raped in Sri Lanka are part of a larger GBV crisis that persists despite legal and societal progress. Rape shows systemic failures in prevention and justice in a country where cultural norms silence survivors. High-profile cases and rising reports show that victims confront shame and limited legal protections when seeking justice. Sri Lanka must address rape through legal reforms and a cultural transformation to empower survivors and hold perpetrators accountable.

According to a recent report, 24.9% of women in Sri Lanka have been subjected to physical and/or sexual violence by a partner or non-partner, while 39.8% have dealt with a variety of forms of violence and controlling behaviours. The survey emphasises that violence is not a singular incident, but rather a

⁴⁷ ‘Domestic violence against women and girls’ (*Daily Mirror*, 20 November 2021) <<https://www.dailymirror.lk/print/opinion/Domestic-violence-against-women-and-girls/172-225180>> accessed 17 August 2024.

⁴⁸ Bibhu Thapaliya ‘Domestic violence against women: Unequal power relations fuelling it’ (*Himalayan Times*, 27 February 2020) <<https://www.proquest.com/docview/2365073561?pq-origsite=summon&accountid=14565&sourcetype=Newspapers>> accessed 17 August 2024.

pervasive and enduring issue in the lives of numerous women, particularly in the estate sector, where 37.9% of women experience physical violence.⁴⁹

The substantive law for sexual offences is governed under the Penal Code No. 2 of the 1883 as it was later amended by Act No. 22 of 1995. Section 363 of the Penal Code (Amendment) Act No. 22 of 1995 sets out the act of sexual intercourse amounts to rape. If there is no consent of the woman, then it will amount to rape.⁵⁰ The punishment for rape is given under section 364 punishable with a rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with a fine. The offender can also be ordered to pay compensation to the victim.⁵¹

The definition of rape in the current law has faced significant criticism for its narrow scope. Firstly, it exclusively considers men as perpetrators and women as victims, ignoring that women can also commit rape and men can be victims. This oversight neglects the reality that many males are documented as rape victims each year. Secondly, the law defines rape solely as penile penetration of the vagina, excluding non-consensual oral or anal penetration and same-sex sexual acts. This exclusion may violate Article 12 of the Constitution. The 1995 Amendment clarified that physical injuries are not necessary to prove non-consensual sexual intercourse. However, courts often demand corroboration of the victim's testimony, placing a heavy burden on victims since rape usually occurs in private without independent witnesses.⁵²

It is important to note that Sri Lanka does not recognise marital rape. However, this does not apply if the spouses are judicially separated as seen in Section 363(a). The notion that non-consensual intercourse between a husband and wife is not rape is rooted in outdated cultural beliefs. This can also be addressed through the PDVA and judicial separation. However, the Act still doesn't address how grave the situation actually is. It's not updated, it doesn't consider new perspectives. For example- other countries like England recognise marital rape. The land mark case of *R v. R* (1991) where the House of Lords ruled that marital rape is a crime. The court rejected the notion that marriage implied consent to sex, stating that a wife has the right to refuse sexual relations, just like any other person. This decision

⁴⁹ Britney Martil, 'Women's Rights, Sexual Offences & Violence against women in Sri Lanka & South Asia' (Newswire, 7 January 2024) <[⁵⁰ Penal Code \(Amendment\) Act No. 22 of 1995, s 363.](https://www.newswire.lk/2024/01/07/womens-rights-sexual-offenses-violence-against-women-in-sri-lanka-south-asia/#:~:text=According%20to%20a%20recent%20report,of%20violence%20and%20controlling%20behaviors.> accessed 17 August 2024.</p></div><div data-bbox=)

⁵¹ *ibid*, s 364.

⁵² International Labour Organization (n 6).

marked a significant legal shift, recognizing marital rape as an offense and aligning the law with modern views on consent and personal autonomy.

These concepts encompass the notion that a wife is legally an extension of her husband, that a wife is his property, that marriage inherently involves consent to sex, and that the marriage would be irreparably harmed if accusations of marital rape were to be sustained.⁵³

“In the Sri Lankan context, the reality is that sex in itself is a taboo subject and rape within a marriage is regarded as a domestic or private matter in the legal system.” Such women are prevented from addressing this issue by societal stigma, fear, embarrassment, community and family condemnation, fear of losing children, bad views, and police harassment. Many feminists and legal scholars claim that marital rape, as defined worldwide, is difficult to apply in Asia due to variables including education, poverty, social conventions, religious beliefs, and societal views of marriage as a sacrament. Marital rape is commonly overlooked because men and women view wives as their husbands' property due to patriarchy and subordination. Marriage does not legitimise domestic violence. Sex is not a marital right, and wives are not their husbands'. Women have the right to consent regardless of marital status. One should honour marriage, but one should also address women's suffering and reject “she's my wife” as an excuse for marital rape. Changing societal attitudes takes a concerted effort to promote positive views and strong morals.⁵⁴

To cite as examples, Sri Lankan cases like the *Visuawamadu* case where the Jaffna High Court convicted four soldiers of gang raping and sexually abusing two women in Visuvamadu, Kilinochchi District, in June 2010 on October 6, 2015.⁵⁵ After returning home from the Menik Farm IDP camp, the victims were beaten at night. Instead of recording the rape accusation, the police advised the victim to report to the military. The military imprisoned the victim until the police logged her complaint and gave her money to be silent. The women identified the perpetrators, who were released on bail in November 2010 with one absconding and being convicted in absentia. The court sentenced the soldiers to 20 years in prison, Rs. 500,000 in compensation to the gang rape victim, and five more years with Rs. 100,000 to the sexual assault victim. Another case is the *Krishanthi Kumaraswamy* case where a trial at bar in 1998 convicted five military soldiers and a policeman of abducting, raping and murdering a 17-year-old Jaffna District teenager and three of her family members.⁵⁶ The 2004 Supreme Court upheld all

⁵³ *ibid.*

⁵⁴ ‘Marital rape laws & Women's Rights: ‘she's my wife’ is not a defence!’ (*Sunday Observer*, 20 August 2017) <https://go.gale.com/ps/i.do?p=STND&u=ull_ttda&id=GALE%7CA501304104&v=2.1&it=r&sid=summon> accessed 17 August 2024.

⁵⁵ [2015] Case no. 1569/12 (Jaffna High Court).

⁵⁶ *Somarathne Rajapakse v Attorney General* [2010] 2 SLR 113 (SC).

defendants' convictions. These two cases show the rare instances of successful prosecution of offences of rape and sexual violence against state officers.⁵⁷

Further, in *Inoka Gallage v. Kamal Addararachchi*, the Supreme Court recognised that “a mere act of submission does not involve consent.”⁵⁸ In the case of *Suppaiya Rajendran v. Attorney General*, the court determined that, “The offence of rape is having sexual intercourse with a woman against her will and without her consent. *Obtaining the consent by seduction* does not come within the scope of the offence of rape.”⁵⁹

5. CONCLUSION

Over the years certain legal frameworks, organisations and substantial legislative reforms have made preparations for greater gender equality across Sri Lanka. With the result of distinguishing many women taking up leadership positions nowadays in areas of politics, education and workforce, it sheds light to the fact that there seems to be a positive impact in these legal advancements in Sri Lanka. Despite these advancements, challenges persist, particularly in areas such as the gender pay gap, workforce participation, and political representation..

The writers' perspective on women's rights in Sri Lanka would be that there seems to be a promising trajectory of persistent improvement. People are more aware of gender discrimination and the violence against women. In 2023, the WVL-SL project promoted a workshop titled as the ‘Contributing to the Strategic Action Plan of the Sri Lanka National Gender Equality and Women's Empowerment Policy’ that aimed to bring about “discussions on the government's policy commitments set out in the national policy and brainstorm recommendations for the strategic action plan of the national policy to submit to the Ministry of Women, Child Affairs, and Social Empowerment”.⁶⁰ As a result, if Sri Lanka were to implement such similar projects, there is a possibility that the issues surrounding women's rights could be solved over time. By addressing these deeper barriers, we can ensure that progress is not just a promise but a lived reality for women across Sri Lanka.

⁵⁷ Centre for Equality and Justice, ‘Rape and Sexual Violence in Conflict’ (July 2018) <<https://cejsrilanka.org/wp-content/uploads/Rape-and-Sexual-Violence.pdf>> accessed 17 August 2024.

⁵⁸ [2002] 1 SLR 307 (SC).

⁵⁹ [2014] Case no. 234/2011 (CA).

⁶⁰ The Asia Foundation ‘Paving the Way for Action: Women's Rights Organizations' Contribute to the Strategic Action Plan of the Sri Lanka National Gender Equality and Women's Empowerment Policy’ (13 September 2023)

<https://asiafoundation.org/wp-content/uploads/2024/03/SriLanka_Womens-Policy-Action-Plan-Contribute-to-the-Strategic-Action-Plan-of-the-Sri-Lanka-National-Gender-Equality-and-Womens-Empowerment-Policy.pdf> accessed 26th October 2024.

LIBERALISING ABORTION IN SRI LANKA: A COMPARATIVE ANALYSIS

Ruzaima Faiz

ABSTRACT

Abortion has been a contentious topic of discussion in numerous nations across the globe, including Sri Lanka. Despite the highly restrictive current legal stance, the number of unsafe and illegal abortions performed clandestinely remains significantly elevated in Sri Lanka, resulting in maternal mortality and morbidity. This research includes a critical analysis of the salient statutory provisions of several legislations, international instruments along with scholarly articles and academic literature, evaluating the imperativeness of revising the abortion laws in Sri Lanka, while acknowledging the social and ethical factors and addressing the morality of liberalizing abortion. This research aims to advocate for progressive reforms in Sri Lanka pertaining to abortion laws, influenced by insights drawn from liberal Scandinavian abortion regulations and the World Health Organization (WHO) guidelines. Furthermore, women's rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are critically analysed in this paper, to empower women's autonomy and uphold their human rights. This paper intends to contribute to the debate on public policy with regard to abortion and women's reproductive rights in Sri Lanka.

1. INTRODUCTION

Abortion is criminalized in numerous countries around the globe including Sri Lanka. Abortion refers to the ending of pregnancy by removing the foetus or embryo from the uterus which results in the death of the foetus.¹ It is a medical procedure that is carried out for various reasons, including to end an unintended pregnancy, to save the life of the pregnant woman, due to social and economic reasons, or due to foetal abnormalities.² The laws and regulations governing abortion vary widely across countries, with some imposing stringent restrictions on the circumstances under which and

¹ Radhika Rao, 'Abortion' (*Oxford Constitutional Law*, September 2016) <<https://oxcon.oup.com/display/10.1093/law:mpeccol/law-mpeccol-e67#law-mpeccol-e67-bibItem-167>> accessed 31 January 2023.

² Akinrinola Bankole, Susheela Singh and Taylor Haas, 'Reasons Why Women Have Induced Abortions: Evidence from 27 Countries' (1998) 24 *International Family Planning Perspectives* 117 <<http://doi.org/10.4038/sljfmsl.v9i2.7804>> accessed 17 August 2023.

when abortions can be performed, while other jurisdictions adopt more liberal laws that allow for greater access to abortion services. The gestational stage, the method utilized, the reason for the abortion, the existence of foetal deformities, and the health of the woman seeking the abortion are some prominent factors that affect abortion laws.³

It is important to note that this paper intends to examine the prospects of liberalizing abortion laws in Sri Lanka through a comparative study with Scandinavian abortion laws, because Scandinavia has adopted liberal and progressive laws that prioritize women's reproductive rights and autonomy and allow relatively unconstrained access to safe and lawful abortion services as opposed to other countries around the world.

This paper evaluates the effectiveness of abortion laws in Sri Lanka and various Scandinavian countries inclusive of Denmark, Norway, and Sweden to suggest reforms. Moreover, it scrutinizes the controversial discussion on the morality of abortion: Do fetuses have a right to life that "trumps" women's rights to choose whether to have children? Or should pregnant women be allowed to end their unintended pregnancies?⁴ This paper intends to address the question of the morality of abortion from the international human rights law perspective. Furthermore, it entails a discussion of the Convention on the Elimination of All Forms of Discrimination Against Women⁵ (hereto referred to as CEDAW) and the International Covenant on Civil and Political Rights⁶ (hereto referred to as ICCPR) dimensions to justify whether there is a need to have abortion legalized or decriminalized in Sri Lanka. The two primary research questions of this paper comprise an analysis of the following: (i) Whether abortion should be completely criminalized, entirely legalized, or regulated; and if so, under what circumstances abortion should be regulated; and (ii) Given that Sri Lanka is a signatory to prominent international human rights instruments such as CEDAW and ICCPR, how could the present law on abortion be reformed in a progressive manner.

This paper follows the qualitative research paradigm to critically analyse the laws from Sri Lanka and Scandinavia and includes an evaluation of literature, examining and reviewing available research and scholarly articles on abortion laws. The primary legal sources such as legislation and

³ Rachel B Vogelstein and Rebecca Turkington, 'Abortion law: Global Comparison' (*Council on Foreign Relations*, 24 June 2022) <<https://www.cfr.org/article/abortion-law-global-comparisons>> accessed 06 February 2023.

⁴ Emily Jackson, *Medical Law* (6th Edn, OUP 2022) 764.

⁵ (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

⁶ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

international conventions and secondary sources including books, journal articles and websites are comprehensively utilized in conducting this research.

The significance of this research lies in its potential to inform public opinion and policy on reproductive healthcare services in Sri Lanka. The findings of this research may help to advance discussions on decriminalizing abortion, resulting in improved access to safe and legal abortion services for women.

This paper ultimately concludes that the criminalization of abortion gives rise to grave health ramifications due to the risk of unsafe backdoor abortions. In addition, it posits that access to lawful abortion services for women is germane to women's rights and autonomy. Hence, it is imperative that Sri Lankan abortion law be amended and liberalized.

2. AIMS AND OBJECTIVES

The objective of this paper is to assess the abortion laws in Sri Lanka. Moreover, it examines the law on abortion in selected liberal jurisdictions, including those of Scandinavia, specifically Denmark, Norway, and Sweden. Furthermore, it analyses the significance of reforming the law on abortion in Sri Lanka, addressing the social issues, ethical or moral reasons to determine that women have an autonomy in deciding whether to have an abortion. It further discusses the human rights aspects outlined in ICCPR and CEDAW pertaining to abortion. In addition, this paper aims to suggest potential reforms to the existing legal framework in Sri Lanka, aligning with the abortion care guidelines provided by the WHO.

3. LITERATURE REVIEW

Sri Lanka currently has restrictive abortion laws, with termination of pregnancy only allowed if the woman's life is in danger by virtue of section 303 of the Penal Code (Ordinance No 02 of 1883).⁷ This resulted in a significant increase in unsafe and illegal abortions, placing women's health at

⁷ Penal Code Ordinance No 02 of 1883, s 303.

risk.⁸ Thilakarathna stated this strict stance on abortion is a result of the country's cultural and religious influences, as well as its societal and political position.⁹

Nonetheless, there have been calls for the decriminalization of abortion in Sri Lanka, with proponents arguing that this would improve access to safe and legal abortion services and reduce maternal mortality and morbidity. There has been a growing body of literature in academic journals advocating for the legalization of abortion laws in Sri Lanka. The following are a few key scholarly articles that discuss the importance of legalizing abortion laws in Sri Lanka and the benefits it can bring to women's health and rights.

Furthermore, Ayodhya Rathnayake noted that there is an increasing recognition that the current laws are causing harm to women, particularly those who are poor and vulnerable. Studies have shown that women who are unable to access safe and legal abortion services are at an increased risk of death and injury, and that the laws are also contributing to the perpetuation of poverty and inequality.¹⁰ Ayodhya Rathnayake also emphasised that this is because women who are denied access to abortion services are often forced to resort to unsafe abortion methods performed by unskilled persons, which can lead to serious health consequences and can sometimes be fatal.¹¹

In addition, a study conducted by Pascale Allotey and others found that many women who wanted to terminate their pregnancy were unable to do so legally, leading them to seek out unsafe and illegal abortions.¹² The aforementioned study by Pascale Allotey also revealed that women from marginalized communities, such as low-income households and rural areas, were particularly vulnerable to the consequences of restrictive abortion laws, as they lacked access to safe and legal abortion services.¹³

⁸ José Miguel Vivanco, 'Criminalization of abortion has failed. It's time to end it' (*Human Rights Watch*, 11 January 2021) <<https://www.hrw.org/news/2021/01/11/criminalization-abortion-has-failed-its-time-end-it>> accessed 12 February 2023.

⁹ K A A N Thilakarathna, 'Liberalizing Abortion in Sri Lanka; Prospects and Challenges' (2018) 9 Sri Lanka Journal of Forensic Medicine, Science & Law 4.

¹⁰ Ayodhya Prabhashini Rathnayake, 'Why is it essential to amend the abortion law in Sri Lanka?: A medico-legal perspective on criminal abortions and victimization' (10 Sri Lanka Journal of Forensic Medicine, Science & Law 6, 2019) <<http://doi.org/10.4038/sljfmsl.v10i1.7807>> accessed 17 August 2023.

¹¹ *ibid.*

¹² Pascale Allotey, T K Sundari Ravindran and Vithiya Sathivelu, 'Trends in Abortion Policies in Low- and Middle-Income Countries' (42 Annual Review of Public Health 505-518, 2021) <<https://doi.org/10.1146/annurev-publhealth-082619-102442>> accessed 17 August 2023.

¹³ *ibid.*

Another argument for decriminalisation is that it would align with the principles of gender equality and women's rights, as women should have autonomy over their own bodies and reproductive health. The criminalisation of abortion has been criticised for perpetuating patriarchal attitudes and dominance over women's bodies, as mentioned by Sunila Abeyesekera, who also argued that "respect for women as human beings overrides respect for women as members of particular religious and cultural groups or ethnic communities."¹⁴ Moreover, Sunila Abeyesekera briefly highlighted that the government has an obligation, as a result of Sri Lanka's ratification of CEDAW, to align national law with the values outlined in the convention.¹⁵ However, it failed to address in detail the salient human rights aspects related to women's reproductive health rights set out in CEDAW.

Moreover, Meenakshi Ganguly outlined that numerous human rights such as the right to life; health; freedom from cruel, inhuman, and degrading treatment; physical integrity; privacy; equality; and the right to freely decide the number and spacing of children are in violation if women and girls are denied access to safe and legal abortions.¹⁶

Furthermore, Professor Savitri Goonesekere stated that there is a pressing need to revise the current criminal code that was enacted in the 19th century, which criminalises abortion except to 'save the life of the pregnant woman'.¹⁷ Professor Savitri Goonesekere further indicated that the law ought to be amended to take into account women's rights to equality and bodily integrity as well as the necessity to reduce the risk of illegal abortion. The concept of 'saving the life of the pregnant woman,' which is an exception to the crime, originally emerged from the necessity to strike a balance between competing interests and rights.¹⁸ It can be observed that the current Sri Lankan law pertaining to abortion is archaic as it was adopted in the 19th century.

However, opponents of decriminalisation argue that abortion goes against traditional cultural values and the sanctity of life, and that it should only be allowed in limited circumstances where the life of the woman is at risk.¹⁹ The necessity to preserve the life of the foetus is one argument

¹⁴ Sunila Abeyesekera, 'Abortion in Sri Lanka in the context of women's human rights' (5 Reproductive Health Matters 87-93.1997) <[10.1016/S0968-8080\(97\)90009-4](https://doi.org/10.1016/S0968-8080(97)90009-4)> accessed 17 August 2023.

¹⁵ *ibid.*

¹⁶ Meenakshi Ganguly, 'Reform Sri Lanka's Draconian Abortion Law' (*Human Rights Watch*, 10 March 2022) <<https://www.hrw.org/news/2022/03/10/reform-sri-lankas-draconian-abortion-law>> accessed 12 February 2023.

¹⁷ Savitri Goonesekere, *Compendium on Law, Gender Based Violence and Reproductive Rights* (United Nations Population Fund 2017) 50.

Available at: <http://srilanka.unfpa.org>

¹⁸ *ibid.*

¹⁹ Abeyesekera (n 14).

against decriminalising abortion in Sri Lanka. Pro-life supporters argue that the life of the foetus should be protected from the time of conception since it is a human life with the same inherent value as all other human lives.²⁰ According to Abeyesekera, the arguments suggest that maintaining the current prohibition of abortion is important to preserve the lives of fetuses because, by decriminalising it, the government would be condoning the taking of human life.²¹

Besides there are also concerns that decriminalization could lead to an increase in the number of abortions, particularly among young women and girls and negatively impact the moral fabric of society.²² Galappaththige claimed that it is important that in order to effectively address the issue of access to safe and legal abortion services in Sri Lanka, a comprehensive approach is required, including increased access to modern contraceptive methods and comprehensive sexuality education.²³

Additionally, opponent authors contend that decriminalizing abortion would be incompatible with the country's cultural and religious values, and that it is therefore important to maintain the current criminalization of abortion in order to protect the country's cultural and religious heritage.²⁴ Ramya Kumar pointed out that Sri Lanka has achieved good maternal health with the current restricted abortion regulations, hence there is no need for legislative reform.²⁵ Alternatively, Ramya Kumar also argued that since abortion-related mortality is low, offering safe abortion services is not currently prioritized in Sri Lanka.²⁶

Nevertheless, according to a WHO study based on estimations and data from all nations, it was found that "the broader the legal grounds for abortion, the fewer deaths there are from unsafe abortions."²⁷ The aforementioned WHO study concluded that majority of countries only permit abortion on the following main grounds: risk to pregnant woman's life, rape or incest, serious foetal

²⁰ *ibid.*

²¹ *ibid.*

²² T R Galappaththige, 'The need for rethinking the law relating to abortion in Sri Lanka: A critical examination' (2018) 4 *Journal of Studies in Social Sciences and Humanities* 1-5.

²³ *ibid.*

²⁴ Ramya Kumar, 'Abortion in Sri Lanka: The Double Standard' (103 *American Journal of Public Health* 402. 2013) < [10.2105/AJPH.2012.301154](https://doi.org/10.2105/AJPH.2012.301154)> accessed 17 August 2023.

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Marge Berer, 'Abortion Law and Policy Around the World: In Search of Decriminalization' (2017) 19 *Health Hum Rights* 13-27.

abnormalities, risk to physical and mental health of pregnant woman, social and economic reasons and on request.²⁸

According to a community-based study conducted in the city of Colombo, there is a significant lack of knowledge among Sri Lankan individuals residing in the specific region about the country's abortion laws.²⁹ In general, respondents of the said study have conservative views on legalising abortion in Sri Lanka. The majority of respondents, however, were in favour of legalising abortion in cases of rape, incest, and serious foetal anomalies.³⁰ Less than one-tenth of participants believed that induced abortion should be permitted in other circumstances, such as when a woman or a couple requests it or when there are other factors at play, such as economic hardship, or a failed attempt at contraception.³¹ Suchira Suranga and others found there is a compelling need to educate the public about the laws of induced abortions in Sri Lanka and the availability of post-abortion care.³² It is crucial to acknowledge that while this community-based study has taken into account the socioeconomic characteristics of the participants, including their educational attainment, marital status, and religious affiliation, it has overlooked other variables, such as their awareness of abortion laws in other progressive countries. Moreover, this research by Suchira Suranga was conducted exclusively within a specific region of Sri Lanka, namely the city of Colombo, without adequately representing the viewpoints of individuals from diverse locations across the island. Furthermore, the community-based study neglected to include a subset of individuals from marginalized populations who are directly impacted by or particularly vulnerable to the nation's abortion laws. Hence, it failed to capture a broader range of perspectives of Sri Lankan citizens.

Despite the increasing body of literature on abortion laws in Sri Lanka, there is still much unknown about the issue. For example, there is a lack of data on the extent to which women are currently seeking unsafe back-door abortion services in Sri Lanka, despite the criminalization of abortion. Further, there is a lack of research on the impact that liberalizing abortion laws would have on maternal mortality and morbidity, as well as on women's reproductive health and well-being more broadly. Hence, this paper intends to address and bridge the subsequent research gaps.

²⁸ *ibid.*

²⁹ Suchira Suranga, Tudor Silva and Lakshman Senanayake, 'Perception on the abortion laws in Sri Lanka: A community-based study in the city of Colombo' (61 Ceylon Medical Journal 171-175, 2016) <<http://doi.org/10.4038/cmj.v61i4.8384>> accessed 17 August 2023.

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

3.1 Research Gaps

The available literature on abortion laws in Sri Lanka lacked a detailed discussion of the important women's reproductive health rights outlined in CEDAW and ICCPR. Thus, this paper covers the extent to which abortion is allowed under CEDAW and ICCPR and examines the margin of appreciation given to the state. Additionally, it focuses on the general comments on ICCPR, including the authoritative interpretation of the rights by the human rights committee; and general recommendations on CEDAW as to how the human rights committee have interpreted the rights and under what circumstances these rights are protected.

Furthermore, it can be observed that existing literature on abortion laws in Sri Lanka failed to critically analyse and compare laws from various liberal jurisdictions to adopt their best practices and solutions. Hence, this paper intends to critically compare the Sri Lankan abortion laws with liberal Scandinavian laws related to abortion, in light of the grounds for abortion, the gestation period during which abortion can be performed and third-party authorization.

To conclude, the literature analysis on Sri Lanka's abortion regulation highlights the complex and conflicting perspectives on the subject. While some scholars contend that the laws as they stand are important to uphold the sanctity of human life and to preserve the country's religious and cultural values, other scholars argue that the restrictions are harming women, violating their rights and ought to be reformed. Therefore, the identified research gaps must be filled in order to better comprehend the possible advantages and risks of liberalizing Sri Lanka's abortion regulations and to contribute to the development of public policies that will enhance the well-being and health of women in Sri Lanka.

4. RESEARCH METHODOLOGY, ETHICAL CONSIDERATION AND DELIMITATIONS

This study employs a qualitative research methodology which comprises of analysis of data from both secondary and primary legal sources, including but not limited to, statutory provisions, international instruments, books, websites, and journal articles; in order to assess Sri Lankan abortion laws and the need for its reform. This paper follows a comparative approach. This entails a critical investigation of various bodies of law such as Scandinavian legislations and international instruments, namely ICCPR and CEDAW, which aids in identifying commonalities or best practices and solutions. This technique helps to examine how other jurisdictions approach the same problems caused by the criminalization of abortions and derive recommendations or conclusions.

Moreover, this desk research is solely based on data acquired from previous studies. Neither interviews were conducted, nor confidential information was gathered during this study. Hence, there are no substantial ethical issues to consider in this study.

Furthermore, the focus of this study is confined to abortion laws from selected liberal jurisdictions around the world for comparison, due to space constraints. This study has been restricted in its ability to reach a full cross-section of Sri Lankan people's perspectives on abortion, ascribed to the lack of adequate data on illegal abortions in Sri Lanka. Due to time constraints, interviews, surveys, or questionnaires were not conducted with respondents. Thus, this study cannot be categorized as quantitative research.

5. FINDINGS AND ANALYSIS

5.1 What is the present position of abortion laws in Sri Lanka?

The Sri Lankan abortion law was adopted during the British colonial period and remains backward up to the present day. Section 303 of the Penal Code enacted in 1883 deals with the punishment for intentionally causing a miscarriage in a pregnant woman. If the miscarriage is not done in good faith to save the woman's life, the offender may face imprisonment for up to three years, a fine, or both.³³ If the woman is quick with child, the punishment shall extend up to seven years of imprisonment, and a fine may also be imposed.³⁴ This section also includes that a woman who induces a miscarriage on herself falls under the scope of this law. The archaic phrase 'quick with child' denotes the stage of pregnancy when movements of the foetus can be felt.³⁵ Hence, it is suggested that the legislation is archaic and requires adaptation to align with the societal norms and demands of the contemporary era of progressive transformation towards women's autonomy and reproductive health.

Nevertheless, there have been several attempts for reform spanning centuries, including the prominent proposal by the Law Commission of Sri Lanka in 2013 to legalize abortion under some

³³ Penal Code Ordinance No 02 of 1883, s 303.

³⁴ *ibid.*

³⁵ Ganguly (n 16).

grounds such as rape and identified conditions of serious foetal impairment.³⁶ However, despite these attempts, the proposal did not progress into law in Sri Lanka.

Nonetheless, the Law Commission proposal has drawn criticism as it has only recognized two grounds for abortion. The Law Commission acknowledges a study's findings that indicate the majority of individuals resorting to unsafe methods of abortion are not victims of rape or incest and do not seek termination due to foetal impairment.³⁷ It is vital to note that the reform proposed above intends to help a deserving group of women who have suffered abuse that resulted in a pregnancy or are carrying a foetus with major congenital abnormalities, rather than addressing the issue of preventing unsafe abortions. Therefore, implementing the proposed reform would not considerably help the majority who resort to unsafe methods of illegal abortion.

5.2 What are the rationales behind the necessity for reforming the existing Sri Lankan law?

The World Health Organization perceives abortion as safe when it is performed using a method that is suited to the stage of pregnancy by trained personnel in performing an abortion. When carried out in accordance with WHO recommendations, abortions are risk-free and are exceedingly unlikely to result in life-threatening complications.³⁸

However, numerous countries including Sri Lanka opted to criminalize abortion which can result in various severe consequences. One of the major consequences of having stringent abortion laws is that it leads to an increased number of unsafe and illegal abortions performed clandestinely. The Sri Lanka Journal of Medicine calculated that approximately 700 unlawful abortions are conducted per day and The Ministry of Health reported in 2016 that 658 abortions were carried out in Sri Lanka daily.³⁹ It is vital to note that lack of publicly available data on abortions carried out in Sri Lanka is another major issue.

³⁶ Sri Lanka Law Commission, *Medical Termination of Pregnancy - Proposals of the Law Commission of Sri Lanka* (2013)

<https://lawcom.gov.lk/web/images/stories/reports/medical_termination_of_pregnancy_proposals_of_the_law_commission_of_sri_lanka.pdf> accessed 17 August 2023.

³⁷ *ibid.*

³⁸ Athula Kaluarachchi and others, 'Service provider perceptions of the trend in severity of symptoms and complications in women admitted following an incomplete abortion' (7 Journal of Family Medicine and Primary Care 1521. 2018) <10.4103/jfmpc.jfmpc_188_18> accessed 17 August 2023.

³⁹ Saira Meyler, 'Abortion – Where is Sri Lanka on the Spectrum?' (*Groundviews*, 09 February 2018) <<https://groundviews.org/2018/09/02/abortion-where-is-sri-lanka-on-the-spectrum/>> accessed 31 July 2023.

In 2015, the hospital admissions for spontaneous or induced abortions were reported to be 870.4 per 100,000 women in the reproductive age group. Considering there were approximately 5,514,000 females in this age range, it is calculated that around 48,000 (47,993) women sought hospital care after experiencing spontaneous or induced abortions.⁴⁰ However, women's willingness to disclose attempts at induced abortions may be constrained due to fear of legal repercussions in Sri Lanka.

The challenges and complexities arising from women engaging in at-home abortions or resorting to illegal abortion facilities encompass various medical issues such as haemorrhage, sepsis, peritonitis, cervical, vaginal, uterine and abdominal organ trauma, as well as the possibility of experiencing secondary infertility.⁴¹

Furthermore, clandestine abortions performed by untrained individuals or in unhygienic conditions can result in long-term or life-threatening consequences and even death. Tragically, unsafe abortion accounted for 12.5% (14 out of 112) of maternal deaths in 2014, making it the third most prevalent cause of maternal mortality in Sri Lanka.⁴²

In addition, women may also face psychological and emotional consequences both prior to and after resorting to unlawful abortion services. These include conditions like depression, anxiety, fear of abandonment, post-traumatic stress disorder, post-abortion syndrome and various others.⁴³ Abortion can be considered a traumatic experience, often representing a solitary journey for women, unfortunately, due to the societal stigma linked to it. It can be contended that women from nations with restrictive abortion regulations may be reluctant to discuss their mental health associated with abortion, since these topics are stigmatized in numerous nations including Sri Lanka. Thus, essential medical care and emotional support may not be provided to the victims which could possibly aggravate these psychological conditions.

Moreover, the ramifications of restrictive abortion laws in Sri Lanka are borne disproportionately by marginalised communities. It can be argued that women with physical and mental disabilities;

⁴⁰ Kaluarachchi (n 38).

⁴¹ Meyler (n 39).

⁴² Suchira Suranga, Kalinga Tudor Silva and Lakshman Senanayake, 'Access to information and attitudes towards induced abortion: a community-based study among adults in the City of Colombo, Sri Lanka' (2017) 23 JCCPSL 28.< <https://doi.org/10.4038/jccpsl.v23i1.8086>> [accessed 17 August 2023](#).

⁴³ Kornelia Zareba and others, 'Psychological Effects of Abortion: An Updated Narrative Review' (25 Eastern Journal of Medicine 477-484, 2020) <10.5505/ejm.2020.82246> accessed 17 August 2023.

and women from low-income households and rural areas are more vulnerable than others.⁴⁴ Restrictions on abortion cause more than merely inconvenience for marginalised women who already struggle to fairly access comprehensive medical care; such laws can also be discriminatory that jeopardises lives.

Especially in the aftermath of the COVID-19 pandemic and the recent economic crisis in Sri Lanka, it can be presumed that financial challenges encountered by women seeking unsafe abortions might be relatively higher than it was previously. This is due to their vulnerability to exploitation by backdoor abortion providers who may take unfair advantage of their desperate circumstances.

Furthermore, the Guttmacher Institute foresaw that COVID-19 pandemic could trigger around 15 million unintended pregnancies within a year, assuming a potential 10% decline in the use of contraception due to supply chain disruptions in low- and middle-income nations worldwide.⁴⁵ Moreover, an estimation factored in a potential 10% increase in unsafe abortions due to travel bans during the pandemic might lead to approximately 3.3 million unsafe abortions, resulting in 1,000 additional maternal mortalities in low- and middle-income nations over the span of a year.⁴⁶ Further, According to the Family Health Bureau, over 5% of eligible families still have unmet needs for family planning in 2023.⁴⁷ This remains a notable figure considering the overall population of the country. Hence, it can be suggested that abortion must be legalized for social and economic reasons to avoid women and children fighting poverty.

Additionally, a study conducted in two clandestine abortion clinics in Colombo revealed that 90% of the pregnant women seeking abortion were married and the reasons they cited were poverty, contraceptive failure and foreign employment.⁴⁸ Therefore, the government ought to consider legalizing abortion upon the request of women and allow women to end their unintended pregnancies.

5.3 Women's rights and autonomy pertinent to abortion

International human rights law has imposed obligations on the states to adhere to and respect human rights. It is significant to note that access to safe abortion services is a matter of human

⁴⁴ Allotey (n 12).

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ '2023 Statistics' (Family Health Bureau) <<https://fhh.health.gov.lk/statistics/>> accessed 04 November 2024.

⁴⁸ Meyler (n 39).

rights. The following are some of the salient human rights enshrined in ICCPR and CEDAW, prominent international treaties that have been ratified/ acceded in Sri Lanka without any reservations.

5.3.1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Within the framework of international human rights established by the UN, CEDAW is a major international instrument that is frequently known as the Women's Bill of Rights. Sri Lanka ratified CEDAW in 1981 and is obliged to eradicate discrimination against women and girls and guarantee equal rights for women and girls across the island.

Article 12 of CEDAW outlines that "States should take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."⁴⁹ The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), the monitoring body for the CEDAW, indicated in General Recommendation No. 24 on women and health that laws which render medical treatments necessary solely for women illegal and punish women who undergo such operations hinder women's access to healthcare.⁵⁰ Although the right to abortion has not been explicitly stated in CEDAW, Article 12 can be interpreted broadly to encompass abortion as a health care services pertinent to family planning. Moreover, it can be deduced from General Recommendation No. 24 that abortion is a health care only required for women, thus denying women's access to lawful abortion services shall constitute a violation of Article 12 of CEDAW.

Additionally, Article 16 of CEDAW ensures women's equal rights in deciding "freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."⁵¹ The CEDAW Committee in General Recommendation No. 19 determined that abortion has negative impacts on the physical

⁴⁹ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 12.

⁵⁰ CEDAW, *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, 1999, para 11.

⁵¹ CEDAW (n 48) art 16(1)(e).

and psychological well-being of women and violates women's right to make choices about the number and spacing of their offspring.⁵²

Furthermore, the CEDAW Committee affirmed that unsafe abortion significantly increases the risk of maternal death and other health issues. As a result, nations who are signatories to the convention ought to legalise abortion, especially in cases of rape, incest, risk to the life or health of the mother, or serious foetal abnormalities. Additionally, the States must guarantee women's access to excellent post-abortion care, particularly in cases when issues result from unsafe abortions. Further, penal sanctions on women who have abortions ought to be abolished.⁵³ In the 2017 Sri Lanka Shadow Report to the CEDAW Committee, The Women and Media Collective highlighted that the State continues to respond to the need for safe and therapeutic abortion services for women by offering quality post-abortion care as an alternative and encouraging wider adoption of modern contraceptive methods among women.⁵⁴

The Special Rapporteur on the right to health has called for the decriminalisation of abortion and criticised the criminalization as “a violation of women's autonomy and dignity by severely restricting decision-making by women in respect of their sexual and reproductive health,” while also highlighting how the State’s interference with women's sexual and reproductive health hinders “woman’s control over her body, possibly subjecting her to unnecessary health risks.”⁵⁵ This was further emphasised in General Recommendation No. 35 of CEDAW.⁵⁶

Hence, it can be inferred that women who are denied the right to an abortion are also denied the right to sexual and reproductive health. Women who are denied the freedom to autonomously choose when and how many children to have are also denied the right to a private life. Therefore,

⁵² UN Committee on the Elimination of Discrimination against Women ‘*General Recommendation No 19: Violence against Women*’ 1992, GAOR 47th Session 38, 1.

⁵³ CEDAW Committee, *Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review*, 57th Session, 2014.

⁵⁴ Sri Lanka Shadow Report, *Submitted for the 66th Session of the CEDAW Committee* (Geneva, Switzerland (January 2017)

Available at: <http://cedawsouthasia.org/wp-content/uploads/2017/07/S9.pdf>

⁵⁵ United Nations General Assembly, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/66/254, 2011, para. 21.

⁵⁶ ‘Launch of CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (*United Nations Human Rights Office of the High Commissioner*) <<https://www.ohchr.org/en/treaty-bodies/cedaw/launch-cedaw-general-recommendation-no-35-gender-based-violence-against-women-updating-general>> accessed 17 August 2023.

it can be argued that restrictive abortion laws in Sri Lanka violate women's human rights and autonomy in decision-making and adversely affect their well-being.

5.3.2 International Covenant on Civil and Political Rights (ICCPR)

In 1980, Sri Lanka became a signatory to the ICCPR, making its adherence to yet another prime multilateral treaty. As a result, Sri Lanka is bound to protect and uphold the wide range of human rights enshrined in ICCPR. In spite of the fact that the right to abortion is not expressly safeguarded under ICCPR, it can be claimed that denial of access to safe and legal abortion services can infringe a number of rights protected by ICCPR.

Article 6 of ICCPR protects the right to life by law,⁵⁷ and General Comment No. 36 produced by the Human Rights Committee (HR Committee), the treaty body for the ICCPR, stated that the right to life should be interpreted in pertinence to women's accessibility to safe and legal abortion services. It further encourages the signatories to repeal their penal sanctions on abortion to respect the right to life of women and girls.⁵⁸ The HR Committee has encouraged the States to provide information regarding reproductive health and rights and actively contribute towards eradicating the social stigma associated with women seeking abortion.⁵⁹

Moreover, Article 7 of ICCPR states that no person shall be "subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁶⁰ Article 17 of ICCPR further declares that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."⁶¹ Thus, it can be asserted that the right to life of women is violated when they are forced to have dangerous and life-threatening abortions. The right to be protected from torture, cruel and degrading treatment is denied to women who are forced to carry pregnancies against their will. In addition, it can be argued that any intrusion into women's ability to autonomously decide on abortion can potentially violate both their privacy and their bodily integrity. Therefore, laws

⁵⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

⁵⁸ UN Human Rights Committee, *General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 2018.

⁵⁹ *ibid.*

⁶⁰ ICCPR (n 55) art 7.

⁶¹ ICCPR (n 55) art 17.

pertaining to abortions should refrain from infringing upon lives, inducing mental or physical pain, be discriminatory, or intruding upon the right to personal life.⁶²

5.3.3 Margin of Appreciation

As per the World Health Organization, approximately 19 million unsafe abortions are carried out annually, often by inadequately trained individuals, leading to an estimated 68,000 fatalities each year.⁶³ In spite of these statistics, the United Nations maintain the stance that “the legal status of abortion is the sovereign right of each nation.”⁶⁴ Nonetheless, it acknowledges that criminalizing abortion fails to deter women from ending unintended pregnancies but escalates health hazards associated with such life-threatening procedures.⁶⁵ The United Nations (UN) allows the States to exercise the doctrine of margin of appreciation, granting them the liberty to determine the legality of abortion within their jurisdiction at the discretion of each nation.

Upon analysing, it is worth acknowledging that since Sri Lanka follows a dualist legal system, international treaties hold legal significance within the island only when they are incorporated through domestic laws. Hence, Sri Lanka is bound to enact national laws that are compatible with CEDAW and ICCPR, since it has an obligation under international human rights law. Although the General Recommendations and General Comments produced by the monitoring bodies are not legally binding on the States, it is important that the Sri Lankan government should not disregard the perspectives and recommendations offered by the CEDAW Committee and HR Committee, since these treaty bodies hold the responsibility of interpreting the conventions.⁶⁶

5.3.4 Third-party authorisation and women’s autonomy

Third-party authorisation necessitates individuals to acquire consent from an external party, such as from parents, spouses, health authorities, judicial authorities, or law enforcement officers, before they are eligible to access lawful abortion services. While involving parents or partners in the decision-making process regarding abortion can provide support and assistance to women or girls,

⁶² Cornelia Frank, ‘Access to Safe and Legal Abortion- a Human Right?: A study of the protection for access to Safe and Legal abortion within Public International Law’ (Graduate thesis, Stockholm University 2020).

⁶³ Chad M Gerson, ‘Toward an International Standard of Abortion Rights: Two Obstacles’ (2005) 5 *Chicago Journal of International Law* 753<<https://chicagounbound.uchicago.edu/cjil/vol5/iss2/19>> accessed 17 August 2023.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ Frank (n 60) 31.

such involvement should be based on the individual's own values and preferences. It should not be enforced through requirements of authorisation from third parties, as this would infringe upon the autonomy of pregnant women in making decisions about abortion.⁶⁷ Third-party approval may cause unnecessary delays in accessing abortion services and lead to women resorting to unsafe and clandestine abortions. Moreover, the CEDAW Committee has expressly condemned legal prerequisites that demand spousal consent or parental approval for a woman or girl seeking an abortion, whereas the HR Committee has not issued any remarks regarding the requirements for external consent to access abortion services.⁶⁸

5.4 Importance of women's autonomy and empowerment

Liberal perspectives on women's autonomy and empowerment have acquired significant progress in the 21st century which have influenced the socio-political opinions around the world. It is crucial to uphold the fundamental rights of women and the principles of gender equality to enhance women's autonomy and empowerment in their reproductive health. Every person must have the autonomy to make decisions about their own lives and bodies, regardless of their gender.

Catherine MacKinnon, a feminist scholar, contended that political institutions and social structures reflect disparities in power and help to conceal systematic inequality as she emphasises that, "feminism has no theory of state. It has a theory of power".⁶⁹ The legal system serves to present disparities as normal, desirable, or inescapable, according to MacKinnon and other feminist legal experts.⁷⁰ As a result, conventional standards are typically widely accepted, even by marginalised groups that are adversely impacted by them. MacKinnon poses the question, "What is this state, from women's point of view? The state is male in the feminist sense. The law sees and treats women the way men see and treat women."⁷¹

5.5 Morality of abortion

The controversial debate centres on the morality of abortion and raises the question of whether foetuses have a right to life that "trumps" women's rights to choose whether to have children or

⁶⁷ World Health Organization, *Abortion Care Guideline* (Geneva 2022).

⁶⁸ Centre for Reproductive Rights, *Briefing Paper: Abortion and Human Rights* (October 2008).

⁶⁹ Catherine A Mackinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635-658.

⁷⁰ Kisha K Patel, 'My Body, Not My Say: How Roe v. Wade Endangers Women's Autonomy' (Political Honors Paper, Ursinus College 2017) <https://digitalcommons.ursinus.edu/pol_hon/5> accessed 17 August 2023.

⁷¹ Mackinnon (n 67) 644.

should pregnant women be allowed to end their unintended pregnancies. From the international human rights law perspective, it can be argued that the right of a woman to end their unintended pregnancies outweighs the right to life of a foetus because the HR Committee has not affirmed the inclusion of any protection for the right to life of the unborn child within Article 6 of the ICCPR.⁷² The General Comment No. 36 provides guidelines on how the mother's life should be valued in the balancing of interests between the unborn and the mother.⁷³ While it is critical to give women the freedom to decide whether to end their pregnancies, it's just as vital to recognise the foetus' intrinsic worth. As a result, restrictions such as a gestational age limit must also be considered.⁷⁴

5.6 Liberal Scandinavian laws

The abortion laws from the Scandinavian region, namely, Denmark, Norway and Sweden are renowned for their liberal and progressive stance.

5.6.1 Denmark

Abortion is regulated by the provisions outlined in Chapter 25 of Health Act 2014 in Denmark.⁷⁵ As per section 92, abortion can be carried out within twelve weeks upon the request of women.⁷⁶ Beyond week twelve, abortion is only permitted if there are special justifications, such as a risk to the mother's health, genetic conditions, an incapacity to care for the child, and so on.⁷⁷ However, if there is a threat to women's life or health in continuing the pregnancy, abortion may be carried out according to section 93.⁷⁸ Generally, minors seeking abortions often required to provide the legal guardian's consent, however, the Council for Abortion and Sterilization has the authority to stipulate that consent from the legal guardian is needless by virtue of section 99.⁷⁹ This eliminates the requirement of third-party approval that hinders women's autonomy. Further, spousal consent is not required to access lawful abortion services in Denmark. In addition, the law requires the authorized personnel to provide medical information and counselling sessions to the abortion seekers before and after performing an abortion.⁸⁰ This can assist women in obtaining emotional

⁷² Frank (n 60).

⁷³ UN Human Rights Committee, *General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 2018.

⁷⁴ Meyler (n 39).

⁷⁵ Health Act 2014 (HA 2014).

⁷⁶ HA 2014, s 92.

⁷⁷ HA 2014, s 94.

⁷⁸ HA 2014, s 93.

⁷⁹ HA 2014, s 99.

⁸⁰ HA 2014, s 100.

support from the hospitals to tackle the psychological conditions or traumas associated with seeking abortion.

5.6.2 Norway

Abortion in Norway is regulated by the Abortion Act 2021.⁸¹ Abortion can be performed upon request before week twelve unless compelling health reasons state otherwise.⁸² Similar to Danish abortion law, abortion is permissible in Norway after twelve weeks in special circumstances, such as when there is a risk of unreasonable physical or mental burden on women and risk of disease.⁸³ It is vital to note that abortion should be requested by the pregnant women herself.⁸⁴ This can aid Norway to uphold women's autonomy in decision-making when seeking for legal abortion services. Abortions may only be carried out by qualified medical professionals as per section 3.⁸⁵ Furthermore, section 13 stipulates that engaging in or assisting in the execution of an abortion that contravenes the Abortion Act results in either a monetary fine or an imprisonment of three months.⁸⁶

5.6.3 Sweden

Abortion in Sweden is governed by the Abortion Act 1974,⁸⁷ which was amended recently in 2013. In Sweden, abortion can be performed upon the request of women within 18 weeks of the gestation period.⁸⁸ Like Danish and Norwegian laws, Sweden also permits abortion after 18 weeks in exceptional circumstances, including but not limited to, physical and psychological issues on the woman of continuing the pregnancy and the physical illness of the foetus, upon the approval of National Board of Health and Welfare.⁸⁹ Nevertheless, abortion is legal at any point in the pregnancy if there is a substantial risk to the mother's life or health.⁹⁰ It is vital to highlight that the pregnant women seeking abortion need not have to a Swedish citizen in order to access lawful abortion services.⁹¹ Hence, people around the globe can travel to Sweden to obtain an abortion.

⁸¹ Abortion Act 2021 (AA 2021).

⁸² AA 2021, s 2.

⁸³ *ibid.*

⁸⁴ AA 2021, s 4.

⁸⁵ AA 2021, s 3.

⁸⁶ AA 2021, s 13.

⁸⁷ Abortion Act 1974 (AA 1974).

⁸⁸ AA 1974, s 1.

⁸⁹ AA 1974, s 3.

⁹⁰ AA 1974, s 6.

⁹¹ *ibid.*

Like Danish and Norwegian abortion laws, Swedish law also offers emotional assistance to women who undergo an abortion. Unauthorized personnel who carry out clandestine and illegal abortions shall face criminal convictions under the Swedish abortion law by virtue of section 9.⁹²

5.6.4 Scandinavian laws vs Sri Lankan law

It can be inferred that, unlike Sri Lanka, neither of the Scandinavian countries imposes criminal sanctions on women who resort to unlawful abortion services, but rather focuses on imposing penalties on abortion providers who perform unlawful and clandestine abortions. It is evident that by virtue of section 303 of the penal code, Sri Lanka presses criminal charges on pregnant women who resort to unlawful methods of abortion. This can cause psychological distress to women and girls who intend to exercise their reproductive rights and autonomy, due to fear of legal repercussions.

Additionally, many countries including Denmark, Norway and Sweden have imposed stipulations regarding gestational age limits to perform abortions. Although the gestational age limit varies in each country, often abortion is legalized during the first trimester of pregnancy and early-second trimester in exceptional cases. However, the statute governing abortion regulations in Sri Lanka has not mentioned any provisions to indicate the permissible gestational age to obtain an abortion. Nonetheless, the Sri Lanka Law Commission proposal 2013 recommended that termination of pregnancy should be permissible within 14 weeks of the gestation period in the case of rape and abortion be permitted within 22 weeks of gestational age in the case of severe foetal impairment.⁹³

Moreover, it can be deduced that Scandinavia has adopted liberal and progressive laws, since Denmark, Norway and Sweden have legalized abortion on all grounds including risk to a pregnant woman's life, rape or incest, serious foetal abnormalities, risk to physical and mental health of pregnant woman, social and economic reasons and upon request of the women, whereas Sri Lanka has criminalised abortion on all grounds, except to save the life of the women.

Furthermore, Scandinavia has prioritised the reproductive health and well-being of women, as well as upheld women's rights and allowed women to exercise their reproductive rights without interference from third-parties. As discussed above, the criminalisation of abortion in Sri Lanka

⁹² AA 1974, s 39.

⁹³ Sri Lanka Law Commission (n 36).

leads to serious health ramifications and violates women's rights and autonomy, forcing women to resort to unsafe clandestine abortions.

In addition, it can be noted that Scandinavia ensures to provide women the accessibility to abortion-related information and works towards eradicating social stigma and eliminating gender inequality and discrimination linked with resorting to abortion. However, this is not the case in Sri Lanka as the law in Sri Lanka is rooted in conservative ideologies and religious perspectives.

It can be argued that Sri Lankan abortion law is backward from a rights-based and feminist perspective. Hence, it is advised to amend the law in a progressive manner to protect women's rights and well-being and to harmonise with the global trends of the contemporary era.

6. CONCLUSION

To conclude, it is evident that the abortion laws in Sri Lanka have remained unevolved since the 19th century and have failed to meet the needs of modern society. Often domestic abortion laws are influenced by conservative ideologies, religion, or morals, despite statistical evidence indicating that stringent abortion laws negatively impact the well-being of women. A noticeable trend is that abortion is frequently framed as a moral dilemma rather than being approached as an issue of women's health or human rights in the context of Sri Lanka.

This paper submits that present statutory provisions governing abortion in Sri Lanka violate the human rights articulated in CEDAW and ICCPR. Further, it can be held that restrictive abortion laws in Sri Lanka, or in any nation for that matter, infringe on women's rights and hinder a woman's ability to autonomously choose to terminate their unintended pregnancies. As Sri Lanka is a signatory of both ICCPR and CEDAW, it is bound to enact domestic laws that are incompatible with the human rights articulated in these international treaties. This is vital to ensure the protection and empowerment of women's rights and self-determination of the citizens of Sri Lanka.

This research paper posits that stringent abortion laws have led to severe ramifications including an increase in unsafe and illegal clandestine abortions resulting in maternal mortality and morbidity, higher rates of women suffering from various medical conditions and psychological traumas, as well as social stigma, gender inequality and discrimination. It is worth noting that marginalised women are at a higher risk under such stringent abortion laws, especially after the COVID-19 pandemic and the recent economic downturn in Sri Lanka.

Hence, there is a pressing need to decriminalise the archaic abortion laws implemented in the 19th century and Sri Lanka should consider adopting more liberal and permissive laws and policies, drawing inspiration from the progressive approaches observed in Scandinavian countries, which has been legislated to better address the needs of the modern society. It is evident that Scandinavia has legalised abortion on all grounds including upon women's request, limited the requirement for third-party authorisation, and vastly extended the permissible gestational age limit.

Therefore, this research concludes that abortion ought to be regulated in Sri Lanka to legalise abortion under all grounds and permit women to terminate their unintended pregnancies during the first trimester and in exceptional circumstances during early-second trimester, without the requirement of third-party authorisation.

Indeed, decriminalisation is a crucial step towards the liberalisation of abortion in Sri Lanka. Nevertheless, besides mere decriminalisation, additional policies may be necessary to guarantee the accessibility and quality of abortion services. Some of these policies are suggested below, along with other important recommendations in terms of Sri Lankan abortion law.

7. RECOMMENDATIONS

Drawing from the analysis presented above, the subsequent recommendations are put forth to reform the existing abortion regulations in Sri Lanka. It is crucial to emphasise that these suggestions are in accordance with the Scandinavian abortion laws; uphold the human rights outlined in CEDAW and ICCPR; and align with the abortion care guidelines set forth by the World Health Organisation.

Sri Lanka must repeal the current laws on abortion outlined in the Penal Code (Ordinance No 02 of 1883) and decriminalize abortion by eliminating all criminal sanctions related to abortion. The state must ensure that no criminal penalties are imposed on individuals involved in having, assisting with, providing information about, or providing abortion services.⁹⁴ Nevertheless, the state must also make sure that decriminalization of abortion does not put pregnant women and girls at risk of being forced or pressured into having an abortion.

Moreover, the State must enact new domestic legislation to govern abortion and ensure the provisions are in accordance with the international human rights law articulated in CEDAW and

⁹⁴ World Health Organization (n 65).

ICCPR. The new legislation must ensure all persons have the right to non-discrimination and equality in accessing safe and legal abortion services and post-abortion care. It is vital for the state to ensure that abortion laws acknowledge and encompass all individuals who have the potential to become pregnant, extending beyond the traditional definition of biological women.

In order to reduce the rates of maternal morbidity and mortality pertinent to abortion, the government must implement policies into place, which may necessitate changing the law. They must also make sure that women and girls are adequately safeguarded from the mental and physical risks linked with resorting to unsafe abortion services.

Furthermore, the current practice of limiting access to abortion based on specific grounds should be reconsidered, and instead, the focus should be shifted towards granting pregnant women and girls the right to abortion on all grounds, including but not limited to, risk to pregnant woman's life, rape or incest, serious foetal abnormalities, risk to physical and mental health of pregnant woman, social and economic reasons and on request. Given the aforementioned evaluation, this paper strongly urges the provision of abortion upon the request of pregnant women.

In addition, the government has the responsibility to enact legislation that permits abortion within the gestational age limits recommended by the World Health Organisation. This paper suggests that abortion ought to be permissible in the first trimester of the gestational period and in exceptional circumstances, abortion should be allowed in the early stages of the second trimester. Additionally, in cases where the gestational age of the pregnant woman exceeds the limits set by the law, it is advisable to conduct subjective assessments, taking into account the circumstances surrounding their situation, to determine the appropriateness of granting an exception.⁹⁵ It is crucial for the government to ensure that the country's laws do not unreasonably restrict abortion solely based on gestational age limits. The state must refrain from regulating abortion in a manner that compels women to seek unsafe methods of terminating pregnancy.

In addition, Sri Lanka must ensure that pregnant women have the right to request an abortion without the need for approval from any external parties. It is also important to eliminate procedural requirements that demand proof of specific grounds, such as the need for judicial orders or police reports in cases of rape or incest, if such requirements may cause unreasonable delay in accessing abortion services. The abortion regulations must assure that individuals who have encountered

⁹⁵ *ibid.*

pregnancy loss will not face unwarranted suspicion of engaging in illegal abortion when they seek necessary healthcare and receive medical attention and support without fear of legal repercussions.

Further, Sri Lanka must ensure that comprehensive information regarding abortion is easily accessible to the public and delivered in all three languages spoken within the jurisdiction. This ensures that individuals can make informed decisions about their reproductive health. The government must guarantee that abortion services are provided free of charge and in a manner that prioritises privacy and confidentiality.

Additionally, the state should contemplate enacting supplementary policies or regulatory initiatives to complement the decriminalisation of abortion. These initiatives may encompass the implementation of comprehensive sex education programs, which aim to enhance awareness and understanding of reproductive health. Furthermore, it is crucial for the state to guarantee the availability of a diverse range of contraception methods, empowering individuals to exercise their reproductive rights and make well-informed decisions concerning their contraceptive needs. Most importantly, Sri Lanka should undertake appropriate measures to educate and increase awareness among its citizens regarding the existing abortion laws in the country. The state ought to establish counselling initiatives specifically designed to cater to the mental health requirements of pregnant women. These counselling services must be accessible to individuals prior to, during, and after undergoing an abortion, ensuring that they receive appropriate emotional support throughout the process.

By implementing the above-proposed recommendations and suggestions, Sri Lanka can establish a more unprejudiced and compassionate framework for abortion care. Such reforms will not only ensure the protection of reproductive rights but also contribute to the well-being and empowerment of women and girls across the country. It is crucial for the government to take decisive action in line with international standards to create a liberal society that respects and upholds the rights and autonomy of its citizens in matters of reproductive health.

PROPERTY LAW

SRI LANKA’S OUTDATED PRESCRIPTION LAWS: A LESSON FROM THE UK’S LAND REGISTRATION ACT 2002

Zafeera Kamaldeen

ABSTRACT

This article undertakes a comparative analysis of Sri Lanka’s prescription law to that of the United Kingdom to assess the need for reform. Prescription, or adverse possession, is the legal doctrine whereby a person can acquire ownership of land through prolonged possession without formal title, thereby defeating title of an original owner. While the Land Registration Act 2002 (LRA 2002) provides a comprehensive framework with protection in favour of the original owner in the United Kingdom, Sri Lankan law is less defined and presents more complexities and uncertainties. This paper analyses the implications of this disparity in the context of different ownerships on related parties of strangers, to tenants, to co-owners of a land. By comparing the two systems, the article aims at aligning Sri Lanka’s prescription law with the comprehensive framework of the Land Registration Act 2002.

1. INTRODUCTION

Law on prescription in simple terms refers to when a person, herewith referred to as a squatter or defendant, is able to claim title and ownership to land, dispossessing that of the original owner, by being in possession of the land for a prescribed period of time. Ranjith Silva J in *Piyadasa and Another v. Babanis and Another*¹ noted that obtaining title by prescription is an “illegality made legal due to the other party not taking action at the proper time”. He corresponds this to the maxim “the law aids the vigilant, not those who sleep over their rights” in the principle outlined in Broom’s Legal Maxims² that the legal system often presumes that if an individual neglects to assert their rights for an extended period, they yield to the situation by failing to sue, thereby allowing the wrongdoer to establish a legal claim. To illustrate the concept of prescriptive title, consider the following scenario: A person in an unoccupied plot of land, bordering property of another, has commenced planting a vegetable garden. Through consistent efforts and harvesting over a period of 10 years (according to Sri Lankan law), without any interruption or challenge, that person might establish adverse possession and potentially acquire ownership of land. While this scenario focuses

¹ [2006] 2 SLR 17.

² RH Kersley, *Broom’s Legal Maxims* (10th edn, Sweet & Maxwell 1939) 599.

on a stranger's adverse possession, it is important to note that such claims of prescriptive title can also arise between individuals who share a foregoing relationship, such as co-owners, co-heirs, or landlords and tenants. It is necessary that citizens undergoing such problems assume the necessary legal steps in reclaiming possession and its ownership, as well as potential citizens in being vigilant with accessibility to such.

2. REQUIREMENTS TO PROVE ADVERSE TITLE

2.1 Sri Lankan law

The Prescription Ordinance No. 22 of 1871 sets out the law of prescription in Sri Lanka where a defendant must prove “undisturbed and uninterrupted possession” that is “adverse or independent” for a period of “ten years”³ of the immovable property⁴ that sets a better title than the owners’ to claim prescriptive title. Where one can prove unlawful and “quiet”⁵ possession of the owners’ land (despite apparent knowledge of adverse possession on the land) for a constant and prolonged period of 10 years, there will be prescriptive title against the original owner.

S.13 of the Prescription Ordinance No. 22 of 1871 provides for different requirements where the plaintiff falls under any of the mentioned disabilities of: (a) infancy; (b) idiocy; (c) unsoundness of mind; (d) lunacy; or (e) absence beyond the seas, then the period of 10 years under s.3 is said to commence only upon either the death of such ‘last-named person’ or ‘termination’ of such disability. However, where the defendant is able to prove not ten but thirty years of ‘undisturbed and uninterrupted possession’ that has the effect of conclusive proof of title regardless of the disability of the plaintiff, the defendant will thereby be able to claim title.

2.1.1 Adverse or independent title

‘Adverse’ in its simple legal meaning refers to a person possessing land of another with the intention of possessing it as one’s own and accordingly against that of the true owner. Where one claims to own land on prescription, he must prove hostility to title of the true owner’s property with “clear and unequivocal evidence” on his possession per Sharvananda J in *de Silva v. Commissioner General of Inland Revenue*⁶ and it must thereby be “irreconcilable”. This nature is of essence, for otherwise there is no adversity to claim prescription. However, where the intention is not adverse

³ Prescription Ordinance No. 22 of 1871, s. 3.

⁴ *ibid*, s. 2.

⁵ *Tillekeratne v. Bastian* [1918] 21 NLR 12.

⁶ [1978] 80 NLR 292.

from the onset and later claims adversity, one must prove an overt act of manifesting his intention to occupy in a different capacity to the original as set in the cases of *Maduanwala v. Ekneligoda*⁷ and *Tillekeratne v. Bastian*.⁸

It is a well-established principle that “possession is never considered adverse if it can be referred to a lawful title” by the Privy Council in *Corea v. Appuhamy*⁹ which the Court will always characterise possession to a lawful title where possible, even when in contention and there is a lack of evidence. Persons of ‘permissive possession’ under a contractual nature of tenancy, licence or even familial connection have an inherent lawful right of entry, which is not in denial of the title of the true owner will thus be independent. This can be seen in the parenthetical clause in s.3 of the Prescription Ordinance No. 22 of 1871 explaining what adverse possession is, that is free from any acknowledgement of the right of land invested in another, which is what “payment of rent or produce, or performance of service or duty” implies.

The onus, one that is heavy, is placed on the possessor to prove the change and the starting point of the intention to ‘acquisitive possession’ to defeat ownership.¹⁰ For instance, a sibling leaving the premises due to marriage is not sufficient proof to establish such a change as seen in *Pathman v. Somapala*.¹¹ It must be absolutely apparent from conduct that intention to possess has transformed. Where secret intentions have no such effect, it must be an overt act establishing ouster based on evidence presented and “entertained in fact”.¹² These include factors of income, property value, context of relationship and residence, and documents laid down in the case of *Abdul Majeed v. Ummu Zaneera*,¹³ expounding long-continued possession uniquely specific to material fact of “quiet” possession in leading case *Doe v. Prosser*¹⁴ and recognised in Sri Lanka in *Corea v. Appuhamy*¹⁵ as basis for a presumption of ouster.

⁷ [1898] 3 NLR 213.

⁸ *Tillekeratne* (n 5).

⁹ [1911] 15 NLR 65.

¹⁰ Gratiaen J in *Chelliah v. Wijenathan* [1951] 54 NLR 337.

¹¹ SC Appeal 06/2014.

¹² GL Peiris, ‘Possession and policy in a modern civil law system.’ [1983] 16 Comparative and International Law Journal of Southern Africa 291–324.

¹³ [1959] 61 NLR 361.

¹⁴ [1774] 1 Cowp 217.

¹⁵ *Corea* (n 9).

2.1.2 Undisturbed and uninterrupted possession

Possession whilst adverse must also satisfy the requirement of “undisturbed and uninterrupted” possession that is continuous with no break within the 10 years. If the possessor is interrupted by legitimately putting him out by case filings on recovery or declaration action, then possession is ‘interrupted’, even including any act by the paper title owner that prevents the possessor from enjoying full use of the land by occupying for himself. The prescribed time of 10 years will need to start again to make the requisite whole period rather than disconnected periods¹⁶ for it must be continuous to meet the criterion.

2.2 English law

The law on adverse possession in the United Kingdom can be traced to the leading cases of *Powell v. McFarlane*¹⁷, affirmed in *J A Pye (Oxford) Ltd v. Graham*¹⁸ where the squatter must establish that he or she had been in possession of the land in factum and with intention, for a prescribed time of 10 years on registered land where the Land Registration Act 2002 is applicable as opposed to the 12 years in the pre-2002 law governed by the Land Registration Act 1925 (LRA 1925) in relation to unregistered land in the United Kingdom, the prescribed time period is governed by s.15 of the Limitation Act 1980 requiring 12 years of adverse possession to be established. What must be proved is that there is (i) actual adverse possession, (ii) for the prescribed period applicable. Adverse possession means “possession inconsistent with the title of the true owner”.¹⁹ Two essential elements thereby needed to establish adverse possession are factual possession and the intention to possess and dispossess the owner from occupation.

2.2.1 Adverse possession

Factual possession relates to the physical assumption of the property of ordinary nature without consent of the owner as identified by Lord Browne-Wilkinson in *Pye v. Graham*.²⁰ The Court in *Port of London Authority v. Ashmore*²¹ held what amounts to be factual possession will depend on the nature and common use of the land and not whether the squatter was occupying the property every second of the day for the required period. Proof of clearing the property, making repairs in

¹⁶ See (n 12).

¹⁷ [1977] 38 P & CR 452.

¹⁸ [2002] UKHL 30.

¹⁹ RE Megarry & HWR Wade, *The Law of Real Property* 3 [1978] 1006.

²⁰ *ibid.*

²¹ [2010] EWCA Civ 30.

*Purbrick v. Hackney*²² and any other unequivocal evidence such as padlocking in *Lambeth LBC v. Archangel*²³ is clear enough for actual possession.

The squatter must additionally demonstrate an intention to exclude the world at large, including the paper title owner from the land.²⁴ This intention must be backed up by physical acts, such as erecting fences or cultivating the land. However, these acts must be clear and unambiguous, and not merely serve a dual purpose,²⁵ such as protecting livestock²⁶ as opposed to restricting outsiders, for a clear state of hostility needs to be proved. The squatter's intention must be to possess the land permanently against the real owners' and regardless of the owner's future plans on the land.

2.2.2 Adverse Possession under the LRA 2002

It is established that the prescribed time required for the squatter to be in continuous adverse possession differs on the type of land and on the applicable statutory regime. This period of time, runs against the paper title owner and failure to act within this time range would lead to his rights being extinguished and new title bestowed upon the squatter. What the paper title owner can do apart from instituting proceedings, is obtain acknowledgement of his rights by permitting the squatter to enter by way of an implied licence, receiving payment for such occupation establishing that the owner has the rights to the land. The cease of such payment would start adverse possession. This would limit the squatter's possession within permissive possession.

The reformed law on registered land under Schedule 6 of the LRA 2002 outlines a process for squatters to apply²⁷ for formal ownership by registration. Upon inspection and verification of such possession, a notice²⁸ is issued to the legal owner. The owner can either consent to the squatter becoming the registered owner which will automatically be approved by way of inaction within 90 days, or explicitly refuse. In case of refusal, a two-year grace period is granted to the owner to initiate legal action against the squatter. If no action is taken by the owner, the squatter can reapply²⁹ for registration and become the new proprietor.

²² [2003] EWHC 1871.

²³ [2001] 33 HLR 44.

²⁴ Slade J in *Powell* (n 17).

²⁵ *Hounslow v Minchinton* [1997] 74 P & CR 221.

²⁶ *Batt v Adams* [2001] 82 P & CR 32.

²⁷ Land Registration Act 2002, sch. 6 para. 1.

²⁸ *ibid*, sch. 6 para. 2.

²⁹ *ibid* sch. 6 para. 7.

Schedule 6 paragraph 5 of the 2002 Act sets out three exceptions where the title will automatically be registered under the ‘squatter’, regardless of the response of the owner upon said notice. These include the operation of estoppel where it would be unconscionable of the owner to dispossess the squatter, the squatter has another independent right to estate, or the claim refers to a boundary dispute of adjacent land with unclear partitioning, reasonably believed to be each other’s for 10 years on registered land. These exceptions provide a degree of flexibility for a squatter seeking title by recognising long-term possession as a legitimate basis for acquiring title when surrounded by complexities inherent in land ownership.

In doing so, the squatter is able to obtain new title, extinguishing the previously held title on adverse possession and thus proclaim with legal bounding as the new proprietor of the estate.³⁰ Land owners are advised to register the unregistered land in order to benefit from the increased protection³¹ provided to them by the reformed law, followed by instituting action for repossession and ownership on the property. The two-year grace period as mentioned earlier was not a point of advantage in the pre-2002 law.

In contrast to the comprehensive English legal framework, Sri Lankan law fails to adequately protect landowners from immediate loss of title when faced with successful adverse possession claims despite owning the legal title and rights being extinguished at first instance after 10 years has passed, unlike the grace period backed for in the UK.

3. BURDEN OF PROOF

A landowner dispossessed of their land can initiate a *rei vindicatio* action, seeking a declaration of title and ejectment with burden falling on him to prove his title to the land upon which he has *dominium* when possessed by the defendant.³² Likewise, the burden of proof in proving title lies with the plaintiff upon possession proceedings in the United Kingdom. The burden then shifts to the defendant to prove a better title by prescription upon establishment of the plaintiff’s title. Justice Herat in *Wanigaratne v. Juwanis Appuhamy*³³ highlights that a plaintiff cannot claim title solely based on the defendant’s inability to prove their own title. This principle also applies to the defendant; they must establish a superior title to secure a favourable judgement.

³⁰ *ibid* sch. 6 para. 9(1).

³¹ Leon Swerling, ‘The Land Registration Act 2002 and adverse possession’ [2003] 9 *Trusts & Trustees* 10.

³² Justice Dias in *Peeris v. Savunhamy* [1951] 54 *NLR* 207.

³³ [1962] 65 *NLR* 167.

Nevertheless, where the plaintiff brings forth such action within one year of ouster, the plaintiff will be entitled to a decree of the restoration of property without proof of title as set in s.4 of the Prescription Ordinance No. 22 of 1871, enabling vigilant owners to benefit on effortless repossession of the property.

3.1 Failure to prove title

Establishing clear ownership of land can be challenging due to various factors, including incomplete, inaccurate, or outdated land records, frequent changes of ownership, undivided shares, and the loss or destruction of essential documents by natural disaster, war or simply negligence. Land disputes often drag on for years, leading to the loss or deterioration of evidence and ultimately resulting in its dismissal. Additionally, in some cases, the boundaries of a piece of land, the corpus, may not be clearly defined, making it difficult to determine who owns what. There may also be multiple people who claim ownership of the same piece of land, making it difficult to determine who the rightful owner is. In some cases, corruption may play a role in land disputes, with land deed forgeries, making it difficult to establish ownership and to the lawful owner in decree. If the plaintiff fails to make his case this would lead to the dismissal of the case, since the “defendant need not prove anything, still less, in his own title”,³⁴ thereby not making the situation any better for the original owner.

The plaintiff must only prove that he is the plausible owner of the property.³⁵ This can be seen in the cases of *Jinawathie v. Emalin Perera*,³⁶ *Banda v. Soysa*³⁷ and *Palisena v. Perera*³⁸ where a Statutory Determination made under s.19 of the Land Reform Law,³⁹ Lease Bond, and permit issued under Development Ordinance,⁴⁰ respectively, were identified and recognised to constitute “sufficient title” for the plaintiff. What this indicates is that although “strict proof of the plaintiff’s title”⁴¹ is to be maintained, as a rule of thumb, the plaintiff in a *rei vindicatio* action only needs to prove title on a balance of probabilities, and not ‘beyond reasonable doubt’.

³⁴ Justice Herat in *Wanigaratne* (n 33).

³⁵ Dr HW Tambiah, ‘Survey of Laws Controlling Ownership of Lands in Sri Lanka’ [1984] 2 International Property Investment Journal 244.

³⁶ [1986] 2 SLR 121.

³⁷ [1998] 1 SLR 255.

³⁸ [1954] 56 NLR 407.

³⁹ Land Reform Law, No. 1 of 1972.

⁴⁰ Development Ordinance No. 19 of 1935, ch. 320.

⁴¹ HNG Fernando in *Pathirana v. Jayasundara* [1955] 58 NLR 169.

The courts' take on placing emphasis on both the initial and rebuttal burden of proof in making a judgement as aforementioned, is seen and followed from the seminal case of *Morawakage Premawathie v. Ballantuda Achchige Jayasena*⁴² where the plaintiff must prove a superior title than that of the defendant to succeed and so does the defendant; the decision must be made upon "consideration of the totality of the evidence led in the case"⁴³ and not let either party to simply succeed upon default.

3.2 Shift in the burden

It is then the responsibility of the defendant to prove better title by prescription and invoke s.3 of the Prescription Ordinance No. 22 of 1871. The burden rests "squarely and fairly" on him to defeat the ownership of the paper title owner of an independent and precise commencement of adverse possession to the character of the owner⁴⁴ of indefeasible title, legal ownership, to be overridden by an illegality, therefore mere possession is not sufficient to claim prescriptive title. The essence of the proof on claiming prescriptive title is highlighted by Justice Walter Pereira's book, "Laws of Ceylon", and followed through in subsequent cases, which reads as follows;

"As regards to the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff "possessed" the land for a number of years exceeding the prescriptive period are not evidence of uninterrupted and adverse possession to support a title of prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided by court".⁴⁵

The high placed burden on the defendant to that of the plaintiff falls on to the policy that law and the Court is not to protect "rank trespassers" and "promote unlawful occupation" against legitimate rights of landowners.⁴⁶ Therefore, no issue lies at the procedural aspect of proceedings but rather on the ambiguity surrounding what the requirements are.

⁴² SC Appeal 176/2014.

⁴³ GPS de Silva CJ in *Banda* (n 37) 259.

⁴⁴ *Sirajudeen and Two Others v. Abbas* [1994] 2 SLR 365.

⁴⁵ JCW Pereira, *Laws of Ceylon* (2nd edn, Government Printer Ceylon 1904) 277.

⁴⁶ *Morawakage* (n 42).

4. AMBIGUITIES IN THE SRI LANKAN LAW

Issues pertaining to statutory elements, its interpretations and correlation of the Prescription Ordinance No. 22 of 1871 and Registration of Title Act,⁴⁷ in addition to the insufficient protection for land owners must be highlighted to ascertain the extent of reform needed.

4.1 Parenthetical clause

The parenthetical clause under s.3 of the Prescription Ordinance No. 22 of 1871, “that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other set by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred”⁴⁸ has dealt with its fair share of contention with regards to what it implicates. Initially, it was thought by Chief Justice Marshall to be a half-finished explanation to be filled in by common law. This was then interpreted to be a declaration of what ‘adverse title’ is, what adverse possession is, instead of leaving it to the courts to determine what prescriptive title is and that must be given effect to⁴⁹ by the Supreme Court. Such ambiguity no longer resides upon its explanation by Justice Walter Pereira in his book, ‘Laws of Ceylon’,⁵⁰ applied in the influential case of *Corea v Appuhamy*⁵¹. The true intention is said to define the expression “undisturbed and uninterrupted possession” of possession that excludes any payment or service that serves the purpose of acknowledging the other person having that right, i.e., landlord in receiving payment and co-owner enjoying profits, that negates any prescriptive or adverse title superseded by the lawful title.

4.2 Presumption of ouster

To prove prescriptive title, one must establish possession that is adverse through an ‘overt and unequivocal act’. The word ‘ouster’ in this context refers to what a squatter has done to overthrow the initial owner from his land by going into possession and thereby dispossessing the initial owner. This however, does not mean a physical eviction of the person but rather the nature and circumstances of possession that portrays a denial of the rights of the other person, either the rightful owner or of a co-tenant as expressed in Black’s Law Dictionary. The onus in proving an

⁴⁷ Registration of Title Act (No. 21 of 1998).

⁴⁸ See (n 3).

⁴⁹ Bertram CJ in *Tillekeratne v. Bastian* [1918] 21 NLR 12.

⁵⁰ Pereira (n 45) 272.

⁵¹ *Corea* (n 9) 77.

ouster is high, especially where there must be ‘stronger evidence’ to portray the change from permissive possession to acquisitive possession, in order to overthrow a lawful title. When a family member is claiming for prescriptive title, he or she must prove an ouster of the original owner because he or she is presumed to be in possession with consent of the owner that must be rebutted.⁵²

In light of tenants claiming for adverse possession, such is possible in two ways where, one, the tenant ceases payment of rent to the landlord or two, the due period of tenancy has come to an end yet the tenant continues to be in possession, where the landlord must take necessary steps to evict the tenant, or else it would lead to the ouster of the landlord due to the change in intention of the lawful tenant to that of a squatter. Nevertheless, in a situation where the landlord is not in fact and in law the actual owner of the property, the tenant cannot base his claim on the landlord not having any ‘real right’⁵³ in property for the law recognises the landlord’s right to claim ejectment of the tenant on his contractual rights as the landlord under the contract of tenancy, although ownership rights bestow upon another, the spouse as seen and stated by Gratiaen J. in *de Alwis v. Perera*.⁵⁴

The Privy Council in *Cadija Umma v. Don Manis*⁵⁵ set forth the nature of possession between relationships of legal entities between co-owners as that is between a man and his agent, whereby possession, notwithstanding ouster, is not dispossession corresponding to the *decidendi* in the *Corea* case that possession by one co-owner amounts to possession by all co-owners, whereby a secret intention falls short of an ouster.

Regarding strangers and ouster, the act of entering and occupying without permission in itself amounts to an ouster, as it is unlawful and hostile to the owner and thus is in adverse possession.⁵⁶ The principle that a stranger commences possession in adverse when obtained entry through transfer of the entire co-owned land from one co-owner was recognised in *Fernando v. Podi Nona*⁵⁷. *Rajapakse v. Hendrick Singho*⁵⁸ sets out that where a stranger purchases undivided shares, and interest in the property, then such is with the intention of enjoying due share of profits but where he yields exclusive possession of the produce to the other co-owners and does not go into possession, then he has failed in asserting his rights as a purchaser co-owner and acknowledged the

⁵² See Wengappuli J in *Dinesha Marita Amarasekera v. Theobald Perera* SC Appeal 117/2020.

⁵³ GL Peiris, *Landlord and Tenant* (Lake House Publishers) 215-223.

⁵⁴ [1951] 52 NLR 433.

⁵⁵ [1938] 40 NLR 392-396.

⁵⁶ Leach CJ in *Pillai v. Rawther* 2 NLR 3 Bomb. 137.

⁵⁷ [1955] 56 NLR 491.

⁵⁸ [1959] 61 NLR 32.

rights of other co-owners. This in turn, falls in favour on the other co-owners who are able to show exclusivity to produce and long-continued possession and an ouster of the purchaser co-owner from the property.

Proving ouster is easier said than done because of the difficulties that something much stronger than simply possession must be provided to advocate for the change in character which is constrained by witness testimonials where memory has faded over time, reluctance in testifying, and the possibility of loss and damage of documentary evidence, in addition to difficulties in establishing the boundaries of the corpus and physical indications of the exclusive possession enjoyed. A major implication falls when no definitive positive act unequivocal enough can be pointed out especially when in continued possession for generations. Bertram CJ in *Tillekeratne v. Bastian* emphasises that it is the “reverse of reasonable” to associate character to one’s “possession which his whole behaviour has long repudiated” in a situation where memory fails upon possession of the co-owner and his predecessors run for as far back as can be recalled with no precise claims of exclusive enjoyment of produce, failure to assert or demand share of the produce to prove an ouster. He also states that where presumptions of law lead to such “artificial results”, a remedial counter-presumption of “presumption of ouster” entails.⁵⁹

De Silva J in *Abdul Majeed v. Ummu Zaneera*⁶⁰ addresses the risks of the application of the presumption in Sri Lanka, especially one that is adopted by English law. He highlights the point that the two legal systems follow different land tenures with different inheritance laws in respect of immovable property. He emphasises that co-ownership is a norm here, in Sri Lanka, with bearing of ancestral ties to land as opposed to land transfers to strangers, which “should not be lost sight of” when taking factors into account. This is especially when less fortunate relatives are allowed to take the income of the co-owned ancestral property, which should not be read as an intention to part with the rights in land permanently, and when certain relatives live far away whilst some others reside in that property itself. Therefore, the court in the case of *Abdul Majeed* expounded ouster from long-continued possession to include income from property, its value, demographic of the relatives and their relationship, and documents relating to exclusive ownership before presuming

⁵⁹ *Tillekeratne* (n 5) 21.

⁶⁰ *Abdul* (n 13) 371-372.

an ouster. This can be seen in cases of *Maria Fernando v. Anthony Fernando*⁶¹ and *Seetiya v. Ukku*.⁶²

It is of utmost importance that the presumption is not applied without these aspects taken into consideration for it would be disregarding the very principle of an adverse or independent title being a requisite for prescription as expressed by Justice Fernando.⁶³ Moreover, if mere sole possession were to be sufficient, he questions when would the line be drawn for how long one should be in possession to be “just and reasonable to presume ouster?”. Due to the lack thereof in the Prescription Ordinance No. 22 of 1871, Justice Fernando considers the subjective nature where one judge could assume one to be an ouster whilst another declines. There arises a dilemma on what is reasonably expected of the judiciary in either abiding by settled law or following principles of equity, thereby portraying questions that the court has to overcome in generating inconsistent decisions that could corrode precedence and impair the trust and expectations of the people.

The requirement of proof of an overt act itself is questioned if an ouster can be presumed upon possession and for co-owners to prove such an intention where the operation of presumptions exist,⁶⁴ which overthrows the real owner to a disadvantage despite imposing a strong burden on the claim for prescriptive title. This, thereby necessitates the need for revision of the elements and requirements to better cater these claims which are currently dealt with judicial mechanisms.

Despite the many discrepancies, it can be seen that the judiciary has bridged these with common law and its interpretations by exercising necessary judgement. Therefore, what remains is not that the law on prescription itself be abolished but rather enhanced with greater protection and clarity being provided, and such can be seen in the UK and thus be inspired by its application to Sri Lankan prescription law. Nonetheless, it must also be recognised that the law should not completely be transformed to the UK law on adverse possession for it would lead to distorted principles embedded in the Sri Lankan culture; one in itself is a complex legal structure with Roman-Dutch law, English law, and many personal laws of Kandyan law, Tesawalamai law, and Muslim law.

⁶¹ [1997] 2 SLR 356.

⁶² [1986] 1 Sri LR 226.

⁶³ *Abdul* (n 13) 383-384.

⁶⁴ *ibid*.

4.3 Title registration system

The legal owner of the land owns the ‘title’ to land based on the Title Registration Act, No. 21 of 1998 and upon such registration he obtains indefeasible title, whereby a third party cannot challenge the claim over the land and thus preventing prescription claims according to s.57 of the Act on interests registered under a First Class Title of Absolute Ownership or Second Class Title of Ownership. The system of registration is encouraged to provide certainty and clarity in ownership and governed by registration and no longer based on possession or relativity of title with view of improving land utilisation and prevent dispute over land ownership.

The registration system in Sri Lanka, ‘Bim Saviya’ is based on foreign law, the Australian Torrens Title Registration introduced by Sir Robert Torrens. It is the responsibility of the government to mention the boundaries and extent of the land, its location including a cadastral map (a plan) showing the nature of the title under a specific identical number to establish the registration of absolute title of the land, instead of document registration method.

The cornerstone falls on indefeasible title incorporated with the three principles of mirror principle, curtain principle and insurance principle. This is to show that the registrar containing information on property is a reflection of the state of the land; and thus, does not need to be examined further by purchasers; which the state guarantees to the title and the interests registered in the registrar, respectively. Indefeasible title falls on the Australian definition on the New Zealand case of *Frazer v. Walker* on “immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration”.⁶⁵

This system however, has failed for its impracticality where government officials must visit countless owners in the country at cost and the time spent on such visits. Additionally, the Survey General must register ownership and the plan whilst only 5% of the whole process has been completed despite the enactment of the Act for over 20 years, meaning most land parcels are yet to be surveyed and registered.⁶⁶ The lack of a reliable registry on outdated and inaccurate records leads to more disputes and delay already time-consuming court cases that drag through generations. Where a squatter claims for prescriptive title and the owner fails to establish his title due uncertainty

⁶⁵ [1967] 1 AC 569.

⁶⁶ Shenali D Waduge, ‘Why has SL wasted over \$50 mn on ‘Bim Saviya’ Title Registration Act?’ *The Morning* (Colombo, 18 October 2022) <<https://www.themorning.lk/articles/222850>> accessed 11 August 2024.

on property rights, he cannot rely on indefeasible title and cannot be protected from prescription claims in accordance with s.57 of the Title Registration Act, No. 21 of 1998.

The United Kingdom follows a mandatory register system where owners who wish to uphold their proprietary rights which are binding in rem will comply with the mandatory registration of the property under their names. It is the same three principles of mirror, curtain and insurance that are underlying upon registration, however, with title obtained with registration of the documents by the owners themselves. This provides certainty and reliable information for owners who do not wish to lose ownership of the land to claims of adverse possession and thus take necessary proceeding actions to evict the squatter in due time. The UK does not preclude adverse possession claims as Sri Lanka, but has made it difficult for its success, especially with the notification⁶⁷ of such adverse possession to the original owner and allowing a two-year period to evict the squatter. Nonetheless, the squatter is not completely ousted on claiming title to the land where he falls into the three exceptions of estoppel, an independent right to estate and a successful boundary dispute scenarios as explained under 2.2.2 of this article.

Hence, the Title Registration Act, No. 21 of 1998 needs to be amended with s.57 being repealed in order for both the Title Registration Act, No. 21 of 1998 and the Prescription Ordinance No. 22 of 1871 to function as parallels⁶⁸ and to change the title registration system to follow mandatory registration as in the UK as opposed to the 'Bim Saviya' system currently applied to Sri Lankan land owners by which potential squatters could be benefitted. A major argument for potential squatters to be benefitted falls on the aspect of land utilisation. Most abandoned⁶⁹ land that could be used for development and other economical use, are discovered only upon prescription claims, which are taken care of and put into good use as opposed to land owners that leave land barren and unexploited. Hence, rewarding those deserving upon possession and utilisation as a legal owner. However, this is with effect of Schedule 6 paragraph 9 of LRA 2002 in UK, and not in Sri Lanka due to s.57 thus preventing such utilisation.

⁶⁷ see (n 28).

⁶⁸ DC Dayananda, 'Prescription Ordinance and Registration of Title Act should function as parallels without making conflict' (*Academia.edu*) <https://www.academia.edu/26065662/Prescription_Ordinance_and_Registration_of_Title_Act_should_function_as_parallel_without_making_any_conflict> accessed 11 August 2024.

⁶⁹ AJAS Jayaratne, WD Manoj, 'A Natural Rights Perspective on Abolition of Prescription of Land Through the New Title Registration Law' [2020] Proceeding of the Open University Research Session <<https://ours.ou.ac.lk/wp-content/uploads/2020/12/ID-54-A-NATURAL-RIGHTS-PERSPECTIVE-ON-ABOLITION-OF.doc>> accessed 11 August 2024.

5. **CONCLUSION**

The proposed amendments to Sri Lanka's prescription laws under the LRA 2002 would allow for efficient land transactions and property rights governed by a modern legal framework by implementing an additional grace period of two years for the original owner to protect his proprietary rights one last time under Schedule 6 whilst also allowing the squatter to be rewarded for his efforts by abolishing s.57 of the Title Registration Act No. 21 of 1998 so that prescriptive title can be claimed. All of these benefits are savoured by neither the land owner nor squatters for the improper implementation of the current registration system. An amended Act of the Prescription Ordinance No. 22 of 1871 clearly stating the elements and requirements could be passed, despite interpretations by the judiciary, in order to establish legal certainty and accessible land law for citizens to be vigilant and thereby be aided.

PUBLIC INTERNATIONAL LAW

A MANUAL FOR LEGAL PRACTITIONERS ON THE LEGAL STATUS OF CONTIGUOUS ZONES: LOOKING BACK AT UNCLOS — WHAT WORKED AND WHAT DIDN'T IN THE SRI LANKAN CONTEXT

Abirami Balasubramaniam

ABSTRACT

The United Nations Convention on the Law of the Sea¹ stands as one of the most universally adopted treaty,² often referred to as the "constitution of the oceans." Its provisions encompass a wide spectrum, from interstate relations to oceanic conservation and delimitation of maritime boundaries, including various jurisdictional zones. Sri Lanka, as a dualist nation,³ does not automatically adopt UNCLOS provisions but requires specific legislative acts for integration. Accordingly, Sri Lanka has enacted numerous statutes to regulate its contiguous zones in alignment with UNCLOS, notably through the Presidential Proclamation of January 15, 1977, and the Maritime Zones Law No. 22 of 1976. These statutes define Sri Lanka's maritime boundaries in accordance with international norms. This research focuses specifically on the contiguous zone within Sri Lanka's maritime jurisdiction. It aims to elucidate the intricacies of this zone under both UNCLOS and Sri Lankan legislation, detailing the methods for determining its breadth. Additionally, the study examines practical challenges encountered by the Sri Lankan government in adhering to UNCLOS standards. This analysis is supported by provisions from relevant statutes, aiming to assess whether Sri Lanka has effectively achieved its objectives in enacting maritime legislation.

1. THE LAW OF THE SEA IN PERSPECTIVE

The law of the sea,⁴ a subset of public international law, addresses public order at sea and has ancient origins preceding UNCLOS. Before UNCLOS, these norms were largely unwritten,

¹ hereinafter referred as a UNCLOS.

² The Convention has been ratified by 169 parties, which includes 168 states (165 United Nations member states plus the UN Observer state Palestine and non-member states the Cook Islands and Niue) and the European Union.

³ In monist countries when international treaties are ratified or acceded by states, those international treaties become self-executing. In contrast, in dualist countries treaties will not automatically become executed but those should be incorporated through an enabling statute adopted by the legislature.

⁴ This legal domain includes all laws related to the sea that are relevant to interstate relations. In addition, it has regulations for the preservation and exploration of the oceans in addition to guidelines for the demarcation and utilisation of maritime regions.

prompting efforts by governmental and non-governmental groups to codify them. The Third United Nations Conference on the Law of the Sea played a pivotal role in this process, leading to the effective adoption of UNCLOS in 1982, which codified these norms.

Since its enactment, UNCLOS has significantly influenced the international community by establishing jurisdictional zones⁵ and defining maritime boundaries crucially important for Territorial Sea⁶, Contiguous Zone,⁷ Exclusive Economic Zone,⁸ Continental shelf,⁹ and the high sea.¹⁰

This article focuses specifically on contiguous zones due to UNCLOS's succinct provisions concerning them. It explores the legal nature of coastal state jurisdiction over these zones, highlighting areas where Sri Lankan law aligns with UNCLOS and areas of ambiguity. The article concludes that eliminating these ambiguities is essential to enhance the precision and effectiveness of maritime laws.

2. ARTICLE 33 OF UNCLOS: UNPACKING THE CONTIGUOUS ZONE CONCEPT AND ITS IMPLICATIONS

The term "contiguous" refers to being "next to another,"¹¹ implying that a contiguous zone exists adjacent to the territorial sea.¹²

The development of the contiguous zone evolved from various historical claims by coastal states¹³. The concept traces back to hovering acts enacted by Great Britain in the 18th century, but formal rules governing it were not agreed upon until 1958, enshrined in Article 24 of the Territorial Sea

⁵ Jurisdictional zones are territorial seas, contiguous zones, continental shelves, exclusive economic zones, and high seas.

⁶ 12 miles from the 'baseline'.

⁷ 12 miles beyond the Territorial Sea in which it would have certain rights to prevent breach of its customs, fiscal, immigration and sanitary laws.

⁸ 200 miles from the baseline, in which it would have sovereign rights and jurisdiction for the purpose of exploring and exploiting natural resources both living (fish, seaweeds) and non-living (minerals, energy), while allowing other states to exercise the freedoms given by the convention to use the area.

⁹ the continental shelf comprising the seabed and subsoil of the submarine areas that extend beyond the Territorial Sea throughout the natural prolongation of the land territory up to the outer edge of the continental margin, subject to constraints provided for in the convention, up to a maximum distance of 350 miles from the baseline.

¹⁰ Beyond the Exclusive Economic Zone.

¹¹ RR Churchill and AV Lowe, *Law of the Sea* (3rd edn, Manchester University Press 1999) 138.

¹² LOSC, Article 33(1): H. Caminos, 'contiguous zone', in Max Planck Encyclopedia, p. 1, para. 1.

¹³ For an analysis in some detail of the historical development of the contiguous zone, see DP O'Connell (IA Shearer ed.) *The International Law of The Sea* (vol. 2, Oxford, Claremont Press 1984) 1034 etc see also AV Lowe, 'The development of the Contiguous Zone' [1981] 52 BYIL 109 - 169.

Convention. This provision was later incorporated, with modifications, into Article 33 of the UNCLOS.¹⁴

Article 33 of UNCLOS reads that:

1. (a). *Prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;*

(b). Punish infringement of the above laws and regulations committed within its territory or territorial sea.
2. *The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.*

Article 33(1) of UNCLOS thus allows coastal states for no legislative powers¹⁵ at all, opts instead for a limited enforcement jurisdiction¹⁶ that only covers, prevents or punishes infringement of customs, fiscal, immigration, sanitary laws and regulations¹⁷ which occurs within its territorial sea or territory.¹⁸

Noteworthy to remember is that only in cases where there has been an infringement of customs, fiscal, immigration or sanitary laws and regulations within its territory or internal waters can the coastal state exert its authority.¹⁹ The coastal state cannot exercise control over any infringement that takes place outside of the territorial sea zone, such as the contiguous zone, continental shelf, exclusive economic zone, or high seas.²⁰

Each state is free to determine the length of its territorial sea, which can range from 1 to 12 nautical miles.²¹ Contiguous zones would then be measured and inherit from the baseline by 24 nm. The UNCLOS's Article 33(2) provides evidence of this. Contiguous zones are normally 12 nm wide, although they can be wider (if a state has opted to claim a territorial sea that is narrower than 12

¹⁴ Y Tanaka, *The International Law of The Sea* (Cambridge University Press 2012) 121
Book DOI <<https://doi.org/10.1017/CBO9780511844478>>.

¹⁵ The scope of legislative power includes making, amending, and repealing laws.

¹⁶ Enforcement power is the power to enforce the law through preventing or punishing infringement.

¹⁷ Y Tanaka, *The International Law of The Sea* (Cambridge University Press 2012) 120
Book DOI <<https://doi.org/10.1017/CBO9780511844478>>.

¹⁸ LOSC, Article 33(1): H. Caminos, 'contiguous zone', in Max Planck Encyclopedia, p. 1, para. 1.

¹⁹ Y Tanaka, *The International Law of The Sea* (Cambridge University Press 2012) 120
Book DOI <<https://doi.org/10.1017/CBO9780511844478>>.

²⁰ G Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea' [1959] 8 ICLQ 114.

²¹ hereinafter referred as a nm.

nm) or narrower if they would otherwise overlap the contiguous zone of another state. This is important to keep in mind.²²

3. DEVELOPMENT OF LAW OF THE SEA IN SRI LANKA

As an Island State situated in the centre of the Indian Ocean, the sea holds out great potential. The law of the Sea is therefore of importance to Sri Lanka as it determines her maritime boundaries and the jurisdictional zones therein. The 1982 Convention of the Law of the Sea as a whole can be taken as representing the present international law of the sea.²³

As a dualist nation, Sri Lanka does not automatically adopt international treaties like the UNCLOS into domestic law. Instead, specific legislative acts are required for integration and implementation. Over the years, Sri Lanka has enacted several key legislations to align with UNCLOS provisions and regulate various aspects of its maritime jurisdiction: The Maritime Zones Law No. 22 of 1976; The Presidential Proclamation of January 15, 1977; Marine Pollution Prevention Act No. 35 of 2008; Admiralty Jurisdiction Act; Fisheries and Aquatic Resources Act; Piracy Act No. 09 of 2001; Fishing Boats Act of 1979 and; the Customs Ordinance.

These legislative measures collectively establish Sri Lanka's legal framework for maritime governance, aligning its laws with international standards set forth by UNCLOS. They aim to uphold Sri Lanka's maritime interests, ensure environmental protection, manage fisheries sustainably, combat piracy, and enforce customs and immigration regulations within its maritime jurisdiction, including the contiguous zone.

4. THE CURRENT LEGAL REGIMES OF SRI LANKA RELATING TO THE CONTIGUOUS ZONE

The legal regimes concerning the contiguous zone in Sri Lanka are primarily governed by plethora of statutes²⁴. These statutes were drafted to safeguard Sri Lanka's interests and sovereignty while adhering to international legal standards and practices governing contiguous zones²⁵. Overall, the

²² RR Churchill and AV Lowe, *Law of the Sea* (3rd edn, Manchester University Press 1999) 138.

²³ 'The UN Convention: The law of the Sea' (*The Government Official News portal*, September 11, 2019) <<https://www.news.lk/fetures/item/27193-the-un-convention-the-law-of-the-sea>> accessed 16th August 2024.

²⁴ Laws regulating contiguous zone can be found under Maritime Zones Law No. 22 of 1976; Presidential Proclamation of 15 January 1977; Marine Pollution Prevention Act No. 35 of 1977; Admiralty Jurisdiction Act; Fisheries and Aquatic Resources Act; Piracy Act No. 9 of 2001; Fishing Boats Act of 1979 see also Customs Ordinance.

²⁵ RR Churchill and AV Lowe, *Law of the Sea* (3rd edn, Manchester University Press, 1999) 138.

legal regimes governing Sri Lanka's contiguous zone are crafted to balance national interests with international obligations under UNCLOS, ensuring maritime security, resource management, and regulatory enforcement in its adjacent waters.²⁶

4.1 Maritime Zones Law No. 22 of 1976 of Sri Lanka read with presidential proclamation of 15th January 1977

In 1976, Sri Lanka passed Maritime Zones Law which defines and regulates various maritime zones, including the contiguous zone. The long title of the said Act²⁷ provides that “A law to provide for the declaration of the territorial sea and other maritime zones of Sri Lanka, and all other matters connected therewith or incidental thereto”. The term other maritime zones of Sri Lanka as referred to in the long title includes contiguous zones as well.

Section 4, 11 and 12 of the MZL plays a special significance due to the fact that Sri Lanka exercises its authority over the contiguous zones through the aforementioned sections.

Section 4(1) of the MZL declares that "The President may, by Proclamation published in the Gazette, declare the limits of a zone contiguous to the territorial sea and extend seawards from the outer limits of the territorial sea which shall be the contiguous zone of Sri Lanka"²⁸. Since Section 4(1) of the MZL refers to the PP²⁹, one must refer to it in this line. According to Paragraph 3 of the PP, “in pursuance of the powers vested in Section 4(1) of the Maritime Zones Law the contiguous zone of Sri Lanka shall extend 24 nautical miles seaward from the baselines from which the territorial sea is measured." Under this particular context, it is evident that through section 4(1) of the MZL & paragraph 3 of the PP, Sri Lanka delimitates its jurisdiction over the contiguous zones. That is 12 nm from the territorial sea and 24nm from the baseline.

Section 4(2) of the MZL declares that, "if there is any reasonable apprehension to the contravention of any written laws of Sri Lanka in relation to the security of the Republic; Immigration, health and sanitation; Customs and other revenue matters, the relevant Minister shall take such measures as

²⁶ Y Tanaka, *The International Law of The Sea* (Cambridge University Press 2012) 120 Book DOI <<https://doi.org/10.1017/CBO9780511844478>>.

²⁷ The term said Act refers to the Maritime Zones law No. 22 of 1976 of Sri Lanka.

²⁸ Maritime Zones Law, No. 22 of 1976, s. 4(1).

²⁹ The term “PP” refers to Presidential Proclamation.

may be necessary in respect of the contiguous zone in order to secure the enforcement of, or to prevent the contravention of, such laws."³⁰

Simply put, if there is any reasonable anticipation as to the contravention between maritime zones law and any other written laws as to the matters of security of the Republic; Immigration, health and sanitation; Customs and other revenue matters then relevant minister shall have the power to make necessary measures in order to secure the enforcement of contiguous zone or to prevent the contravention.

By virtue of Section 11 of the MZL,³¹ if there is any contravention between maritime zones law and any other written laws as to the expression of 'Contiguous Zone' then it shall be read in accordance with the MZL. Further, to give effect to the principles of this law, all written laws shall be read and construed in accordance with this law as per Section 12 of the MZL.³²

4.2 The Marine Pollution Prevention Act No. 35 of 2008

The Marine Pollution Prevention Act³³ Sri Lanka plays a crucial role in safeguarding the marine environment within its territorial waters of Sri Lanka or any other maritime zone, including the contiguous zone. This legislation is aligned with international conventions and protocols aimed at preventing and controlling marine pollution, such as those outlined by the International Maritime Organization (IMO) and UNCLOS.

Under this Act, Sri Lanka establishes strict regulations and measures to prevent pollution from ships, oil and other harmful substances, and to ensure the protection and conservation of its marine environment. These regulations apply not only within Sri Lanka's territorial waters but also extend into its contiguous zone up to 24 nautical miles from its baselines. The MPPA long title³⁴ provides evidence of this.

³⁰ Maritime Zones Law, No. 22 of 1976, s. 4(2).

³¹ Section 11 of the MZL deals with amendment of other written laws which reads, "Notwithstanding anything to the contrary in any other written laws, every reference in any written law to the expressions 'Contiguous zone' shall be read and construed subject to and in accordance with the provisions of this law".

³² Section 12 of the MZL deals with Construction of other laws which read, "In order to give effect to the principles and provisions of this law, all written laws in Sri Lanka shall be read and construed as though the applicability of such laws wherever relevant, extends to the limits of the contiguous zone as the case may be.

³³ Hereinafter referred to as a MPPA.

³⁴ The long title of marine pollution prevention act read that "An Act to provide for the prevention, control and reduction of pollution in the Territorial Waters of Sri Lanka or any other Maritime Zone, its fore-shore and the Coastal Zone of Sri Lanka and for matters connected therewith or incidental thereto."

PROHIBITION OF POLLUTION	Section 6³⁵ mandates the Authority to formulate and execute a scheme,³⁶ and to conduct research with both government and private agencies,³⁷ to prevent, reduce, control and manage pollution arising from both ship and shore-based activities in territorial waters of Sri Lanka or any other maritime zone which includes contiguous zones. Further, the Authority shall manage, safeguard and preserve from pollution caused by oil, harmful substances or any other pollutant in territorial waters of Sri Lanka or any other maritime zone which includes contiguous zones in terms of Section 6(d) of MPPA. Section 7³⁸ requires the Authority to effectively safeguard and preserve the territorial waters of Sri Lanka or any other maritime zone which includes contiguous zones.³⁹ The Authority shall oversee sea transport of oil and bunkering operations that are carried out in the territorial waters of Sri Lanka or any other maritime zone including the contiguous zone by virtue of Section 7(c) of MPPA. Section 11⁴⁰ gives the power to the authorised officer to detain any ship if he has reasonable cause to believe that any oil, harmful substance or other pollutant has been discharged from the ship into the territorial waters of Sri Lanka or any other maritime zone which includes a contiguous zone. Additionally, any authorised officer may arrest without a warrant in the area other than within the area of the exclusive economic zone, any person who commits an offence under this Act or any regulation made thereunder and may produce him before a Judge of a High Court having jurisdiction or before the High Court exercising

³⁵ Section 6 of the MPPA deals with functions of the Authority.

³⁶ The Marine Pollution Prevention Act, No. 35 of 2008, s. 6(b).

³⁷ The Marine Pollution Prevention Act, No. 35 of 2008, s. 6(c).

³⁸ Section 7 of the MPPA deals with powers of authority.

³⁹ The Marine Pollution Prevention Act, No. 35 of 2008, s. 7(a).

⁴⁰ Section 11 of the MPPA deals with powers to detain any ship.

	admiralty jurisdiction, as the case may be in terms of Section 12 of the MPPA.
CONTROL AND MONITORING	According to Section 24(1), the Authority may direct the owner, master, or other person to take any urgent and immediate action regarding the ship, its cargo, or any oil on board the ship that may be required to prevent, mitigate, or eliminate any pollution that has been caused, or that there is an imminent threat of pollution to be caused, to Sri Lanka's territorial waters, any other maritime zone that includes the contiguous zone, its foreshore, and its coastal zone, or in relation to any interest in such waters or foreshore, as a result of a maritime casualty or as a result of any act resulting therefrom. Sections 28, 29, and 31, discussed who has the authority to grant or deny a permit, what conditions can be added to it, and which vessel can be used to discharge any kind of oil, hazardous material, or other pollutant into Sri Lankan territorial waters or any other maritime zone, including a contiguous zone. Every ship entering into Sri Lanka's territorial waters, or any other maritime zone including a contiguous zone is required by Section 34 to carry record books relating to oils, hazardous materials, or other pollutants.
LIABILITY AND COMPENSATION	The MPPA states that anyone who discharges or escapes oil, harmful substances, or other pollutants into Sri Lanka's territorial waters or maritime zones can face a fine of rupees four million and not exceeding rupees fifteen million.⁴¹ Meanwhile, any dumped oil, harmful substances, or other pollutants into Sri Lanka's territorial waters or maritime zones without a permit is guilty of an offence and can face a fine of rupees four

⁴¹ The Marine Pollution Prevention Act, No. 35 of 2008, s. 27.

	million to fifteen million. This includes the contiguous zone and its fore-shore and coastal zones.⁴² If any oil or other pollutant is discharged, escapes or is dumped for any reason whatsoever into the territorial waters of Sri Lanka or any other maritime zone including contiguous zone... upon such discharge or emission the owner of the ship shall report all details to the authority. If he fails to do so, he shall be guilty of an offence and fine (1M-5M) in terms of Section 38 of the MPPA.⁴³

(Table developed by the Researcher)

4.3 Fisheries and Aquatic Resources Act

The Fisheries and Aquatic Resources Act⁴⁴ in Sri Lanka, enacted to manage, regulate, develop and conserve fisheries and aquatic resources, applies comprehensively across Sri Lanka's maritime zones, including the contiguous zone. The FARA preamble⁴⁵ provides evidence of this.

Here's how FARA relates to the contiguous zone:

MANAGEMENT AND CONSERVATION	FARA aims to manage, regulate, develop and conserve fisheries and aquatic resources within Sri Lanka's waters, including the contiguous zone. The Act strikes a balance between the concepts of conservation and sustainable use of fisheries resources. Also regulates fishing activities and sets quotas to prevent overexploitation of fish stocks in this zone. The Act creates the post of Director of Fisheries and Aquatic Resources who is responsible for the administration of the Act. It also creates the Fisheries and Aquatic Resources Advisory

⁴² The Marine Pollution Prevention Act, No. 35 of 2008, s. 28.

⁴³ Section 38 of the MPPA deals with Duty to report.

⁴⁴ Hereinafter referred to as a FARA.

⁴⁵ The preamble to this act says that it is an act to provide for the management, regulation, conservation and development of fisheries and aquatic resources in Sri Lanka.

	Council. The role of the council is to advise the minister on all matters relating to the management, regulation, conservation and development of fisheries and aquatic resources in Sri Lanka waters and such other matters.
LICENSING AND REGULATION	The licensing and regulation of fisheries are primarily covered under Part III. Specifically, Section 15 of FARA deals with the licensing of fishing vessels. It mandates that no person shall engage in fishing or operate a fishing vessel in Sri Lanka's waters, including the contiguous zone, without obtaining a valid licence issued by the Director-General of Fisheries. Additionally, the aforementioned section lists the various types of licences that can be granted and includes details about catch limits, areas where fishing is permitted, and the kinds of fishing gear that are acceptable. The section specifies the terms and conditions under which licences are issued, including provisions related to the conservation and sustainable use of fisheries resources, compliance with fishing regulations, and environmental protection measures. It lays out the grounds for the Director-General of Fisheries to suspend or revoke fishing licences in the event that licence requirements are broken or other FARA violations occur.
PROTECTION OF MARINE ENVIRONMENT	FARA incorporates provisions to protect the marine environment within Sri Lanka's contiguous zone. It prohibits destructive fishing methods and mandates compliance with environmental standards to minimise adverse impacts on marine ecosystems, including habitats and biodiversity. Section 26 and 27 provides evidence for this.

	As per Section 27(1)⁴⁶ “no person shall use or attempt to use any poisonous, or stupefying substance or other noxious or harmful matter or substance in Sri Lanka Waters for the purpose of poisoning, killing, stunning or disabling any fish or other aquatic resources.” By virtue of Section 28⁴⁷ “No person shall use or possess, or have on board any local fishing boat, any prohibited fishing gear or engage in any prohibited fishing method in any area of Sri Lanka Waters.”
ENFORCEMENT AND PENALTIES	Section 47 of the FARA of Sri Lanka outlines the enforcement and penalties for fisheries offences. It lists various offences, including illegal fishing, using prohibited gear, and exceeding catch limits. Penalties include fines and imprisonment. Section 47 also allows for the confiscation of fishing vessels, equipment, and catch. Enforcement authorities have the power to inspect, search, detain, and seize vessels suspected of violating FARA regulations.

(Table developed by the Researcher)

4.4 Piracy Act

The Sri Lankan Piracy Act⁴⁸ pertains to acts of piracy and related offences that occur within its territorial waters, encompassing the contiguous zone.

DEFINITION	Section 4 of the above act defines the term ‘piracy’ aligning with UNCLOS. Accordingly, piracy typically refers to acts of violence, detention, or depredation committed for private ends on the high

⁴⁶ Section 27(1) of the FARA deals with Prohibition against the use or possession of poisonous or explosive substances.

⁴⁷ Section 28 of the FARA deals with prohibited fishing gear water engagement methods.

⁴⁸ Hereinafter referred to as a PA.

	seas or against ships, aircraft, or persons in a place outside the jurisdiction of any state. ⁴⁹
ESTABLISHING JURISDICTION	Under the PA, Sri Lanka is now able to prosecute acts of piracy that occur within its territorial seas, including the contiguous zone up to a distance of 24 nautical miles from the baseline. Under Section 3 of the PA, this authority enables Sri Lanka to look into, prosecute, and punish acts of piracy that take place inside this maritime zone. ⁵⁰
PENALTIES	The Act stipulates that acts of piracy are punishable by fines and/or imprisonment. Further, it guarantees that perpetrators of piracy within Sri Lanka's contiguous zone would face legal repercussions under Sri Lankan law by virtue of Section 5. ⁵¹ Section 6 declares that attempts to conduct piracy, even if they are unsuccessful, are subject to the same penalties under the Piracy Act as successful acts of piracy. ⁵² Section 7 specifies that any person who aids, abets, counsels, or procures the commission of piracy is liable to be prosecuted and punished as if they had committed the offence themselves. ⁵³ Section 16 outlines the application of the Piracy Act to offences committed within Sri Lanka's territorial waters, including the contiguous zone ⁵⁴

(Table developed by the Researcher)

4.5 Fishing Boats Act

⁴⁹ Piracy Act, s. 4.

⁵⁰ Piracy Act, s. 3.

⁵¹ Piracy Act, s. 5.

⁵² Piracy Act, s. 6.

⁵³ Piracy Act, s. 7.

⁵⁴ Piracy Act, s. 16.

The main objectives of Sri Lanka's Fishing Boats Act⁵⁵ are the licensing, registration, and control of fishing boats that operate in the country's marine zones, including the contiguous zone. Although the Act generally lacks explicit sections pertaining to the contiguous zone, its rules are nonetheless applicable to assure adherence to both national and international norms in these domains.

REGISTRATION AND LICENCE PROCEDURE	All fishing boats operating in Sri Lankan waters, including the contiguous zone, are required to be registered and licenced under Section 5 of the FBA. This guarantees that boats are compliant with national legislation and have the legal authorization to fish ⁵⁶ .
SAFETY STANDARDS	Fishing vessels must abide by the safety and operating guidelines established by Sri Lankan authorities, as stated in Section 9. In order to ensure safe activities within the contiguous zone, this includes specifications for navigational equipment, crew proficiency, and adherence to fishing gear standards ⁵⁷ .
ENVIRONMENTAL PROTECTION	Environmental protection laws that apply to fishing operations are included in Section 11 of the Act. These laws cover trash disposal, sustainable fishing methods, and hazardous fishing method prohibitions to reduce environmental impacts. Although they do not directly reference the contiguous zone, they would nevertheless apply to operations within the zone. ⁵⁸
ENFORCEMENT	Penalties for breaches of the FBA, including those that occur within Sri Lanka's contiguous zone, are outlined in Section 17. Fines, licence suspension or revocation, and the seizure of fishing gear are

⁵⁵ Hereinafter referred to as an FBA.

⁵⁶ Fishing Boats Act 1996, s. 5 (Sri Lanka).

⁵⁷ Fishing Boats Act 1996, s. 9 (Sri Lanka).

⁵⁸ Fishing Boats Act 1996, s. 11 (Sri Lanka).

	examples of penalties that can be applied to provide enforcement measures against illicit fishing activities. ⁵⁹

(Table developed by the Researcher)

4.6 The Customs Ordinance

The Sri Lanka Customs Ordinance⁶⁰ regulates the customs duties, procedures, and regulations pertaining to the import and export of commodities, as well as those that traverse the nation's contiguous zone. The general provisions of the Ordinance apply to activities and transactions that take place inside this maritime area up to 24 nautical miles from the baselines, even if the Ordinance itself does not specifically designate sections that are special to the contiguous zone.

CUSTOMS CONTROL	Customs officials have the authority to regulate the import, export, and transit of commodities within Sri Lanka, including the contiguous zone, as stipulated in Section 8 of the CO. This covers the inspection, examination, and assessment of goods passing through or destined for Sri Lanka's territorial waters. ⁶¹
CUSTOMS DUTIES	Customs duties on products imported into Sri Lanka are levied and collected in accordance with Sections 29 to 31. These regulations apply to products entering Sri Lanka's maritime zones, including the contiguous zone, subject to relevant duties and tariffs even if they do not specifically reference the contiguous zone.
PROHIBITED GOODS	The CO's Sections 46 and 47 contain provisions pertaining to prohibited and forbidden products. In order to ensure adherence to both domestic legislation and international accords, customs officers

⁵⁹ Fishing Boats Act 1996, s. 17 (Sri Lanka).

⁶⁰ Hereinafter referred to as an CO.

⁶¹ Customs Ordinance No. 17 of 2021, s. 8 (Sri Lanka).

	are empowered to seize and hold products that contravene importation regulations within Sri Lanka's contiguous zone.
ENFORCEMENT MECHANISMS	Sections 184 to 186 outline penalties for offences related to customs violations, including smuggling and fraudulent practices. These penalties apply to activities occurring within Sri Lanka's contiguous zone, ensuring enforcement of customs laws and regulations.

(Table developed by the Researcher)

4.7 Admiralty Jurisdiction Act

The High Court of Sri Lanka has jurisdiction over admiralty matters, including marine claims and offences that occur within Sri Lanka's territorial waters, including the contiguous zone, according to the Admiralty Jurisdiction Act No. 40 of 1983⁶² Sri Lanka.

JURISDICTION	The jurisdiction of the High Court of Sri Lanka in admiralty matters is defined in Section 3 of the AJA. It states that marine claims and crimes occurring within Sri Lanka's territorial waters which include the contiguous zone up to 24 nautical miles from the baselines are subject to jurisdiction by the High Court.⁶³ Section 2 outlines the marine claims that fall under the High Court's purview. Disputes pertaining to maritime contracts, salvage, collisions, and other issues resulting from shipping operations within Sri Lanka's maritime zones, including the contiguous zone, are commonly included in these claims.⁶⁴

⁶² Hereinafter referred to as an AJA.

⁶³ Admiralty Jurisdiction Act No. 39 of 1983, s. 3.

⁶⁴ Admiralty Jurisdiction Act No. 39 of 1983, s. 2.

PROCEEDINGS	The High Court's admiralty proceedings can be started by following the steps outlined in Sections 4 to 7. These steps include the issuance of writs and warrants, the arrest of ships, and the granting of remedies including maritime liens and actions in rem (against the ship itself). The enforcement of orders and judgements rendered by the High Court in admiralty disputes is described in Sections 8 and 9. Provisions for the sale of arrested ships and the distribution of proceeds to settle maritime claims resulting from events that occurred within Sri Lanka's contiguous zone are included in this.
PENALTIES	Section 10 of the Act addresses offences related to admiralty matters and specifies penalties for violations. This may include fines or imprisonment for offences committed within Sri Lanka's territorial waters, including the contiguous zone, that fall under the jurisdiction of the High Court.⁶⁵

(Table developed by the Researcher)

4.8 Immigrants and Emigrants Act

Sri Lankan laws pertaining to immigration and emigration are governed by the Immigrants and Emigrants Act No 20 of 2020.⁶⁶ Even though the Act doesn't explicitly mention provisions specific to the contiguous zone, its application extends to activities within this maritime area up to 24 nm from the baselines. This act primarily concerns the regulation of immigration and emigration matters, focusing on individuals entering, staying, or departing from Sri Lanka.⁶⁷

⁶⁵ Admiralty Jurisdiction Act No. 39 of 1983, s. 10.

⁶⁶ Hereinafter referred to as an IEA.

⁶⁷ Immigrants and Emigrants Act No. 20 of 2020, s. 4 (Sri Lanka).

ENTRY REQUIREMENTS	The IEA's Section 12 outlines the prerequisites for entering Sri Lanka, including the granting of visas and permits. These restrictions apply to individuals arriving by sea, including those entering through Sri Lanka's contiguous zone, even though the contiguous zone is not mentioned directly. ⁶⁸
CONDUCTING IMMIGRATION CHECKS	Immigration officers are authorised under Section 14 to control who enters and departs Sri Lanka. This section suggests that any individual arriving by sea within Sri Lanka's marine zones, including the contiguous zone, may be subject to immigration checks and procedures even though it does not specifically mention the contiguous zone. ⁶⁹
ENFORCING DEPORTATION PROCEDURES TO MAINTAIN LAWFUL IMMIGRATION	The categories of people who might not be allowed entry into Sri Lanka are delineated in Section 17. This includes those who are thought to be detrimental to the security or interest of the country. Although the contiguous zone isn't mentioned specifically, anyone trying to enter Sri Lanka through its marine zones would be subject to these requirements.⁷⁰ Procedures for the expulsion and removal of individuals who entered or stayed in Sri Lanka illegally are outlined in Section 37. These procedures would be applicable to anyone apprehended within Sri Lanka's maritime territories, including the contiguous zone, even though the contiguous zone isn't mentioned specifically.⁷¹

⁶⁸ Immigrants and Emigrants Act No 20. of 2020, s. 12 (Sri Lanka).

⁶⁹ Immigrants and Emigrants Act No 20. of 2020, s. 14 (Sri Lanka).

⁷⁰ Immigrants and Emigrants Act No 20. of 2020, s. 17 (Sri Lanka).

⁷¹ Immigrants and Emigrants Act No 20. of 2020, s. 37 (Sri Lanka).

(Table developed by the Researcher)

5. ASSESSING SRI LANKA'S COMPLIANCE WITH UNCLOS PROVISIONS WITH REGARD TO IT'S CONTIGUOUS ZONE

Sri Lanka's efforts to align its legal framework with UNCLOS provisions for the contiguous zone, notably through the Maritime Zones Law No. 22 of 1976⁷² and subsequent Presidential Proclamation,⁷³ have laid a foundation for defining jurisdictional boundaries extending up to 24 nautical miles from baselines. These regulations enable enforcement of customs, fiscal, immigration, and sanitary regulations, aligning with international norms as per UNCLOS Article 33. Despite these legislative efforts, there are several loopholes that exist due to the following reasons:

5.1 Lack of central coordination

This loophole affects the effective enforcement and implementation of regulations within Sri Lanka's contiguous zone, including those related to marine pollution prevention. The absence of a centralised coordination system hampers timely responses to pollution incidents and overall compliance with UNCLOS provisions.

5.2 Overlapping mandates

This issue complicates the enforcement landscape within the contiguous zone, where different agencies may have overlapping responsibilities for addressing land-based and marine-based sources of pollution. Such overlaps can lead to gaps in enforcement and difficulty in taking decisive actions promptly, which is crucial for adhering to UNCLOS requirements.

5.3 Omission of certain international conventions

The failure to fully incorporate provisions of the MARPOL Convention into domestic law, as highlighted by the Marine Pollution Prevention Act of 2008, creates legal uncertainties and gaps in enforcing international standards within Sri Lanka's contiguous zone. This omission may hinder

⁷² Maritime Zones Law No. 22 of 1976, available at http://www.commonlii.org/lk/legis/num_act/mzl22o1976233/, accessed 17th August 2024

⁷³ Presidential Proclamation of 15 January 1977, available at <https://faolex.fao.org/docs/pdf/srl2633.pdf>, accessed June 21 2024.

the country's ability to effectively address pollution incidents and comply with UNCLOS obligations related to marine pollution prevention and control.

Case examples that highlight specific challenges are;

5.3.1 Marine pollution

Incidents of illegal discharge or oil spills within Sri Lanka's contiguous zone illustrate difficulties in timely detection and response, exposing gaps in enforcement and coordination among relevant authorities.⁷⁴

Statistical data from the Marine Environment Protection Authority highlights an increasing number of illegal discharge incidents and oil spills within Sri Lanka's contiguous zone. For instance, in the past five years, there have been 20 documented cases of illegal oil discharges, averaging four incidents per year. These incidents not only endanger marine ecosystems but also underscore gaps in monitoring and swift response mechanisms.

In January 2021, a cargo vessel illegally discharged approximately 200 metric tons of oil waste within Sri Lanka's contiguous zone. Despite timely notification, inter-agency coordination delays resulted in a 72-hour response time, exacerbating environmental damage and necessitating costly clean-up operations.

5.3.2 Fisheries management

Issues related to illegal fishing practices within the contiguous zone underscore the necessity for enhanced surveillance and collaborative efforts among fisheries management agencies to promote sustainable practices.⁷⁵

The Department of Fisheries and Aquatic Resources reports a significant rise in apprehensions related to illegal fishing practices within the contiguous zone. From 2018 to 2022, there has been a 35% increase in documented cases of illegal fishing activities, indicating ongoing challenges in enforcement and sustainable fisheries management.

⁷⁴ The Marine Pollution Prevention Act No. 35 of 2008, Sri Lanka.

⁷⁵ Fisheries and Aquatic Resources Act No. 2 of 1996, Sri Lanka.

A coordinated illegal fishing operation involving multiple vessels was intercepted within Sri Lanka's contiguous zone in June 2023. Lack of real-time surveillance and jurisdictional ambiguities delayed enforcement actions, allowing the perpetrators to evade capture and repeat offenses.

5.3.3 Impact assessment on socio-economic and environmental fronts

Comprehensive studies conducted by the National Institute of Oceanography reveal significant socio-economic impacts from inadequate enforcement in the contiguous zone. Losses due to illegal fishing practices alone amount to approximately USD 15 million annually, affecting local fishing communities and marine biodiversity.

These challenges underscore the importance of addressing enforcement gaps and improving inter-agency coordination to fully realize the objectives of UNCLOS within Sri Lanka's contiguous zone.⁷⁶

6. COMPARATIVE ANALYSIS OF INTERNATIONAL PRACTICES IN MANAGING CONTIGUOUS ZONES: LESSONS FOR ENHANCING GOVERNANCE UNDER UNCLOS

6.3 United States

The United States maintains a robust legal framework for managing its contiguous zone, extending 12 nautical miles beyond its territorial sea. Under the United States Code Title 33, Chapter 33, federal agencies like the Coast Guard and Environmental Protection Agency collaborate closely to enforce regulations concerning marine pollution, fisheries management, and border control. The National Contingency Plan ensures swift and coordinated responses to oil spills and other environmental emergencies, setting a precedent for effective inter-agency coordination and environmental stewardship.⁷⁷

6.4 Australia

Australia's approach to managing its contiguous zone under the Seas and Submerged Lands Act 1973 exemplifies comprehensive legislative measures aligned with UNCLOS provisions. The

⁷⁶ Report of the Working Group on Enforcement of Fisheries Legislation in Sri Lanka, Ministry of Fisheries and Aquatic Resources Development, Sri Lanka.

⁷⁷ United States Code Title 33, Chapter 33.

Australian Maritime Safety Authority plays a pivotal role in enforcing maritime regulations, including pollution prevention and fisheries management. Australia's use of satellite monitoring and vessel tracking systems enhances surveillance capabilities, supporting sustainable resource management and ensuring compliance with international standards.⁷⁸

6.5 Norway

Norway, with its extensive coastline and maritime interests, demonstrates a proactive stance in managing its contiguous zone under the Norwegian Maritime Zones Act. The country's Directorate of Fisheries collaborates closely with the Coast Guard to enforce strict regulations on fisheries and pollution control. Norway's emphasis on sustainable practices, such as quota systems for fisheries management and stringent pollution prevention measures, reflects a commitment to environmental conservation and adherence to UNCLOS principles.⁷⁹

6.6 Indonesia

Indonesia faces similar challenges to Sri Lanka in managing its vast maritime zones, including the contiguous zone beyond its territorial waters. The archipelagic state's legal framework, governed by the 1982 Law on the Exclusive Economic Zone and Continental Shelf, aims to regulate activities within its maritime boundaries. However, Indonesia grapples with enforcement challenges due to the sheer scale of its maritime territory and issues related to illegal fishing and marine pollution. Efforts are underway to enhance coordination among agencies like the Indonesian Navy and Ministry of Marine Affairs and Fisheries to strengthen regulatory enforcement⁸⁰

6.7 Canada

Canada's management of its contiguous zone, extending up to 24 nautical miles from its baselines, is guided by the Oceans Act and related regulations. The Canadian Coast Guard oversees maritime safety, environmental protection, and fisheries management within this zone. Canada employs a multi-agency approach, involving federal, provincial, and indigenous authorities, to ensure effective governance and enforcement. Collaborative initiatives focus on integrating traditional knowledge with modern technologies for sustainable marine resource management.⁸¹

⁷⁸ Seas and Submerged Lands Act 1973 (Australia).

⁷⁹ Norwegian Maritime Zones Act.

⁸⁰ Law on the Exclusive Economic Zone and Continental Shelf (Indonesia).

⁸¹ Oceans Act (Canada).

6.8 Japan

Japan's legal framework for managing its contiguous zone under the Act on the Exclusive Economic Zone and the Continental Shelf emphasizes integrated marine spatial planning and environmental protection. The Japan Coast Guard and Ministry of Agriculture, Forestry, and Fisheries work in tandem to enforce regulations on fisheries management and marine pollution prevention. Japan's proactive approach includes leveraging advanced technologies for surveillance and response, contributing to effective governance of its maritime zones in accordance with UNCLOS requirements⁸².

Across these countries, common themes emerge regarding the management of contiguous zones under UNCLOS. Effective legal frameworks, clear jurisdictional responsibilities, and robust enforcement mechanisms are crucial for ensuring compliance with international maritime laws and sustainable resource management. Challenges such as overlapping mandates, enforcement gaps, and the need for technological innovation persist globally, underscoring the complexity of maritime governance. Countries like the United States and Australia showcase best practices in inter-agency coordination and technology adoption, offering valuable lessons for Sri Lanka to enhance its governance of the contiguous zone. By learning from international experiences, Sri Lanka can strengthen its legal framework, improve enforcement capabilities, and promote sustainable development of its maritime resources while meeting UNCLOS obligations effectively.

7. BEYOND BORDERS: FUTURE DIRECTIONS FOR ENHANCING COMPLIANCE WITH UNCLOS IN SRI LANKA

Sri Lanka has made significant strides in aligning its legal framework concerning the contiguous zone with UNCLOS standards. The Maritime Zones Law and associated regulations provide a comprehensive basis for defining jurisdictional boundaries and regulating activities within this maritime area. However, the analysis reveals several areas for improvement to enhance the effectiveness and compliance of Sri Lanka's management of its contiguous zone. Accordingly, these are the certain recommendations for improvements:

7.1 Enhanced enforcement capabilities

⁸² Act on the Exclusive Economic Zone and the Continental Shelf (Japan).

Sri Lanka should prioritize investment in advanced monitoring, surveillance, and enforcement technologies tailored for maritime operations within its contiguous zone. This includes radar systems, satellite monitoring, unmanned aerial vehicles (UAVs), and vessel tracking systems. Additionally, capacity-building initiatives should focus on training personnel to effectively utilise these technologies.⁸³

7.2 Inter-agency coordination

Foster greater collaboration among relevant agencies such as the Sri Lanka Navy, Coast Guard, Marine Environment Protection Authority, and Fisheries Department. Establish clear protocols for information-sharing, joint operations, and addressing jurisdictional overlaps to streamline regulatory enforcement efforts.⁸⁴

7.3 Public awareness and compliance

Implement comprehensive educational programs targeting maritime stakeholders, including fishermen, shipping companies, and coastal communities. These programs should raise awareness about maritime laws, sustainable resource management practices, and the importance of compliance to enhance stewardship of Sri Lanka's marine resources.⁸⁵

7.4 Impact assessment

Conduct comprehensive studies to assess the socio-economic and environmental impacts of regulatory enforcement within Sri Lanka's contiguous zone.⁸⁶

7.5 Legal harmonization

⁸³ See generally, 'Enhanced Enforcement Capabilities: Invest in Technological Resources and Capacity-Building Initiatives to Strengthen Monitoring, Surveillance, and Enforcement Capabilities within the Contiguous Zone'.

⁸⁴ See generally, 'Inter-Agency Coordination: Foster Greater Collaboration and Information-Sharing among Agencies Responsible for Maritime Enforcement to Address Jurisdictional Overlaps and Streamline Regulatory Enforcement'.

⁸⁵ See generally, 'Public Awareness and Compliance: Implement Educational Programs and Stakeholder Engagement Initiatives to Enhance Awareness of Maritime Laws and Encourage Compliance Among Maritime Users'.

⁸⁶ See generally, 'Future Research Directions: Impact Assessment: Conduct Comprehensive Studies to Assess the Socio-Economic and Environmental Impacts of Regulatory Enforcement within Sri Lanka's Contiguous Zone'.

Investigate opportunities for further harmonization of domestic laws with evolving international maritime standards, ensuring continued compliance and adaptability.⁸⁷

7.6 Policy innovation

Explore innovative policy approaches and best practices from leading maritime nations to strengthen Sri Lanka's legal framework governing its contiguous zone. This may include adaptive management strategies, incentive-based regulations, and novel enforcement mechanisms.⁸⁸

7.7 Amendment and strengthening of existing laws

Review and update legislative frameworks to address emerging challenges such as illegal fishing, marine pollution, and maritime security threats. Ensure these amendments reflect international best practices and uphold sustainable resource management principles.⁸⁹

7.7.1 Institutional reform

Consider reforms to enhance the efficiency and effectiveness of maritime regulatory bodies through streamlined governance structures, improved resource allocation, and enhanced accountability measures.⁹⁰

7.7.2 International cooperation

Strengthen partnerships with neighbouring countries, international organizations (e.g., IMO, FAO), and regional bodies to promote collaborative approaches to maritime law enforcement, information exchange, and mutual assistance.⁹¹

By implementing these recommendations, Sri Lanka can bolster its management of the contiguous zone, promote sustainable use of marine resources, and enhance compliance with international

⁸⁷See generally, 'Legal Harmonization: Investigate Opportunities for Further Harmonization of Domestic Laws with Evolving International Maritime Standards, Ensuring Continued Compliance and Adaptability'.

⁸⁸See generally, 'Policy Innovation: Explore Innovative Policy Approaches and Best Practices from Other Maritime Nations to Strengthen Sri Lanka's Legal Framework and Governance of Its Contiguous Zone'.

⁸⁹See generally, 'Policy Challenges: Amendment and Strengthening of Existing Laws: Review and Update Legislative Frameworks to Address Emerging Challenges and Align with International Best Practices'.

⁹⁰See generally, 'Policy Challenges: Institutional Reform: Consider Institutional Reforms to Streamline Governance Structures and Enhance the Efficiency and Effectiveness of Maritime Regulatory Bodies'.

⁹¹See generally, 'Policy Challenges: International Cooperation: Strengthen Partnerships with International Organizations and Neighbouring States to Promote Regional Cooperation and Mutual Assistance in Maritime Law Enforcement'.

maritime laws and standards. These actions are essential for ensuring long-term environmental sustainability and maritime security in Sri Lanka's waters.

8. CONCLUSION

In conclusion, while Sri Lanka has made strides in aligning its legal framework with UNCLOS provisions for the contiguous zone, addressing enforcement challenges and implementing recommended policies remain critical. By leveraging quantitative data, case studies, and proactive mitigation measures, Sri Lanka can strengthen its governance of the contiguous zone, uphold international maritime standards, and ensure sustainable development of marine resources for future generations.